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Members Only: Undocumented Students & In-State Tuition

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*Angela M. Banks**

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INTRODUCTION

On a spring day in 2010, Jessica Colotl was stopped for a minor traffic violation.¹ She was charged with driving without a license and spent thirty-seven days in a detention center in Alabama.² This traffic stop transformed Jessica from a low-profile college student to the poster child for the issue of undocumented students' access to postsecondary education. Jessica is an unauthorized migrant who was a junior at Kennesaw State University at the time of her arrest.³ At that time, only her closest friends knew about her immigration status. Now, advocates on all sides of the public debate about unauthorized migration know about Jessica.

Jessica's case prompted the University System of Georgia Board of Regents to review its policies regarding the admission and residency determination of undocumented students.⁴ At the time, Georgia law prohibited undocumented students from being eligible for in-state tuition rates.⁵ Regardless of how long they have lived in Georgia, undocumented students are considered non-residents for tuition purposes. In response to the public outcry to Jessica's matriculation at Kennesaw State University, the University System of Georgia Board of Regents decided that undocumented students are not eligible for admission to the University of Georgia, Georgia Institute of Technology, Georgia State University, Georgia College & State University, or the Medical College of Georgia.⁶ While a

1. Kate Brumback, *Jessica Colotl, Kennesaw State Student, Becomes a Reluctant Symbol of the Immigration Debate*, HUFFINGTON POST (May 11, 2011), http://www.huffingtonpost.com/2011/05/11/jessica-colotl-kennesaw-s_0_n_860384.html.

2. *Id.*

3. *Id.* Throughout this paper I use the terms "unauthorized migrants" and "undocumented students" interchangeably. The literature on unauthorized migrant students uses the terminology undocumented students, so I use it here.

4. Univ. Sys. of Ga., Minutes of the Meeting of the Board of Regents of the University System of Georgia Held at Atlanta, Georgia October 12–13, 2010, at 27 (Oct. 2010).

5. *Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES (July 2013), <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx> [hereinafter *NCSL State Action*]. In-state tuition rates are also referred to as resident tuition rates.

6. Press Release, Univ. Sys. of Ga., Regents Adopt New Policies on Undocumented Students (Oct. 13, 2010), available at http://www.usg.edu/news/release/regents_adopt_new_policies_on_undocumented_students. The ban is based on the inability of these colleges and universities to "admit all academically qualified applicants" for the two most recent academic years. Univ. Sys. of Ga., *supra* note 4.

number of states prohibit undocumented students from being eligible for in-state tuition rates, only Alabama, Georgia, and South Carolina prohibit these students from enrolling in public colleges and universities.⁷ A greater number of states, like California and Texas, have taken a different approach. As of July 2013, undocumented students who satisfy certain criteria are eligible for in-state tuition rates in sixteen states.⁸

This Article uses these divergent approaches to unauthorized migrants' access to postsecondary education to identify competing notions of national membership operating within the United States. The approach taken in states like California prioritizes connections and experiences as the basis for membership, while the approach of states like Georgia prioritizes status. A status-based approach is problematic when it is under- or over-inclusive. Such an approach can be a useful strategy for administrative efficiency, but it can deny individuals rights and benefits that they otherwise deserve.

This Article has three parts. Part I describes the current legal landscape for undocumented students' access to postsecondary education. Part II identifies the different conceptions of membership underlying the arguments that challenge and support undocumented students' access to postsecondary education. Part III contends that in-state tuition rates are justified as a benefit for individuals' past and future economic and civic contributions to the state. Part III also evaluates the ability of the different notions of membership to identify students with the requisite past contributions and the requisite likelihood of making future contributions. The Article concludes that the status-based approach to membership is under-inclusive. This approach denies in-state tuition and admission to public colleges and universities to students who have made and will continue to make the requisite contributions.

7. Michael A. Olivas, *The Political Economy of the Dream Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1781-82 (2009). Georgia only prohibits undocumented students from enrolling at University of Georgia, Georgia Institute of Technology, Georgia State University, Georgia College & State University, and the Medical College of Georgia. See *supra* note 6. Alabama prohibits undocumented students from attending community colleges within the state. *NCSL State Action*, *supra* note 5.

8. *NCSL State Action*, *supra* note 5.

I. THE LEGAL LANDSCAPE

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and the Personal Responsibility and Work Reconciliation Act (“PRWORA”). These laws altered noncitizens’ access to public benefits.⁹ The laws have deemed that in-state tuition at public colleges and universities is a public benefit and have created specific requirements for states that wish to grant in-state tuition rates to unauthorized migrants. IIRIRA states that unauthorized migrants

shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.¹⁰

PRWORA made unauthorized migrants ineligible for “any State or local public benefit” unless the state enacts “a State law after August 22, 1996, which affirmatively provides for such eligibility.”¹¹ Public benefits were defined to include any “postsecondary education . . . benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.”¹²

In light of these requirements, a number of states enacted laws that enabled certain undocumented students to be eligible for in-state tuition rates. In 2001, Texas enacted legislation that defined a state resident in a way that included some undocumented students. Individuals who graduated from a high school in Texas or received a GED in Texas and maintained a residence continuously in Texas for “the three years preceding the date of graduation or receipt of the diploma equivalent, as applicable; and the year preceding the census date of the academic term in which the person is enrolled in an institution of higher education” are considered Texas residents.¹³

9. See MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 65–66 (2012).

10. 8 U.S.C. § 1623(a) (2012).

11. 8 U.S.C. § 1621(d) (2012).

12. 8 U.S.C. § 1621(c)(1)(B) (2012).

13. TEX. EDUC. CODE ANN. § 54.052 (2005).

Later in 2001, the California legislature provided that all individuals who attended high school in California for three years and graduated from a California high school would be eligible for in-state tuition rates.¹⁴ In 2005, the Federation for American Immigration Reform (“FAIR”) challenged the California statute because it made certain undocumented students eligible for in-state tuition rates.¹⁵ FAIR sued the Regents of the University of California, and the trial court ruled against FAIR.¹⁶ FAIR appealed, and the appellate court overturned the trial court’s decision.¹⁷ In 2010, the California Supreme Court overruled the state appellate court and upheld the law enacted by the state legislature in 2001.

As of July 2013, sixteen states allow unauthorized migrants to qualify for in-state tuition rates if they meet specific requirements.¹⁸ These states are California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New York, Oregon, Oklahoma,¹⁹ Rhode Island, Texas, Utah, and Washington.²⁰

14. *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010). Students who are without lawful immigration status are also required to file an affidavit stating that they have “filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.” *Id.* at 861.

15. OLIVAS, *supra* note 9, at 68.

16. *Id.*

17. *Id.*

18. *NCSL State Action*, *supra* note 5.

19. *Undocumented Student Tuition: Overview*, NAT’L CONF. STATE. LEGISLATURES (July 2013), <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-overview.aspx> [hereinafter *NCSL Overview*] (“Oklahoma has since amended its law, leaving granting of in-state tuition rates to undocumented students up to the Oklahoma Board of Regents. The Board of Regents currently still allows undocumented students who meet Oklahoma’s original statutory requirements to receive in-state tuition.”).

20. *In-State Tuition and Unauthorized Immigrant Students*, NAT’L CONF. STATE LEGISLATURES (Nov. 28, 2012), <http://www.ncsl.org/issues-research/immig/in-state-tuition-and-unauthorized-immigrants.aspx>; Caitlin Emma, *Immigration Debate: Tuition Breaks Go Largely Unclaimed*, POLITICO (July 7, 2013), <http://www.politico.com/story/2013/07/an-in-state-tuition-deal-that-is-largely-unclaimed-93795.html>; Anthony Cotton, *Colorado Governor Signs Bill for Illegal Immigrants’ In-state Tuition*, DENVER POST (Apr. 29, 2013), http://www.denverpost.com/breakingnews/ci_23133446/gov-signs-state-tuition-bill-undocumented-colorado-students; Richard Pérez-Peña, *Immigrants to Pay Tuition at Rate Set for Residents*, N.Y. TIMES (Nov. 19, 2012), <http://www.nytimes.com/2012/11/20/us/illegal-immigrants-to-pay-in-state-tuition-at-mass-state-colleges.html>. Wisconsin adopted such a law in 2009, but revoked it in 2011. *Id.* Minnesota undertook a creative approach in 2007 when a number of state colleges and universities eliminated out-of-state/non-resident tuition rates. Olivas, *supra* note 7, at 1772–73. The new rate is the former in-state/resident rate, and any individual, regardless of state of

At the same time, five states have taken a different approach. Alabama, Arizona, Georgia, Indiana, and South Carolina prohibit undocumented students from being eligible for in-state tuition rates.²¹ Arizona was the first state to adopt such a policy with Proposition 300. This proposition prohibited undocumented students from being eligible for “in-state tuition rates and any type of state financial aid.”²² By summer 2007, 5,000 students “had been removed from resident status in the state’s colleges and adult basic-education classes.”²³ As noted above, Alabama, Georgia, and South Carolina also prohibit undocumented students from enrolling in certain public colleges and universities.²⁴

II. MEMBERSHIP BOUNDARIES

Allocating membership is a task whereby states determine who will have the legal status of member and, consequently, will obtain membership rights, including the ability to engage in political participation. The United States has several different legal membership categories: citizen, lawful permanent resident, and nonimmigrant. Each of these categories has different legal statuses, rights, and responsibilities.²⁵ The boundaries between these categories are not static, but are dynamic, and they shift in response to demands for expansion or restriction. Throughout U.S. history, the boundaries of membership have been expanded in response to

residence or immigration status, qualifies for this rate. *Id.* All of these states’ provisions are based on state law, except Rhode Island’s. Rhode Island’s Board of Governors for Higher Education approved a policy allowing unauthorized migrants to pay in-state tuition rates if they attended high school in Rhode Island for three years and graduated from a high school in Rhode Island. *Id.* at 1784 & n.117.

21. *NCSL State Action*, *supra* note 5. North Carolina has a similar policy for its community colleges. Olivas, *supra* note 7, at 1780–81.

22. *NCSL State Action*, *supra* note 5.

23. Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER EDUC. 407, 408 (2009).

24. *NCSL State Action*, *supra* note 5.

25. However, the difference in responsibilities between citizens and lawful permanent residents is minimal. Both are required to pay sales taxes and income taxes, register for the Selective Service, and abide by local, state, and federal laws. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1254 (2013). The similarity in responsibilities reflects the minimal amount of duties that U.S. citizens have. Most duties that U.S. citizens have are tied to their residence in the United States rather than their citizenship status.

claims that existing membership criteria were under-inclusive. For example, between 1790 and 1952, only members of certain racial and ethnic groups were eligible to naturalize.²⁶ In 1952, Congress finally concluded that naturalization rules that had racial limitations were under-inclusive. The non-white, non-citizen population fulfilled all the basic factors that Congress had identified for future citizens, but the racial restrictions prohibited their naturalization. These rules prohibited individuals who were loyal to the United States and had adopted American beliefs and practices from becoming citizens.

Legal and political battles regarding undocumented students' access to in-state tuition rates represent one way in which the boundaries of membership are currently being challenged. One position contends that current membership rules are under-inclusive. This position points out that the rules exclude long-term residents who are embedded in American communities and who embody so many of the beliefs and practices that are thought to be quintessentially American.²⁷ The other position contends that such an emphasis on connections and experience fails to account for the state's interests in managing immigration and membership.²⁸ Within this position, the status quo membership rules are based on a reasonable assessment of how many, and what type of, members can be successfully absorbed within the United States.

The "real and substantive ties" that undocumented youth develop in the United States are not denied by those who approve of the use of legal status as the basis for assigning membership status and rights. Rather, they contend that "real and substantive ties" are simply not a sufficient basis for granting membership within a national polity.²⁹ National interests must also be taken into account, and the current membership rules correctly balance both the state's and the noncitizens' interests in membership status in the United States.

26. IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (2006).

27. Another common argument is that these students are not culpable for their unlawful immigration status. Due to their arrival in the United States as children, they should not bear the consequences of their parents' decisions. *NCSL Overview*, *supra* note 19.

28. See, e.g., *id.*

29. See *infra* Part II.B.

This section contends that two different conceptions of membership are at the heart of the current debates over undocumented students' access to in-state tuition rates, and postsecondary education more broadly. These ideas about membership reflect either an abiding faith in the status quo's balance of state interests and undocumented students' interests or a strong skepticism of the status quo.

The debates in Massachusetts and Georgia in particular provide interesting case studies of how these conceptions of membership shape positions in this debate. In 2004, the Massachusetts state legislature passed a bill granting in-state tuition rates to students who graduated from a high school in Massachusetts after three years of attendance and signed an affidavit stating that they intended to pursue citizenship.³⁰ Governor Romney vetoed the bill.³¹ The next year, a similar bill passed the state senate, but failed in the state house with a vote of 96 to 57.³² In subsequent years, similar bills have been introduced, but have not been enacted.³³ In Georgia, the arrest of Jessica Colotl prompted the University System of Georgia Board of Regents to examine not only undocumented students' access to in-state tuition rates, but their access to public colleges and universities more broadly.³⁴ As noted in the introduction, the University System of Georgia Board of Regents decided that undocumented students are not eligible for admission to the University of Georgia, Georgia Institute of Technology, Georgia State University, Georgia College & State University, and the Medical College of Georgia.³⁵

30. 2004 Mass. Acts 515.

31. Franco Ordonez & Eun Lee Koh, *Tuition Bill Veto May Face Override Challenge*, BOS. GLOBE, July 11, 2004, at GW1.

32. Yvonne Abraham, *Immigrant Tuition Bill Defeated*, BOS. GLOBE, Jan. 12, 2006, at A1.

33. See Olivas, *supra* note 7, at 1772.

34. Univ. Sys. of Ga., *supra* note 4; Mark Davis & Helena Oliviero, *New Face on an Old Debate*, ATLANTA J.-CONST., May 16, 2010, at A1.

35. Press Release, *supra* note 6. The ban is based on the inability of these colleges and universities to "admit all academically qualified applicants" for the two most recent academic years. Univ. Sys. of Ga., *supra* note 4, at 27.

A. Challenging the Status Quo

*"I think it's a compromise that helps out kids that are truly citizens of the commonwealth but just don't have that status yet."*³⁶

Representative Kevin Murphy of Lowell, Massachusetts, spoke these words in 2004 when the Massachusetts legislature was considering granting undocumented students access to in-state tuition rates. This statement reflects a conception of long-term resident undocumented students as members of the Massachusetts polity, regardless of their legal status. Representative Murphy did not elaborate on the factors that led him to conclude that these students are "truly citizens," but other proponents of in-state tuition rates for undocumented students highlight these students' connections to the state.³⁷ For example, proponents point to the students' long-term residence within the state, the likelihood that they will remain within the United States, and their educational achievement.³⁸ Based on these connections, proponents want to ensure that these young people will be in the best possible position to contribute to their local communities—economically and civically.³⁹

These arguments reflect a conception of membership rooted in the *jus nexi* principle—the idea that membership should be based on an individual's genuine connections to the polity.⁴⁰ Rather than using formal status as the basis for allocating membership status, the *jus nexi* principle allows individuals with "real and substantive ties" to a community to be recognized as members who are entitled to rights, protections, and benefits.⁴¹ Ayelet Schachar has argued that citizenship should be available based on this principle.⁴² In previous work, I have argued that the *jus nexi* principle provides a basis for

36. Julie Mehegan, *Noncitizens May Be in Line for Tuition Break in Massachusetts*, SUN, June 22, 2004, at 1 (emphasis added).

37. Another common argument is that these students are not culpable for their unlawful immigration status. Due to their arrival in the United States as children, they should not bear the consequences of their parents' decisions. *NCSL Overview*, *supra* note 19.

38. *Id.*

39. *Id.*

40. AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 16 (2009). The *jus nexi* principle assigns political membership based on an individual's "connection, union, or linkage" to the political community. *Id.*

41. *Id.* at 166.

42. *Id.* at 165.

allocating membership benefits short of citizenship, such as the right to remain.⁴³ The *jus nexi* principle also provides a basis for extending in-state tuition rates and access to public colleges and universities to certain undocumented students.

Of all the connections that could be considered to determine whether or not an individual has “real and substantive ties” to the community, proponents of access to in-state tuition rates emphasize connections that suggest knowledge of and adherence to American social norms, values, and practices.

1. Long-term residence

United States law has viewed long-term residence in the United States as a mechanism by which one becomes embedded within American communities. With such embeddedness, knowledge of and adherence to American culture is presumed. Length of residence in the United States has been a criterion used in naturalization law and immigration law for providing benefits, discretionary relief, and status. For example, U.S. naturalization law has required noncitizens to reside in the United States anywhere from two to fourteen years before being eligible for citizenship.⁴⁴ Despite the variation in the period of residence required, the requirement has endured to ensure that future citizens have had an adequate opportunity “to acquire a knowledge of [American] institutions.”⁴⁵ Length of residence was also an important criterion in Congress’s decision regarding which unauthorized migrants would be eligible for a pathway to citizenship in 1986. The Immigration Reform and Control Act of 1986 (“IRCA”) provided that unauthorized migrants who entered the United States before January 1, 1982, and continuously resided in the United States, were eligible for temporary resident status, which could be adjusted to LPR status if certain criteria were met.⁴⁶

43. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013).

44. See Naturalization Act of 1790, ch. 4, § 1, 1 Stat. 103 (repealed 1798); Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566 (repealed 1802); Naturalization Law of 1802, ch. 26 § 1, para. 3, 2 Stat. 153.

45. *To Establish a Bureau of Naturalization, and To Provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States, and On the Different Bills Referring to the Subject Restricting Immigration: Hearings Before the H. Comm. on Immigration and Naturalization*, 59th Cong. 39 (1906) (statement of Richard K. Campbell, Dep’t of Commerce & Labor).

46. 8 U.S.C. § 1255a(a)(2)(A) (2012). In order to obtain LPR status, an individual had

Attorney General Edwin Meese III explained that “longstanding presence [in the United States] has demonstrated an abiding commitment to this country as productive and law abiding residents.”⁴⁷ Finally, certain lawful permanent residents facing deportation are eligible for discretionary relief if they have resided in the United States for seven years; and other noncitizens are eligible if they have resided in the United States for ten years.⁴⁸

Each of these examples demonstrates various ways in which long-term residence in the United States has been used as a proxy for embeddedness within American communities. Such embeddedness stems from connections to people and institutions. Proponents of granting undocumented students access to in-state tuition rates refer to the students’ long-term residence as a justification for seeing them as members of the polity entitled to in-state tuition rates. Lawmakers like Representative Alice Wolf of Cambridge, a sponsor of the bill in 2011, view these students as members—“They’re Massachusetts kids. That’s what they are.”⁴⁹ Long-term residence not only provides an opportunity to become familiar with American beliefs and practices, but also a chance to adopt them as one’s own. Torres, a twenty-year-old undocumented student who arrived in the United States at age nine on a tourist visa, sees herself as American even if others do not. She said, “People say I’m Mexican, but I’m also American. . . . This is home. Not Mexico.”⁵⁰ Jessica Colotl’s attorney similarly described Jessica as “an American in her heart because she

to apply for such status within two years after having temporary resident status for 19 months, be admissible, and demonstrate basic citizenship skills. *Id.* at § 1255a(b)(1).

47. *Immigration Control and Legalization Amendments: Hearing on H.R. 3080 Before the H. Comm. on the Judiciary*, 99th Cong. 1st Sess. 8 (1985). Attorney General Meese also explained that a legalization program was necessary to “make a clear dividing line between those people who are really part of our society and those people who are coming in here illegally on a current basis.” *Id.* at 10.

Immigration and Naturalization Service Commissioner Alan C. Nelson expressed a similar sentiment to the House Subcommittee on Immigration, Refugees, and International Law when he stated that people “with more than five to six years of illegal residence in the United States would appear to have demonstrated the type of commitment to warrant adjustment to temporary residence.” *Id.* at 34 (statement of Alan C. Nelson, Comm’r, Immigration & Naturalization Servs.).

48. 8 U.S.C. § 1229b (2012).

49. Kyle Cheney, *Mass. Immigrant Advocates Applaud Conn. Tuition Law*, BOS. GLOBE, June 17, 2011, at B4.

50. Laura Diamond, *Student Caught in the Middle: Dream of College Awakes to the Reality Graduates Face When Here Illegally*, ATLANTA J. & CONST., Sept. 6, 2010, at A1.

believes in the values of this country.”⁵¹ Jessica’s and Miriam’s long-term residence in the United States and embeddedness in American communities has led them, and the people who know them, to see them as members of the American polity.

Proponents not only point to the students’ long-term residence in the state, but also to the fact that the United States is often the only community they know as home. For example, in 2011, when the Massachusetts legislature was considering granting undocumented students access to in-state tuition rates, Governor Deval Patrick went to the state house in support of the legislation. He said that he knew that there would be “arguments on both sides,” but that the legislators “should keep in mind we’re talking about real people—individuals, students, and families—whose ambitions are caught up in the only community in most cases that they know.”⁵²

2. *Educational achievement*

Those challenging the status quo highlight the academic achievement of the undocumented students seeking admission and in-state tuition rates at public colleges and universities. By emphasizing these students’ dedication and focus on their schoolwork, they suggest that the students have done all that the United States asks of its young people—study hard and do well in school. Even after undocumented students have demonstrated their internalization and commitment to these values, they are still denied access to postsecondary education. This is portrayed as unfair or an injustice. Another critical aspect of this argument is the impact that failing to educate undocumented students will have on a state’s economy. Numerous arguments in Georgia and Massachusetts were made about the states’ need for these students’ participation within the workforce and as consumers.

51. Azadeh N. Shahshahani, Op-Ed., *Pro & Con: Should States Extend College Benefits to Illegal Immigrants?*, ATLANTA J. & CONST., May 27, 2010, at A19, available at <http://www.ajc.com/news/news/opinion/pro-con-should-states-extend-college-benefits-to-i/nQgM8/>. The author is the national security/immigrants’ rights project director at the American Civil Liberties Union of Georgia.

52. Maria Sacchetti, *Patrick Backs Illegal Immigrants on Tuition*, BOS. GLOBE (July 21, 2011), http://www.boston.com/news/politics/articles/2011/07/21/patrick_backs_in_state_college_tuition_for_illegal_immigrants/.

A common argument made in support of extending in-state tuition rates to certain undocumented students is their exceptional academic performance. Article after article includes statements about students being the valedictorian or graduating with a 4.0, but being unable to attend college because they cannot afford the out-of-state tuition.⁵³ State Senator Jarrett T. Barrios of Cambridge explained that “[t]hese are the children who are valedictorians of their schools, and we’re not letting them go to college. . . . That’s not fair, and that’s not smart.”⁵⁴ In 2004, Ali Noorani, executive director of the Massachusetts Immigrant & Refugee Advocacy Coalition, described the students as “getting GPAs of 4.0. They’re applying to UMass-Boston, and suddenly they get a tuition bill of (more than) \$15,000.”⁵⁵ Azadeh N. Shahshahani, the national security/immigrant rights project director at the ACLU Georgia, made a similar argument when she explained that “[u]ndocumented college students are by and large talented high achievers who arrived in the U.S. as children because of the choices their parents made. They grew up in this country and persevered against the odds to graduate from high school and secure admission to Georgia colleges.”⁵⁶

The academic successes of undocumented students are offered to establish that the students deserve an affordable college education. These students have done what America asks of its young people—work hard to do well in school so that you can go to college and be successful. As one DREAMer asked, “What are we going to do? Spend the rest of our lives washing dishes, or working in factories?”⁵⁷

A college education is also viewed as an important investment in the state’s future economy. Immigrants were described as Massachusetts’s “growth population.”⁵⁸ Educating this population is viewed as “key to securing an educated work force.”⁵⁹ An educated

53. See, e.g., Cheney, *supra* note 49.

54. Matthew Rodriguez, *In-State Tuition Sought*, BOS. GLOBE, Apr. 8, 2004, at B3.

55. *Id.*

56. Shahshahani, *supra* note 51.

57. Monica Rhor, *Conference Eyes Hurdles of Immigrant Teenagers*, BOS. GLOBE, Jan. 5, 2004, at B1. DREAMers are undocumented youth who arrived in the United States at a young age and have lived in the United States since their arrival. See *infra* text accompanying notes 121–23.

58. Julie Mchegan, *Noncitizens May Be in Line for Tuition Break in Massachusetts*, SUN, June 22, 2004, at 1.

59. *Id.*

work force is thought to be beneficial for state economies. For example, Massachusetts legislators have argued that broader access to in-state tuition rates “would help the state’s economy by training young adults for the work force.”⁶⁰ Representative James B. Leary of Worcester said that “[w]e’re a heck of a lot better off as a state when people get an education, get work force training. . . . That’s a person who’s a lot less likely to need basic assistance.”⁶¹ Senator Harriette L. Chandler of Worcester explained that “[m]aking noncitizens pay nonresident tuition is penny-wise and poundfoolish. In the long run we’re going to lose money”⁶² Keeping with the theme of future contributors to the state economy, Mr. Noorani, of the Massachusetts Immigrant & Refugee Advocacy Coalition, argued that “[g]ranting access to in-state tuition rates for all immigrant youth leverages our investment in their primary educations, utilizes the income, sales, and property taxes immigrants pay, and develops a highly skilled work force for our economy.”⁶³ Similar arguments were made in Georgia. Ms. Shahshahani stated,

Denying higher education access to Georgia’s undocumented students would mean failing to capitalize on the state’s investment in their K-12 education.

And denying these students access to affordable college education is short-sighted because they are likely to remain in Georgia and may well regularize their immigration status under current or future federal laws. Many of those students may one day be legal residents and citizens.⁶⁴

The emphasis on both long-term residence and educational achievement is used to show that undocumented students have “real and substantive ties” to their states of residence. As a result of these ties, they should be considered members of the state polity and

60. Shaun Sutner, *Immigrants’ Day Draws 700; Supporters Lobby for Citizen Rights*, TELEGRAM & GAZETTE, Apr. 8, 2004, at A2.

61. *Id.*

62. *Id.*

63. Ali Noorani, Op-Ed., *Romney Dims State’s Beacon to Immigrants*, BOS. GLOBE, July 18, 2004, at E11.

64. Shahshahani, *supra* note 51. Ms. Shahshahani also drew a connection between educating undocumented students and promoting economic growth. She stated, “College graduates who are likely to remain in Georgia earn higher wages and therefore generate significantly more in income, sales and property taxes. Their increased earning power and disposable income stimulates growth in Georgia’s economy. A better educated population also increases competitiveness in the global economy.” *Id.*

extended a specific membership right—access to public colleges and universities in the form of admission and in-state tuition rates.

B. Maintaining the Status Quo

*“It was a simple choice, and Harold Naughton picked educating illegal immigrants over our children.”*⁶⁵

1. Congress got it right

This piece of campaign literature from the 2004 election season in Massachusetts presents a different conception of membership than that discussed in the previous section. “Illegal immigrant” children are not “our children.” This statement and similar contentions seem to be based on the idea that legal status is a critical factor for determining who is one of ours—a member of the community. It is my contention that legal status is considered paramount to status quo proponents because it reflects reasonable congressional decisions about how many noncitizens, and which noncitizens, should be admitted to the United States annually. These membership rules should be respected not only because they are the law of the land, but also because they are reasonable.

Congress has established criteria and procedures for obtaining lawful immigration status and citizenship status in the United States. Undocumented students either lack the substantive criteria necessary for lawful immigration status or have failed to adhere to the appropriate procedures for obtaining such a status. The substantive criteria are based on congressional conclusions regarding which noncitizens should be admitted to the United States and for what purposes. These decisions reflect congressional determinations about which noncitizens are socially valuable and how many can be admitted without undermining that social value.

Proponents of the status quo contend that individuals who enter and reside in the United States contrary to the framework created by Congress should not be considered members of the polity. This conclusion is implicit in comments that undocumented students are not “our” students. This conception of membership was front and

65. Karen Nugent, *State Rep: GOP Flier Nearly Racist*, TELEGRAM & GAZETTE, Oct. 14, 2004, at B1 (quoting Republican Party flyer distributed to constituents of the 12th Worcester District).

center in Georgia during the debates about undocumented students' access to the state's public colleges and universities. After Jessica Colotl's case came to light, the University System of Georgia Board of Regents was confronted with public outcries that "the University System was being swamped by thousands of undocumented students, that Georgia taxpayers were subsidizing the education of these students through in-state tuition," and perhaps most importantly that "undocumented students were taking seats in college from academically qualified Georgians."⁶⁶ While data indicated that only .48% of new students entering Georgia public colleges and universities in the fall of 2010 and .16% of all students enrolled in those schools in fall 2010 were undocumented students, the concern about non-members taking membership benefits away from members remained paramount.⁶⁷ Georgia legislators responded to these concerns by introducing legislation that would have banned undocumented students from all public colleges and universities in Georgia.⁶⁸ Representative Tom Rice, a co-sponsor of this legislation, said that the bill "guarantees illegal immigrants don't take seats away from those who are here legally."⁶⁹ Senator Barry Loudermilk sponsored similar legislation in 2012 and stated that the legislation was important because "the current system takes slots at state colleges away from citizens. 'Our colleges and universities are for those that are U.S. citizens and are here legally.'"⁷⁰

For proponents of maintaining the status quo, membership is a status determined by Congress. Christen Varly, president of the Greater Boston Tea Party, expressed this sentiment when she explained, "They're still here illegally If you're not a legal resident of the state, you're not entitled to in-state tuition rates. That's as simple as it is."⁷¹ A similar perspective was provided by

66. Press Release, *supra* note 6.

67. In-state tuition is viewed as a benefit of membership. Non-members are ineligible for this benefit and are subject to the higher out-of-state/non-resident tuition rates.

68. Laura Diamond, *Much Debate Over Bill to Bar Illegal Immigrants from Georgia Colleges*, ATLANTA J.-CONST. (Jan. 31, 2012), <http://www.ajc.com/news/news/state-regional-govt-politics/much-debate-over-bill-to-bar-illegal-immigrants-fr/nQQtz/>.

69. *Id.*

70. Joeff Davis, *Bill Banning Undocumented Students from Attending Georgia's Colleges Passes in Committee*, CREATIVE LOAFING (Feb. 28, 2012), <http://clatl.com/freshloaf/archives/2012/02/28/bill-banning-undocumented-students-from-attending-georgias-colleges-passes-in-committee>.

71. Sacchetti, *supra* note 52.

GOP executive director Tim O'Brien when he asked, "What part of 'illegal' don't they understand? They're illegal immigrants. They're not supposed to be here."⁷² Failure to satisfy the substantive and procedural requirements for membership precludes one from obtaining the benefits of membership. Implicit within this position is an acceptance of the membership criteria used by Congress.⁷³

Two additional arguments stem from the conclusion that undocumented students are not members of the American polity. The first is that states have limited resources and in-state tuition rates and admission to public colleges and universities are coveted benefits that states cannot afford to extend to non-members. The second is that extending in-state tuition rates, or admission, to undocumented students rewards or encourages unlawful activity.

2. Limited resources

The limited resource argument was prominent in Georgia and Massachusetts.⁷⁴ Much of the discussion, as reported in local newspapers, centered on undocumented students taking university seats away from "our students" and on taxpayers being required to subsidize the education of undocumented students. These arguments are premised on the idea that undocumented students are not "our students" and do not pay taxes. I contend that these arguments are based on viewing immigration status as the basis for membership. After defining undocumented students as non-members, the next move for status quo supporters is to contend that there are not enough seats at the public colleges and universities for qualified Georgians or Bay Staters or that the state should not subsidize undocumented students' tuition in light of other pressing needs.⁷⁵ Ira Mehlman, of the Federation for American Immigration

72. Scott S. Greenberger, *GOP Says Democrats Aid Illegal Immigrants*, BOS. GLOBE, Oct. 20, 2004, at B1.

73. Alternatively, those seeking to extend in-state tuition rates to undocumented students are challenging the substantive and procedural requirements created by Congress as under-inclusive.

74. See, e.g., Jim Galloway, *Student is Fodder for GOP Candidates*, ATLANTA J.-CONST., May 16, 2010 ("But in Georgia, the prevailing argument has been that undocumented students eat up the resources—and limited university slots—that should belong to legal residents of the state.").

75. See, e.g., Matthew Rodriguez, *In-State College Tuition Sought*, BOS. GLOBE, Apr. 8, 2004, at B3 ("Opponents of federal and state legislation such as St. Fleur's bill have said American students would lose positions in this country's universities if immigrants were

Reform, explained that granting in-state tuition rates to undocumented students “is an unwarranted benefit to people in the country illegally at the expense of taxpayers and really at the expense of other people’s kids [who are in the country legally] trying to get an education at a public university.”⁷⁶ Additionally, a group of Georgia state senators wrote to the University System of Georgia Board of Regents to express their disapproval of admitting undocumented students to public colleges and universities. Their arguments focused on the idea of limited resources. They wrote that “[b]eyond the clear inappropriateness of denying a legal Georgia resident an educational opportunity in favor of an unlawful alien, is the inescapable lack of wisdom in forcing Georgia taxpayers to subsidize the education of a person who upon graduation is not legally eligible to be employed.”⁷⁷ They saw admission to the state’s public colleges and universities as being subsidized because they concluded that the out-of-state tuition fees did not cover the education received.⁷⁸ They also opposed extending eligibility for in-state tuition rates to undocumented students because these tuition rates “cover less than 30% of the total cost to educate a student in our public system.”⁷⁹ They concluded that “Georgia taxpayers have a vested interest in knowing that only eligible students be subsidized.”⁸⁰ Here again, eligibility is presumed to be based on a legal status conception of membership.

This conception of membership also leads to arguments that undocumented students took college and university seats away from deserving students. Phil Kent, national spokesman for Americans for Immigration Control, stated that allowing undocumented students to attend public colleges and universities was “an outrageous abuse of college presidential power, and an insult to the taxpayers and

allowed to pay in-state tuition rates.”).

76. Travis Andersen, *Immigrant Youth Advocates Lauded*, BOS. GLOBE, Feb. 14, 2011, at B1 (alteration in original).

77. Letter from Senators Don Balfour, Jim Butterworth, John Douglas, et al., to Georgia Board of Regents Members (2010) [hereinafter Letter] (on file with author).

78. *Id.* (“It is also important to note, out-of-state tuition rates do not cover the full cost to educate a student. Again, Georgia taxpayers are footing a portion of the education costs.”). *But see* Willoughby Mariano, *Out-of-State Tuition Pays for More than an Education*, ATLANTA J.-CONST., Dec. 17, 2010, at B1 (demonstrating that the tuition paid by students paying out-of-state tuition more than covers the cost of their education).

79. Letter, *supra* note 77.

80. *Id.*

parents of children who strive to get into college yet their slots are taken by illegals.”⁸¹ D.A. King, the founder of the Dustin Inman Society, echoed this concern when he said that “[w]e have a finite amount of classroom seats. . . . It’s always been a mystery to me for seats to go to people who are deportable at any time and cannot work upon graduation when unemployment is 10 percent.”⁸² James Dutton, the student body president of Georgia State University, expressed a similar opinion while sympathizing with the position of undocumented students:

I don’t begrudge anyone wanting an education and I think international students provide an important perspective to our classes, but it’s already hard for some Georgians to get into college. . . . I know that all illegal immigrants didn’t necessarily create the problem they’re stuck in but I feel that everyone should have to go through the proper channels. . . . Everyone should have to play by the same rules in higher education.⁸³

Arguments supporting the status quo in Georgia and Massachusetts regarding undocumented students’ access to public colleges and universities conceptualize in-state tuition rates and admission as scarce resources. The state cannot provide these resources to all students residing within the state. In deciding how to allocate such scarce resources, a priority is placed on members of the state polity. Undocumented students are not deemed members because membership is based on immigration status.⁸⁴ Therefore, they should not be eligible for in-state tuition rates, and should not be admitted to the state’s public colleges and universities. These

81. Phil Kent, Op-Ed., *Pro & Con: Should States Extend College Benefits to Illegal Immigrants?*, ATLANTA J.-CONST., May 26, 2010, at A19. Phil Kent is the national spokesman for Americans for Immigration Control.

82. Blake Aued, *Most Georgians Want Colleges Off-Limits*, AUGUSTA CHRON., Sept. 22, 2010, at A8; *see also* Diamond, *supra* note 50.

83. Diamond, *supra* note 50. Campaign literature during the 2004 elections in Massachusetts also highlighted this perspective on undocumented students’ access to post-secondary education. One piece of campaign literature said,

[W]hen Barbara L’Italien voted to give illegal immigrants a tuition break at our state colleges and universities, she also turned her back on some of our best and brightest students here in Massachusetts. . . . Barbara L’Italien could have spent that money on scholarships for the state’s best-performing high school graduates.

Greenberger, *supra* note 72 (discussing campaign literature during the 2004 election in Massachusetts).

84. *See supra* Part II.A.1.

arguments offer a reasonable approach to line drawing and allocating resources as long as one agrees with the initial premise of who members of the polity are. Disagreement about membership criteria, normatively and within the law, is at the heart of the debate about undocumented students' access to post-secondary education.

3. Encouraging or rewarding unlawful activity

Advocates of the status quo in Georgia and Massachusetts were also concerned that allowing undocumented students to be eligible for in-state tuition rates and admission to public colleges and universities would encourage or reward unlawful behavior. Government officials (including a governor and several state legislators), community activists, and members of the public have all expressed concern that changing the status quo makes immigration law meaningless. If individuals know that by making it into the United States and staying long enough they can obtain the benefits of lawful immigration status, then there is no point in getting a visa and pursuing lawful admission. Consequently, expanding access to postsecondary education is viewed as counterintuitive because it undermines the rule of law.

In July 2013, Governor Deval Patrick announced that Deferred Action for Childhood Arrivals ("DACA") recipients would be eligible for in-state tuition rates at Massachusetts colleges and universities.⁸⁵ As during the previous debates in Massachusetts and Georgia, some people argued that Governor Patrick was encouraging unlawful migration. Roy Beck, president of NumbersUSA, explained his opposition to the Governor's decision, noting, "We oppose any benefits that reward illegal immigration that entice more people to come in illegally. . . . Certainly, if people are thinking of moving here illegally, Massachusetts looks like a good place to come."⁸⁶ In 2004,

85. Sacchetti, *supra* note 52. DACA allows individuals who meet specific criteria to be considered for deferred action, which is an exercise of prosecutorial discretion. See *infra* text accompanying notes 121–22 for additional discussion of DACA.

86. Peter Schworm, *Massachusetts Immigrant Tuition Plan Could Be a Model: Will Charge In-State Fees*, BOS. GLOBE, Nov. 21, 2012, at B, available at <http://www.bostonglobe.com/metro/2012/11/21/massachusetts-move-extend-state-tuition-some-illegal-immigrants-may-help-motivate-other-states/aRWkyTMDtJn8i8uMXMR5zM/story.html>. NumbersUSA is a group that favors "reductions in immigration numbers." *About NumbersUSA: Moderates, Conservatives & Liberals Working for Immigration Numbers That Serve America's Finest Goals*, NUMBERSUSA, <https://www.numbersusa.com/content/about-us.html> (last visited June 22, 2013).

Governor Romney vetoed legislation passed by the Massachusetts legislature that would have extended in-state tuition rates to undocumented students. At that time he explained, "I hate the idea of in any way making it more difficult for kids, even those who are illegal aliens, to afford college in our state. But equally, perhaps a little more than equally, I do not want to create an incentive to do something which is illegal."⁸⁷ He reiterated this concern about encouraging unlawful behavior in December 2004, stating, "I do not want to create an incentive to do something which is illegal."⁸⁸ The editorial staff of the *Boston Herald* echoed this concern in 2004, explaining that "[a] measure to reward and incentivize illegal immigration by proffering [sic] resident tuition rates for public higher education to illegal immigrants sends the wrong message."⁸⁹

Within this type of argument is an implicit assumption that the current membership rules are reasonable and just. Proponents of the status quo rarely make this point explicitly. Rather, they emphasize that the law is the law, and it ought to be followed. David Bachman, a student at Middle Georgia College who works part-time to afford his college education, referred to undocumented students as criminals.⁹⁰ These students "are breaking the law by living in this country. [Jessica Colotl's] family never should have come and she shouldn't remain. . . . The law is the law and they're breaking it and they don't belong here. . . . We need to make sure they don't enter. And they definitely don't belong in our public colleges."⁹¹

I believe that this is one of the strongest arguments offered by proponents of the status quo because it resonates with the general public. Lawful and unlawful behavior or activity is easy for people to

87. Angie Drobnic Holan, *Romney's In-State Tuition Charge*, POLITIFACT (Dec. 5, 2007), <http://www.politifact.com/truth-o-meter/article/2007/dec/05/romneys-state-tuition-charge/>. Governor Romney's spokeswoman Shawn Feddeman also noted that the "Commonwealth should not make it easier for illegal aliens to violate federal immigration laws And we shouldn't excuse those violations of the law by giving illegal aliens the same benefits we provide our own citizens." Franco Ordonez & Eun Lee Koh, *Veto of Massachusetts Tuition Bill May Face Override Challenge*, BOS. GLOBE, July 11, 2004; see also Elise Castelli, *Lower Tuition Rate for Undocumented Immigrants Sought*, BOS. GLOBE, Dec. 9, 2005, at 5 (noting that Governor Romney's spokesperson explained that "No matter how well intentioned, we don't believe in extending benefits to people who are hiding from the law.").

88. Castelli, *supra* note 87.

89. Editorial, *Vetoed on a Bumper Sticker*, BOS. HERALD, June 24, 2004, at 42.

90. Diamond, *supra* note 50.

91. *Id.*

understand. This argument takes away all nuance and ambiguity. Yet the idea that one should not benefit from illegal activity is the beginning of the conversation, not the end. Various areas of law provide for defenses or excuses that allow individuals to avoid the negative consequences of engaging in otherwise illegal activity. For example, killing someone in self-defense or breaching a contract after the purpose of the contract has been frustrated are not subject to the traditional sanctions for murder or breach of contract. Thus, there is a normative question at play here—should students who have lived the majority of their lives in the United States be precluded from certain opportunities in the United States because they lack lawful immigration status? Are there extenuating circumstances, like self-defense or frustration, which suggest that undocumented children's life opportunities should not be permanently limited? Our society could conclude that individuals brought to the United States as young children who have lived in the United States for a significant number of years should not be subject to the same consequences as adults who are unlawfully present in the United States or children who are recent arrivals.

Those opposed to extending in-state tuition rates and/or admission to public colleges and universities do not address this normative question. They merely conclude that unlawful activity should not be rewarded or encouraged. It is possible that within this argument there is an implicit normative position—unlawfully present young people should not be treated any differently than other unlawfully present individuals. Yet there is no justification offered for this conclusion. Reaching a national consensus or compromise on this issue requires some amount of deliberation, some evaluation of the various positions and arguments at play. When arguments are implicit or under-developed, it is difficult for them to receive serious consideration. The idea that unlawful activity or behavior should not be rewarded is the beginning of a normative conversation about whether or not the consequences for unlawful presence by long-term resident children and young adults should be the same as it is for adults. Public opinion polls regarding the DREAM Act and general support for DACA suggest that the national consensus is that the consequences for young people should be different than those currently required under law. If this is the case, then the idea that providing undocumented students access to in-state tuition rates and

admission to public colleges and universities improperly rewards unlawful activity has less normative appeal.

Both those seeking to challenge the status quo approach to membership and those defending it appear to agree that in-state tuition rates and access to public postsecondary education are membership benefits. The disagreement is about who is a member. Those defending the status quo prioritize citizenship status and immigration status. Their arguments implicitly contend that the criterion adopted by Congress reasonably and justly allocates membership in the American polity. Those challenging the status quo contend that the current membership rules are under-inclusive—they exclude a significant number of people who have “real and substantive ties” to the United States.⁹² Within this argument, such ties are at the heart of being a member of the American polity and when membership rules are found to be under-inclusive of people with these ties, the rules need to be revised. Both approaches offer a reasonable approach to identifying members so long as immigration status is an accurate proxy for the substantive criteria that make an individual a member of a community.

III. JUSTIFYING IN-STATE TUITION

Access to lower in-state tuition rates is generally justified as providing a benefit to members of the community based on their past contributions to the state or to encourage future contributions to the state. For example, a common justification for state residents getting a lower tuition rate is that the residents’ (or their families’) taxes support the public colleges and universities. As a result of this past support, they should get subsidized tuition.⁹³ An alternative justification is that state residents should pay lower tuition rates because they “as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being.”⁹⁴ This section contends that undocumented students’ immigration status does not preclude them from financially supporting public colleges

92. SHACHAR, *supra* note 40, at 166.

93. Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice of Postsecondary Residency Requirements*, 59 J. HIGHER EDUC. 263, 263 (1988) (noting this justification for lower in-state tuition rates).

94. *Toll v. Moreno*, 458 U.S. 1, 7 (1982).

and universities through taxes or from having a close affinity to the state and contributing to it in the future.

A. Past Contributions to the State

A common myth about unauthorized migrants is that they do not pay taxes. This group of migrants pays a variety of local, state, and federal taxes. Unauthorized migrants can pay federal taxes as a result of having an Individual Tax Identification Number or a false or fraudulent Social Security Number. Even if one does not qualify for a Social Security Number, one can obtain an Individual Tax Identification Number ("ITIN"). With an ITIN, an individual can file a tax return, make tax payments, and apply for refunds.⁹⁵ Alternatively, a false or fraudulent Social Security Number may be used to "satisfy paperwork requirements during the hiring process"⁹⁶ Employers then use those numbers "to withhold federal, state, and local income and payroll taxes for employees."⁹⁷ The Internal Revenue Service estimates that six million unauthorized migrants file individual tax returns each year.⁹⁸ "Other researchers estimate that between 50 percent and 75 percent of unauthorized [migrants] pay federal, state, and local taxes."⁹⁹ Unauthorized migrants also pay sales taxes. For example the Iowa Legislative Services Agency estimates that approximately 70,000 unauthorized migrants in the state paid between \$45.5 million and \$70.9 million in state income and sales taxes in 2004.¹⁰⁰ The state of Colorado estimated that state and local taxes from unauthorized migrants were between \$159 and \$194 million annually.¹⁰¹

Despite these financial contributions, a number of studies conclude that the tax revenue generated by unauthorized migrants

95. CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON BUDGETS OF STATE AND LOCAL GOVERNMENTS 6 (Dec. 2007), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf>.

96. *Id.*

97. *Id.*

98. Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1449, 1429-33 (Sept. 20, 2004).

99. CONGRESSIONAL BUDGET OFFICE, *supra* note 95, at 6.

100. Kerri Johannsen, *Undocumented Immigrants' Cost to the State*, IOWA LEGIS. SERVICES AGENCY FISCAL SERVICES, Feb. 22, 2007, at 2.

101. Robin Baker & Rich Jones, *Costs of Federally Mandated Services to Undocumented Immigrants in Colorado*, BELL POL'Y CENTER, June 30, 2006, at 6.

does not offset the total cost of services provided to them.¹⁰² Other studies conclude that unauthorized migrants pay more in taxes than they use in services.¹⁰³ Even if the first conclusion is correct—unauthorized migrants do not pay sufficient taxes to cover the social services used—it is useful to think about an alternative explanation for this outcome. This mismatch may be due to the low wages that unauthorized migrants tend to earn. In 2007, the median household income for unauthorized migrant households was \$36,000.¹⁰⁴ In comparison, the median household income for native U.S. citizen households was \$50,000.¹⁰⁵ This is due to lower levels of education and larger percentages of low-skilled occupations for unauthorized migrants.¹⁰⁶ These differences are even starker than they initially appear because the average unauthorized migrant household has more workers than the average native U.S. citizen household.¹⁰⁷

Undocumented students are members of families that contribute to the tax base of their state of residence. While they may not contribute as much as lawfully present migrants or U.S. citizens, hinging access to public benefits on financial contributions takes us down a dangerous slippery slope. Numerous Americans come from impoverished families. Access to postsecondary education is presented as their hope for a better life. The fact that their families may not contribute enough tax revenue to cover the benefits they receive from the state has never been offered as a justification for denying these students access to in-state tuition rates.

States that allow undocumented students to qualify for in-state tuition rates have taken two approaches to address the past contribution issue. Maryland requires undocumented students to provide state tax returns for three years while the student attended high school.¹⁰⁸ More commonly, states like California and Texas require attending high school within the state for three years. This

102. *Id.* at 3.

103. See, e.g., *Undocumented Immigrants as Taxpayers*, IMMIGR. POL'Y CENTER (Nov. 1, 2007), <http://www.immigrationpolicy.org/just-facts/undocumented-immigrants-taxpayers>.

104. Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISP. CENTER, Apr. 14, 2009, at 16.

105. *Id.*

106. *Id.*

107. *Id.* Unauthorized migrant households have 1.75 workers compared to 1.23 workers in U.S. born U.S. citizen households. *Id.*

108. S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011).

can be seen as operating as a proxy for past contributions to the state. The assumption would be that during the three years of residence in the state the student and/or the student's parents have been making financial contributions to the state. A student would not qualify unless they resided in the state for three years, which is two years longer than many states require from U.S. citizens and lawfully present noncitizens to establish state residency.¹⁰⁹

To the extent that lower in-state tuition rates are justified based on the idea that residents contribute to the funding of public postsecondary institutions through the various forms of taxes they pay, immigration status should not preclude undocumented students who are long-term residents within the state from receiving those benefits.

B. Future Contributions to the State

Unauthorized migrants' immigration status might suggest that their tenure within the United States is likely to be limited. They do not have permission to reside in the United States and are constantly at risk of being deported. Consequently, some contend that states should not expend precious resources on students who are not likely to remain in the United States. Even if they do remain here, the law does not authorize them to work. This section addresses both of these concerns by noting the long-term residence of the vast majority of unauthorized migrants and the potential for lawful employment pursuant to programs like Deferred Action for Childhood Arrivals ("DACA").¹¹⁰

Unauthorized migrants tend to be long-term residents of the United States. The Pew Hispanic Center estimates that sixty-three percent of unauthorized migrants have lived in the United States for at least 10 years.¹¹¹ Additionally, thirty-five percent have been in the United States for fifteen years or more.¹¹² Recent statistics estimate

109. See Michael A. Olivas, *Administering Intentions: Law, Theory, and Practice of Postsecondary Residency Requirements*, 59 J. HIGHER ED. 263, 265 (1988).

110. Jeffrey S. Passel & Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW HISP. CENTER (Aug. 14, 2012), http://www.pewhispanic.org/files/2012/12/unauthroized_immigrant_youth_update.pdf.

111. Jeffrey S. Passel & Mark Hugo Lopez, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW HISP. CENTER 3 (Dec. 1, 2011), <http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf>.

112. *Id.*

that there are 1.1 million unauthorized migrants under the age of 18 and another 1.29 million between the ages of 18 and 24.¹¹³ Due to current immigration enforcement priorities that focus on “criminal aliens” these individuals are likely to spend their adult lives in the United States.¹¹⁴

In light of unauthorized migrants’ long-term residence in the United States, educational attainment becomes an important factor in determining their incorporation within U.S. society. Age of arrival plays an important role in predicting the likelihood of educational attainment. Those who arrived before the age of 14 are more likely to have completed high school and to attend a college or university.¹¹⁵ For example, only 28% of 18 to 24 year olds who arrived before age 14 did not complete high school compared to 46% of those who arrived after age 14.¹¹⁶ Additionally 61% of 18 to 24 year olds who arrived before the age of 14 are in college or have attended college compared to 42% of those who arrived after age 14.¹¹⁷ Access to colleges and universities for those unauthorized migrants who complete high school is an important factor in determining the types of jobs and occupations that those individuals will hold.¹¹⁸

Length of residence and completing college does not, however, alter these individuals’ legal status. As unauthorized migrants, they do not have legal permission to work in the United States. Consequently, they will find themselves using fraudulent or stolen

113. Michael Hoefer, Nancy Rytina & Brian C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, DEPARTMENT HOMELAND SECURITY 5 (Feb. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

114. Memorandum from John Morton for ICE Employees regarding Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010) (on file with author). The research indicates that unauthorized migrants rarely return to their country of origin absent being deported. While circular migration used to be a common pattern where migrants would come to the United States for a particular season to work and then return to their country of origin, increased border enforcement has made return trips more treacherous and expensive. Consequently migrants tend to stay once they enter the United States. See Douglass S. Massey & Fernando Riosmena, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294, 298 (2010).

115. Passel & Cohn, *supra* note 104, at 12.

116. *Id.*

117. *Id.*

118. *Id.* at 14 (noting that less education leads unauthorized migrants to be more likely to have low-skilled jobs and less likely to be in white-collar occupations).

social security numbers to work or they will find themselves working in jobs that are less scrupulous about checking paperwork. For the 49% of unauthorized migrants ages 18 to 24 who are in college or have completed college post-graduation employment options remain bleak absent immigration reform like the proposed Development, Relief, and Education for Alien Minors Act (“DREAM Act”).¹¹⁹

[The DREAM Act] creates a pathway to lawful immigration status for individuals who entered the United States under the age of 16, have been physically present for at least 5 years, earned a high school diploma or a GED, have good moral character, and are not inadmissible or deportable based on criminal activity or national security concerns. The DREAM Act would grant these individuals conditional [lawful permanent resident status, also known as a green card]. The conditional LPR status would be valid for 10 years. If within that 10-year period the individual completed 2 years of college or military service and maintained good moral character, then he or she could apply for regular, not conditional, LPR status. They would become green-card holders who could eventually apply for citizenship.¹²⁰

The DREAM Act has yet to be enacted, but the Obama Administration instituted the Deferred Action for Childhood Arrivals (“DACA”) program on June 15, 2012.¹²¹ DACA allows individuals who meet specific criteria to be considered for deferred action.¹²² Deferred action is an exercise of prosecutorial discretion. If an individual obtains deferred action, the immigration enforcement

119. *Id.*

120. Angela M. Banks, *Closing the Schoolhouse Doors: State Efforts to Limit K-12 Education for Unauthorized Migrants*, in *THE RESEGREGATION OF SCHOOLS: RACE AND EDUCATION IN THE TWENTY-FIRST CENTURY* (Jamel K. Donnor & Adrienne D. Dixon eds., 2013).

121. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Nov. 30, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>. Despite widespread public support for the DREAM Act certain members of Congress have insisted that this act be considered alongside other aspects of comprehensive immigration reform. The comprehensive immigration reform bill passed by the Senate in June 2013 includes the DREAM Act provisions. Enacting the DREAM Act would provide many undocumented students with lawful immigration status, which should make them eligible for in-state tuition rates.

122. *Id.*

authorities agree not to pursue enforcement action against that individual for a specified period of time.¹²³ DACA grants deferred action for two years, and beneficiaries are eligible for work authorization.¹²⁴

Secretary Napolitano explained that “certain young people who were brought to this country as children and know only this country as home” were low priority cases.¹²⁵ She described these individuals as “productive young people” many of whom “have already contributed to our country in significant ways.”¹²⁶ In order to be eligible for DACA, one must have arrived in the United States under the age of sixteen; resided continuously in the United States for at least five years before June 15, 2012 and be present in the United States on June 15, 2012; be in school, graduated from high school, obtained a general education development certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; must not have been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and must not be over the age of 30.¹²⁷

Programs like DACA provide an opportunity for undocumented students to lawfully work in the United States. President Obama has indicated that comprehensive immigration reform is a matter that Congress will address in 2013.¹²⁸ Part of any comprehensive package

123. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 18, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD>; see also Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463, 475–80 (2012).

124. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 14, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD#decisions>.

125. Memorandum from Janet Napolitano to David V. Aguilar, Alejandro Mayorkas & John Morton regarding Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

126. *Id.* at 2.

127. *Id.* at 1.

128. Lisa Lambert, *Obama Seeks Comprehensive Immigration Reform in Early 2013*, CHI. TRIB. (Nov. 14, 2012), http://articles.chicagotribune.com/2012-11-14/news/sns-rt-usa-obama-immigrationbre8ad1x6-20121114_1_immigration-reform-immigration-system-

considered will likely include a DREAM Act, which would provide a pathway to lawful immigration status and citizenship for unauthorized youth. In light of developments like DACA, undocumented students are not necessarily doomed to a future in which their college or university degrees would be useless. To the contrary, these degrees will enable these students to participate more fully in the local communities in which they reside. Undocumented students who otherwise meet state residency requirements are as likely as other residents to “have a close affinity to the State and to contribute more to its economic well-being.”¹²⁹ As such, this justification for lower in-state tuition rates can apply equally to undocumented students as it does to students who are citizens or lawfully present migrants. The discussion provided in this Part suggests that immigration status is an under-inclusive proxy for identifying individuals who satisfy the seemingly important factors for determining who should be eligible for lower in-state tuition rates.

CONCLUSION

States have taken two different approaches to undocumented students’ access to postsecondary education. Some states, like Texas and California, allow admission to public colleges and universities regardless of immigration status and allow undocumented students who are long-term residents to be eligible for in-state tuition rates. Other states, like Massachusetts, prohibit undocumented students from being eligible for in-state tuition rates, and some states like Georgia and South Carolina go further and prohibit undocumented students from attending public colleges and universities. This piece has used these divergent approaches to undocumented students’ access to postsecondary education to identify competing notions of membership operating within the United States. It is my contention that there are two conceptions of membership at work here. One conception prioritizes connections and participation within a community as the basis for membership. Another conception emphasizes legal status as the main criterion for membership. The connection approach to membership leads individuals to challenge the status quo that denies undocumented students in-state tuition

unauthorized-immigrants.

129. *Toll v. Moreno*, 458 U.S. 1, 7 (1982).

rates and admission in many states. The status approach supports this status quo. In light of the justifications offered for providing in-state tuition rates, I conclude that the status approach to membership is under-inclusive. This conception of membership does not sufficiently identify students who have made past contributions to the state and are likely to make contributions in the future. While status may be an appropriate conception of membership in certain contexts, in this context it is under-inclusive and threatens to create a permanent underclass in the United States.