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Reimagining and Redefining the Dream: A Proposal for Improving Access to Higher Education for Undocumented Immigrants

By KoKo Ye Huang¹

INTRODUCTION

Immigration policies in the United States are ineffective and inadequate. Current policies do not provide immigrants with adequate access to higher education.² Education is a vital right;³ for immigrants adjusting to life in the United States, education provides exposure to American society and can serve as a useful societal structure to assist immigrants, both students and their parents, as they transition to a new country and culture.⁴ Moreover, education levels the playing field by providing opportunities for immigrants to improve their lives and socioeconomic standing.⁵

The disparity between immigrants and U.S. citizens will continue to grow if immigrants do not have adequate access to education. Statistics indicate that while U.S. citizens are becoming more educated, educational attainment levels for immigrant populations are steadily declining.⁶ Each year, approximately 65,000 undocumented⁷ high school graduates in the United States are denied access to postsecondary education because of federal laws barring undocumented students from educational resources, namely financial aid.⁸ These students can make valuable contributions to society and to the economy, but their contributions are being overlooked because of their immigration status. This note will argue that, rather than penalize students, the federal government—through congressional legislation—should introduce new policy that amends the DREAM Act and accounts for the individualized experiences of immigrant groups by considering factors such as family background, societal discrimination, and pre-immigration educational attainment.

Part I of this note argues that denying undocumented immigrants access to higher education has negative social and economic consequences; specifically, this part describes and deconstructs the problem of access to education in the United States. Because recent immigration trends show that immigrant populations are primarily Asian and Latino,⁹ Part II provides an overview of U.S. immigration and migration policies that affect these populations and describes access to higher education policies, including a comparison and analysis of the effect of U.S. education policies on Asian and Latino immigrant populations. Next, Part III includes a cohesive policy proposal for providing immigrants with adequate access to higher education. Finally, Part IV concludes that the DREAM Act should be amended and that effective immigration policies related to access to education should differ according to the needs of immigrant populations.

I. THE PROBLEM

The hardest part about being an immigrant is that when you finish high school you can't go to college because your parents don't make enough to send you, and you can't qualify for loans or scholarships if you don't have a green card. If you have the highest GPA in your school, it's worthless.

Pancracio, 31, Oregon¹⁰

A. Under Current Law, Undocumented Immigrants Do Not Have Access to Higher Education

Immigrants leave their country of origin for various reasons. Among those reasons, predominantly, is a desire to seek a better life for themselves and their families. Most immigrants share a common motivation: a desire to ensure that their children have access to a better education than they would in their countries of origin.¹¹ Yet statistics indicate that approximately 65,000 undocumented students are unable to achieve this

goal because federal laws bar them from the access to higher education and educational resources such as financial aid that U.S. citizens receive.¹²

Currently, undocumented U.S. students are neither guaranteed access to postsecondary education nor allowed to benefit from federal financial aid programs or in-state tuition. Under the Supreme Court's holding in *Plyler v. Doe*, all undocumented students in the United States are guaranteed a free primary and secondary education.¹³ They are not, however, all eligible for a postsecondary education.¹⁴ The Supreme Court has declined to classify education as a fundamental right,¹⁵ even though it has been recognized as such by international law.¹⁶ Therefore, when undocumented students apply for college in the United States, they may be denied access to resources guaranteed to U.S. citizens and permanent residents, specifically financial aid.¹⁷

Two federal statutes regulate access to higher education for immigrants: the Personal Responsibility and Work Opportunity Reconciliation Act (hereinafter PRWORA)¹⁸ and the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (hereinafter IIRIRA).¹⁹ Together, these acts effectively prevent undocumented immigrants from access to higher education by denying them access to in-state tuition and to financial aid. Specifically, PRWORA restricts states' ability to grant undocumented immigrants access to state and local public benefits, including postsecondary education.²⁰ In other words, undocumented students are disqualified from federal financial aid or student loans to cover their college expenses.²¹ Similarly, Section 505 of IIRIRA²² limits the eligibility of "aliens"²³ for postsecondary education benefits on the basis of residency by prohibiting states from charging in-state tuition rates to undocumented students unless in-state tuition rates are provided to all nonresident students.²⁴

The practical effect of these policies is that undocumented immigrants do not have access to postsecondary education. When applying for college, students are typically asked to provide a social security number and disclose

citizenship status.²⁵ These requests may deter undocumented students from applying to college because of students' fears that revealing their immigration status will result in deportation or equally detrimental consequences.²⁶ While undocumented students may still be able to attend college, they are ineligible for federal aid until they gain legal immigration status.²⁷ This is problematic for undocumented students because they often cannot easily gain legal status,²⁸ nor can they afford to pay for college.²⁹ The students' inability to pay for college is based on their undocumented status; they are unable to find work to help pay for college because of their status.³⁰ For similar reasons, undocumented students generally cannot rely on their parents, who are most likely undocumented employees working in low-wage jobs and, thus, unable to provide financial support.³¹

B. Undocumented Immigrants' Lack of Access to Secondary Education Has Political, Social, and Economic Implications

While in high school, I decided to drop out because I don't [sic] have documents to go to college and apply for financial aid. Not having documents affects me a lot because I can't get a good job. You don't have opportunities to improve your life. I cannot go to college because I have to pay more money to get in and I barely earn enough money to eat.

Salvador, 21, Idaho³²

Immigration policy and immigrant rights are generally highly contested issues. The debate today is particularly relevant because these issues present urgent problems of social justice. More specifically, access to higher education by undocumented immigrants is an issue with political, social, and economic ramifications.

The general debate over immigration has ongoing political implications³³ as elections, specifically the 2008 presidential election, take shape over these issues.³⁴ Undocumented immigration is one of the primary topics of the debate. Americans are concerned that immigrants, presumably both

documented and undocumented, present a burden by taking jobs and housing and by placing pressure on the health care system.³⁵ This concern is reflected by 67 percent of Americans who are opposed to undocumented immigrants receiving social services offered by state and local governments.³⁶ Yet an even greater majority, 71 percent, believes that children of undocumented immigrants should be allowed to attend public schools.³⁷ These seemingly contradictory statistics suggest that Americans support the education of undocumented children, which is presumably not categorized as a social service by most Americans; these statistics also suggest that Americans believe that undocumented children should receive the benefits of an education. It is unclear, however, whether Americans believe undocumented students should have access to postsecondary education, as research revealed no studies of Americans' beliefs on this topic.

Both politicians and ordinary citizens debate whether undocumented children should receive an education; this mirrors the greater immigration debate between opponents of immigration, including restrictionists, and proponents of immigration such as civil rights activists.³⁸ The debate over immigration and undocumented immigrants involves more than a concern about whether undocumented immigrants create a strain on the U.S. economy; it also implicates the question of whether immigrants should be given rights.

Those opposed to granting rights to undocumented immigrants do so based on their belief that "undocumented immigrants are law-breakers who do not belong in this country."³⁹ They further believe that because undocumented people are living in the United States illegally, they are "criminals and thus, unworthy of any preferential treatment from the states or the federal government."⁴⁰ Additionally, opponents of immigration are concerned about immigrants' failure to assimilate into American culture and "about the economic impact of illegal immigration on both a local and federal scale, including the use of American tax dollars to pay for services

for [undocumented immigrants].”⁴¹ Opponents believe that extending financial aid to undocumented aliens circumvents the United States’ current immigration policies by: (1) incorrectly rewarding “illegal status as compared to the legal status held by nonimmigrant foreign students”; (2) giving undocumented students “an advantage over U.S. citizens who are nonresidents of a particular state and must go through . . . proper channels to benefit from a state institution’s in-state tuition rates”; and (3) presuming that “illegal aliens” are in-state students.⁴² Finally, opponents believe that undocumented students must first correct their status before receiving benefits normally afforded to U.S. citizens and visa-holding students in the United States, such as enrolling in a state higher education institution.⁴³ The argument made by opponents is that individuals should be ineligible for positions in the workforce and subject to deportation until they correct their undocumented status.⁴⁴

On the other hand, proponents of granting rights to undocumented immigrants believe “that the debate is motivated largely by racial discrimination” and that the nativist movement proposed by the restrictionists is perpetuated by fear that new immigrants “will be unable to assimilate into American society.”⁴⁵ In terms of the political and legal aspects of the immigrant debate, proponents of educational rights argue “that the federal government, through PRWORA and IIRIRA, is infringing on the states’ rights to regulate activities specifically delegated to the states in the Constitution.”⁴⁶ On an economic level, proponents believe that “investment in the higher education of undocumented students reduces public spending on social and health benefits and increases tax revenue.”⁴⁷

Granting access to higher education for undocumented students is economically beneficial for immigrants and the United States as a whole. For immigrants, education increases socioeconomic standing and earning potential. For the United States, a more educated immigrant population means a more robust economy through greater tax revenue contributed by

immigrants and new jobs for U.S. workers through new corporations created by immigrants in fields such as math, technology, and science.

Immigrants have already made great contributions to the U.S. economy by creating new jobs and companies and have the potential to make even greater contributions; immigrants are responsible for the majority of technology startups in the past decade.⁴⁸ In 2005, these companies employed 450,000 workers and generated \$52 billion in sales, thereby contributing novel technological ideas and capital to the U.S. economy.⁴⁹ Without these contributions, the U.S. economy will suffer because the United States, once considered a world leader in science and technology, is increasingly outpaced by other countries and will need to import the products and technology created by other countries rather than creating the products and technology at home.⁵⁰

The United States will need to import these products and technology because the United States is no longer the ultimate “IQ magnet.”⁵¹ Instead, other countries, including Canada and Australia, have designed successful immigration programs to attract the “best and brightest” worldwide.⁵² These programs are centered on whether an immigrant can contribute to the receiving country’s knowledge-based economy.⁵³ Without a similar program or ability to develop its own talent domestically by attracting foreign students and workers, and by losing workers to other countries’ programs, the United States will not be able to retain its standing. As a result, the U.S. economy will suffer because it will lose revenues and jobs associated with the creation of the products in these fields. The United States is able to retain its current standing as a world leader in these areas because of the significant role immigrants have played in the U.S. dominance of technological fields.⁵⁴

Children of immigrants also have the potential to make valuable contributions to the United States’ math and science base; in fact, they already do. Children of immigrants are the top science and math students in the United States.⁵⁵ Sixty percent of top science students and 65 percent of

top math students in the United States are the children of immigrants.⁵⁶ Foreign-born high school students made up 50 percent of 2004 U.S. Math Olympiad's top scorers, 38 percent of the U.S. Physics Team, and 25 percent of the Intel Science Talent Search finalists—the United States' most prestigious awards for young scientists and mathematicians.⁵⁷ Yet these children receive no rewards and derive no benefits for their contributions. Instead, they are being penalized by policies that deny them access to higher education. Rather than penalizing these students, the United States should cultivate this talent by encouraging the educational development of immigrant children by granting them access to higher education. Without these students, the United States will surely lose future mathematicians and scientists⁵⁸ who will contribute to the U.S. prominence in these fields⁵⁹ and to the U.S. economy in general by later starting the corporations in these fields which yield revenues and jobs. Even if the United States created its own programs or strengthened existing programs for U.S. students, the effect would not be immediate; it would take years for any proposed or existing program to develop and for the United States to reach its current level of prestige and dominance in the math, science, and technology fields. During this time, the U.S. economy would suffer because it would lose the important contributions made by these individuals. Instead, the United States should capitalize on the contributions of these immigrant children.

Losing immigrants in the math, science, and technology fields implicates other economic concerns and would be detrimental to the U.S. economy. Barriers to education for undocumented immigrants create a subclass of citizens who could otherwise contribute as taxpayers and who would remain in the United States.⁶⁰ In fact, studies show that higher levels of education are associated with higher tax contributions.⁶¹ Barred from postsecondary education, the majority of undocumented students are thus unable to contribute to the U.S. economy as workers and taxpayers; instead, they are forced to remain in the United States without documentation or to return to their countries of origin to obtain student visas. The only way to qualify for

legal status as an international student is to file a change of status petition for an international student visa from the student's native country.⁶² However, even then, the visa is not guaranteed⁶³ and is costly to obtain.⁶⁴ There is a strong possibility that those students who are unable to obtain a visa and return to the United States will ultimately not pursue a college education;⁶⁵ instead, these students choose to remain in the United States without a job that they could otherwise qualify for if they had an education.

Contributing to the U.S. economy is only one way that immigrants would benefit the United States and receive benefit themselves. Access to higher education for undocumented immigrants will also prevent greater social inequity from occurring, provide opportunities for achievement to undocumented students, and benefit the communities in which undocumented students live.⁶⁶ Benefits include reduced dropout rates and increased income for the community through stimulated spending and investment.⁶⁷ In addition to providing exposure to U.S. societal structures for recent immigrants,⁶⁸ education levels the playing field and allows immigrants to improve their socioeconomic standing. Without an education, immigrants have lower paying positions without opportunities for upward mobility.⁶⁹ In other words, impediments to education repress immigrants to the lowest socioeconomic class, which encourages and perpetuates poverty.⁷⁰ Even if this is by design, it is unfair and has far-reaching social justice implications; it creates a subclass of second-class citizens. Because immigrants have the potential to contribute substantially to society, undocumented immigrants should not simply be in the United States to take low paying, menial jobs.

However, given the current employment patterns of foreign-born workers, it is clear that the potential for contribution by immigrants is ignored. A subclass of second-class citizens in menial labor jobs is evident as immigrants fill more of the jobs that utilize younger workers with less education.⁷¹ In 2004, the foreign-born share of workers was highest in lower-skilled occupations such as farming, janitorial services, construction,

and food preparation, in which 20 to 38 percent of workers were immigrants.⁷² In contrast, the percentage of foreign-born workers was lowest in occupations that require U.S. education and training, such as legal occupations, police and protective services, and social services.⁷³ The discrepancy between the above figures and those concerning the success of immigrants in mathematics and science can be reconciled in that the latter group has access to additional educational opportunities.⁷⁴ If current immigration laws concerning access to higher education do not change, undocumented immigrants will account for one in eight new workers in industries employing large number of workers with lower levels of formal education between 2002 and 2012,⁷⁵ thus perpetuating socioeconomic standings and inequities. This is unfair to immigrants because it locks them in this lower subclass and detrimental to society because it ignores the potential contributions these immigrants can make beyond the scope of working in menial jobs.

Disparities clearly exist between the educational attainment of native-born workers and foreign-born workers. Native-born workers are increasingly well educated while immigrant workers have less formal education. For example, the number of native-born workers, aged twenty-five and older, with at least a four-year college degree increased from 27.2 percent to 32.6 percent between 1994 and 2004.⁷⁶ Conversely, 53.3 percent of the foreign-born labor force in the United States, aged twenty-five and older, had no more than a high school diploma in 2004.⁷⁷ This is quite startling when compared to the 37.8 percent of the native-born labor force who had no more than a high school diploma.⁷⁸ In other words, immigrant workers were more likely, specifically four times as likely, as native workers to lack a high school diploma.⁷⁹ This is inequitable and unfair to immigrants because immigrants have the capacity and ability to achieve academic success and contribute to society in other meaningful ways through, for example, starting new corporations that create more jobs and increase tax revenue, thereby benefitting the United States.

As demonstrated above, the political, social, and economic implications of barring undocumented students from access to higher education are multidimensional. Without an education, undocumented students will continue to be second-class citizens with no way to improve their socioeconomic position or to contribute to the U.S. economy as taxpayers. The United States will also suffer by losing valuable workers who could otherwise assist the United States in retaining its prominence as a leader through the contribution of immigrants in the fields of mathematics, science, and business. Simply put, “[p]reventing undocumented high school graduates from obtaining higher education is bad public policy.”⁸⁰

II. U.S. IMMIGRATION

A. Immigration Patterns Have Changed over Time

America is touted as the land of the free, the land of golden opportunities. Recent statistics indicate that immigration to the United States, both documented and undocumented, continues to thrive even with increasingly stringent immigration regulations. While 800,000 people immigrate to the United States legally per year,⁸¹ the total number of immigrants arriving in the United States from 2000 to 2004 averaged 1.3 million.⁸² More than half of those immigrants, 53 percent, were undocumented.⁸³ About 300,000 undocumented immigrants arrive annually,⁸⁴ amounting to, as of January 2005, an estimated 10.5 million undocumented immigrants living in the United States.⁸⁵

Historically, immigrants came from Europe, but the immigrant population changed after immigration regulations were eased in 1965 through the signing of the Immigration and Nationality Act Amendments.⁸⁶ The shift in immigration population was twofold. First, the population shifted in intensity and in regard to country of origin.⁸⁷ This shift in intensity resulted in the growth of the immigrant population by over 30 percent in the 1990s.⁸⁸ Currently, “over 50 percent of all immigrants are

from Latin America and over 25 percent are from Asia.”⁸⁹ The leading source countries for legal immigration to the United States in 2006 were Mexico with 91,000 immigrants, Vietnam with 78,000 immigrants, and the Philippines with 59,000 immigrants.⁹⁰

Because the history and data concerning immigration patterns and educational attainment for Latin and Asian immigrants are important considerations in shaping a new access to higher education policy for undocumented immigrants, this part will describe how immigrants are influenced by a wide variety of factors that determine their educational attainment prior to immigration. First, factors affecting Asian immigrant populations are discussed, followed by a discussion of factors affecting Latino immigrant populations.

Asian migration to the United States has increased in response to changes in the immigration laws. The Chinese Exclusion Act⁹¹ of 1882 severely curtailed immigration from Asia,⁹² but changes to the immigration laws in 1965 increased the Asian immigrant population from one million in 1965 to seven million in 1990.⁹³ The regions and countries of origins comprising the largest Asian American communities in the United States today are: East Asia, including China, the Philippines, Japan, and Korea; South Asia, including India; and Southeast Asia, including Vietnam.⁹⁴

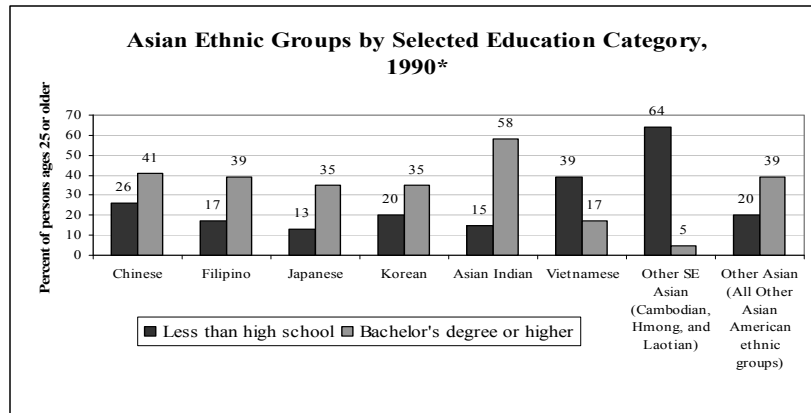
Stereotypes abound about Asians as the model minority.⁹⁵ The popular perception is that Asian immigrants are highly educated, more likely to have advanced degrees, and more skilled than the native-born population⁹⁶ because they are hardworking and value education.⁹⁷ Even though some generalizations may ring true, the stereotype is misconceived when comparing the educational attainment rates of different Asian immigrant groups.⁹⁸ For example, based on the 2000 census, the high school completion rates for the foreign-born population⁹⁹ aged twenty-five or older from Asia were 83.8 percent, which was comparable but higher than the rates of the foreign-born from Europe (81.3 percent), South America (79.6 percent), and Latin America (49.6 percent), and significantly higher than the

foreign-born average (67.0 percent).¹⁰⁰ The high school completion rates for the Asian-born population, however, were still lower than those rates for the native population (86.6 percent).¹⁰¹

Although Asians have attained the highest educational achievement rates among the foreign-born population, the experiences of Asian immigrants and their academic success cannot be generalized without considering the individualized experiences that impact educational performance.¹⁰² For example, within the Vietnamese immigrant population, currently the largest and fastest growing Asian immigrant group in the United States,¹⁰³ there were two different waves of immigration.¹⁰⁴ The first wave of immigration included Vietnamese refugees who were relatively well educated, proficient in English, and experienced in urban living.¹⁰⁵ As a result of this background, the first wave accepted very little resettlement assistance and worked to minimize reliance on government benefits, using that assistance to attain professional status and create successful businesses.¹⁰⁶ In contrast, the second wave was characterized by poorer and less educated refugees who lacked “the skills needed for employment in a technologically complex society.”¹⁰⁷ Because of this and the fact that the second wave was not offered government resettlement assistance, the second wave has continued to be employed in low status, service sector jobs.¹⁰⁸

The experience of Vietnamese immigrants, in regard to individualized experiences affecting educational achievement, is not unique among Asian immigrant groups.¹⁰⁹ Among the different Asian immigrant groups, there is a disparity in educational attainment. Data from the 1990 census showed that about two-thirds of Cambodian, Hmong, and Laotian adults did not have a high school education, which was comparable to the large percentage of Chinese and Vietnamese adults without a high school diploma.¹¹⁰ However, a large percentage of Japanese Americans and Asian Indians have completed high school.¹¹¹ Interestingly, a higher percentage of Chinese (40 percent) and Asian Indian Americans (58 percent) completed an undergraduate, graduate, or professional degree than Southeast Asian

Americans (5 percent).¹¹² A full breakdown of educational attainment for Asian ethnic groups can be found below.



*Source: U.S. Bureau of the Census, *1990 Census of Population, Social and Economic Characteristics*, United States CP-2-1 (November 1993): table 106.¹¹³

Attitudes towards education and immigration policies and status also have an impact on Asian educational achievement. Studies show that becoming “Americanized” is detrimental to educational achievement as loss of achievement drive increases with acculturation.¹¹⁴ For example, a student who is in the second or subsequent generation of his/her family to immigrate is less committed to doing well in school than his/her immigrant counterparts.¹¹⁵ This is mostly true for the Asian immigrant population.¹¹⁶ One study showed that third generation Asian American students in Chicago had lower grades than immigrant children.¹¹⁷ But another study in San Francisco revealed that grades for Filipinos decreased from first to second generation, while the grades for Koreans and Chinese did not change, and grades for Japanese students increased.¹¹⁸ Again, these different statistics tend to indicate that individualized experiences need to

be considered in determining why disparities in educational achievement exist.

However, there is a limit to which individualized experiences can play a role in formulating access to educational policy. While each Asian immigrant group has different experiences and factors that contribute to its educational attainment, some of these experiences are further differentiated within the immigrant groups based on country of origin and background. For example, an immigrant from China could either be highly educated or poorly educated before coming to the United States based on his/her family background, including socioeconomic conditions and time of immigration. Data indicates that “[a]mong Chinese Americans, . . . recent immigrants have relatively low educational attainment while longer-term residents and the native born have relatively high levels.”¹¹⁹ Additionally, based on the data above, “some Asian ethnic groups have relatively high percentages at both the highest and lowest ends of the educational spectrum, creating a bipolar distribution.”¹²⁰ Consideration of this bipolar distribution is crucial when designing an education policy for Asian immigrants; a bipolar distribution yields two classes of immigrants: one with greater educational achievement and the subsequent benefits that an education confers, and one without an education.

The Latino¹²¹ migration, like the Asian migration, has increased gradually as a response to immigration laws.¹²² In spite of the 1965 immigration law amendments that imposed a ceiling on immigration from the Western Hemisphere, the number of Spanish-speaking immigrants, especially those from Mexico and Latin America, increased dramatically.¹²³ That immigration, however, has been comprised largely of undocumented immigrants.¹²⁴ In 2005, the largest number of unauthorized immigrants came from Mexico, with nearly 6 million residing in the United States, followed by El Salvador and Guatemala.¹²⁵

Latino immigrants, like Asian immigrants, are similarly affected by attitudes towards education from internal and external sources, which

impact educational success. Specifically, those attitudes toward education involve attitudes toward authority, school, and achievement motivation.¹²⁶ For example, and possibly as a result of those attitudes, the high school completion rates of foreign-born Latin American immigrants, at 49.6 percent, were considerably lower than the rates for the foreign-born population from other regions.¹²⁷

There are many theories about why Latinos perform poorly in school. A common stereotype is that Latino immigrant parents have not had much education themselves; another stereotype is that “[t]he kind of socialization Mexican American children receive is not conducive to development of the capacities needed for advancement in a dynamic society.”¹²⁸ Researchers have found both of these reasons to be unsatisfactory; instead, new studies show that Mexican immigrants initially embrace school as the key to a better future, but that attitude and expectation diminishes among more acculturated Latinos.¹²⁹ Data from these studies indicates that “[t]he more acculturated students become, the more skeptical and ambivalent they are about schools.”¹³⁰ Students may also face economic pressure to become employed in order to support families, which affects achievement in and attitudes about school.¹³¹

Another factor affecting the educational achievement of Latinos is societal hostility and discrimination.¹³² The perception is that Latino immigrants are poorly schooled, semiskilled, or unskilled workers who lack proper documentation and end up in poorly paid jobs, settled in areas of deep poverty and racial segregation.¹³³ These stereotypes affect the educational achievement of second- and third-generation Mexican American youths because they become less motivated and “may respond to patterns of discrimination and cultural alienation in schools by giving up on education.”¹³⁴

Yet, generalizations about the Latino immigrant population, like stereotypes about Asian immigrants, are difficult to make without acknowledging the different experiences of the immigrants from the various

countries comprising the Latino immigrant population. For example, although Latino high school completion rates are generally low, there is a disparity between the foreign-born populations from Mexico and those from South America.¹³⁵ South America had the highest proportion of high school completions, with 79.6 percent, whereas Mexico yielded the lowest, with 33.8 percent.¹³⁶

Research also demonstrates that children of highly educated immigrants tend to perform better in schools than children of less skilled immigrant workers, especially those from Latin America.¹³⁷ Evidence “suggests that some immigrant children, especially those originating in families with more education, resources, connections, and skills, will indeed thrive in the era of globalization [especially academically].”¹³⁸ Like the studies concerning Asian immigrants, the process of acculturation, meaning becoming Americanized, is similarly detrimental to the educational achievement of Latino immigrants.¹³⁹ With each succeeding generation’s increasing acculturation, Latinos lose their achievement drive and are less committed to academic achievement in school than their immigrant counterparts.¹⁴⁰

B. Under Current Immigration Policy, Documented Immigrant and Nonimmigrant Students Are Treated Differently from Undocumented Students.

The status of students entering the United States, whether documented immigrant and nonimmigrant or undocumented, affects the students’ ability to access higher education once in the United States. Several visa categories are available to documented immigrant and nonimmigrant students. There are no current policies for undocumented immigrants to access higher education, except for several proposed policies, including the DREAM Act.

1. Documented Immigrant/Nonimmigrant¹⁴¹ Students

The United States Citizenship and Immigration Service (hereinafter USCIS) has articulated policies for nonimmigrants who wish to pursue an education in the United States. These policies are insufficient because they do not address the fact that few international students come to the United States having met the stringent requirements such as financial self-sufficiency. In addition, even fewer students are currently coming as a result of post-September 11 procedural changes. The USCIS designates several visa categories for international students currently outside the United States who want to pursue an U.S. education.¹⁴² One category, the F-1 visa, is reserved for nonimmigrants wishing to pursue academic studies or language training programs.¹⁴³ The F-1 category targets students “studying in ‘colleges, universities, seminaries, conservatories, academic high schools, other academic institutions, and in language training.’”¹⁴⁴ Students with F-1 status may also pursue Curricular Practical Training or Optional Practical Training, which allow students one cumulative year for training, during or after they complete their studies.¹⁴⁵

Prior to September 11, the United States attracted a great number of international students.¹⁴⁶ However, overall international enrollment has decreased since September 11. Total international student enrollment in the United States had consistently increased from 34,232 in 1954–55 to 582,996 in 2001–02,¹⁴⁷ but began gradually decreasing after September 11 to its current level of 564,766 students in 2005–06.¹⁴⁸ Those numbers have declined since September 11 due in large part to the requirement that international students comply with a number of new regulations.¹⁴⁹ Post-September 11 procedural changes include a requirement that students obtain an approved student visa before they are eligible to enroll in classes.¹⁵⁰ Previously, students could come to the United States under a visitor visa and apply for a change in status once they were in the United States.¹⁵¹ Further restrictions placed on foreign students include compliance with post-September 11 entry regulations and security-motivated tracking

systems, including the Student and Exchange Visitor Information System.¹⁵² In addition, international students face further limitations such as increasingly stringent requirements for the visa application procedure.

The effects of these changes are evidenced by the increased number of denials for F-1 student visa applications; denials increased from 27.3 percent in 2001 to 35.2 percent in 2003.¹⁵³ Interestingly, however, more visa applications were approved in 2006. This suggests that the USCIS recognized that fewer international students were studying in the United States and reversed its practices to allow more international students to enter. The State Department issued 591,050 student and exchange visas between September 2005 and 2006.¹⁵⁴ This was a 14 percent increase from the prior year and a 6 percent increase from the year leading up to September 11.¹⁵⁵ This trend of increased F-1 student visa approvals is consistent with the number of new international students enrolled at American colleges and universities. The number of newly enrolled international students increased 8.3 percent from 131,945 in 2004–05 to 142,923 in 2005–06.¹⁵⁶ This number, however, is still lower than the pre-September 11 numbers. The countries and regions from which immigrants hailed have also changed as a result of September 11.

The tables below illustrate these changes:

Composition of Immigrant Students from 2000–01 to 2001–02 Based on Place of Origin¹⁵⁷

Rank	Place of Origin	2000–2001	2001–2002	2000–2001 %Change	% of U.S. Foreign Student Total
1	India	54,664	66,836	22.3	11.5
2	China	59,939	63,211	5.5	10.8
3	Korea, Republic of	45,685	49,046	7.4	8.4
4	Japan	46,497	46,810	0.7	8.0
5	Taiwan	28,566	28,930	1.3	5.0
6	Canada	25,279	26,514	4.9	4.5
7	Mexico	10,670	12,518	17.3	2.1
8	Turkey	10,983	12,091	10.1	2.1
9	Indonesia	11,625	11,614	-0.1	2.0
10	Thailand	11,187	11,606	3.7	2.0
11	Germany	10,128	9,613	-5.1	1.6
12	Brazil	8,846	8,972	1.4	1.5
13	Pakistan	6,948	8,644	24.4	1.5
14	United Kingdom	8,139	8,414	3.4	1.4
15	Colombia	6,765	8,068	19.3	1.4

Composition of Immigrant Students from 2004–05 to 2005–06 Based on Place of Origin¹⁵⁸

Rank	Place of Origin	2004–2005	2005–2006	2005–2006 %Change	% of International Student Total
1	India	80,456	76,503	-4.9	13.5
2	China	62,523	62,582	0.1	11.1
3	Korea, Republic of	53,358	59,022	10.6	10.5
4	Japan	42,215	38,712	-8.3	6.9
5	Canada	28,140	28,202	0.2	5.0
6	Taiwan	25,914	27,876	7.6	4.9
7	Mexico	13,063	13,931	6.6	2.5
8	Turkey	12,474	11,622	-6.8	2.1
9	Germany	8,640	8,829	2.2	1.6
10	Thailand	8,637	8,765	1.5	1.6
11	United Kingdom	8,236	8,274	0.5	1.5
12	Hong Kong	7,180	7,849	9.3	1.4
13	Indonesia	7,760	7,575	-2.4	1.3
14	Brazil	7,244	7,009	-3.2	1.2
15	Colombia	7,334	6,835	-6.8	1.2
16	France	6,555	6,640	1.3	1.2
17	Kenya	6,728	6,559	-2.5	1.2
18	Nigeria	6,335	6,192	-2.3	1.1
19	Nepal	4,861	6,061	24.7	1.1
20	Pakistan	6,926	5,759	-8.5	1.0

This data indicates the general trend that most foreign students coming to study in the United States come from Asia, with India, China, Republic of Korea, and Japan consistently ranking in the top four countries of origin for international students.¹⁵⁹ The number of students coming from those countries has decreased as a result of post-September 11 immigration regulations, but increased recently, reflecting the trend noted above. For example, in 2001–02, the number of Asian students from those four countries listed above, India, China, Republic of Korea, and Japan was 225,903; most recently, in 2005–06, the number increased to 236,819 students.¹⁶⁰

Data analysis further shows that very few students from Latin America study in the United States. Mexico ranks seventh in countries making up the international student total in the United States with 13,931 students in 2005–06.¹⁶¹ While this is a slight increase from the 2001–02 total of 12,518 Mexican students,¹⁶² Mexico is the only Latin American country that ranks in the top ten leading places of origin for international students coming to the United States, with Brazil and Colombia ranking fourteenth and fifteenth, respectively.¹⁶³ Yet, Latin American students, totaling 27,223 775 from Mexico, Brazil, and Colombia in 2005–06, make up only a fraction of the total international students in the United States.¹⁶⁴ When compared with the Asian student population, there is approximately one Latin American student for every 5.77 Asian students studying in the United States.¹⁶⁵

These trends suggest that Latino immigrants have a more difficult time coming to the United States to study through authorized nonimmigrant status. Possible explanations for this disproportionality include: (1) education in Latin America is adequate; (2) students do not want to come to the United States to study; or (3) students do not have financial resources to qualify for F-1 status.¹⁶⁶

If immigrants come to the United States to pursue a better life for their children through a U.S. education,¹⁶⁷ then the first two explanations are easily dismissed. While education in some Latin American countries may

be adequate, it may be greatly inadequate in others. Regardless of the adequacy of education in Latin American countries, however, students or their parents may still want students to pursue an education in the United States because of the prestige and other benefits associated with obtaining a U.S. education.¹⁶⁸ Thus, a more feasible explanation as to why few Latino students are coming to the United States is that more Latino students lack financial resources to meet the F-1 requirements for financial self-sufficiency. These trends, however, do not explain or address the issue of access to higher education for undocumented immigrants.

2. Undocumented Immigrant Students

The most recent statistics compiled by the Department of Homeland Security's Office of Immigration Statistics show that there were an estimated 10.5 million undocumented immigrants living in the United States as of January 2005, and a total of 11 million undocumented immigrants were expected to live in the United States in 2006.¹⁶⁹ This indicates a significant increase from 2002, when the number of undocumented immigrants in the United States was in the range of 7.5–9.5 million.¹⁷⁰ Included in the number of undocumented immigrants living in the United States are the 65,000 undocumented students who have resided in the United States five years or longer and graduate from high school annually.¹⁷¹ As stated earlier, access to higher education for immigrants is statutorily regulated by PRWORA¹⁷² and IIRIRA.¹⁷³ PRWORA precludes undocumented students from qualifying for federal financial aid or student loans to cover their college expenses¹⁷⁴ and IIRIRA bars states from offering undocumented immigrants in-state tuition.¹⁷⁵

These laws deny immigrants postsecondary education, a resource needed to adjust to American society and become self-sustaining individuals; they “reduce the likelihood of undocumented immigrants ever becoming legal permanent residents through cancellation of removal,¹⁷⁶ and . . . trap [immigrants] at the bottom of the socio-economic [sic] ladder.”¹⁷⁷

a) *The DREAM Act and Other Proposals for Improving Access to Higher Education for Undocumented Immigrants*

Although none have become law, several policies that favor access to higher education for undocumented immigrants have been proposed. Chief among these proposed policies is the Development, Relief, and Education for Alien Minors Act, the DREAM Act.¹⁷⁸ The DREAM Act is bipartisan legislation pending in Congress that, if passed, would allow undocumented high school graduates who have grown up in the United States and who entered the United States as children to apply for conditional immigration authorization to attend college.¹⁷⁹ The Act would authorize up to six years of legal residency.¹⁸⁰ During the six year period, the student would be required to: (1) graduate from a two-year college; (2) complete at least two years toward a four-year degree; or (3) serve in the U.S. military for at least two years.¹⁸¹ In order to qualify for the benefits under the DREAM Act, the student must have been brought to the United States more than five years ago when he/she was fifteen years old or younger, and be able to demonstrate good moral character.¹⁸²

The DREAM Act would eliminate Section 505 of the IIRIRA. Under that section, students attending an out-of-state college or university must also qualify for lower in-state tuition.¹⁸³ By eliminating the provision, states would again have the authority to determine state college and university fees.¹⁸⁴ Even absent the DREAM Act, ten states have already enacted laws permitting anyone who has graduated from high school in the state, including undocumented immigrants, to pay the in-state rate at public colleges and universities.¹⁸⁵ These ten states are Texas, California, Utah, Washington, New York, Oklahoma, Illinois, Kansas, New Mexico, and Nebraska.¹⁸⁶

Unfortunately, the future of the DREAM Act remains uncertain. Even though the DREAM Act was introduced in 2001, it is still pending in Congress.¹⁸⁷ Most recently, in 2007, Senate Democrats proposed the DREAM Act as an amendment to a Defense Department authorization bill,

but Senate Republicans blocked it.¹⁸⁸ Previously, in 2006, the DREAM Act was passed by a Senate Judiciary Committee voice vote as an amendment to comprehensive immigration reform.¹⁸⁹ It appears that the Act would have passed either chamber if brought up for a vote, but this action was not taken.¹⁹⁰ Possible reasons for the inaction include concerns that the Act would not pass in an anti-immigration Congress or in a contentious political environment, which makes it more probable that the Act would pass with the newly elected Democratic majority in Congress.¹⁹¹ However, recent unsuccessful attempts by Senate Democrats to reintroduce the DREAM Act in 2007 indicate that the DREAM Act still faces significant opposition.¹⁹²

Another reason for the delay in enacting the DREAM Act is based on debate as to whether the DREAM Act should be enacted at all. Proponents of the DREAM Act argue that unauthorized immigrant children had no choice about whether to enter the United States illegally, have grown up in the United States, and can make economic and social contributions if allowed to continue their studies.¹⁹³ Proponents counter the opposition by arguing that the DREAM Act is in some ways a corrective action—that undocumented high school graduates who are brought to the United States as children should be given the same opportunity to pursue an education as other children, including an opportunity to correct their parents' actions by contributing to the U.S. society and economy once they obtain an education.

Opponents, on the other hand, believe that the bill would reward lawbreakers, that only lawful resident students should qualify for resident tuition, and that the DREAM Act could result in added costs to taxpayers.¹⁹⁴ Further, opponents believe that the DREAM Act would encourage undocumented immigrants “to maintain their illegal status rather than pursue . . . corrective measure[s] to become legally permitted to remain in the United States.”¹⁹⁵ Opponents also fear that the DREAM Act “gives states the ability to award residency to illegal aliens and effectively removes Congress’s ability to control naturalization.”¹⁹⁶ Finally, opponents believe

that the Act maintains “a disparate impact on the treatment of legal nonimmigrants and illegal aliens.”¹⁹⁷

In addition to the DREAM Act, other proposals to allow undocumented students access to postsecondary education include those that argue that PRWORA and IIRIRA should be repealed, and those that argue that states should take unilateral action.¹⁹⁸ Under the former proposal, Congress, because it has absolute power over states in immigration matters, would have the authority to repeal PRWORA and IIRIRA.¹⁹⁹ Congress’ absolute power is derived from the plenary power doctrine, which “requires that judicial deference be given to Congress’s power to admit, exclude, deport, or even prescribe the terms and conditions upon which aliens are allowed into the United States.”²⁰⁰ The latter proposal, requiring states to take unilateral action, is premised on the belief that the debate about access to higher education is not an immigration issue, but rather a local matter.²⁰¹ As such, local interests are implicated because states have already invested resources into educating these undocumented students and thus should be able to determine whether they want to provide higher-education benefits.²⁰² Therefore, this proposal advances the argument that the federal government should defer to the states because issues pertaining to public benefits and social welfare are matters for state control.²⁰³ Regardless of how undocumented students are granted access to higher education, a policy that actually grants access and is supported by both the Congress and the president is crucial.

III. POLICY PROPOSAL

A. Proposal for Policy that Provides Undocumented Immigrants Access to Education

Current discriminatory immigration policies regarding access to education should be overhauled to include the individualized experiences of undocumented immigrant populations by considering such factors as family

background, societal discrimination, and pre-immigration educational attainment. An effective policy²⁰⁴ granting access to higher education for undocumented students accounts for these factors through inclusion of two crucial components: (1) amending the DREAM Act to increase support from opponents, and (2) incorporating the individualized experiences of immigrant groups into the policy.

1. Amend the DREAM Act

Since 2001, the DREAM Act has been pending in Congress. In order to pass, the DREAM Act must garner more support and approval from legislators on both sides of the immigration debate. This can be done by addressing the concerns of those opposed to immigration. Those concerns, as outlined in detail above, are based, in part, on the belief that undocumented immigrants are lawbreakers who are in the United States illegally. While that underlying belief cannot be changed, the resultant beliefs can be changed. The resultant beliefs are: (1) undocumented immigrants should not receive preferential government treatment;²⁰⁵ (2) American tax dollars should not be used to pay for services for undocumented immigrants;²⁰⁶ (3) extending benefits to undocumented aliens circumvents the United States' current immigration policies by incorrectly rewarding undocumented students over nonimmigrant foreign students;²⁰⁷ and (4) undocumented aliens should change their status before receiving benefits awarded to U.S. citizens and visa-holding students in the United States.²⁰⁸

There are three ways to address the concerns of those opposed to immigration: (1) add a training component that allows students to work for one year, either while they are attending school or after they graduate; (2) eliminate the permanent residency benefit; and (3) require undocumented students to pursue permanent residency through the same avenues as other F-1 documented students.

First, adding a one-year training component counters concerns raised by opponents and also provides an opportunity for students to gain the practical skills needed to obtain future employment after the training period ends. The proposed training component, similar to both the F-1 Curricular Practical Training and Optional Practical Training programs in the United States and the Canadian work permit,²⁰⁹ would grant one year of work authorization to students in a field reasonably related to their course of study after they have completed their educational program. Because the employment is reasonably related to the student's course of study, he/she will gain the skills needed to obtain a job after the training period ends. This one year between finishing a postsecondary education program and securing other work authorization after the program ends, for example through the H-1B program as discussed below, is sufficient for students to secure another route to work authorization after the training program ends. This one-year period is adequate because the students will have gained the practical skills needed to obtain employment; in addition, this same system has, for many years, provided sufficient opportunities for F-1 students to secure permanent jobs.

The inclusion of the proposed training program counters concerns raised by opponents of immigration that students do not have access to job opportunities once they finish schooling and, thus, will not become a drain on the U.S. economy and resources. The training component counters these concerns because students will gain the skills needed to obtain employment, thereby not creating a drain on the U.S. economy and resources. In fact, students would contribute to the U.S. economy by paying taxes. By working and applying the skills received through their education, the undocumented immigrants could support themselves and American tax dollars would not be used to pay for social services. Furthermore, a program, similar to the F-1 training program, would be administered by USCIS and individual schools, as it is currently for the F-1 program. Consequently, there would be negligible additional costs, because the F-1

training component is already in place. No new systems, and costs associated with those systems, would be needed, thereby countering concerns that programs such as these are expensive to implement and administer.

Second, by eliminating the DREAM Act's permanent residency benefit, which currently allows students to become permanent residents after they have met the six-year conditional residency requirement, it is likely that a greater number of DREAM Act opponents would support the amended legislation. The amended policy would garner more support because undocumented immigrants would not receive preferential treatment. Elimination of the permanent residence benefit does not incorrectly reward undocumented students over nonimmigrant students; rather, it maintains equal treatment of authorized and unauthorized students because both groups would pursue legal residency the same way. Furthermore, removing the permanent residency benefit would not set up beneficiaries of the DREAM Act for financial insolvency; instead, by pursuing the training program opportunity proposed above, this group of newly educated students could benefit from the social mobility their degrees will afford. These students would choose to stay in the United States because of the opportunities they could pursue after graduation; in turn, these students would further contribute to the U.S. economy through increased tax revenues, thus reversing the "brain drain" and creating new jobs with their entrepreneurial spirit.²¹⁰ Given these added benefits, eliminating the permanent residency component would increase support for the amended policy proposed.

Third, during Optional Practical Training, rather than being automatically granted permanent residency, students would pursue an H-1B employment visa and later pursue legal residency through employer-sponsored or employment-based permanent residency. Because this is the method by which documented students currently pursue permanent employment and/or permanent residency, there is no disparate impact on the treatment of legal

nonimmigrants and undocumented immigrants. Obtaining an H-1B visa also addresses concerns that undocumented students are not first changing their status before they can be eligible for positions in the workforce. Students would be eligible for positions in the workforce, and the requirement to pursue permanent employment would not result in a loss of jobs for U.S. workers. While it is clear that those opposed to immigration would not support a policy that resulted in loss of jobs, these new graduates would not be taking jobs away from U.S. workers; in fact, they would create new jobs if they continue in their entrepreneurial spirit of starting new businesses.²¹¹

Additionally, through the creation of new businesses and new jobs by immigrants, this activity would most likely stimulate the economy. In turn, stimulation of the economy would most likely garner support for increasing the number of H-1B visas awarded annually: the number of H-1B visas allocated has increased during successful economic times.²¹² This would address the concern that the H-1B visa quota is capped at 65,000 visas annually and that not enough visas will be available to a new group of graduates. Finally, allowing undocumented students to pursue an H-1B visa and permanent residency is fair to students because it addresses their fears of retribution and deportation,²¹³ and it allows students to pursue opportunities that an education affords them, such as increasing socioeconomic standing.

2. Incorporate Immigrant Population Experience into Policy

An effective immigration policy considers the impact on immigrant populations and the individualized experiences of immigrant groups. As shown above, Latino and Asian immigrants have had different experiences and come from different backgrounds with regard to pre-immigration socioeconomic conditions and educational attainment. While it is impossible to generalize the experience of all Latinos or all Asian immigrants, especially in light of the differences within the individual

immigrant populations, it is possible to consider overall trends in the reception the immigrant groups have received in the United States in order to design effective access to higher education policies.

Statistics have shown that Latinos are often perceived as being undocumented and uneducated. As a result, Latinos have experienced societal hostility and discrimination, which has influenced their attitudes and motivations for educational achievement. An educational policy benefiting undocumented Latino immigrants will take into account these negative perceptions and discrimination. Similarly, the fact that those from Latin America have lower high school completion rates than other immigrant groups and fewer numbers of “foreign” students studying in the United States should also factor into an immigration policy for access to higher education. Consequently, the educational policy for undocumented Latino students should allow the students to overcome negative stereotypes and lower educational attainment levels by ensuring that they are able to access higher education. To overcome these barriers, a framework that addresses negative stereotypes and lower educational attainment levels should be enacted. The framework would incorporate a multidimensional approach and solutions to problems of traditional access—lower enrollment rates and lack of financial aid—to ensure Latino students actually have access to higher education.

This framework would have two components: (1) increasing the number of Latinos eligible for higher education under the new education policy and (2) guaranteeing other sources of financial aid. First, because Latinos have considerably lower educational attainment levels, the proposed policy to amend the DREAM Act and incorporate individualized immigrant group experiences would allow a greater number of Latino immigrants to benefit initially from the new education policy proposed. The federal policy would then be evaluated annually and new numbers set once more equitable educational achievement has been reached, similar to the achievement rates of other minority groups. Whether equitable educational achievement has

been reached will be monitored annually by a consortium, as described in greater detail below. Second, in addition to ensuring that students have access to school vis-à-vis proper immigration status as granted by the amended DREAM Act, the consortium overseeing the new federal education policy will also ensure that students have financial access to college. By granting Latino students access to federal and school student loans, in addition to private scholarships from foundations, these students will be able to complete school without concerns about affording four years of postsecondary education.

Asians, on the other hand, while generally positively perceived, have sometimes experienced hostility as a result of the high educational attainment and professional success they are perceived to have achieved. Therefore, the new federal access to education policy for them will differ from the policy for Latinos. Varying statistics outlined above indicate that educational policies aimed at Asian immigrants need to factor in the differences between and within each group, although it will be difficult to incorporate each of the individualized experiences of the Asian immigrant groups.²¹⁴

Even though different groups within the Asian immigrant population have had varying individualized experiences with regard to access to education, these experiences still need to be factored in when creating an effective policy. To do so, policymakers in the proposed consortium will need to consider when the particular immigrant group came to the United States (i.e., whether the group has had many prior generations of immigrants or if this is the first generation), and what level of educational achievement the group has generally achieved pre- and post-immigration. These factors are especially important: subsequent generations and those just arriving in the United States may either lose the achievement drive or face the barriers to educational success if they are without proper documentation. The oversight and administration of this policy would also

be through the same consortium concerning Latino educational policy proposed above.

This consortium of higher education institutions, private foundations, and the USCIS referenced above will oversee and administer the new federal access-to-education policy proposed in this note. The consortium will initially meet to evaluate which groups suffer the most marginalization from education and propose policy for these groups using the factors, data, and socioeconomic and historic considerations identified above for the Latino and Asian groups. Meetings will then occur annually for the consortium to monitor whether equitable achievement rates have been attained. Because most of the research for evaluating the marginalization and achievement rates of immigrant groups is readily accessible, there would be no cost in accessing this data in order to design and effectuate specific implementation plans for the proposed access to higher education policy. As a result, the administrative and actual costs to the public will not be significantly higher than current costs. Those costs are not significant, as a 2004 Congressional Budget Office cost estimate of the DREAM Act indicated that enacting the DREAM Act would increase direct spending for the student loan, Food Stamp, and Medicaid programs by an insignificant amount.²¹⁵ Accordingly, the creation of a consortium is essential in overseeing and administering this new education policy.

Arguably, creating such a structure for the Latino and Asian groups through this type of education policy has the potential to raise concerns when subjected to an equal protection analysis under the Fifth Amendment. The incorporation of these factors as considerations in the numerical allotment, however, should not be dismissed as unnecessary preferential treatment or “reverse discrimination” with regard to differentiating among certain classes of individuals. Rather, this structure levels the playing field for those individuals who have faced, and continue to face, institutional and structural discrimination embedded in our society.²¹⁶ Such an argument is similar to those proffered by scholars and critical race theorists with regard

to “white privilege” and continued discrimination against racial minorities.²¹⁷ It is critical that policies such as these level the playing field.

Rather than proposing the “one size fits all approach”²¹⁸ that the current DREAM Act does, the proposed access to education policy includes considerations applicable to undocumented Asians and Latinos including family background, societal discrimination, and pre-immigration educational achievement of the constituent groups. By incorporating these factors into the new policy, it will adequately address the individualized needs of each constituent group while still effectively benefiting the immigrant groups and the United States as a whole. The immigrant groups benefit because they will be provided with educational resources such as financial aid, thereby allowing historically marginalized groups to overcome barriers to higher education. The United States benefits because it will be able to appreciate the potential contributions of immigrants.

IV. CONCLUSION

Growing immigration concerns and the widening disparity between socioeconomic classes cannot be addressed effectively until undocumented students have adequate access to higher education through a more cohesive immigration policy. As a fundamental human right, education implicates political, economic, and social justice concerns. The United States cannot achieve social justice and equality before it provides the annual 65,000 undocumented graduating high school students with access to postsecondary education and educational resources.

Effective immigration policies related to access to education should differ according to the needs of the immigrant population. New policy should attempt to distinguish the experiences of the population group and reflect those experiences. Policies should take into account family background, societal discrimination, and pre-immigration educational achievement of the immigrant population group. By removing financial and immigration status barriers, 65,000 undocumented students would be able to pursue an

education and other benefits flowing from a degree each year, while contributing to the U.S. economy and society.

¹ JD candidate, Seattle University School of Law, May 2008; BA, Bowdoin College, 2000. The author would like to thank the members of the editorial staff of the *Seattle Journal for Social Justice* for their thoughtful comments, careful editing, and immensely helpful suggestions. The author dedicates this note to her mother, without whose love, support, encouragement, and sacrifice would not allow the author to realize the value of her education.

² For purposes of this note, higher education is defined as postsecondary education.

³ While it is debatable whether education is a vital right, it is recognized by international law as a human right. For example, the right to education is cited by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. See Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 189, 189 (Asbjørn Eide et al. eds., 1995).

⁴ Marcelo M. Suárez-Orozco, *Globalization, Immigration, and Education: The Research Agenda*, HARV. EDUC. REV., Fall 2001, at 345–65, available at <http://steinhardt.nyu.edu/immigration/pdf/globalization.pdf> (“For immigrant children, schooling also serves as the primary point of sustained and close contact with a crucial institution of the society their parents choose to join. For many immigrant children, it is the *only* point of systematic and meaningful contact with the new society.”). See also Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 417 (2005) (“[C]ontemporary immigrant workers have fewer prospects for participation in the workplace and fewer opportunities to integrate themselves into community life, American politics, and society.”).

⁵ Gary Orfield explains:

Schooling in the era of globalization, arguably more than ever before, profoundly shapes the current and future well-being of children, as well as their chances and opportunities. Children who thrive in schools, immigrant or otherwise, will be better prepared to penetrate the well-remunerated opportunity structure. On the other hand, youth who leave school without acquiring the skills demanded in the global economy will be de facto locked out of the more appealing sectors of this structure.

Gary Orfield, *Commentary on the Education of Latino Youth*, in LATINOS! REMAKING AMERICA 389, 389-97 (Marcelo M. Suárez-Orozco & Mariela M. Páez, eds., 2002).

⁶ IMMIGRATION POLICY CTR., AM. IMMIGRATION LAW FOUND., ECONOMIC GROWTH & IMMIGRATION: BRIDGING THE DEMOGRAPHIC DIVIDE (2005), available at http://www.aifl.org/ipc/special_report/2005_bridging.pdf.

⁷ Janice Alfred, Note, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 650 n.2 (2003) (“Undocumented immigrants are foreign nationals who (1) entered the United States without inspection or with fraudulent documents; or (2) entered legally

as a nonimmigrant but then violated status and then remained in the United States without authorization.”).

⁸ N.W. FED’N OF CMTY. ORGS. (NWFCO), *In Our Own Words: Immigrants’ Experiences in the Northwest* (Feb. 2006), available at http://www.nwfc.org/pubs/2006-0214_In.our.own.words-Immigrants.experiences.in.the.NW-web.version.pdf.

⁹ Suárez-Orozco, *supra* note 4, at 349 (“[T]oday over 50 percent of all immigrants are from Latin America and over 25 percent are from Asia.”).

¹⁰ NWFCO, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ *See* *Pylar v. Doe*, 457 U.S. 202 (1982).

¹⁴ Ann Morse & Leya Speasmaker, National Conference of State Legislatures, Tuition and Unauthorized Immigrant Students (July 26, 2006), http://www.ncsl.org/programs/immig/immig_InStateTuition0706.htm.

¹⁵ Jennifer L. Maki, Note, *The Three R’s: Reading, ‘Riting, and Rewarding Illegal Immigrants: How Higher Education Has Acquiesced in the Illegal Presence of Undocumented Aliens in the United States*, 13 WM. & MARY BILL RTS. J. 1341, 1342 (2005).

¹⁶ The right to education is recognized by international law as a human right. For example, the right to education is cited by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. *See* Nowak, *supra* note 3, at 189. Moreover, access to postsecondary education is included as a right by international law in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. *See* Universal Declaration of Human Rights, art. 26(1), Dec. 10, 1948, GA Res. 217A (III) (“Everyone has the right to education. . . . Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”); International Covenant on Economic, Social and Cultural Rights, art. 13, Jan 3, 1976, 99 U.N.T.S. (“[W]ith a view to achieving the full realization of this right . . . (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”).

¹⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

¹⁸ *Id.*

¹⁹ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

²⁰ Alfred, *supra* note 7, at 617.

²¹ *Id.*

²² The precise language of Section 505 of IIRIRA reads:

An alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary 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.

8 U.S.C. § 1623 (1996).

²³ The term *alien* is used to refer to immigrants, though it is not used in this note. See BLACK'S LAW DICTIONARY 79 (8th ed. 2004) ("In the United States, an alien is a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law."). Alien is not used in this note because of the negative connotations associated with the term. See IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 231-32 (Juan F. Perea ed., 1997) (explaining the negative connotation of alien to include definitions such as "contrary, hostile, strange, unsuitable").

²⁴ Alfred, *supra* note 7, at 617-18; see also NWFCO, *supra* note 8.

²⁵ Morse & Speasmaker, *supra* note 14.

²⁶ See Catherine Hausman & Victoria Goldman, *Great Expectations*, NY TIMES, Apr. 8, 2001, at 4A ("There are probably. . . [more]. . . undocumented students who are qualified and desirous of a college education," he [Michael A. Olivas, director of the Institute for Higher Education Law and Governance at the University of Houston Law Center] said, but they are discouraged from applying because of fear of the I.N.S. and soaring tuitions.').

²⁷ Morse & Speasmaker, *supra* note 14.

²⁸ In order to gain legal status, students would be required to return to their country of origin and apply for a student visa, which is not guaranteed. Alfred, *supra* note 7, at 638.

²⁹ See NWFCO, *supra* note 8.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See, e.g., Jessica Salsbury, Comment, *Evading "Residence": Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 490 n.11 (2003).

³⁴ Shaila Dewan, *The Impetus for Changes: Voters Display Frustrations and Dissatisfactions*, N.Y. TIMES, Nov. 8, 2006, at P8 ("Voters [in the 2006 mid-term congressional elections] expressed discontent over the economy, the cost of health care, gasoline prices, and illegal immigration.').

³⁵ THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, AMERICA'S IMMIGRATION QUANDARY: NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES (2006), <http://people-press.org/reports/display.php3?ReportID=274> (last visited Nov. 15, 2006).

³⁶ *Id.*

³⁷ *Id.*

³⁸ It should be noted that there are more than two camps, opponents and proponents, involved in the immigration debate. There are others who fall between the two camps.

³⁹ Alfred, *supra* note 7, at 628.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Maki, *supra* note 15, at 1345.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Alfred, *supra* note 7, at 629.

⁴⁶ *Id.*; see also Salsbury, *supra* note 33, at 480–90.

⁴⁷ Salsbury, *supra* note 33, at 469.

⁴⁸ Nina Bernstein, *The New Immigrant Dream: Arepas as Common as Bagels*, N.Y. TIMES, Feb. 6, 2007, at A1 (providing examples of how immigrant entrepreneurs are shaping the economy in New York and other U.S. cities); see also Rachel Konrad, *Immigrants Behind 25 Percent of Startups*, ASSOCIATED PRESS, <http://diversityinc.com/public/1104print.cfm> (last visited Jan. 9, 2007) (citing a recent Duke University study estimating that 25 percent of technology and engineering companies started from 1995 to 2005 had at least one foreign-born senior executive).

⁴⁹ Konrad, *supra* note 48 (citing a recent Duke University study on the effect of foreign-born entrepreneurs on the U.S. economy).

⁵⁰ See Jeri Clausing, *Use of Work Visas by Technology Companies Is Under Fire*, N.Y. TIMES, Apr. 20, 1998, at D1 (indicating that shortage of high-tech workers in US would require technology companies to send sophisticated technology projects overseas); see also Karen W. Arenson, *A Decline in Foreign Students is Reversed*, N.Y. TIMES, Nov. 13, 2006, at A20, (“Educators have long argued that being able to attract the best students from around the world is mutually beneficial to universities and students, and helps strengthen American research programs.”).

⁵¹ Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 152 (2006).

⁵² *Id.* at 151.

⁵³ *Id.*

⁵⁴ Stuart Anderson, *The Multiplier Effect*, INT’L EDUCATOR, Summer 2004, at 14–19, available at <http://www.nfap.net/researchactivities/studies/TheMultiplierEffectNFAP.pdf>.

⁵⁵ *Id.* at 20.

⁵⁶ *Id.* at 15.

⁵⁷ *Id.* at 20.

⁵⁸ See Diana Jean Schemo, *Most Students in Big Cities Lag Badly in Basic Science*, N.Y. TIMES, Nov. 16, 2006, at A22 (highlighting poor U.S. student performance in science).

⁵⁹ Anderson, *supra* note 54, at 15.

⁶⁰ Alfred, *supra* note 7, at 618.

⁶¹ S. REP. NO. 108-224, at 3 (2004) (citing Rand Corporation “study showing that higher levels of education are associated with public savings in the form of lower expenditures for public income transfer and health programs, and higher tax contributions.”), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr224&db name=108&>.

⁶² Alfred, *supra* note 7, at 638.

⁶³ *Id.*

⁶⁴ Fees for obtaining an F-1 visa include a SEVIS I-901 fee for each program of study and a visa reciprocity fee, known as the MRV fee, which varies depending on a person’s country of origin. U.S. Dep’t of State, Student Visas, http://travel.state.gov/visa/temp/types/types_1268.html (last visited Oct. 30, 2007).

⁶⁵ Alfred, *supra* note 7, at 638.

⁶⁶ Salsbury, *supra* note 33, at 490.

⁶⁷ See NAT'L IMMIGRATION LAW CTR., THE ECONOMIC BENEFITS OF THE DREAM ACT AND THE STUDENT ADJUSTMENT ACT (Feb. 2005), http://www.nilc.org/immilawpolicy/DREAM/Econ_Bens_DREAM&Stdnt_Adjst_0205.pdf.

⁶⁸ See Suárez-Orozco, *supra* note 4, at 345–46.

⁶⁹ *Id.* at 351.

⁷⁰ Alfred, *supra* note 7, at 618.

⁷¹ IMMIGRATION POLICY CTR., AM. IMMIGRATION LAW FOUND., ECONOMIC GROWTH & IMMIGRATION: BRIDGING THE DEMOGRAPHIC DIVIDE, (2005), *available at* http://www.aifl.org/ipc/special_report/2005_bridging.pdf.

⁷² *Id.* at 2, 14.

⁷³ *Id.* at 16.

⁷⁴ A distinction must be made between children whose parents have authorization to be in the United States and children whose parents are undocumented. The first group is able to access opportunities such as higher education and financial aid because the parents are generally in H-1B, L-1, or other professional immigration status with jobs that pay a comparable salary. In contrast, the latter group is unable to access these opportunities because the parents are in low-wage jobs such as those referenced above, which require little or no U.S. education and training.

⁷⁵ IMMIGRATION POLICY CTR., *supra* note 71, at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 10.

⁷⁹ *Id.*

⁸⁰ Alfred, *supra* note 7, at 618.

⁸¹ AM. IMMIGRATION LAWYERS ASS'N. (AILA), LEGAL IMMIGRATION TO THE UNITED STATES, <http://www.aila.org/content/default.aspx?docid=1064> (last visited Oct. 5, 2006).

⁸² IMMIGRATION POLICY CTR., *supra* note 71, at 6.

⁸³ *Id.*

⁸⁴ AILA, *supra* note 81.

⁸⁵ MICHAEL HOEFER ET AL., DHS OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, at 1 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf.

⁸⁶ Suárez-Orozco, *supra* note 4, at 345–65; *see also* Alfred, *supra* note 7, at 621 (referencing Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965)).

⁸⁷ Suárez-Orozco, *supra* note 4, at 349.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ AILA, *supra* note 81.

⁹¹ *See generally* Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1982) (repealed 1943).

⁹² The Chinese Exclusion Act (Act) was enacted to respond to concerns about the number of Chinese immigrants working in the United States. The Act discouraged

immigration from China by barring entry of Chinese laborers for ten years. Small numbers of teachers, students, and merchants, however, were allowed to enter the United States. See BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, 23-24 (1993).

⁹³ HING, *supra* note 92, at 1.

⁹⁴ *Id.*

⁹⁵ See generally *id.*, at 140-53.

⁹⁶ Suárez-Orozco, *supra* note 4, at 350.

⁹⁷ HING, *supra* note 92, at 140-53.

⁹⁸ Timothy Egan, *Little Asia on the Hill*, N.Y. TIMES, Jan. 7, 2007, 4A, at 24 (citing statistics that Asian enrollment at elite private and public universities is at 10 to 30 percent of students at the nation's best colleges, even though Asians only make up less than 5 percent of the U.S. population).

⁹⁹ The term foreign-born refers to those who are not U.S. citizens at birth. The foreign-born population includes those who have become U.S. citizens through naturalizations and those who are not U.S. citizens, including immigrants, legal nonimmigrants, and persons illegally residing in the United States. DIANNE A. SCHMIDLEY, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SER. P23-206, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, at 8 (2001), available at <http://www.census.gov/prod/2002pubs/p23-206.pdf>.

¹⁰⁰ *Id.* at 37 (finding that high school completion rates for the foreign-born from Northern America, presumably Canada, were the only rates higher than the Asian foreign-born rates at 85.5 percent). In addition to the high school completion rates for the regions above, the foreign-born average of 67.0 percent was tabulated using statistics for Africa (94.9 percent), Caribbean (68.1 percent), Central America (37.3 percent), Mexico (33.8 percent), Other (50.8 percent), and Northern America (85.5 percent).

¹⁰¹ *Id.* at 36-37.

¹⁰² See Monica Boyd, *Educational Attainments of Immigrant Offspring: Success or Segmented Assimilation*, 36 INT'L MIGRATION REV. 1037, 1037-60 (2002), available at http://www.utoronto.ca/ethnicstudies/Boyd_paper.pdf (suggesting that educational achievement studies in the United States focused on specific ethnic and racial groups can assist future studies about immigrant offspring in Canada because American "researchers [have] observe[d] differences in the levels of performance by Chinese, Filipinos, Koreans, Japanese, South Asians, [and] Southeast Asian students.").

¹⁰³ Vietnam is one of the leading source countries for legal immigration to the United States. AILA, *supra* note 81. Vietnam also has the fastest growth rate, 134.8 percent since 1980, among the six largest Asian American groups in the U.S. HING, *supra* note 92, at 121.

¹⁰⁴ *Id.* at 135.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 136.

¹⁰⁹ See generally *id.* at 140-53.

¹¹⁰ Sharon M. Lee, *Asian Americans: Diverse and Growing*, 53 POPULATION BULL. NO. 2, June 1998, at 24–25, available at <http://www.prb.org/Source/53.2AsianAmerican.pdf>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 24–25.

¹¹⁴ Suárez-Orozco, *supra* note 4, at 355.

¹¹⁵ Suárez-Orozco, *supra* note 4.

¹¹⁶ HING, *supra* note 92, at 146 (comparing academic achievement rates for later generations of Asian immigrant groups).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Lee, *supra* note 110, at 24.

¹²⁰ *Id.*

¹²¹ For purposes of this note, the term Latino refers to those individuals from the following Latin American regions and countries: Central America—Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama; South America—Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay, Venezuela; and North America—Mexico. See Latin American Network Information Center, Countries in Latin America & the Caribbean, <http://lanic.utexas.edu/subject/countries/> (last visited Oct. 12, 2007).

¹²² See Alfred, *supra* note 7, at 621–22.

¹²³ *Id.*

¹²⁴ HOEFER ET AL., *supra* note 85, at 1.

¹²⁵ *Id.*

¹²⁶ MARCELO M. SUÁREZ-OROZCO, TRANSFORMATIONS: IMMIGRATION, FAMILY LIFE, AND ACHIEVEMENT MOTIVATION AMONG LATINO ADOLESCENTS (1995) [hereinafter SUÁREZ-OROZCO, TRANSFORMATIONS].

¹²⁷ SCHMIDLEY, *supra* note 99.

¹²⁸ SUÁREZ-OROZCO, TRANSFORMATIONS, *supra* note 126, at 58.

¹²⁹ *Id.* at 183.

¹³⁰ *Id.*

¹³¹ *Id.* at 155.

¹³² *Id.* at 164, 167.

¹³³ Suárez-Orozco, *supra* note 4, at 351.

¹³⁴ SUÁREZ-OROZCO, TRANSFORMATIONS, *supra* note 126, at 167.

¹³⁵ SCHMIDLEY, *supra* note 99.

¹³⁶ *Id.*

¹³⁷ Suárez-Orozco, *supra* note 4, at 353.

¹³⁸ *Id.* at 356.

¹³⁹ *Id.* at 355.

¹⁴⁰ *Id.*

¹⁴¹ For purposes of this note, nonimmigrants are defined as refugees and persons on student or work visas for an authorized temporary period. In contrast, “[i]mmigrants, as defined in the Immigration and Nationality Act, are aliens admitted the United States for lawful permanent residence.” SCHMIDLEY, *supra* note 99, at 8.

¹⁴² The J-1 visa category will not be discussed in this note because it only addresses access to higher education. While related to education,

The 'J' exchange visitor program is designed to promote the interchange of persons, knowledge, and skills in the fields of education, arts, and sciences. Participants include students at all academic levels; trainees obtaining on-the-job training with firms, institutions, and agencies; teachers of primary, secondary, and specialized schools; professors coming to teach or do research at institutions of higher learning; research scholars; professional trainees in the medical and allied fields; and international visitors coming for the purpose of traveling, observing, consulting, conducting research, training, sharing, or demonstrating specialized knowledge or skills, or participating in organized people-to-people programs.

U.S. Citizenship and Immigration Services, Exchange Visitors, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow "Service & Benefits" hyperlink, then "Visit the U.S." hyperlink, then "Exchange Visitors" hyperlink) (last visited Oct. 22, 2006). In addition, the M-1 visa category will not be discussed in this note because the category is reserved to designate students who will be studying in vocational institutes. *See also* U.S. Citizenship and Immigration Services, Student Visas, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow "Service & Benefits" hyperlink, then "Visit the U.S." hyperlink, then "Student Visas" hyperlink) (last visited Nov. 10, 2006).

¹⁴³ The U.S. Citizenship and Immigration Services explains that the criteria for F-1 classification are:

(1) the student must be enrolled in an 'academic' educational program, a language-training program, or a vocational program; (2) the school must be approved by U.S. Citizenship and Immigration Services (USCIS); (3) the student must be enrolled as a full-time student at the institution; (4) the student must be proficient in English or be enrolled in courses leading to English proficiency; (5) the student must have sufficient funds available for self-support during the entire proposed course of study; and (6) the student must maintain a residence abroad which he/she has no intention of giving up.

U.S. Citizenship and Immigration Services, Student Visas, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow "Service & Benefits" hyperlink, then "Visit the U.S." hyperlink, then "Student Visas" hyperlink) (last visited Nov. 17, 2006).

¹⁴⁴ Yvette Ramos Wade, Comment and Case Note, *U.S. Immigration Restrictions on Foreign Students After 9/11: Impact on Students from Mexico*, 9 LAW & BUS. REV. AM. 181, 182 (2003).

¹⁴⁵ U.S. Immigration and Customs Enforcement, ICE Student and Exchange Visitor Information Systems: Students, <http://www.ice.gov/sevis/students/index.htm> (last visited Nov. 17, 2006).

¹⁴⁶ *See* Open Doors on the Web, International Student and Total U.S. Enrollment, <http://opendoors.iienetwork.org/?p=89192> (last visited Nov. 22, 2006) [hereinafter Open Doors, International Student and Total U.S. Enrollment].

¹⁴⁷ Wade, *supra* note 144, at 185; *see also* Open Doors, International Student and Total U.S. Enrollment, *supra* note 146.

¹⁴⁸ Open Doors, International Student and Total U.S. Enrollment, *supra* note 146.

¹⁴⁹ *See* Arenson, *supra* note 50, at A20 (attributing an increase in foreign students coming to the United States to the easing of visa restrictions imposed after September 11). By the same logic, this would suggest that the initial decrease in students coming to the United States can be attributed, in part, to visa restrictions imposed after September 11. *See id.* The number of new foreign students coming to the U.S. increased in the 2006 academic year: “The number of new foreign students coming to the United States grew this school year [to 142,923 students], after several years of weakness that followed the terrorist attacks of 2001, according to a survey to be released today by the Institute of International Education.” *Id.*

¹⁵⁰ Wade, *supra* note 144, at 184.

¹⁵¹ *Id.*

¹⁵² Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 169 (2006); *see also* U.S. Dep’t of State, The Student and Exchange Visitor Information System, <http://exchanges.state.gov/education/jexchanges/about/sevis.htm> (last visited Oct. 12, 2007) (stating that SEVIS is an Internet-based system that tracks and monitors status events for nonimmigrant students (F and M visa), exchange visitors (J visa), and their dependents throughout the duration of their USCIS approved education experience. Status events include entry/exit data, changes in U.S. address, program extensions, employment notifications, and changes in program of study.).

¹⁵³ Anderson, *supra* note 54, at 21.

¹⁵⁴ Arenson, *supra* note 50.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; *see also* Open Doors on the Web, Newly Enrolled International Students for 2005/06, <http://opendoors.iienetwork.org/page/92270/> (last visited Nov. 22, 2006).

¹⁵⁷ Open Doors on the Web, Leading Countries of Origin [2001/02], <http://opendoors.iienetwork.org/?p=25184> (last visited Oct. 22, 2006) [hereinafter Open Doors, Leading Countries].

¹⁵⁸ Open Doors on the Web, Leading 20 Places of Origin [of International Students], 2004/05 & 2005/06, <http://opendoors.iienetwork.org/?p=89191> (last visited Nov. 22, 2006) [hereinafter Open Doors, Leading 20 Places].

¹⁵⁹ Open Doors, Leading Countries, *supra* note 157; *see also* Open Doors, Leading 20 Places, *supra* note 158.

¹⁶⁰ Open Doors, Leading Countries, *supra* note 157; *see also* Open Doors, Leading 20 Places, *supra* note 158.

¹⁶¹ Open Doors, Leading 20 Places, *supra* note 158.

¹⁶² Open Doors, Leading Countries, *supra* note 157.

¹⁶³ *Id.*; *see also* Open Doors, Leading 20 Places, *supra* note 158.

¹⁶⁴ *See* Open Doors, Leading 20 Places, *supra* note 158.

¹⁶⁵ *Id.* This calculation was made by dividing the number of Asian students (160,141) by Latin American students (27,775) to yield 5.77.

¹⁶⁶ As mentioned earlier, one of the requirements for F-1 classification is financial self-sufficiency during the proposed course of study. See U.S. Citizenship and Immigration Services, *supra* note 143.

¹⁶⁷ See NWFCO, *supra* note 8.

¹⁶⁸ See eduPass, College Admissions, Advantages of a U.S. Education, <http://www.edupass.org/admissions/advantages.phtml> (last visited Oct. 11, 2007) (emphasizing benefits of U.S. education).

¹⁶⁹ This forecast is conditional on assuming the same growth rate. HOEFER ET AL., *supra* note 85, at 1.

¹⁷⁰ JEFFREY S. PASSEL, URBAN INST., FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT (2003), available at http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

¹⁷¹ *Id.*

¹⁷² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 17.

¹⁷³ Omnibus Consolidated Appropriations Act, *supra* note 19.

¹⁷⁴ Alfred, *supra* note 7, at 671.

¹⁷⁵ See *id.* at 617; see also NWFCO, *supra* note 8.

¹⁷⁶ Cancellation of removal is authorized by Congress in circumstances where an immigration judge finds that an undocumented immigrant in removal proceedings can demonstrate, among other requirements, that it would cause “exceptional and extremely unusual hardship” to an immediate family member who is a permanent resident or U.S. citizen and to the applicant seeking cancellation of removal. See Alfred, *supra* note 7, at 632–35 (explaining why undocumented students cannot meet the requirements for cancellation of removal). See also DHS: Definition of Terms, <http://www.dhs.gov/ximgtn/statistics/stdfdef.shtm> (last visited Oct. 18, 2007) (defining *cancellation of removal* as “[a] discretionary benefit adjusting an alien’s status from that of deportable alien to one lawfully admitted for permanent residence . . . during the course of a hearing before an immigration judge).

¹⁷⁷ Alfred, *supra* note 7, at 632.

¹⁷⁸ See NAT’L IMMIGRATION LAW CTR., *DREAM ACT: BASIC INFO* (Oct. 2007), http://www.nilc.org/immlawpolicy/DREAM/dream_basic_info_0406.pdf; NAT’L

IMMIGRATION LAW CTR., *DREAM ACT SUMMARY* (Apr. 2006), http://www.nilc.org/immlawpolicy/DREAM/dream_act_06_summary_2006-04.pdf.

¹⁷⁹ See sources cited *supra* note 178.

¹⁸⁰ See sources cited *supra* note 178.

¹⁸¹ See sources cited *supra* note 178.

¹⁸² See sources cited *supra* note 178.

¹⁸³ See sources cited *supra* note 178.

¹⁸⁴ See *DREAM ACT: BASIC INFO*, *supra* note 178.

¹⁸⁵ See sources cited *supra* note 178.

¹⁸⁶ See *DREAM ACT SUMMARY*, *supra* note 178.

¹⁸⁷ In the Senate, the DREAM Act is also known as the Development, Relief, and Education for Alien Minors Act (S 2075); in the House, the American DREAM Act (HR 5131). See sources cited *supra* note 178.

¹⁸⁸ Julia Preston, *Measure on Legal Status for Immigrant Students Blocked*, N.Y. TIMES, Sept. 28, 2007, at A25.

¹⁸⁹ See sources cited *supra* note 178.

¹⁹⁰ See *DREAM ACT: BASIC INFO*, *supra* note 178.

¹⁹¹ *Id.*

¹⁹² See Preston, *supra* note 188.

¹⁹³ Morse & Speasmaker, *supra* note 14.

¹⁹⁴ *Id.*; see also Maki *supra* note 15, at 1372 (“The Congressional Budget Office’s Cost Estimate from enactment of the DREAM Act determined that this extension of in-state tuition to illegal immigrants would cost approximately \$362 million between 2003-2006. This would result in a further drain on states’ already inadequate budgets.”).

¹⁹⁵ Maki *supra* note 15, at 1363.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Alfred, *supra* note 7, at 645–49.

¹⁹⁹ *Id.* at 645.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 646–47.

²⁰² *Id.* at 646.

²⁰³ *Id.* at 646–47.

²⁰⁴ Several considerations should be made in order to formulate an effective immigration policy for access to higher education for undocumented immigrants. One consideration is whether the policy is discriminatory in formulation and application. With regard to whether the policy is discriminatory in formulation, lawmakers must consider how the policy is designed, who designs the policy, and whether research is used to design the policy and the type of research used. Another concern, whether the policy is discriminatory in application, also requires analysis of how the policy has affected immigrant populations as discussed in this note. For example, how does the policy affect Latino and Asian immigrants, and has the policy been challenged? Statistics show that a large number of Asian immigrants have achieved educational success, whereas Latino immigrants have not. See *supra* notes 100, 111–12 and accompanying text. Specifically, Asians have greater high school completion rates than Latinos. See *supra* text accompanying notes 100, 127. Furthermore, statistics show that foreign students from Asia exceed the number of foreign students from Latin American countries. See *supra* text accompanying note 165. On that basis, facially, it would seem that the policies are discriminatory, even though the policies have not been scrutinized under any legal challenges.

Another consideration with regard to formulating an effective immigration policy for access to higher education for undocumented immigrants is whether that policy is effective. In this context, two questions should be considered. First, what makes a policy effective? Second, what are the criteria to assess a policy’s effectiveness? Facially, a policy would be effective if it provides benefits to the constituents the policy is designed to benefit. Yet, recent studies about social inclusion have demonstrated that public policy, in order to be effective, “must be more closely linked to the lived experiences of children and families, both in terms of actual programs and in terms of the process for

arriving at those policies and programs.” Ratna Omidvar & Ted Richmond, *Immigrant Settlement and Social Inclusion in Canada*, (Laidlaw Found., Working Paper Series, Perspectives on Social Inclusion, 2003), available at <http://www.laidlawfdn.org/files/children/richmond.pdf>. Specifically, with regard to educational policies affecting recent immigrants, studies have shown that “programs...must be targeted, taking into account the differences experienced by newcomer youth according to country of origin, ethnoracial and cultural and religious background, immigration status and gender.” *Id.* Social inclusion studies have, however, also shown that “universal programs and policies that serve all [constituents] generally provide a stronger foundation for improving well-being than residual, targeted or segregated approaches.” *Id.* Finally, policies must take into consideration diversity and difference; “the ‘one size fits all approach’ is no longer acceptable and has never been effective in advancing the well-being of children and families.” *Id.* These approaches, while seemingly contradictory, are not. They simply emphasize that educational policies must serve all constituents, while also factoring in considerations such as each constituent group’s background.

²⁰⁵ Alfred, *supra* note 7, at 628.

²⁰⁶ *Id.*

²⁰⁷ Maki, *supra* note 15, at 1345.

²⁰⁸ *Id.*

²⁰⁹ Canada’s work permit program is included for comparison because educational policies for authorized students in the U.S. and Canada are similar; both policies include a provision which allows students to work while either in school as part of the academic program or after completion of studies so that students can be trained in their field of study. See U.S. Immigration and Customs Enforcement, *supra* note 145; see also Citizenship and Immigration Canada, *Studying in Canada: A Guide for Foreign Students*, <http://www.cic.gc.ca/english/resources/publications/study.asp> (last visited Nov. 10, 2007). In Canada, if a student is enrolled full-time at a postsecondary publicly funded or degree-granting institution, he/she may be allowed to work if (1) the employment is part of a course of study, such as a work term during a cooperative program; or (2) the student wants to work after graduation in a study-related job for up to one year. Citizenship and Immigration Canada, *supra*.

²¹⁰ Konrad, *supra* note 48.

²¹¹ *Id.*

²¹² For example, in 2000, Congress passed the American Competitiveness in the 21st Century Act, Pub. L. No. 106-313, 114 Stat. 1251 (2000). Among other provisions, the act increased the number of H-1B employment-based visas from 65,000 to 195,000 annually for fiscal years 2001–03. *Id.* This act was passed with support from businesses, specifically from the technology sector, during a time of economic growth. See Warren Strugatch, *Skilled Foreign Workers: More to Come*, N.Y. TIMES, Nov. 26, 2000, § 14LL, at 6 (“The competitiveness act was passed with much support nationally from the software industry . . .”). See generally Clausing, *supra* note 50 (referring to the information technology’s lobbying of Congress to allow more high-skilled foreign workers to enter the United States); Fragomen, Del Rey, Bensen & Loewy, LLP, *New H-1B Law Has Broad Impact*, <http://pubweb.fdbl.com/news1.nsf/7f4d7596b0572ba886256e3100809439/6d2a5c79bbcb9881852569840065a581?OpenDo>

cument (last visited Nov. 28, 2007) (highlighting that the Act provided relief for high technology companies during a time of economic growth and demand for skilled workers). After 2003, the H-1B quota was reduced to its usual allotment of 65,000. 8 U.S.C. § 1184(g)(1)(A) (1997).

²¹³ Further research opportunities in this area could be pursued through interviews. Questions to be asked include: (1) Were undocumented immigrants worried about retribution or deportation? (2) How has education helped undocumented immigrants acclimate?

²¹⁴ Lee, *supra* note 110, at 24.

²¹⁵ S. REP. NO. 108-224, *supra* note 61, at 7–10.

²¹⁶ See Fred Pincus, *Discrimination Comes in Many Forms: Individual, Institutional, and Structural*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE 1, 1 (Maurianne Adams et al. eds., 2000) (contrasting “institutional discrimination . . . [which] refers to the policies of the dominant race/ethnic/gender institutions and the behavior of individuals who control these institutions and implement policies that are intended to have a differential and/or harmful effect on minority race/ethnic/gender groups” with “structural discrimination [which] refers to the policies of dominant race/ethnic/gender institutions and the behavior of the individuals who implement these policies and control of these institutions, which are race/ethnic/gender neutral in intent but which have a differential and/or harmful effect on minority race/ethnic/gender groups.”).

²¹⁷ See generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY (2001).

²¹⁸ Omidvar & Richmond, *supra* note 204.