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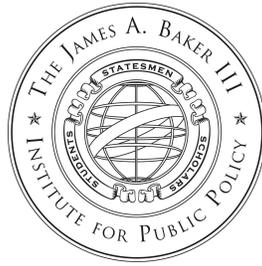
IMMIGRATION REFORM

A SYSTEM FOR THE 21st CENTURY



**U.S. Immigration Policy in the 21st Century, with
Special Reference to Education: Examining the
Crosscurrents of Nativist and Accommodationist
Policymaking**

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JAMES A. BAKER III INSTITUTE FOR PUBLIC POLICY
RICE UNIVERSITY

LATIN AMERICA INITIATIVE IMMIGRATION RESEARCH PROJECT
WORKING PAPER

U.S. IMMIGRATION POLICY IN THE 21ST CENTURY,
WITH SPECIAL REFERENCE TO EDUCATION:
EXAMINING CROSSCURRENTS OF NATIVIST AND
ACCOMMODATIONIST POLICYMAKING

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U.S. Immigration Policy in the 21st Century

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Abstract

In the spring of 2012, the Republican candidates for their party's presidential nomination argued over immigration policy, focusing especially on a topic that few had been aware of: whether or not the undocumented should be allowed to attend college and receive resident tuition. The topic receded, especially after Texas Gov. Rick Perry, who had borne the brunt of the disdain for his "accommodationist" policies on the subject, left the race. Yet, the higher-education debate that emerged briefly has since become a more sustained controversy, and in the summer of 2012, President Barack Obama enacted a significant policy change in the use of prosecutorial discretion concerning undocumented college students, a continuation of his 2011 review of assigning priorities to those who would be removed or deported from the United States if their status were unauthorized. Paradoxically, in the early 21st century, there has been a rise in the country's anti-immigrant sentiment, especially in the growing enactment of "restrictionist" state and local ordinances, many of which are playing out in courts and legislatures. At the same time, there have been widespread efforts to incorporate these students and undocumented families into the larger community — not just in progressive enclaves, but in surprisingly mainstream and heartland areas. This paper will examine these contradictory strains of U.S. immigration policy issues in more detail, employing the fundamental trope of education as the anchor for the good, the bad and the ugly of immigration policies and the resultant discourse.

Introduction

In a development that Charles Dickens might have appreciated, it is the best of times and the worst of times in the United States for undocumented immigrant children and young adults. At the macro level, there is an unmistakable anti-immigrant policy evident in various state legislatures, resulting in partially discredited and punitive statutes and policies in several states, from Arizona to Alabama and Georgia. A national barometer of interest in this larger issue is the scorecard of how many state legislatures have considered legislation on immigration-related issues. The National Conference of State Legislatures (NCSL) issues a report twice each year that details the state-level immigration legislation every six months, and this discouraging report card shows that state legislators in 46 states and the District of Columbia introduced 948 bills

U.S. Immigration Policy in the 21st Century

and resolutions related to immigrants and refugees from January 1 to June 30, 2012; this was a 40 percent drop from the peak of 1,592 in the first half of 2011, although the state legislatures in Montana, Nevada, North Dakota, and Texas did not meet in regular session in 2012. In the first half of 2012, 41 state legislatures enacted 114 bills and adopted 92 immigration-related resolutions for a total of 206, a decrease of 20 percent from the 257 laws and resolutions enacted in the same period in 2011 (NCSL 2012). Of course, not all of these statutes were anti-immigrant but the vast majorities were restrictionist. In addition, it appears that the widespread use of E-Verify will lock many states and employers into a required employment regime, one sure to be applied against Latinos in the work authorization process. And although there is evidence that the GOP overplayed its anti-immigrant cards in the 2012 federal election and was punished for it, the lessons to be learned are not yet clear, and will become clarified only as the contours of Comprehensive Immigration Reform (CIR) make their way through Congress (Preston 2013).

Notwithstanding this visible and extensive infrastructure of nativist and restrictionist policies, there are substantial countervailing currents evident as well at the federal and state levels, most notably in the areas of K-12 and higher education, where the sheer demographic realities are playing out to ensure that Latino children will be the substantial growth sector for years to come, especially in states such as California and Texas. In Texas, African-American and Hispanic K-12 enrollment increased between the 2009-10 and 2010-11 school years, while white enrollment decreased; in 2010-11, Latino students accounted for more than half of total enrollments (50.3 percent), followed by white students (31.2 percent) and African-American students (12.9 percent) (TEA 2011). California figures are similarly revealing (CDE 2012). In these and other states, the enrollments at both levels already reveal a tidal wave of these children currently enrolled and moving through the system. The year 2012 was the 30th anniversary of the U.S. Supreme Court decision in *Plyler v. Doe*, and that decision has proven to be more supple and resilient than was evident at the time; *Doe* has gone to college, aided by more than a dozen state laws enacted to accommodate the undocumented college students—in several instances even providing them with in-state resident tuition and financial assistance. This anniversary also provided President Barack Obama with an occasion to extend the administrative prosecutorial discretion available to immigration authorities, and he announced Deferred Action for Childhood Arrivals (DACA), a status that has provided over 400,000 undocumented college students the

U.S. Immigration Policy in the 21st Century

chance to enter a program that froze any potential deportation action, and accorded them “lawful presence” and eligibility for employment, licensing, and other status benefits with that space (Olivas 2012).

While it did not regularize their status or offer any opportunity for legalization, it was a remarkable and generous opportunity for many of them to come out of the shadows and pay back the investment that society had made in them in accord with *Plyler*. The hoped-for DREAM Act at the federal level has stalled, but this time, it is being reintroduced as part of a CIR promise that President Obama has introduced; the legislative efforts for CIR are likely to provide some safe harbor for these DACA-beneficiaries, so that they will begin their long march to permanent residence and citizenship, depending upon the details likely to surface in the congressional action. Meanwhile, even before DACA was announced in June 2012 and begun in August 2012, several state bar authorities had acted to admit undocumented law graduates to their ranks, and the possibility of an undocumented lawyer practicing in court was near at hand, depending upon the actions of the California and Florida state supreme courts (Laird 2013). It has been a long and strange ride to this point. Other related developments also assisted in the accommodation of college students, such as courts in New Jersey and Florida striking down statutes that had precluded U.S. citizen children of undocumented parents from receiving college tuition and financial aid (Preston 2012). Maryland voters even defeated a ballot measure that had frozen an earlier statute, restoring a resident tuition statute—the first ballot measure that had allowed these undocumented children to pay the lower resident tuition (Tilsley 2012). The thermodynamics of these accommodationist and restrictionist narratives have clearly begun to favor the immigrant children, and federal relief seems more likely than it has in many years. This section reviews developments in the last half dozen years, employs education as a metric for examining the crosscurrents of nativist and restrictionist policymaking, and evaluates likely efforts at enacting comprehensive immigration relief.

Political scientists Benjamin Marquez and John Witte have written an exceptionally useful paper that maps out what they consider the varying and kaleidoscopic legislative strategies in recent immigration reform efforts (Marquez and Witte 2009). (They wrote in 2009, referring to developments in the first term of the Obama administration.) They grappled with the key issue in

U.S. Immigration Policy in the 21st Century

negotiating complex and interlocking facets—i.e., whether to enact piecemeal statutes in the hope that varying coalitions will have different alignments in any complex regime, or to attempt a comprehensive solution that has many moving parts. They perceptively set out the basic trade-offs inherent in comprehensive immigration reform efforts in their conclusion:

A paper that sets out to discuss legislative strategies should in the end have some definitive recommendations, but we do not. That may be a function of the policy subject—immigration—or it may be because, when faced with complex policy issues, the road ahead depends on trying different strategies. And that is what we see for immigration policy. It is clear that, whatever occurs, moving down that road will be very difficult, as it has been in the past. For some issues such as amnesty, there seems to be strong support across a range of interest groups, yet no issue divides Congress more decisively. If that issue needs to be resolved, and the demand is pressing, it may be best to separate the issue and try to reach compromises with the backing of the interest groups. To include it instead in a large package of reforms is likely to sink the package along with amnesty.

On the other hand, other issues have formed natural combinations and compromises. Such has been the case on legal visa levels and in negotiations over types of visas. The Irish were even able to increase their numbers through a clever and indirect route as “diversity visas.” In other contexts, diversity for Northern Europeans may well have been hard to sell. What we believe is essential is to keep the prospect of dealing with discrete and separable issues on the table. There is in Congress the powerful tendency to solve all the problems at one time in a huge complex bill that covers broad ranges of issues.

This tendency has several possible failings. First, it may often produce nothing—as has been the case with immigration policy in the current

U.S. Immigration Policy in the 21st Century

century. Second, the results of large sets of compromises may make the resolution of individual issues less optimal than if they were handled in discrete legislation. We trust the skills and wisdom of leaders who work for years in a policy area to realize when one of these outcomes looms. At that point, it might be better simply to ask: “Can we make positive progress on issue x, always remembering that issue y can be dealt with on another day.” Indeed, we also suspect that similar analyses on other issues, such as healthcare reform, would benefit from the same advice (Marquez and Witte 24-25).

My reading of this work agrees in large part, but the most interesting facet of their analysis is that it omits the DREAM Act and education generally from its consideration. This dog-that-does-not-bark dimension is interesting because it would have been the best test of their thesis—that incremental and severable legislative approaches to complex problems are preferable and, especially in immigration reform, likely the most efficacious political strategy. For example, they identify theoretical positions on “Major Policy Issues on Immigration: Higher Immigration Totals, Higher Family Unification, Higher Specialized Employment, Amnesty—Path to Citizenship, Guest Worker Program, Social Services for Illegals [*sic*], Employer Sanctions/IDs, and Border Security.” In these core areas, they chart interest group salience, probe the resistance each position triggers, and indicate the extent to which there are possibilities for compromise. They also helpfully measure the additional partisan and ideological implications of particular salience to analyses of immigration, and highlight two: “the effects on members of both parties of representing districts in southwestern border states, and, independently, districts with high levels of foreign-born constituents”(Marquez and Witte, 8). Although they do not focus upon the DREAM Act or the area of undocumented postsecondary students, they might profitably have done so, as there has been substantial sub-federal legislative activity in the field; there is evident a tug-of-war among advocates and restrictionists; there is a large body of literature and public focus on the subject; there is the categorical precedent of related U.S. Supreme Court decisions with bearing upon the issue; there is a growing litigation record in other federal and state courts; and, more to their point, the issue is severable (what they characterize as “discrete and separable”) and has already been contested in the Congress. Thus, it would have been the perfect

U.S. Immigration Policy in the 21st Century

test case for their thesis, and a useful case study proxy for contesting the efficacy of comprehensive immigration reform.

Even as this CIR legislative struggle goes on during the timing of this conference, the reelection of President Obama, the retention of the U.S. Senate by the Democrats and the smaller GOP majority in the House, when combined with the perceived need to accommodate Latino voters and the successful implementation of DACA—with its LPR-ready recipients, its required biometrics, its screening-mesh of even small criminal conduct, and its strong narrative—the odds appear greater today for CIR than at any recent time in memory. If the object lesson from the president's first term high-wire gamble on health care and financial reform is that comprehensive legislative efforts are possible, even with a gridlocked Congress, CIR may pass, depending upon the details, where both God and the devil reside (Olivas 2009).

Higher education has been the unusual emphasis for congressional consideration of immigration reform issues—"unusual" in several ways. First, except when the Higher Education Act itself is being reauthorized, as it is every few years, causing a reconsideration of financial aid and student loan programs, college itself is simply not a major omnibus legislative priority for either party. This is not to say that the stakes and appropriations are not important or strategic, as they surely are. But if higher education is a repeat player, it is more for its widespread reach of financial assistance issues, which extend to bankruptcy policy, tax policy, Pell Grant efficacy, and college going generally. Two scholars have recently reviewed the field of federal financial aid legislation and noted the need for evaluation of the many programs:

As state and federal budgets face increasing pressures and politicians look for ways to control spending, financial aid programs will be vulnerable to cutbacks if evidence is lacking on their effectiveness, and even those programs with documented positive effects may be asked to do more with less. Fortunately, more may be known about the effects of financial aid than about any other interventions aimed at increasing postsecondary attainment. No longer is it necessary to ask the question, "Does aid work?"—for the research definitively shows

U.S. Immigration Policy in the 21st Century

that it can. But the evidence also suggests that some programs work better than others, and because of the magnitude of government investment as well as the numbers of individuals affected by student aid, the stakes have never been higher for understanding what aid programs work best and why (Dynarski and Scott-Clayton 2013, 32).

In turn, however central to the postsecondary polity financial aid legislation is, because Title IV funds are unavailable to the undocumented, even in recent versions of the DREAM Act, this subject matter is an unlikely provenance for immigration reform (Olivas 2009). Therefore, this domain is not where any such reform will be considered, nor will the wellspring of state statutes and programs for undocumented college students ascend to a national stage, for such initiatives are reserved to the states and affect only state policies. Even if the DREAM Act were to miraculously appear on the statute books tomorrow, it would not make state resident tuition or financial assistance available to these unauthorized students, as these benefits or statuses can only be given or denied (or rescinded) by the states.

A Thumbnail Sketch of State Laws Concerning Undocumented College Students

The holding of *Plyler v. Doe*, which allowed undocumented school children to enroll freely in elementary and secondary schools, has been challenged but has remained good law nearly 30 years after the 1982 decision. Indeed, except for a mid-1990s dust-up that threatened congressional action to overturn the holding, *Plyler* has become accepted and accommodated by a substantial majority of school districts and policymakers, making a virtue of necessity and holding the innocent children harmless for what may have been the transgressions of their undocumented parents. However, the holding does not extend to high school graduates and their admission to college or other post-compulsory schooling, and a number of cases have arisen in several states. This section details the final two facets of undocumented college students as a component of comprehensive immigration reform: the severability of the issue and the legislative history of the DREAM Act in Congress. The near-miss of the 2007 legislation, its unusual provenance, and its recurrence in 2010—when it passed the U.S. House but narrowly failed again in the Senate vote—made this issue a bellwether for the likelihood of a more omnibus

U.S. Immigration Policy in the 21st Century

legislative strategy. Recalling Marquez and Witte’s framing question—“At that point, it might be better simply to ask: ‘Can we make positive progress on issue x, always remembering that issue y can be dealt with on another day?’”—one might usefully ask: Can the DREAM Act pass as a standalone bill, if at all, or must it be a part of a larger legislative strategy (Olivas 2009)?

Table 1. State Laws Allowing Undocumented College Students to Establish Residency, 2013

Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) [amended by S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005), relating to student financial aid]; TEX. EDUC. CODE ANN. § 54.052

California, A.B. 540, 2001-02 Cal. Sess. (Cal. 2001); CAL. EDUC. CODE §68130.5; A.B. 30 (2011), amending CAL. EDUC. CODE §68130.7 and adding §66021.7, relating to nonstate funded scholarships); A.B. 131, October 8, 2011 (amending Section 68130.7 of and adding Sections 66021.6, 69508.5, and 76300.5 to the Education Code, relating to state financial aid); A.B. 844, October 8, 2011 (amending Section 72023.5 and adding Sections 66016.3 and 66016.4 to the Education Code, relating to state financial aid to certain student leadership positions)

Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); UTAH CODE ANN. § 53B-8-106

New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002); N.Y. EDUC. LAW §355(2)(h)(8)

Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); WASH. REV. CODE ANN § 28B.15.012

Oklahoma, S.B. 596, 49th Leg., 1st Reg. Sess. (OK 2003) [financial assistance provisions rescinded, Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804)]; OKLA. STAT.ANN.TIT. 70, § 3242

Illinois, H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); 110 ILL. COMP. STAT. ANN. [amended by S.B. 2085, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); 110 ILL. COMP. STAT. ANN.]

Kansas, H.B. 2145, 2003-2004 Leg., Reg. Sess. (KS 2004); K.S.A. §76-731a

New Mexico, S.B. 582, 47th Leg. Reg. Sess. (2005); N.M.STAT. ANN. §21-1-1.

Nebraska, L.B. 239, 99th Leg. 1st Sess. (Neb. 2006); NEB REV. STAT. ANN. § 85-502

U.S. Immigration Policy in the 21st Century

Wisconsin, 2009 Assembly Bill 75 (2009 WISCONSIN ACT 28); WIS. STAT. § 36.27 [repealed by AB 40, June 26, 2011]

Maryland, S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011); MD. CODE ANN. § 15-106.8 [“suspended,” pending state referendum: MD Const. XVI, Sec. 2] [Ballot measure approved in general election, November 2012]

Connecticut, H.B. 6390, 2011 Leg., Reg. Sess. (Conn. 2011); CONN. GEN. STAT. § 10a-29

Rhode Island, S. 5.0, R.I. Board of Governors for Higher Education, Sept. 26, 2011

Colorado, S.B. 33 (2013)

Current as of Spring, 2013

Source: <http://www.law.uh.edu/ihelg/documents/Statute-TableOne.html>

Table 2. States Restricting Access to Postsecondary Education, 2013.

By statute

Alabama, H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); ALA. CODE § 31-13-8 [added section barring undocumented students from enrolling in or attending any institutions of postsecondary education; enjoined by federal district court, October 2011]

Arizona, S.C.R. 1031, § 3, Proposition 300, approved election Nov. 7, 2006, eff. Dec. 7, 2006 (Ariz. 2006); ARIZ. REV. STAT. ANN. § 15-1803 [amended to ban in-state tuition for undocumented students]

Colorado, H.B. 06S-1023, 63rd Gen. Assemb., 1st Spec. Sess. (Colo. 2006); COLO. REV. STAT. ANN. § 24-76.5-103 [added section to ban in-state tuition for undocumented students]

Georgia, S.B. 492, 149th Gen. Assemb., Reg. Sess. (Ga. 2008); GA. CODE ANN. § 20-3-66(d) [amended to ban in-state tuition for undocumented students]

Indiana, H.B. 1402, 2011 Gen. Assemb., Reg. Sess. (Ind. 2011); IND. CODE ANN. § 21-14-11 [added Ch. 11 to title 21, banning in-state tuition for undocumented students]

Ohio, 129th Gen. Assemb. File No. 28, HB 153, § 101.01; O.R.C. 3333.31 (D), (E) (2011) [banning in-state tuition for undocumented students]

Montana, 2011 Mont. Laws 1238 [ratified by state ballot measure, November 2012; amending Mont. Code Ann. § 20-25-502 (2009), eff. 1/2013]

U.S. Immigration Policy in the 21st Century

South Carolina, H.B. 4400, 117th Gen. Assemb. Reg. Sess. (S.C. 2008); S.C. CODE ANN. § 59-101-430 [added section 430 to bar undocumented students from attending public institutions of higher learning, and also bar them from being able to receive in-state tuition]

By policy or regulation

Georgia Board of Regents, October, 2010

Section 4: Student Affairs

4.1.6 Admission of Persons Not Lawfully Present in the United States

A person who is not lawfully present in the United States shall not be eligible for admission to any University System institution which, for the two most recent academic years, did not admit all academically qualified applicants (except for cases in which applicants were rejected for non-academic reasons).

(http://www.usg.edu/policymanual/section4/policy/4.1_general_policy/#p4.1.6_admission_of_persons_not_lawfully_present_in_the_united_states) (affecting Georgia College & State University, Medical College of Georgia, Georgia State University, Georgia Institute of Technology, and University of Georgia)

4.3.4 Verification of Lawful Presence

Each University System institution shall verify the lawful presence in the United States of every successfully admitted person applying for resident tuition status, as defined in Section 7.3 of this Policy Manual, and of every person admitted to an institution referenced in Section 4.1.6 of this Policy Manual.

(http://www.usg.edu/policymanual/section4/policy/4.3_student_residency/#p4.3.4_verification_of_lawful_presence)

University of North Carolina Board of Governors:

Chapter 700

700.1.4[G]

Guidelines on the Admission of Undocumented Aliens

Undocumented aliens are eligible to be considered for admission as undergraduates at UNC constituent institutions [1] based on their individual qualifications with limitations as set out below:

1. An undocumented alien may be considered for admission only if he or she graduated from high school in the United States.
2. Undocumented aliens may not receive state or federal financial aid in the form of a grant or a loan.
3. An undocumented alien may not be considered a North Carolina resident for tuition purposes; all undocumented aliens must be charged out-of-state tuition.
4. All undocumented aliens, whether or not they abide in North Carolina or graduated from a North Carolina high school, will be considered out of State for purposes of calculating the 18 percent cap on out of state freshmen pursuant to Policy 700.1.3.
5. When considering whether or not to admit an undocumented alien into a specific program of study, constituent institutions should take into account that federal law prohibits the states from granting professional licenses to undocumented aliens.

U.S. Immigration Policy in the 21st Century

[1] The North Carolina School of Science and Mathematics admits and enrolls only legal residents of the state of North Carolina. G.S. 116-235. (http://www.northcarolina.edu/policy/index.php?pg=vb&node_id=451)

Current as of Spring 2013

Source: <http://www.law.uh.edu/ihelg/documents/Statute-TableTwo.html>

Here, it is useful to recall in more detail the original status and introduction of the DREAM Act. As noted in Table 3, it was first introduced on August 1, 2001, by Senator Orrin Hatch (R-UT) and Senator Richard Durbin (D-IL). The bill had broad, bipartisan support, with Senator Hatch being among the most conservative members of the Senate, and Senator Durbin being among the most liberal. Despite some traction on the issue, formal hearings, and even a positive vote out of the Senate committee in November 2003, the DREAM Act in its various versions languished there until comprehensive immigration reform efforts failed in Summer 2007. In July 2007, the Senate tried a different legislative approach, and developed plans to attach the legislation to the Department of Defense (DOD) authorization bill, but Sen. Harry Reid (D-NV) pulled it from the floor when an Iraq timetable amendment failed; as a result, the Senate never got to the DREAM vote in this guise.

Nonetheless, the tactic to use the DOD bill as a vehicle was quite clever and germane because of provisions in the legislation that would have facilitated the legalization of undocumented members of the U.S. military. The DOD authorization bill was scheduled to return to the Senate floor in September 2007, but by late fall 2007, there had been no additional movement on the proposal. By now, the growing unpopularity of the war in Iraq had made the issue a political landmine, too divisive to provide the ground cover that might have been available had the tactic been used sooner after 2001's "war on terror" or in the early stages of the Iraq or Afghanistan military actions. The House Judiciary Committee held a DREAM Act hearing on May 18, 2007; on September 6, 2007, the House held subcommittee hearings on the STRIVE Act, the comprehensive House legislation that contained, among other provisions, the DREAM Act. In one last attempt to enact the postsecondary education legislation, on October 24, 2007, the Senate voted down the standalone DREAM Act, 44-52, on the cloture motion. The one possible aperture closed and its moment passed.

U.S. Immigration Policy in the 21st Century

The actors in this 2007 vote were an odd array. In a situation where 60 votes were needed and every vote counted, four voters who were on record as supporting the legislation did not vote. Senator John McCain (R-AZ), who had been instrumental in the failed Kennedy-McCain effort at comprehensive immigration reform, did not vote, as he was in the midst of his unsuccessful presidential campaign. Senator Edward Kennedy (D-MA) was unavailable for the vote, as his health had taken a turn for the worse. (He died less than two years later, in August 2009.) Senator Barbara Boxer (D-CA) was unavailable, as extensive fires had broken out in her state, and she was attending to business there. Senator Christopher Dodd (D-CT), an early DREAM Act supporter, was also unavailable and did not vote. Most unusual and remarkable was the action of Senator Arlen Specter (R-PA), who had been a supporter of the DREAM Act and who was considered among the most liberal Republicans in the Senate. He voted against the bill, on the credulity-straining grounds that if it were enacted, it would impede the larger goal of comprehensive immigration reform. On the Senate floor on October 24, 2007, he read the following remarks:

Mr. President, I believe that the DREAM Act is a good act, and I believe that its purposes are beneficial. I think it ought to be enacted. But I have grave reservations about seeing a part of comprehensive immigration reform go forward because it weakens our position to get a comprehensive bill. Right now, we are witnessing a national disaster, a governmental disaster, as states and counties and cities and townships and boroughs and municipalities—every level of government—are legislating on immigration because the Congress of the United States is derelict in its duty to proceed.

We passed an immigration bill out of both Houses last year. It was not conferenced. It was a disgrace that we couldn't get the people's business done. We were unsuccessful in June in trying to pass an immigration bill. I think we ought to be going back to it. I have discussed it with my colleagues.

U.S. Immigration Policy in the 21st Century

I had proposed a modification to the bill defeated in June, which, much as I dislike it, would not have granted citizenship as part of the bill, but would have removed fugitive status only. That means someone could not be arrested if the only violation was being in the country illegally. That would eliminate the opportunity for unscrupulous employers to blackmail employees with squalid living conditions and low wages, and it would enable people to come out of the shadows, to register within a year. We cannot support 12 to 20 million undocumented immigrants, but we could deport the criminal element if we could segregate those who would be granted amnesty only. I believe we ought to proceed with hearings in the Judiciary Committee. We ought to set up legislation. If we cannot act this year because of the appropriations logjam, we will have time in late January. But as reluctant as I am to oppose this excellent idea of the Senator from Illinois, I do not think we ought to cherry-pick. It would take the pressure off of comprehensive immigration reform, which is the responsibility of the federal government. We ought to act on it, and we ought to act on it now (Specter 2007).

This defection of a previously supportive senior Republican senator, combined with the Bush White House's efforts to defeat passage, essentially on the same grounds, were the kiss of death to the bill. The White House issued a press release just prior to the DREAM Act Senate vote, suggesting the need for overall immigration reform and suggesting that the current legislation was too generous: "The administration continues to believe that the nation's broken immigration system requires comprehensive reform. This reform should include strong border and interior enforcement, a temporary worker program, a program to bring the millions of undocumented aliens out of the shadows without amnesty and without animosity, and assistance that helps newcomers assimilate into American society. Unless it provides additional authorities in all of these areas, Congress will do little more than perpetuate the unfortunate status quo. The administration is sympathetic to the position of young people who were brought here illegally as children and have come to know the United States as home. Any resolution of their status,

U.S. Immigration Policy in the 21st Century

however, must be careful not to provide incentives for recurrence of the illegal conduct that has brought the nation to this point” (OMB 2007).

Senator Specter was widely considered a safe vote on the issue, and his politics had evolved to the point where he would even switch parties in 2008 and become a Democrat. (He died in 2012.) Senator Kay Bailey Hutchison (R-TX), who anticipated running for governor of Texas against the incumbent Republican Rick Perry (who had signed into law the first state legislation to grant in-state tuition to the undocumented), voted for the DREAM Act, and thereby reduced the risk of alienating Latino voters in her home state, who would now have to choose in the primary between two candidates who had both supported the issue. Observers, including Senate staff, noted that there had been several other possible votes that would have been available for the legislation if the required 60 votes were within shouting distance; these senators were only willing to risk the wrath of critical voters if the game were worth the candle and their votes would actually count. However, the absence of Senators McCain and Kennedy, both champions of immigration reform generally, the absences of Senators Dodd and Boxer, the defection of Specter, and the White House withholding support combined and clearly doomed the star-crossed bill at the very last stages of maneuvering. There was evidence that Republicans, all of whom except McCain voted, also had not wanted to give what would likely be viewed as a legislative “victory” to the Democrats, or to appear to do so, with the national presidential elections coming soon afterward. Given that the DREAM Act had bipartisan sponsorship, there were signals that its enactment would be able to garner the 60 votes necessary to avoid the filibuster, under the structural and operating rules of Congress.

This was the final nail in the coffin, especially when the Republican presidential primary candidates began in earnest to accuse each other of weakness on immigration and of favoring an amnesty to the affected students. By this time, FAIR, the Heritage Foundation, and restrictionist lawyers had also added to the thermodynamics, making it impossible for supporters to bring up the issue. The fleeting, best opportunity for enacting the DREAM Act had passed, caught in the ironic pincers of being too much (for conservative legislators who feared being tarred as supporting an “amnesty”) and too little (enacting it would torpedo the larger strategy of reforming overall immigration problems). In this scenario, the initiative died both by fire and by

U.S. Immigration Policy in the 21st Century

ice, and even was too-little/too-late, being tarnished by the increasingly unpopular Iraq War association. Had the strategy been attempted either immediately after September 11, 2001, or soon after, when support for the Afghan and Iraq war efforts had been greater, it is more likely it would have passed. Ironically, several of the terrorists involved in the deadly attacks were themselves college students out of status, and the predictable reaction to the acts of terrorism also entangled the issue. It is all the more remarkable that the various state DREAM Acts were all undertaken after 2001, save the original statute, signed into Texas state law before September 11 by Gov. Bush's successor.

After Obama, an early co-sponsor of the bill when he was in the U.S. Senate, was elected to the presidency and assumed office in January 2009, his first major legislative initiatives were dealing with the economic meltdown that began to surface politically in the late summer and fall of 2008, and then with comprehensive health care and insurance reform and financial institution legislation, which were brought forward in the omnibus fashion that Marquez and Witte had suggested was less likely to succeed. Senator Reid, the Senate majority leader, indicated that he would not proceed with the next two major legislative subjects in piecemeal fashion, forcing climate change and immigration reform to evolve as omnibus projects. There was also a substantial wait until the Obama administration made its own immigration reform design clear. (Preston 2009). It was not until mid-November 2009 that DHS Secretary Janet Napolitano made her first address on the subject of comprehensive immigration reform, and while she stressed the need to incorporate the undocumented "shadow" population through legalization provisions, the major emphasis appeared to be on border security and employment verification:

Let me be clear: when I talk about "immigration reform," I'm referring to what I call the "three-legged stool" that includes a commitment to serious and effective enforcement, improved legal flows for families and workers, and a firm but fair way to deal with those who are already here. That's the way that this problem has to be solved, because we need all three aspects to build a successful system. This approach has at its heart the conviction that we must demand responsibility and accountability from everyone involved in the

U.S. Immigration Policy in the 21st Century

system: immigrants, employers and government. And that begins with fair, reliable enforcement (Napolitano 2009).

At the present, until the actual proposals are finalized and negotiated, by Congress or by President Obama and the executive branch, the full contours will not be evident, but everything points to an omnibus approach; the convolutions of the 2009-2010 health care reform strategy may suggest that the most salient consideration will be which of the large-scale systemic initiatives is able to move forward and under what timing and calendar constraints it will emerge. Senator Charles Schumer (D-NY) assumed the responsibility for shepherding immigration reform through the Senate, following the death of Senator Kennedy, and his remarks have shown him to be much more conservative than was the late senator. For example, in his public remarks, he has adopted restrictionist code words and rhetoric (for example, “force-multiplier” and “border security”), has made it clear that his first priority is to “secure the border,” and has even touted language to signal and characterize the problems. For example, in summer 2009, he gave a public lecture in which he laid out his first principle: objecting to widely employed terminology such as “undocumented workers.”

The first of these seven principles is that illegal immigration is wrong—plain and simple. When we use phrases like “undocumented workers,” we convey a message to the American people that their Government is not serious about combating illegal immigration, which the American people overwhelmingly oppose. Above all else, the American people want their Government to be serious about protecting the public, enforcing the rule of law, and creating a rational system of legal immigration that will proactively fit our needs rather than reactively responding to future waves of illegal immigration. People who enter the United States without our permission are illegal aliens, and illegal aliens should not be treated the same as people who entered the United States legally (Schumer 2009).

U.S. Immigration Policy in the 21st Century

These words were surprising for a liberal Senator, one who had been a regular supporter of CIR. On the subject of the DREAM Act, his principles did not include specific reference to the topic, but he did vote for the bill in 2007, and did so again in 2010, suggesting his inclination and support for this part of the larger issue. The draft versions of that reform legislation included DREAM Act provisions, buried in larger, omnibus overhaul approaches, drawing attention away from their “legalization” or “amnesty” features. As of the 111th Congress in spring 2010, the House and Senate versions of this legislation were filed and waiting in the queues. In the House, the chief sponsor of H.R. 1751 was Representative Howard L. Berman (D-CA), and it was introduced on March 26, 2009, with 106 cosponsors. It was referred to the House Judiciary and House Education and Labor Committees; on May 14, 2009, it was referred to House subcommittee, and in turn, to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness. In the U.S. Senate: S. 729, whose chief sponsor was Senator Richard Durbin (D-IL), was introduced on March 26, 2009, with 32 co-sponsors. On the same day, it was referred to the Senate Judiciary Committee.

Then, in fall 2010, at the urging of Latino groups, and to jumpstart Comprehensive Immigration Reform, Senator Harry Reid (D-NV) changed his mind and brought forward a bill. Facing a substantial challenge in his own reelection to the U.S. Senate, he opted for a down payment approach, with DREAM being the first building block toward future comprehensive reforms, and AGJOBS legislation as the likely next step. The DREAM Act became an amendment to a Department of Defense bill, S. 3454, the “National Defense Authorization Act for Fiscal Year 2011.” He also added two other amendments: a repeal of “Don't Ask, Don't Tell,” regarding the enlistment of gays and lesbian soldiers in the military, and an overhaul of the “secret hold” tradition in the Senate, to require public disclosure moving legislative actions forward. On September 21, 2010, the vote became hostage to the DADT controversy, and the Republicans voted as a bloc, rather than accord President Obama and the Democrats a victory on this issue; the cloture motion was rejected 43-56 (with one absence). Senator Reid voted “no” after it was clear that he did not have the required 60 votes. (The “no” vote for his own motion would allow him to call for reconsideration.) Disappointingly, even Republican supporters of the legislation in the 2007 vote did not support the overall package in the 2010 effort, and two Democrats crossed over to vote against it as well. Once again, the DREAM Act was tantalizingly close, and

followed many public stories about undocumented college students in the media; these continued through the lame duck session, where once again the votes were not there.

The “third time” may be the mythical “charm,” but not in this subject matter. In the final days of the same Congress, the greatest disappointment occurred. On December 8, 2010, the House attached the DREAM Act (H.R. 6497) to another moving House bill, H.R. 5281, and passed it, 216 to 198. This was the first time that the House had ever voted upon a version of the DREAM Act since its introduction in 2001. Initially, the Senate was scheduled to take a procedural vote on its version of DREAM (S. 3992), but instead, Senate Democrats voted 59-40 to withdraw S. 3992 and focus on the bill passed on December 8 by the House. On December 18, 2010, the Senate took up the cloture motion (technically, the Motion to Invoke Cloture on the Motion to Concur in the House Amendment to the Senate Amendment No. 3 to H.R. 5281, the Removal Clarification Act of 2010). Democratic backers of the legislation fell short of the 60 votes required to move the DREAM Act legislation forward, with a vote of 55-41 in favor. Five Democrats—Senators Max Baucus (MT), Kay Hagan (NC), Ben Nelson (NE), Mark Pryor (AR), and Jon Tester (MT)—joined most Republicans in voting against the measure. Three Republicans, Senators Bob Bennett (UT), Richard Lugar (IN), and Lisa Murkowski (AK), voted yes. Four members—Senators Jim Bunning (R-KY), Judd Gregg (R-NH), Orrin Hatch (R-UT), and Joe Manchin (D-WV)—were not present for the vote. The ultimate irony was that in a separate vote, the “Don’t Ask, Don’t Tell” policy was repealed, and that Senator Hatch, who introduced the original legislation a decade earlier, did not vote for the DREAM Act. But it turned out that all these complex moving parts were only prelude to spring 2012, when several developments kept the larger DREAM Act issues in the public eye and with another place on legislative agenda.

Table 3. DREAM Act Congressional Legislative History

(107th Congress) 2001-2002:

S. 1291, DREAM Act of 2001

H.R. 1918, Student Adjustment Act of 2001

(108th Congress) 2003-2004:

S. 1545, DREAM Act of 2003

U.S. Immigration Policy in the 21st Century

H.R. 1684, Student Adjustment Act of 2003

(109th Congress) 2005-2006:

S. 2075, DREAM Act of 2005

H.R. 5131, American Dream Act of 2006

S. 2611, Comprehensive Immigration Reform Act of 2006

(110th Congress) 2007-2008:

S. 1348, Comprehensive Immigration Reform Act of 2007

S. 774, 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 and who entered the United States as children, and for other purposes.

H.R. 1221, To provide for cancellation of removal and adjustment of status for certain long-term residents who entered the United States as children

H.R.1275, 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 and who entered the United States as children, and for other purposes.

S. 2205, A bill to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes. [defeated 44-52 (October 24, 2007)]

S. 2919, Department of Defense Authorization Bill* (originated in House)

U.S. Immigration Policy in the 21st Century

H.R. 4986, DoD Authorization Bill

(111th Congress), 2009-2010:

S. 729, DREAM Act of 2009

H.R. 1751, American Dream Act

S. 3827, DREAM Act of 2010

H.R. 6327, Citizenship and Service Act of 2010

S. 3962, DREAM Act of 2010

S. 3963, DREAM Act of 2010

S. 3992, DREAM Act of 2010 (withdrawn, combined with H. R. 5281

(Motion to Invoke Cloture on the Motion to Concur in the House

Amendment to the Senate Amendment No. 3 to H.R. 5281, the Removal

Clarification Act of 2010; defeated 55-41, December 18, 2010)

S. 3454, National Defense Authorization for FY 2011 (cloture motion defeated:

43-56, September 21, 2010)

H.R. 6497, DREAM Act of 2010 (combined with H.R. 5281 [Removal

Clarification Act of 2010]: passed 216-198, December 8, 2010)

(112th Congress), 2011-2012:

S. 952, DREAM Act of 2011

H.R. 1842, DREAM Act of 2011

(113th Congress), 2013-2014:

Spring 2012 Developments

In spring 2012, the state supreme courts in Florida and California considered two unprecedented requests from their bar licensing authorities: would federal and state law allow them to admit undocumented law students to the practice of law in their states? By July 15, 2012, both state bars had formal legal requests before their highest courts, asking for permission to admit the graduates, both of whom had passed the required bar exams and navigated the moral character and fitness provisions and other bar criteria. In both instances, the graduates had been brought to the United States by their parents, and both had attended state K-12 schools, college, and law school. Somewhat caught off guard by the questions of first impression, both courts requested

amici to submit briefs on the issues that were raised. On May 16, 2012, for example, the California State Supreme Court issued the following order:

The California Supreme Court today unanimously issued an order directing the Committee of Bar Examiners of the State Bar of California to show cause before the Supreme Court why the court should grant the Committee’s motion to admit Sergio C. Garcia to the State Bar of California as a licensed attorney. Garcia has graduated from law school in California and has passed the California bar examination, but is currently an undocumented immigrant. After reviewing his application and performing a moral character review, the Committee of Bar Examiners certified his name to the Supreme Court for admission to the State Bar. The bar notified the court of Garcia’s immigration status at the time the motion was filed. The Supreme Court’s order directs the Committee of Bar Examiners and Garcia to file opening briefs in support of the Committee’s motion by June 18, 2012, and invites others to file *amicus curiae* briefs in the Supreme Court, either in support of or in opposition to the motion. In particular, the order invites *amicus* participation by the Attorneys General of California and the United States.

The order also listed five specific questions as “among the issues that should be briefed.” The five questions were:

- “1. Does 8 U.S.C. section 1621, subdivision (c) apply and preclude this court’s admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude the admission?”
2. Is there any state legislation that provides—as specifically authorized by 8 U.S.C. section 1621, subdivision (d)—that undocumented immigrants are eligible for professional licenses in fields such as law, medicine, or other professions, and, if not, what significance, if any, should be given to the absence of such legislation?”

U.S. Immigration Policy in the 21st Century

3. Does the issuance of a license to practice law impliedly represent that the licensee may be legally employed as an attorney?
4. If licensed, what are the legal and public policy limitations, if any, on an undocumented immigrant's ability to practice law?
5. What, if any, other concerns arise with a grant of this application?" (Judicial Council of California 2012)

In addition, in a similar action in Florida, four former American Bar Association (ABA) presidents filed an action with the Florida Supreme Court, seeking to determine whether or not their undocumented client (who has passed the Florida bar examination) could be admitted to the State Bar. At first, the Florida Board of Bar Examiners had denied the applicant's application, but still sought clarification about its authority from the court. Following President Obama's announcement of a new policy on deferred action and the use of his prosecutorial discretion (DACA), it appeared that the candidate's unlawful status in the U.S. would be reconstituted so that he would no longer accrue unlawful presence. Therefore, the Florida Board ruled in August 2012 that under the new guidelines, the candidate appeared to qualify for a law license, but it still wanted an advisory opinion from the state Supreme Court about his immigration status and exactly the same posture as that pending in California—two state authorities seeking clarification of the legal authority to allow the graduates to be licensed, with positive recommendations from both bars. This issue is pending in spring 2013 (Dolan 2012, LATEXTRA-1).

The new Deferred Action for Childhood Arrivals policy (DACA) by the president will also guarantee that more undocumented students will not only surface and work their way through the pipeline (another is awaiting developments in New York, and more are in the DACA application process), but the permission to gain employment authorization will affect their applications as well. The California law deans collectively prepared and submitted a brief in the California matter, as did immigration law professors, indicating that there is a substantial stake in this issue for legal educators and the lawyer establishment. Virtually all the California regional and specialized bar associations, chief among them the State Bar, submitted careful briefs in favor of the petitioner, also revealing the deep and broad interest and support for his admission to their Bar. Finally, licensing in other professional fields will be affected, as there will now be

U.S. Immigration Policy in the 21st Century

undocumented graduates applying for teaching certificates, psychologist licenses, and licenses in medicine, engineering, architecture, pharmacy, and many other related fields. In this sense, the law license issue has been the lead runner in the marathon, but other fields will also be in this same situation.

Another development has been the sheer number of cases involving citizens, residency requirements, and tuition benefits, all of which have favored accommodationist values. While almost a dozen cases challenging the various state laws concerning have been filed by restrictionist advocates, as of spring 2013, not one had prevailed, falling short either on civil procedure grounds (that is, the plaintiffs had not been harmed by someone else receiving the lower, in-state tuition—so they could not be provided a remedy in law) or, as in the important 2010 *Martinez v. University of California Regents* case, the state statute was upheld as a legitimate state policy. In another higher education immigration/residency case that occurred in California during this time period, a number of immigrant organizations filed suit in November 2006 to challenge California's postsecondary residency and financial aid provisions in *Student Advocates for Higher Education et al. v. Trustees, California State University et al.* Citizen students with undocumented parents were being prevented from receiving the tuition and financial aid benefits due to them, at least in part because the California statute was not precisely drawn (or was being imperfectly administered). The challenge highlights several overlapping policies: immigration, financial aid independence/dependence upon parents, and the age of majority/domicile. The state agreed to discontinue the practice, and entered into a consent decree, resolving the matter in the plaintiffs' favor. The order overturned CSU's odd and likely-unconstitutional take on undocumented college student residency—that a citizen, majority-age college student with undocumented parents, was not able to take advantage of the California statute according the undocumented in-state residence, even if the student were otherwise eligible.

Rulings such as these have made a virtue of necessity, inasmuch as citizen children (whether birthright or naturalized) who reach the age of majority by operation of law establish their own domicile, so that their parents' undocumented status is irrelevant to the ability of the children to establish residency. In *A.Z. v. HESSA*, a 2012 New Jersey appeals court ruled that a similar

U.S. Immigration Policy in the 21st Century

program in the state (the Tuition Assistance Grant, TAG) could not withhold the grants from citizen children whose parent were undocumented: “Given our determination that A.Z. is the intended TAG recipient and that she meets the residency and domicile requirements independently of her mother, we need not determine B.Z.'s legal residence or domicile nor review HESAA's conclusion that B.Z. lacks the capacity to become a legal resident or domiciliary of New Jersey. We note, however, substantial authority supporting the proposition that a person's federal immigration status does not necessarily bar a person from becoming a domiciliary of a state ... In sum, A.Z. is the intended recipient of a TAG. She is a citizen. The record also supports that she is a legal resident of, and domiciled in, New Jersey, based upon her lengthy and continuous residence here. To the extent the agency's 2005 regulation irrebuttably established that a dependent student's legal residence or domicile is that of his or her parents, it is void. Therefore, HESAA erred in denying A.Z. a TAG.” The latest instance of such a restriction upon birthright citizens was discovered in Florida, when the *Ruiz v. Robinson* case, filed in 2011, challenged a similar practice in the state. The state regulation denied resident tuition to U.S. citizen children whose parents were undocumented, as the New Jersey and California practices had done for state financial aid. On August 31, 2012, the federal court in Florida struck down this statute. Both states acceded to the courts, and have revised their practices (Olivas 2012).

Back on the national front, President Obama determined that he would find executive authority to address the inchoate and marginal status where these students found themselves, and in summer 2011, within six months of the failure of the DREAM Act to attract the required 60 votes, his administration indicated it would simply assign low-enforcement priority to DREAMers, and would not remove or deport them if they were caught in the immigration enforcement mechanism, unless they had criminal records or other disqualifying characteristics. In June 2011, in a series of detailed “Morton” memoranda, the administration rolled out a series of reviews of all the 400,000 persons then in immigration proceedings, and would close the removal cases and grant two-year stays and possible employment authorization (permission for the DREAMERS so certified to work without violating federal law). The review, which had seemed so promising, was underwhelming by any measure. The Obama administration had developed the most aggressive enforcement in U.S. history, militarizing the border, building the futile fence that is supposed to deter unauthorized entry, and removing over 400,000 persons

U.S. Immigration Policy in the 21st Century

each in 2011 and 2012, more than any recent presidency. In addition, the reset of Deferred Action was used more sparingly than had been the case in George W. Bush's presidency (Wadhia 2012; Martin 2012).

Yet even with these demonstrable enforcement priorities and results, congressional restrictionists were not satisfied. They would not acknowledge the metrics of immigration enforcement, as the stated predicate for what everyone knew was needed, comprehensive immigration reform of one sort or another, to regularize the flow, to reorganize the complicated and unsuccessful employment provisions, especially those designed for short-term high skilled work, and to provide some tradeoff for increased legal immigration: a pathway to eventual legalization or "amnesty," perhaps along the lines of the last such program, the 1986 IRCA legalization provisions. The data have not been transparent or easily available, but the preliminary figures revealed fewer than 2 percent of the test case reviews for Deferred Action led to closed cases, and only 54 percent of those fortunate few were given permission to work—and these were considered the easy, most deserving, "low-hanging fruit"—and while their removals were temporarily stayed, they received no benefits, remained ineligible for most forms of relief, and were, in many respects, no better off than before. Fewer than 300 of these closed cases were DREAM Act eligible students. They were now known to the government, yet had no hope of any reconstitution of their unlawful status (Olivas 2012).

Worse, a number of DREAMers had become frustrated by the legislative failures, and with no futures, they began to "out" themselves in a longstanding U.S. protest tradition and civil rights argot. While their status may have been characterized as a low priority for removal, this public revelation of their status had the practical effect of putting their undocumented families at risk, and in the increased removal regime, they were less well off than they had been before. And in the difficult thermodynamics of immigration, the conservative restrictionists howled, and all the competing GOP presidential candidates in an election year vied with each other to see who could be the most nativist, build (or electrify) the biggest fence, or engage in the harshest rhetoric (Raab 2011). (The only exception was Texas Gov. Rick Perry who, having signed the state's DREAM Act legislation twice, was the piñata of the group.)

U.S. Immigration Policy in the 21st Century

Tens of thousands of undocumented students are making their way through college without federal financial support and with little state financial aid available. Yet they persist—only to find that they cannot accept employment or enter the professions for which they have trained. Thus, cases of undocumented law-school graduates who have passed the bar are surfacing in California, Florida, and New York, and more will surface soon enough concerning lawyers, doctors, teachers, psychologists, and other licensed professionals, as more and more unauthorized students graduate from college. Seeing this brick wall, a number of immigration law professors drafted and circulated a letter to the president, calling upon him to use the administrative discretion available to him, in lieu of any likely legislative reform of immigration policy right now, to help undocumented college students who find themselves in the worst of all possible worlds. It appears that President Obama heard, and in June 2012, he announced an even more expansive Deferred Action for Childhood Arrivals (DACA) policy for DREAMers, which is still in the first phases of implementation (Olivas 2012). On the 30th anniversary of *Plyler v. Doe*—the 1982 case in which the U.S. Supreme Court ruled that states could not deny funds for the education of children of unauthorized immigrants—the president announced a halt to the deportation of some undocumented immigrants who came to the United States as children and have graduated from high school and served in the military. Unfortunately, despite the excitement—and outrage from Obama's Republican opponents—it is not the stalled DREAM Act, which would have created a path to citizenship for some immigrants who came to the United States as children and have been admitted to college or registered under the Selective Service Act. The president's decision, which uses existing prosecutorial discretion, generously gave the applicants employment authorization and permission to remain in the U.S. for renewable two-year periods.

In reality, the president's adoption of a "deferred action" policy was, to a great extent, old wine in a new bottle. The policy does not grant legal residency status, as the DREAM Act would, but defers deportation for a renewable two-year period. Announcing the policy shows new political will, but it does not change existing law or expand available discretion. Forms of prosecutorial discretion, including deferred action, have been available for many years (originating in the John Lennon deportation case, in the early 1970s); nothing substantive has been added to existing authority. Indeed, in the Morton Memo of June 2011, the government announced that it would

U.S. Immigration Policy in the 21st Century

focus on deporting known criminals and urged prosecutors to use their discretion in considering the cases of students who would qualify for the DREAM Act. Yet data from the Department of Homeland Security show that fewer than 300 such “Morton” students were granted administrative closure—a remarkably small number, given their clear qualifications for approval. While it is impossible to tell just how successful the review ordered by John Morton, director of U.S. Immigration and Customs Enforcement, has been to this point—the government has made the data virtually impossible to gather and analyze in any systematic way—the program has been disappointing. Bear in mind, too, that this administration removed and deported nearly 400,000 unauthorized immigrants in 2011 and 2012, the greatest removal efforts in over a half-century (Wadhia 2012).

Even with those metrics, and the militarization of the U.S.-Mexico border, those who would further restrict immigration are not convinced that there has been enough enforcement. They adamantly oppose the president's new decision, and in August 2012, disgruntled immigration employees filed suit in federal court; in January 2013, they cleared the first trial hurdle to continue the litigation (Winograd 2013b).

There is a new application procedure for deferred action and many details yet to be determined. Deferred action is a vague and confusing process—and it will probably lead to unscrupulous *notarios* entering the picture. Furthermore, students who reside in states where they cannot enroll in public colleges or where the states have no resident-tuition provisions for undocumented immigrants may not be able to raise a claim under this policy, because they will have been unable to enroll in college. While a dozen states have laws granting some undocumented immigrants in-state tuition rates, most do not (see Tables 1 and 2). Even if the DREAM Act itself were to be enacted tomorrow by Congress, states would still have to pass laws to grant in-state tuition and financial aid to qualified students in the majority of states, or most of them would be unable to afford college. The real value of President Obama's announcement was that it surpassed the earlier disappointing Morton effort, and called attention to the vexing issue of how to deal responsibly with the potential, and eventually likely, new members of our American community. One might add, but need not, that administrations come and go, and that such

U.S. Immigration Policy in the 21st Century

initiatives can wax and wane. On this point, opponents and supporters of immigration reform can agree: The approach just announced cannot be the only way to resolve the impasse.

The real question is: How can this complex issue be resolved in the current climate? Thirty years after the Supreme Court told us that undocumented immigrants deserve an education, we have not resolved the impasse. Even when the tens of thousands of undocumented students currently enrolled in our colleges, and the many who have graduated and cannot use their education, do receive Deferred Action, they will still not find themselves on a pathway to permanent residence. Their chances of being deported may be reduced, but without employment authorization and a reasonable opportunity to regularize their status, they will still live in the shadows—with limited hope. Despite the uncertainty, hundreds of thousands of these DREAMers have begun the process of seeking Deferred Action and employment authorization. In major cities, the applicants lined up and applied by the hundreds of thousands, and paid their application fees, which fees are the means by which the program will be administered (Solis2013). In the racial thermodynamics of the nativism in Arizona, which has persisted in its restrictionist efforts, Gov. Jan Brewer enacted law that took place the day after the Deferred Action programs to be certain that Arizona benefits were still out of the reach of these students (Winograd 2013a). History may be on the side of the DREAMers, but they still find themselves in a cruel limbo not of their making, and with no clear way out of the thicket.

Within the first week of the DA program application, which began August 15, 2012, tens of thousands of these students surfaced. By the spring 2013 semester, the contours of the DA review process have become more evident, and, depending upon political circumstances and agency capacity, a number of the applicants will have received their DA status and will be newly eligible for certain benefits and legal status. As just some examples, consider the following issues that arose in the 60-day period between the announcement of the revised DA policy and its implementation as a benefit for which the eligible students could apply. (Prior to this, and under any other prosecutorial discretion criteria, applicants could not apply for this status; only prosecutors or other immigration authorities could grant the status.) Early contacts with would-be applicants surfaced many individual issues, likely to be ones that had to be dealt with, finessed, or subject to exceptions or waivers. These examples will give a sense of the complexity

of adjudications: Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion, in this case, for a two-year renewable period. Under current regulations, more than 400,000 individuals whose cases have been deferred are eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate “an economic necessity for employment,” as virtually all have been able to prove (Manuel and Garvey 2013). The federal government has made it clear that it will not be eligible for additional federal benefits, such as health care. Each DA applicant’s history will be considered along with other facts to determine whether, under the totality of the circumstances and on a case-by-case basis, he or she will be granted prosecutorial discretion. I had one such successful DACA recipient in my Higher Education Law Seminar in spring 2013; not surprisingly, he wrote his seminar paper on immigration and higher education issues.

Conclusion: The Crosscurrents

Even with the increasingly evident nativism that has arisen—especially in state and local ordinances that attempt to preempt immigration policymaking, which have caused great mischief and racial violence against the Latinos at whom they are aimed—there is also a strong countervailing crosscurrent in the polity, one that is demonstrably integrationist and accommodationist, especially in the areas of education at the K-12 and higher education levels. Although the doctrine of preemption obligates states and local authorities to yield to clear federal prerogatives, there are many interstices to be filled out and state benefits eligibility to be determined at the sub-federal levels, both for policy determination and implementation (Wadhia 2012). This has been most evident in the subject matter of education, where state and local policies predominate. Here, the legacy of *Plyler* has continued to cast a long shadow, even with recent efforts such as occurred in Alabama’s overreaching. The Morton Memorandum trial run and the more successful DACA initiatives have shown that there are many undocumented students who can navigate exacting federal eligibility requirements, and the likely enactment of CIR will facilitate the incorporation of these innocent sojourners into the educational polity even more firmly and irrevocably. This continued viability and extension of *Plyler* reaffirm the decision in its maturity.

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