THE DREAM ACT AND THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY: AN ANALYSIS OF U.S. AND INTERNATIONAL HUMAN RIGHTS FRAMEWORKS AS THEY RELATE TO EDUCATION RIGHTS

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I. INTRODUCTION

Over the past 14 years, I’ve graduated from high school and college and built a career as a journalist, interviewing some of the most famous people in the country. On the surface, I’ve created a good life. I’ve lived the American dream. But I am still an undocumented immigrant. And that means living a different kind of reality. It means going about my day in fear of being found out.2

The story of the Pulitzer-Prize winning journalist and undocumented immigrant, Jose Antonio Vargas, gives a face to the controversial and political debate about the educational rights of undocumented children who come as minors to live illegally in the U.S. with their parents. These undocumented children, approximately 65,000,3 grow up as socially and culturally American as the American citizen children they sit next to in school. However, due to the undocumented and illegal status of these children, their future opportunities are much bleaker than their American citizen classmates. Under the current U.S. immigration laws, undocumented children face deportation and are frequently denied access to higher education, either through state legislation that prohibits their


3. RADHA ROY BISWAS, JOBS FOR THE FUTURE, ACCESS TO COMMUNITY COLLEGE FOR UNDOCUMENTED IMMIGRANTS: A GUIDE FOR STATE POLICYMAKERS: AN ACHIEVING THE DREAM POLICY BRIEF 2 (2005). Sixty-five thousand is an estimate for the number of undocumented students who will qualify for the DREAM Act. See id. In the last five years the number of eligible students has been around 65,000. Id. “The actual number of undocumented students is difficult to determine, because few public higher education systems track these students, and students themselves are reluctant to divulge their status for fear of deportation or other legal consequences.” Id.
enrollment into college in their home state, or through the exorbitant costs for tuition they must pay, because they are denied access to federal aid and loans.

In 2001, American legislators introduced a bill called the Development, Relief, and Education for Alien Minors (“DREAM”) Act. The DREAM Act has never been made law and has been re-introduced in almost every subsequent federal legislative session. The DREAM Act, as it stands today, would provide conditional permanent residency to certain illegal alien applicants who graduate from U.S. high schools, are of good moral character, arrived in the U.S. illegally as minors, and have been residing in the U.S. continuously for at least five (5) years prior to the bill’s enactment. The reaction to the proposed DREAM Act has been divisive and highly-politicized.

Failure to pass a version of the DREAM Act at the federal level has opened the door for many state legislatures to address the issue of undocumented students and their access to higher education on a state-by-state basis. Some states have responded with state legislation, such as New York’s proposed New York Dream Act and California’s proposed California Dream Act (the latter of which was recently signed into law), that have allowed for undocumented students to receive access to educational opportunities such as those provided for in the DREAM Act. Other state responses, such as Alabama’s, with the recent passage of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, contain provisions that deny undocumented students access to higher education and verge on racial profiling.

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5. See discussion infra Part II.1.
The DREAM Act proposes higher education rights for certain undocumented students and touches on a variety of human rights issues, including the right to education and the right to be free from discrimination on the basis of national origin. Assessing the legal basis for these rights, at the international and U.S. domestic level, offers a perspective and focus that is frequently overshadowed by the political elements of the debate over undocumented students and American public schools.

An evaluation of the international human rights framework highlights an individual rights-based approach that identifies particular social, cultural, political, and economic rights as they pertain to children. Additionally, it reinforces the importance and fundamentality of the individual rights themselves, primarily, the right to education and the right to be free from discrimination. An evaluation of the U.S. domestic legal framework yields a less-defined human rights system, that, while centered on the “best interests of the child” standard, does not embrace the protection of individual (positive or negative) education rights. Indeed, the U.S. has not ratified the Convention on the Rights of the Child, nor has it recognized a fundamental right to education. Given these limitations, the basis for passing the DREAM Act and granting undocumented students rights to higher education seems to stem from the Equal Protection Clause in the U.S. Constitution and freedom from discrimination in the international human rights framework.

This article argues that by denying undocumented children access to higher education, the U.S. government is violating their obligations under the Universal Declaration of Human Rights ("UDHR") and Universal Covenant on Civil and Political Rights ("UCCPR"), as they relate to discrimination of social groups on the basis of national origin. Furthermore, by denying undocumented students access to higher education which is afforded to their American contemporaries, and is provided by the DREAM Act, these undocumented students are being discriminated against participating and contributing in American society and civic life and are being denied the equality of educational opportunity. The right to education, while not recognized as a fundamental right by the U.S. Constitution, is an important driver in American society for creating a

eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.”

less discriminatory and class-based society. For this reason, the U.S. Congress should pass the DREAM Act.

This paper will argue that the U.S. has both international and national legal obligations to pass the DREAM Act and further protect undocumented students who qualify under the DREAM Act right to equal access to higher education. Section II of this paper will examine the history of the DREAM Act, the provisions of the DREAM Act of 2011, and the states’ individual responses to this issue, with a particular focus on the New York, California, and Alabama bills respectively. Section III of this paper will discuss the U.S. Constitutional framework as it relates to education and undocumented students. Section IV will examine the lack of educational opportunity for undocumented students in the U.S. and how that translates into a lack of meaningful participation in modern American civic society. Section V will discuss the intersection between the U.S. and international human rights frameworks. Section VI will examine general international human rights framework generally, and as related to the rights of children and the Convention on the Rights of the Child (“CRC”). Section VII of this paper will discuss the right to education within the international human rights framework. Section VII of this paper will discuss the obligations that the U.S. has under international human rights law to avoid discrimination.

II. THE DREAM ACT OF 2011

1. LEGISLATIVE HISTORY OF DREAM ACT

In 2001, a very similar bill to the DREAM Act was introduced during the 107th Congress as H.R. 1918 and S. 1291 in the House of Representatives and in the Senate, respectively. The 2001 bills did not


12. The focus of this article is the legal bases to adopt the DREAM Act found in international human rights law and in the U.S.’s legal framework. See infra Part IV–VIII. However, this article acknowledges that there are a variety of policy reasons to adopt the DREAM Act ranging from fiscal cost-saving arguments to national security interests. See e.g., America’s Voice Research on Immigration Reform: 5 Reasons to Support the DREAM Act, AMERICA’S VOICE ONLINE, Sept. 15, 2010, http://americasvoiceonline.org/research/entry/ reasons_to_support_the_dream_act (discussing the benefits the military stands to gain from passage of the DREAM Act); see also RAUL HINOJOSA OJEDA ET AL., N. AM. INTEGRATION AND DEV. CTR. UCLA, NO DREAMERS LEFT BEHIND: THE ECONOMIC POTENTIAL OF DREAM ACT BENEFICIARIES 3 (2010), available at http://naid.ucla.edu/uploads/4/2/1/9/4219226/no_dreamers_left_behind.pdf (discussing the cost benefits of passing the DREAM Act).

13. Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001); Development, Relief,
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successfully pass through the House or the Senate. On July 31, 2003, Senators Orrin Hatch and Richard Durbin first introduced a bill named the “DREAM Act” in the 108th Congress. The DREAM Act initially passed through the Senate Judiciary Committee in October 2003, by a 16-3 vote. The final version of the DREAM Act that actually passed through the Senate Judiciary Committee in 2003 also included controversial amendments proposed by Senators Charles Grassley (R-IA) and Dianne Feinstein (D-CA).

During the 108th Congress, there was never a full Senate vote on the DREAM Act; accordingly, the Act was reintroduced on November 18, 2005 during the 109th Congressional session. In 2006, the DREAM Act appeared as an amendment to the Comprehensive Immigration Reform Act of 2006, a bill designed to produce long-term solutions to illegal immigration problems. On May 25, 2006, the Senate passed the Comprehensive Immigration Reform Act by a 62-36 vote, but it failed to become law because both houses of Congress could not agree on what the bill should contain. This failure to enact this bill during the 109th Congressional session in 2006 resulted in Senator Durbin making it a personal goal for the 210th session.

In September 2007, Durbin filed to place the DREAM Act as an amendment to the Department of Defense Authorization Bill (S. 2919).


The following month, Durbin, along with Republican co-sponsors Senators Charles Hagel and Richard Lugar, introduced a new version of the DREAM Act.22 A vote was scheduled on October 24, 2007, to debate the DREAM Act in the Senate. The 2007 DREAM Act fell short of the required sixty votes to overcome the Republican’s filibuster.23

On September 21, 2010 the Senate voted again on the DREAM Act.24 The Democrats then had a majority in Congress and needed only one Republican vote to reach the required sixty votes to pass the Act without interference from a Republican filibuster.25 Democrats hoped Republican Senator Susan Collins of Maine would cross the aisle,26 though ultimately, Senator Collins voted with her party and against the DREAM Act, sealing its failure once again.27

The Senate tried again in December 2010, but failed.28 Three months earlier, in September, Senate majority Senator Harry Reid attempted to attach the DREAM Act, as piecemeal legislation, to a defense reauthorization bill, but his effort was unsuccessful, and the DREAM Act for 2010 was effectively killed.29 As of December 2010, the fate of the Act was uncertain, despite President Obama’s personal lobbying efforts in support of the bill.30

On May 11, 2011, Senator Reid reintroduced the DREAM Act in the Senate, shortly after President Obama called on Congress to make progress on a comprehensive immigration reform bill that aims to address the citizenship rights of the nation’s eleven million undocumented


25. Id.

26. Id.

27. Id.


29. Id.

immigrants.\textsuperscript{31} With Republicans now in control of the House, Senator Durbin believes the future of the Act is grim.\textsuperscript{32} Senator Durbin stated that the Act must endure a “long, long journey ahead.”\textsuperscript{33}

2. PROVISIONS OF THE 2011 DREAM ACT

The Dream Act of 2011 provides a conditional permanent resident status for certain long-term residents who entered the U.S. illegally as children.\textsuperscript{34} The requirements state that the applicant must have been continuously physically present in the U.S. since at least five years before the date of enactment of the DREAM Act 2011;\textsuperscript{35} have been fifteen years of age or younger on the date he or she initially entered the U.S.;\textsuperscript{36} be a person of good moral character since the date he or she entered the U.S.;\textsuperscript{37} have not ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;\textsuperscript{38} have not been convicted of any offense under Federal or State law punishable by a maximum term of imprisonment of more than one year;\textsuperscript{39} have not been convicted of three or more offenses under Federal or State law for which he or she had been convicted on different dates for each of the three offenses and imprisoned for an aggregate of ninety days or more;\textsuperscript{40} must be admitted to an institution of higher education in the U.S. or have earned a high school diploma or obtained a general education development (GED) certificate in the U.S.;\textsuperscript{41} and must be thirty-five years of age or younger on the date the Act is enacted.\textsuperscript{42} An applicant applying for permanent resident


\textsuperscript{33} Id.


\textsuperscript{35} Id. § 3(b)(1)(A).

\textsuperscript{36} Id. § 3(b)(1)(B).

\textsuperscript{37} Id. § 3(b)(1)(C).

\textsuperscript{38} Id. § 3(b)(1)(D)(ii).

\textsuperscript{39} Id. § 3(b)(1)(D)(iii)(I).

\textsuperscript{40} S. 952 § 3(b)(1)(D)(iii)(II).

\textsuperscript{41} Id. § 3(b)(1)(E)(i) & (ii).

\textsuperscript{42} Id. § 3(b)(1)(F).
status on a conditional basis must establish that he or she has registered under the Military Selective Service Act if he or she is subject to that Act.\textsuperscript{43} A careful examination of the text of the 2011 DREAM Act shows that the criteria are very specific and tailored and apply to a small group of individuals.

3. STATES’ RESPONSE TO THE DREAM ACT

In the past ten years, while national lawmakers have been unable to pass the federal DREAM Act, some states have already passed legislation addressing the issue of undocumented students pursuing higher education at state-affiliated universities and colleges. While the U.S. federal government maintains supremacy in immigration matters, such as attaining citizenship, the states’ individual responses are possible largely because higher education of state residents is currently the responsibility of the states.\textsuperscript{44} While states cannot legalize the status of undocumented immigrants, they may allow undocumented students to attend state universities and qualify for in-state tuition.\textsuperscript{45} Colleges and universities each have their own policies regarding the admission of undocumented students; some reject them and others admit them.\textsuperscript{46}

By 2001, nine states had passed laws permitting certain undocumented students to enroll and also pay in-state tuition at state universities.\textsuperscript{47} By 2009, Texas, California, Utah, Washington, New York,
Maryland, Oklahoma, Illinois, Kansas, Nebraska, and New Mexico had laws that provided for in-state tuition to undocumented students who were state residents and who had attended and graduated from the state’s secondary schools.\footnote{See Garcia, supra note 47, at 256; see also Karin Fischer, \textit{Illegal Immigrants Rarely Use Hard Won Tuition Break}, CHRON. HIGHER EDUC., Dec. 10, 2004, http://chronicle.com/article/Illegal-Immigrants-Rarely-Use/27367/} Four of the above-mentioned states (New York, Texas, California, and Illinois) are among the states that have the most potential DREAM Act beneficiaries and large undocumented immigrant populations generally.\footnote{See \textit{The DREAM Act: Creating Opportunities}, supra note 45, at 3.} These states generally require undocumented students to: 1) attend schools in the state for a certain number of years; 2) graduate from high school in the state; and 3) sign an affidavit stating that they will apply to legalize their status as soon as they are eligible to do so.\footnote{Id. at 7.} Nine (9) other states (Colorado, Connecticut, Florida, Iowa, Massachusetts, Mississippi, Missouri, Oregon, and Rhode Island) are currently considering similar legislation that would allow undocumented students to attend state universities.\footnote{Id.}

All of the existing state laws extending educational benefits to legal permanent residents are in compliance with federal law.\footnote{Id.} Section 505 of the \textit{Illegal Immigration Reform and Immigrant Responsibility Act of 1996} (IIRIRA) prohibits states from providing any higher education benefit based on residency to undocumented immigrants unless they provide the same benefit to U.S. citizens in the same circumstances.\footnote{Id.; see also \textit{Illegal Immigration Reform and Immigrant Responsibility Act of 1996} § 505(a), 8 U.S.C. § 1623 (1996).} The eleven (11) states that grant undocumented students in-state tuition also provide U.S. citizens or legal permanent residents who meet the requirements, but who no longer live in the state, with in-state tuition rates.\footnote{See \textit{The DREAM Act: Creating Opportunities}, supra note 45, at 3.}

A. New York and California Dream Acts

After the 2010 defeat of the DREAM Act in Congress, New York not-for-profits, including the New York State Youth Leadership Council (“NYSYLC”), started an aggressive campaign to introduce and gather
support for a proposed New York state version of the DREAM Act.\(^{55}\) In March 2011, State Senator Bill Perkins and Dan Squadron introduced the New York DREAM Act (S. 4179).\(^{56}\) The New York DREAM Act aims to provide benefits to New York’s undocumented students who meet certain criteria and it represents one of the broadest pieces of state legislation pertaining to undocumented youth’s rights in the U.S.\(^{57}\) The proposed benefits of the bill include access to financial aid for higher education, driver’s licenses, work authorization, and health care.\(^{58}\) In order to qualify for these benefits, the undocumented student must have arrived to the U.S. before the age of sixteen (16), be under the age of thirty-five (35), have resided in New York State for at least two (2) years, have obtained a high school diploma or GED equivalent from an American institution, and have good moral character.\(^{59}\) The New York DREAM Act represents a hopeful example of how far states can and are willing to go to protect the education rights of undocumented students.

On July 25, 2011, California Governor Jerry Brown signed into law legislation allowing undocumented Californian college students to receive privately-financed scholarships for California state universities.\(^{60}\) The bill, part of package known as the California Dream Act, would entitle those students to the same kind of state aid that California legal residents can receive. Governor Brown also indicated that he would likely support an additional measure allowing undocumented students to seek California state-funded tuition aid in the future.\(^{61}\) The California Dream Act has passed the California state Assembly, but has not come to the floor for a vote in the Senate.\(^{62}\) Assemblyman Gil Cedillo of Los Angeles, the author of the California Dream Act, is pursuing a more expansive bill in the California legislature, which would make certain undocumented students eligible for the state’s Cal Grants and other forms of California state tuition aid.\(^{63}\) The California Dream Act has drawn strong support across the California Latino community, and is “seen as a civil rights issue in the

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\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) See Medina, supra note 8.


\(^{62}\) See Medina, supra note 7.

\(^{63}\) Reston, supra note 61.
Latino community, especially for young people.\(^{64}\)

B. The Beason-Hammon Alabama Taxpayer and Citizen Protection Act

The Alabama state legislature has recently moved to drastically curtail the rights of Alabama’s undocumented children and students. On May 5, 2011, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (“H.B. 56”) was introduced to the Alabama State Senate, and was signed by Alabama Governor Robert Bentley into law on June 9, 2011.\(^{65}\) H.B. 56 is an “anti-immigrant” bill.\(^{66}\) Under H.B. 56, renting a house or even giving a ride to an undocumented immigrant is a criminal offense.\(^{67}\)

The text of H.B. 56 is uniformly anti-immigration, and the original version of the law took particular aim at the rights of undocumented children in the Alabama public schools.\(^{68}\) H.B. 56 states that “[a]n alien who is not lawfully present in the U.S. shall not be permitted to enroll in or attend any public post-secondary education institution in [the state of Alabama].”\(^{69}\) H.B. 56 effectively turns Alabama public school teachers and administrators into immigration officials as it targets undocumented students’ presence at public schools and requires that school officials collect information about the status of these students and their parents.\(^{70}\)

H.B. 56 also puts an unprecedented demand upon schools and educators by making school officials and teachers personally responsible to facilitate the law.\(^{71}\) Schools have the responsibility to report undocumented

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64. Id. (quoting Jaime A. Regalado, director of the Pat Brown Institute of Public Affairs).
65. See 2011 Ala. Acts 535. H.B. 56 was introduced to the Alabama House of Representatives on June 2, 2011. Id.
67. Id.; see also 2011 Ala. Acts 535 § 13(a).
69. 2011 Ala. Acts 535 § 8. H.B. 56 specifically claims under § 7(e)(1) that verification of lawful presence in the U.S. shall not be required “(1) For primary or secondary school education, and state or local public benefits that are listed in 8 U.S.C. § 1621(b).” Id. § 7(e)(1). It is important to note that H.B. 56 specifically recognizes the federally protected right for undocumented students to access primary and secondary school as mandated by 8 U.S.C. § 1621(b). Id. This paper will later discuss the distinction regarding the U.S. federal education rights protection. See infra Part III.
70. See Violand, supra note 66.
71. Cf. Vargas, supra note 2. The trend of making teachers personally responsible for determining whether students are undocumented possibly was influenced by stories like that of Jose Vargas, who claims that his teachers knew of his undocumented status and aided him despite his illegal status. Id.
students and their parents. H.B. 56 states that every public elementary and secondary school must determine whether the student attempting to enroll in school was born outside the U.S.’s jurisdiction or whether that child is the child of an alien not lawfully present in the U.S. H.B. 56 further requires that these students or parents submit either the student’s original birth certificate or a certified copy of the birth certificate to the school. Section 28 of H.B. 56 requires a public school official to make a legal conclusion about a student’s status within the U.S. Such a status determination by non-professionals could be incorrect and, as a result, be very damaging to the future of a student and his or her family. H.B. 56 ostensibly claims to be collecting this information to analyze and identify the effects upon the standard and quality of education provided to students residing in Alabama and the costs of undocumented children upon the school system. However, commentators argue that the reporting requirement H.B. 56 puts upon Alabama public school officials and teachers is not simply to assess costs, but to prevent undocumented children access to primary and secondary education and that the requirement will inevitably lead to the type of racial profiling in education that is observed in law enforcement practices.

With H.B. 56, the Alabama legislature’s policy towards undocumented children and public schools in particular illustrates a growing animosity towards undocumented students and could be a harbinger of future state legislative efforts throughout the U.S. Policies such as those articulated by H.B. 56 violate international human rights law and U.S. treaty obligations as well as U.S. constitutional law. An examination of the existing U.S. constitutional framework delineates the rights related to undocumented students’ access to higher education within the U.S., particularly as related to the Equal Protection Clause, and highlights an argument for the passage of the DREAM Act.

72. See Violand, supra note 66; see also 2011 Ala. Acts 535 § 2.
74. See id. § 28(a)(2).
75. Id. § 28(a)(1).
76. Id. § 28(d)(3)–(4).
77. Violand, supra note 66.
78. See discussion infra Sections IV & VIII.
III. OVERVIEW OF EDUCATION LAW IN THE U.S.

1. THE U.S. DOES NOT GUARANTEE A FUNDAMENTAL RIGHT TO EDUCATION

At the state level, a myriad of regulations regarding undocumented students’ access to higher education currently exist or have been proposed. However, at the federal level, there is currently no federal law that explicitly prohibits undocumented children from attending public colleges or universities. While there is no federal law prohibiting undocumented students from attending higher education institutions, there is no law protecting undocumented students’ right to higher education nor is there a recognized fundamental right of education generally.

The U.S. Constitution neither expressly mentions education, nor is it guaranteed as a right to children. Under U.S. law, children possess limited, fundamental constitutional rights, such as a Thirteenth Amendment right not to be enslaved and general rights under the Due Process Clause to not be arbitrarily deprived of life or liberty. Yet, of the negligible set of constitutional entitlements children enjoy, education is not one of them. The U.S. Supreme Court rejected an argument that education is a fundamental constitutional right in San Antonio Independent School District v. Rodriguez. In Rodriguez, the Supreme Court refused to recognize a federal right to education because it determined that the Constitution neither explicitly nor implicitly recognized education. Furthermore, the Court found that education’s individual importance, as well as its relationship in promoting other protected “political” rights, such as the right to free speech, and to vote, was insufficient to transform education and access to education into a federally-protected fundamental right within the U.S.

79. See supra Section II.3.A–B, for a discussion of state regulations in California, New York, and Alabama.
81. U.S. CONST. amend. XIII.
82. U.S. CONST. amend. XIV, § 1.
84. See Rodriguez, 411 U.S. at 33–35 (holding that only those rights that are “explicitly or implicitly guaranteed by the Constitution” are fundamental for equal protection analysis); Aaron Y. Tang, Privileges and Immunities, Public Education, and the Case for Public School Choice, 79 GEO. WASH. L. REV. 1103, 1148 (2011) (citing Rodriguez, 411 U.S. at 35).
85. Rodriguez, 411 U.S. at 35; see Tang, supra note 84, at 1148.
86. See Rodriguez, 411 U.S. at 35–36.
2. Plyler: Striking Down Discrimination of Undocumented Students

In the years after Rodriguez, the Court seemed to move away from addressing the issue of education as a fundamental right, and instead began to examine states’ actions that prevented social group’s access to education. Accordingly, the Court began to review certain educational issues with an Equal Protection approach. In Plyler, the Supreme Court addressed the right of undocumented children to receive the same educational rights as children who were citizens.87 The Court examined the constitutionality of a Texas statute that withheld state funds allocated to education if such funds were being used to educate undocumented students.88 The statute also allowed local school districts to deny undocumented students enrollment in Texas public schools on the basis of a student’s undocumented status.89 The Court ultimately struck down this statute and held that the Equal Protection Clause gives undocumented students the same right to obtain basic education as any other students have.90 “The Court reasoned that an alien [or undocumented person] is a ‘person’ in any ordinary sense of the term, especially considering that undocumented immigrants ‘have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”91 While Plyler was a victory for undocumented students, the Plyler court only recognized the right as applied to primary and secondary schooling.92

3. After Plyler: Papasan and Back-Tracking

After Plyler, where the Court ruled that undocumented students had the right to receive the same basic education as other students, the Supreme Court declined to recognize or deny a federal right to “minimally adequate” education in Papasan v. Allain.93 In Papasan, the Court considered

88. Lee, Note, supra note 87, at 240; see Plyler, 457 U.S. at 205.
89. Lee, Note, supra note 87, at 240; Plyler, 457 U.S. at 205 & 205 n.1.
90. Lee, Note, supra note 87, at 240; see Plyler, 457 U.S. at 230.
91. Lee, Note, supra note 87, at 240 & 240 n.66.
93. Papasan v. Allain, 478 U.S. 265, 285 (1986). In Papasan, the Court stated that it had “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be
whether a curtailed fundamental right to a minimally adequate education existed at all.\textsuperscript{94} Students brought an action against state officials challenging Mississippi’s distribution of public school land funds, claiming that the distribution resulted in a disparity in school funds from one section of schools as compared to other schools.\textsuperscript{95} The students claimed the disparity in the funds led the children of the affected school section to receive a less than “minimally adequate” education.\textsuperscript{96} Plaintiffs in \textit{Papasan} did not put forth the issue of a fundamental right to education, as in \textit{Rodriguez} (nor did they attempt a straight-forward Equal Protection claim, as in \textit{Plyler}), but instead addressed the issue of education rights through a less-than-fundamental liberty interest, that of a minimally adequate education. Some legal scholars argue that the Court’s unwillingness to strike down the “minimally adequate” standard signified progress towards education being identified as a fundamental right, however, there remains no federally recognized right to education.\textsuperscript{97}

IV. APPLICATION OF U.S. CONSTITUTIONAL FRAMEWORK TO THE DREAM ACT

1. \textit{PAPASAN’S “MINIMALLY ADEQUATE” STANDARD IS INADEQUATE}

   Even if the Supreme Court were to recognize a “minimally adequate” education standard, undocumented students would not likely receive the right to the type of higher education that the DREAM Act provides. One of the reasons for this is the arbitrariness of the “minimally adequate” standard itself. A “minimally adequate education” is an unclear and imprecise standard that would need constant updating and evaluating in order to be current. For example, a modern “minimally adequate education” would include higher standards and competencies than what constituted a “minimally adequate education” when \textit{Rodriguez}, \textit{Plyler}, or \textit{Papasan} were decided. Today, there is ostensibly a greater need for young people entering the workforce to have a college education and degree than there was thirty years ago.\textsuperscript{98} However, the Supreme Court will likely never

\begin{itemize}
  \item \textsuperscript{94} See \textit{id.} at 285–86.
  \item \textsuperscript{95} \textit{Id.} at 274.
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{98} See Knowledge Gap: 7 in 10 Without College Degrees Don’t Know Basics About
recognize the right to a college education as part of a “minimally adequate” education. But in the context of the DREAM Act, it can be argued the need is not for the U.S. to formally recognize a federal fundamental right to education, but instead to recognize or protect an “equal educational opportunity” right.\textsuperscript{99} It is in this context that \textit{Plyler}, with its analysis of education rights through an Equal Protection perspective, is most aligned with the ideas behind the DREAM Act.

2. \textit{Plyler}’s Relevance to the DREAM Act

The argument in \textit{Plyler}, that undocumented students have a right to the same basic education as other students, reflects the reasoning behind the DREAM Act. The DREAM Act, similar to \textit{Plyler}, invokes the right to equal opportunity and to be free from discrimination.\textsuperscript{100} Much of the language used to describe the Court’s reasoning in \textit{Plyler} can be applied to the rationale behind the DREAM Act. The Court in \textit{Plyler} noted that the children at issue “did not independently choose to come to the U.S. illegally,” but, instead, were brought to the U.S. by their parents.\textsuperscript{101} Because these children did not have a choice as to their immigration status, “the Court reasoned that punishing the children for the acts of their parents or guardians violated fundamental notions of justice.”\textsuperscript{102} This factual point also applies to the background of the children who qualify for the DREAM Act, as many of them were also brought illegally to the U.S. as children by their parents.

Additionally, the Court in \textit{Plyler}, while failing to grant the right to education fundamental status, did note that education plays an essential role in cultivating an economically fruitful society.\textsuperscript{103} Indeed it is this belief in education as a means to advance members of American society that is the ethos behind the creation of the DREAM Act.\textsuperscript{104} However, it is Justice Blackmun’s concurrence that perhaps best articulated concerns about the

\footnote{100. Lee, Note, \textit{supra} note 87, at 240; see Nicole Ochi, \textit{Reinventing Plyler: Undocumented Students, Public School Reform, and the DREAM Act}, 28 CHILD LEGAL RTS. J. 1, 11–12 (2008).}
\footnote{102. Lee, Note, \textit{supra} note 87, at 241; see \textit{Plyler}, 457 U.S. at 220.}
\footnote{103. \textit{Plyler}, 457 U.S. at 221.}
\footnote{104. See Ochi, \textit{supra} note 100, at 11.}
undocumented students at issue in Plyler, and which could be applied to the undocumented students who stand to benefit from the DREAM Act: that “[c]hildren denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve.”

3. DENYING UNDOCUMENTED STUDENTS EQUAL EDUCATIONAL OPPORTUNITIES IN THE PUBLIC SCHOOL SYSTEM AND THE WORKFORCE

A. Linguistic Barriers

Justice Blackmun’s fear, articulated in the concurrence of Plyler, has unfortunately become a reality. Race, language, and income-based achievement gaps have come to underscore the lack of equal access to education in the U.S. By the end of high school, the average Latino student scores at approximately the same level as the average white eighth grader. Minority and undocumented children are less likely to be in gifted and talented programs and are more likely to be in special education programs for children with emotional or behavioral needs. Latinos have higher drop-out rates (28% for Latinos compared to 7% for White-Anglo students) and lower high school completion rates than White-Anglo students.

Education gaps in American society are becoming more prevalent and starting to occur even earlier as a greater number of immigrant children enter the American public school system. “The overall percentage of

105. Plyler, 457 U.S. at 234 (Blackmun, J., concurring).
110. Id.
minority students in public schools increased by 17% between 1972 and 2000” and “[s]lightly more than 10% of that increase was attributable to Latinos.” Additionally, “limited English proficien[cy] (“LEP”) students are the [fastest] growing population in U.S. public elementary schools.”

Between 1993 and 2003, the total number of LEP students in the U.S. schools increased by more than 50 percent from 2.8 million to an increase of more than four (4) million children. “Between 1980 and 2000, the number of children in the U.S. speaking a language other than English at home more than doubled, from 5.1 million to 10.6 million,” 2.6 million of those students being LEP and representing five (5) percentage of all students in U.S. schools.

B. Cost Barriers

The obstacles preventing undocumented students from achieving higher education grow greater as they progress to higher levels of education. A study of 15,000 eighth-grade students in the U.S. indicates that Latinos, on average, are overrepresented with respect to higher education risk factors. The study’s results illuminate Latino students’ distinct disadvantage in preparing for postsecondary education.

Even if undocumented students are able to succeed and make it through the American primary and secondary education system, their prospects of attending and graduating college are very slim. Nearly one-fourth of all LEP students ages 16–24 who enroll in the American public school system drop out. One of the factors attributed to this statistic is

111. Id.
115. FIX AND PASSEL, supra note 114, at 22.
116. See López, supra note 109, at 1380–84.
117. Id. Such factors include “having parents without a high school degree (“educational legacy”); having a low family income; having siblings who have dropped out of school; being held back in school; having a C or lower grade point average; changing schools; and having children while still in high school.” Id.
118. MICHAEL FIX & JORGE RUIZ DE VELASCO, CHALLENGES FACING HIGH IMMIGRANT-SERVING SECONDARY SCHOOLS IN THE CONTEXT OF STANDARDS BASED SCHOOL REFORM, THE
the prohibitive cost of higher education to undocumented students. 119 “The average tuition and fees at public four-year institutions reached $7,605 per year in 2010 for in-state students, up from $4,115 in 2002.” Traditionally, these in-state reduced tuition rates are not available to undocumented students. The cost for private schooling is even higher and has been rapidly increasing. Tuition and fees at private non-profit four-year college rose to an average of $27,293 in 2010. With the costs rising during the 1990s and early 2000s, the percentage of “academically qualified low-income high school graduates attending four-year colleges fell from 54 percent in 1992 to 40 percent in 2004, and the percentage of qualified moderate-income students dropped from 59 percent to 53 percent.” 120

Prohibitive costs and legal barriers to entry in many states make higher education impossible for many undocumented students. For this reason, the DREAM Act offers great hope and opportunity. Higher education has become something that is viewed almost as a necessity in the U.S. 121

4. IS DENYING HIGHER EDUCATION OPPORTUNITIES DENYING AN OPPORTUNITY TO PARTICIPATE IN SOCIETY?

Higher education, particularly a college degree or training such as what the DREAM Act provides, has been proven to be an indicator of greater financial stability, health, and contribution to society. A 2007 study by the College Board found that, over the course of his or her working life, the average college graduate earns in excess of 60 percent more than a


120. *Id.*


Fifty (50) years ago, 48 percent of recent high-school graduates enrolled in a college or university. In 2009, that number was more than 70 percent - a historic high . . . . A 1999 survey sponsored by the Educational Testing Service found that 87 percent of Americans felt the lack of a college education to be a disadvantage in life. “Education has been central to the American Dream since the time of the nation’s founding,” Drew Gilpin Faust, the president of Harvard University, wrote in 2009…. But in the decades since World War II, it has been college, not just elementary or high school, as before, that has become “fundamental to cherished values of opportunity.”
high-school graduate, and workers with advanced degrees earn two to three times as much as high-school graduates. As of 2006, workers without a high school diploma earned only $419 per week and had an unemployment rate of 6.8%. In comparison, workers with a bachelor’s degree earned $962 per week and had an unemployment rate of 2.3 percent, while workers with a doctoral degree earned $1,441 per week and had an unemployment rate of 1.4 percent. But salaries are not the only benefits correlated with educational attainment levels. College graduates are also more likely than other types of workers to enjoy health and pension benefits provided by his or her employer.

In addition to the tangible benefits that come with attainment of higher education, college graduates have greater opportunities. Accordingly, denying the possibility of achieving higher education takes away opportunity and effectively discriminates. Educational equity means an actual guarantee of fair access to some level of educational opportunity. The impact of the DREAM Act is all the “more meaningful in light of the evolving, fast-paced, complex nature of the global economy.” Education no longer prepares youth for participation in local factory or farming economies; today’s children will face future economic challenges as part of a shared national enterprise. The need for a college education is becoming more necessary as the U.S. economy and industry change from a worker economy to a service-based economy. As one


124. Id.

125. See Baum & Ma, supra note 122, at 8.

126. Id. at 2.


scholar noted, the Bureau of Labor Statistics (BLS) “estimates that many of the occupations that will be most in demand in years to come will rely on highly educated workers. Of the fifteen occupations projected to grow at least twice as fast as the national average (13%), ten require an associate degree or higher.”

Seen in this light, discrimination against undocumented children practiced by states or by the U.S. federal government “profoundly threatens our national vitality, as the lowest achieving states fall further and further behind and as uneducated citizens in these states inflict an ever larger burden on the nation, draining valuable national resources.”

Failing to recognize the states’ responsibility to provide the conditions for children’s future well-being simply leaves millions of children vulnerable to the long-term adverse effects of wealth inequality in the U.S. As the states and the federal government fight to give children adequate education, America endures the resulting detriment.

The Supreme Court’s rationale in Plyler regarding the unfairness of penalizing undocumented children for their parents’ illegal acts, as well as the concern over the creation of a permanent caste of undocumented residents, would seem to be applicable to the undocumented student seeking access to higher education in this day and age. Commentators have similarly suggested that public policy supports the desirability of federal activity in furtherance of providing higher education opportunities for undocumented students.

For this reason, I argue that not allowing undocumented children to pursue higher education under the DREAM Act or in some other meaningful way amounts to discrimination of undocumented children and prevents them from fully participating and engaging in modern American society.

V. THE INTERSECTION OF HUMAN RIGHTS LAW AND U.S. LAW AS RELATED TO EDUCATION RIGHTS AND THE DREAM ACT

The legal application of the DREAM Act in Papasan and Plyler, in
addition to other barriers is inconsistent with current U.S. constitutional law as it relates to assessing human rights and liberties. Goodwin Liu, a leading scholar on educational rights, recently brought to light how “the idea that our Constitution guarantees affirmative rights to social and economic welfare has for some time been out of fashion . . . .”

Meanwhile, Anne Dailey, another scholar on the issue of children’s constitutional rights, has observed “the Supreme Court has recognized some affirmative constitutional rights, most in the realm of procedure such as the right to a speedy trial or to habeas corpus, but for the most part, the Constitution has been treated as a charter of negative liberties.”

Nevertheless, the argument for recognizing children’s developmental right to education is a familiar idea. Children’s fundamental interest in education has been highlighted in cases brought by children against school authorities under many constitutional provisions, including the First Amendment and the Due Process and Equal Protection Clauses. However, none of these approaches have ever yielded a fundamentally recognized right to education. Accordingly, this article proposes that examining the international human rights treaties and obligations will likely yield more positive results in terms of recognizing a right to education, and providing a pseudo-legal basis for passing the DREAM Act.

The globalization of human rights has produced multilateral and international treaties that address human rights issues that were once left solely within the scope of sovereign nations to address. Agreements

135. Dailey, supra note 83, at 2168; id. at 2168 n.281 & 282.
136. Dailey, supra note 83, at 2169; id. at 2169 n.284.
137. Dailey, supra note 83, at 2171; see, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (examining “[t]he process of educating our youth for citizenship in public schools”); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (noting “[t]he importance of public schools in the preparation of individuals for participation as citizens . . . long has been recognized”); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence”); Amy Gutmann, Children, Paternalism, and Education: A Liberal Argument, 9 PHILO. & PUB. AFF. 338, 349 (1980) (“[A] child’s right to compulsory education is a precondition to becoming a rational human being and a full citizen of a liberal democratic society.”).
138. Dailey, supra note 83, at 2171–72 (citing as examples Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 536 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923)). In Pierce, the challenge against an act requiring enrollment in public schools was brought by religious schools on behalf of their students as violating the rights of parents to choose “where their children will receive appropriate mental and religious training.” Pierce, 268 U.S. at 531–32. In Meyer, the court considered whether a statute prohibiting instruction in a language other than English violated the Fourteenth Amendment. Meyer, 262 U.S. at 399.
139. Sarah Elizabeth Nokes, Note, Redefining The Supremacy Clause in The Global Age: Reconciling Medellin With Original Intent, 19 WM. & MARY BILL RTS. J. 829, 846 (2011); see,
such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child are examples of treaties that affect the fundamental rights of people and have an international dimension in ratifying nations.\textsuperscript{140} In the U.S., some of the human rights issues covered in treaties are either guaranteed to citizens through the Bill of Rights and its subsequent international human rights interpretation by U.S. courts, or are covered by the legislation individual states enacted by way of the Ninth and Tenth Amendments.\textsuperscript{141} A right to education or an equal educational opportunity right is not guaranteed in the Bill of Rights or the Constitution generally, and the states have initiated a veritable patchwork of rights and regulations as evidenced by Alabama, New York, and California.\textsuperscript{142} However, the U.S., just like other nations, has obligations relating to education and children under the UDHR and ICCPR, as discussed below.\textsuperscript{143}

\begin{itemize}
\item[](e.g., supra at n.150 (referencing Multilateral Treaties Deposited with the Secretary-General, U. N. TREATY COLLECTION, http://treaties.un.org/Pages/Participation Status.aspx (last visited Dec. 31, 2011)).
\item[](141) See Nokes, supra note 141, at \#47; U.S. CONST. amend. IX; U.S. CONST. amend. X.
\item[](142) See supra Part II.3.
VI. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

1. HISTORY OF UDHR, ICCPR, ICESCR

The international legal system protects and addresses human rights generally through its three main international human rights treaty bodies, the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The Universal Declaration of Human Rights (“UDHR”) was adopted in 1945 as a resolution of the UN General Assembly and as a reaction to the injustices and human rights abuses of World War II. The ICCPR was developed as a means of protecting the civil and political rights of individuals. The implementation of the ICCPR and its Protocols in the territory of states party to the ICCPR is overseen by the Human Rights Council (HRC). The ICESCR was created as a means of protecting the social, cultural, and educational rights of individuals.

2. PROTECTION OF CHILDREN WITHIN THE UDHR, ICCPR, ICESCR

The international community has acknowledged the special and precarious status of children and has taken measures to protect them. Children receive rights from the general international human rights framework and are also defined in an individual capacity. Children are recognized as having rights both in the ICCPR and the ICESCR. The ICCPR states that every child shall have, without discrimination, the right to measures of protection as are required by his or her status as a minor, on the part of his or her family, society, and state, and that every child

145. ICCPR, supra note 140, pmbl., at 52.
146. ICESCR, supra note 140, pmbl., at 49.
149. ICESCR, supra note 140, pt. I, art. 1, at 49; ICESCR, supra note 140, pt. III, art. 13, ¶ 1, at 51.
150. ICESCR, supra note 140, pt. III, art. 10, ¶ 3, at 50; see ICCPR, supra note 140, pt. III, art. 14, ¶ 1, at 54; ICCPR, supra note 140, pt. III, art. 18, ¶ 4, at 55; ICCPR, supra note 140, pt. III, art. 23, ¶ 4, at 55.
151. ICCPR, supra note 140, pt. III, art. 24, ¶ 1, at 55.
THE DREAM ACT AND THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY

should have a right to nationality. The ICESCR assigns more extensive rights to children, as it recognizes that the family is responsible for the care and education of dependent children and prohibits discrimination against children for reasons of parentage or other conditions.

3. CONVENTION ON THE RIGHTS OF THE CHILD

While the general international human rights framework of the UDHR, ICCPR, and the ICESCR address children’s rights in an individual context, the most commonly discussed international human rights documents concerning children’s rights are the Declaration of the Rights of the Child (“Declaration”) and the Convention on the Rights of the Child (CRC). The origins of the CRC began with the Geneva Declaration of the Rights of the Child, which was adopted by the League of Nations in 1924. Previous to 1924, there were growing discussion about the need for a comprehensive human rights instrument dedicated to enumerating and protecting the rights of children. In 1959, there was the creation of the Declaration of the Rights of the Child (“Declaration”).

152. ICCPR, supra note 140, pt. III, art. 24, ¶ 2–3, at 55.
153. ICESCR, supra note 140, pt. III, art. 10, ¶ 1, at 50.
154. ICESCR, supra note 140, pt. III, art. 10, ¶ 3, at 50.
155. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959) [hereinafter DRC]; CRC, supra note 140. Under the CRC, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” CRC, supra note 140, pt. I, art. 1, at 167. This article posits that the discussion of the CRC and children’s rights are pertinent to the discussion of the DREAM Act, even though the students who would be eligible for the DREAM Act as it stands today would likely experience the benefits as individuals over the age of eighteen years. CRC, supra note 140, pt. I, art. 24, ¶ 2(e), at 170; CRC, supra note 140, pt. I, art. 28, at 170; CRC, supra note 140, pt. I, art. 29, ¶ 1(a)–(e), at 170; Development Relief and Education for Alien Minors Act of 2011, EAS 11295, 112th Cong. § 3(b). Because the DREAM Act seeks to address the educational rights of individuals who were brought to the U.S. as children under the age of eighteen and a provision of the proposed 2011 DREAM Act requires an applicant to have at least resided in the U.S. from the age of fifteen or younger, an examination of the undocumented students’ rights under the CRC is appropriate. See EAS 11295 § 3(b).
158. DRC, supra note 155.
was a document that contained ten (10) main principles that expanded on the rights set forth in the 1924 Geneva Declaration. The Declaration, in its Preamble, recognizes that children have special needs and provides that a “child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . .” The Declaration contains ambiguous and very optimistic goals for the protection of children’s rights, but the Declaration created the standard of the “best interests of the child,” and set the stage for later children-focused human rights documents, including the CRC.

The CRC was adopted without a vote on November 20, 1989. The adoption of the CRC represents a culmination of sixty-five (65) years of formal, international legal recognition of the human rights of children. Adam Lopatka, a Polish delegate to the UN Commission on Human Rights, is considered instrumental in the creation of the CRC because he proposed a convention on the rights of the child during the Commission’s 34th Session. “The CRC’s adoption of the Declaration’s ‘best interests of the child’ language establishes the international legally binding standard for evaluating” children’s rights abuses globally. The CRC specifically guarantees children’s rights that are categorized as negative, civil, and political rights, such as the right to life. The CRC also protects “positive” social and economic rights that the state has an obligation to accommodate and facilitate, including the “highest attainable standard of health” and free education.

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159. Id.
160. DRC, supra note 155, pmbl., at 19.
161. See CRC, supra note 140.
164. CRC, supra note 140, pt. I, art. 6, ¶ 1, at 168; see also Hernández-Truyol & Luna, supra note 163, at 302. Hernández-Truyol and Luna discuss negative human rights law in conjunction with the CRC. See Hernández-Truyol & Luna, supra. “Negative rights are rights of persons to be free from governmental interference.” Id. at 302 n.40. They give as an example the First Amendment of the U.S. Constitution, which provides for freedom of persons from undue government interference with respect to free speech. Id. (citing U.S. CONST. amend. I.).
165. CRC, supra note 140, pt. I, art. 24, ¶ 1, at 169; Hernández-Truyol & Luna, supra note 163, at 302. Hernández-Truyol and Luna discuss positive rights as rights that requiring affirmative action by government. See Hernández-Truyol & Luna, supra. They list as an example the ICESCR, which “creates duties on government to provide health care and education to its citizens.” Id. at 302 n.41 (citing ICESCR, supra note 140, pt. I, arts. 12–13, at
VII. RIGHT TO EDUCATION UNDER HUMAN RIGHTS FRAMEWORK

1. RIGHT TO EDUCATION UNDER UDHR, ICCPR, ICESCR

The UDHR, ICESCR, and ICCPR all identify and protect the right to education. Article 26 of the UDHR states that “everyone has the right to education” and that the education shall be free in the fundamental stages. Article 13 of ICESCR “requires parties to recognize that everyone has the right to education and that education shall be free to all.” The right to education included in the ICESCR ‘may arguably be viewed as the most important formulation of the right to education in an international agreement.” Additionally, Article 13 of the ICESCR lays out standards regarding access to the different levels of education in an effort to further achieve the full realization of the right to education: Article 13(a) provides that “[p]rimary education shall be compulsory and available free to all;” Article 13(b) states that “[s]econdary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;” and Article 13(c) states that “[h]igher 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.” ICESCR binds parties to “guarantee that the rights enunciated in the present [c]ovenant will be exercised without discrimination of any kind as to . . . national or social origin, property, birth or other status.”

168).
166. CRC, supra note 140, pt. I, art. 28, ¶ 1(a), at 170.
167. UDHR, supra note 144, art. 26, ¶ 1, at 76.
168. See THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 551 (Gudmundur Alfredsson & Asbjorn Eide eds., 1999); see also ICESCR, supra note 140, pt. III, art. 13, ¶ 1, at 51; Komada, supra note 143, at 465.
170. ICESCR, supra note 140, pt. III, art. 13, ¶ 2, at 51.
171. Id.
2. RIGHT TO EDUCATION UNDER THE CRC

The provisions of the CRC espouse the view that all children have a right to education. Articles 28 and 29 discuss states’ obligations to provide children their right to education. Article 28 additionally directs state parties to recognize this right to education. Under the CRC, the right to education includes undocumented alien children as well as children who are legal citizens of signatory countries. “The CRC requires states to provide free, compulsory primary education to every child” in addition to the requirement they encourage children’s regular school attendance. Article 29 of the CRC requires state parties (1) to direct education for the development of the child to their fullest potential, (2) to have respect for fundamental human rights, and (3) to have respect for the child’s parents and cultural identity. Additionally, Article 2 of the CRC does not allow state parties to discriminate against children based on the child’s wealth, disability, birth or any other status. “The CRC [accordingly] forbids ratifying countries from restricting [citizen and non-citizen] children’s access to education and imposes affirmative duties on [ratifying] nations to promote education for all children within their borders.”

VIII. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK TO THE DREAM ACT

1. U.S.’S NON-RATIFICATION OF THE CRC AND ICESCR

While the provisions set forth in the UDHR, ICCPR, ICESCR, and CRC devote substantial attention to the rights of children and families and the right to education generally, a straight-forward application of these treaties and protected rights to the U.S. domestic legal schema remains an impossibility, as the U.S. has not ratified several of these documents.

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173. Komada, supra note 143, at 462; see also CRC, supra note 140, pt. I, art. 28, ¶ 1, at 170; CRC, supra note 140, pt. I, art. 29, ¶ 1, at 170.
174. Komada, supra note 143, at 462 (quoting CRC, supra note 140, pt. I, art. 28, ¶ 1, at 170).
175. Komada, supra note 143, at 462; see also CRC, supra note 140, pt. I, art. 2, ¶ 1, at 167. “The CRC applies to ‘all children in the State, including visitors, refugees, children of migrant workers and those in the State illegally.’” Komada, supra note 143, at 462 (citing RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 23 (3d ed. 2007)).
176. Komada, supra note 143, at 462 (citing CRC, supra note 140, pt. I, art. 28, ¶ 1, at 170); see also HODGKIN & NEWELL, supra note 175, at 407.
177. Komada, supra note 143, at 462 (citing CRC, supra note 140, pt. I, art. 29, ¶ 1, at 170).
179. Komada, supra note 143, at 462; see also CRC, supra note 140, pt. I, art. 28, ¶ 1, at 170.
including the CRC.\textsuperscript{180} Indeed, only two nations, the U.S. and Somalia, have not ratified the CRC.\textsuperscript{181} Although, the U.S. signed the CRC in 1995, it has not ratified it.\textsuperscript{182} Additionally, the U.S. has not ratified the ICESCR.\textsuperscript{183} Because the U.S. has not ratified either the CRC or the ICESCR, the rights that are incorporated in those human rights treaty instruments do not have full effect upon the U.S.\textsuperscript{184} However, this article suggests that despite the

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181. Komada, \textit{supra} note 143, at 461–62 (citing Revaz, \textit{supra} note 164, at 9). The U.S. has given several reasons for not ratifying the CRC, including a rationale that CRC usurps the rights of parents. See John Quigley, \textit{U.S. and its Participation in the Convention on the Rights of the Child}, 22 ST. LOUIS U. L. REV. 401, 402 (2003). The argument that the CRC interferes with parents’ rights to raise their children according to their own morals, can be dismissed through a close reading of the CRC itself. \textit{See generally CRC, supra} note 140. The CRC expressly acknowledges the rights of parents and stresses the importance of the parent-child relationship. \textit{Id.} Article 5 of the CRC states:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance . . . .

CRC, \textit{supra} note 140, pt. 1, art. 5, at 168. Clearly, this statement places a parental supremacy for the care and guidance of their children. Additional statements defending the rights of parent can be found throughout the CRC. \textit{See generally CRC, supra} note 140. Article 8 assures a child the right to “preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” CRC, \textit{supra} note 140, pt. 1, art. 8, ¶ 1, at 168. Article 9 “ensure[s] that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such [action] is necessary for the best interests of the child.” CRC, \textit{supra} note 140, pt. 1, art. 9, ¶ 1, at 168. Inherent principles such as these articulated throughout the CRC lead scholars to assert that instead of eroding the role and responsibility of parents, instead: “[t]he very concept of legal rights of children is questioned, moreover, on the grounds that it might erode the proper role of parents. . . . By recognizing the role of parents, the Convention avoids becoming an instrument whereby the state might replace the parent.” Quigley, \textit{supra} at 402, 405.


U.S.’s non-ratification of the ICESCR and the CRC, a persuasive argument can be made that other elements of both international law and American domestic law\(^{185}\) can be used to protect undocumented students’ rights to higher education as it appears in the form of the DREAM Act of 2011.

2. U.S. RESPONSIBILITIES UNDER THE UDHR AND ICCPR

The U.S. has obligations under the UDHR and ICCPR relating to discrimination, education, and citizenship which the U.S. government has not honored.\(^{186}\) It can be argued that the current Alabama Bill H.B. 56 and the denial of the 2011 DREAM Act are both violations of the UDHR. The UDHR is a significant document because of its extensive application (to all nations) and its status as the codification and acceptance of international legal custom.\(^{187}\) As a resolution, the UDHR does not need to be ratified like a convention or other treaty body (such as the CRC, ICCPR, ICESCR), and is accordingly applicable to every nation, irrespective of a nation’s UN membership.\(^{188}\) The UDHR is not a legally binding document, and is arguably only enforced through political and social pressure. However, this argument is equally dispelled by human rights experts who view the UDHR as a starting point for their human rights claims.\(^{189}\) Nonetheless, the U.S. is expected to adhere to the principles stated in the text of the UDHR,\(^{190}\) particularly the right to education articulated in Article 26.\(^{191}\) Article 26(1) of the UDHR does not put a limit or ceiling on the level of education that is to be provided; instead, it states that “[t]echnical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”\(^{192}\) Under the current American domestic legal framework, this requirement is clearly not being followed at the federal or the state level as evidenced by both the failure to pass the DREAM Act and the existence of bills such as

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185. See supra Parts IV–V.
186. See, e.g., supra note 143 & accompanying text.
187. See Komada, supra note 143, at 464 (citing Eide & Alfredsson, supra note 147, at xxxi).
188. Id.
189. Id. See also Ashild Samnoy, The Origins of the Universal Declaration of Human Rights, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 10 (Gudmundur Alfredsson & Asbjorn Eide eds., 1999) (noting the identification of human rights as a political weapon was one of the motivations for not giving the text binding status).
190. See Eide & Alfredsson, supra note 147, at xxxi (noting some scholars’ conclusion that the UDHR constitutes binding law as international custom); see also supra note 143 and accompanying text.
191. See UDHR, supra note 144, art. 26, ¶ 1, at 76.
192. Id.
Alabama’s H.B. 56.\textsuperscript{193}

3. THE U.S.’S DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN

Undocumented children are being denied higher education opportunities as a result of the discrimination they face due to their national origin. This is in part because the U.S. has not ratified either the CRC or the ICESCR. The U.S. ratified the ICCPR in 1992.\textsuperscript{194} ICCPR Article 24(1) states that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”\textsuperscript{195} Under this requirement, an argument could be made that the U.S. federal government and certain state governments are discriminating against the undocumented children of undocumented workers and preventing their access to civic participation. Additionally, Article 24(3) of the ICCPR provides that “[e]very child has the right to acquire a nationality.”\textsuperscript{196} With the particular circumstance of deportation frequently facing the undocumented children who move here with their parents and live here illegally when they are children,\textsuperscript{197} programs such as the DREAM Act 2011 provide an opportunity to acquire legal nationality and citizenship, and should be made law. The federal government’s refusal to enact the DREAM Act, and the existence of state measures such as H.B. 56, violates the right of these undocumented students to be free to acquire their American citizenship and nationality.

\textsuperscript{194} 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992). The U.S. ratified with “reservations,” stating that Article 20 of the ICCPR does not authorize action that would restrict the constitutionally protected right of free speech and association. \textit{Id.} The U.S. reserved the right to impose capital punishment, and also noted it was bound to Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” was the equivalent of the cruel and unusual treatment or punishment which the Fifth, Eighth, and Fourteenth Amendments prohibit. \textit{Id.} U.S. ratification was further subject to five “understandings.” \textit{Id.} Pursuant to one “understanding,” [T]he Constitution and laws of the U.S. guarantee all persons equal protection of the law and provide extensive protections against discrimination. The U.S. understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in Article 2, paragraph 1 and Article 26 – to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.

\textit{Id.}
\textsuperscript{195} ICCPR, supra note 140, pt. III, art. 24, ¶ 1, at 55.
\textsuperscript{196} ICCPR, supra note 140, pt. III, art. 24, ¶ 3, at 55.
\textsuperscript{197} See Plyler, 457 U.S. at 226 (noting that “like all persons who have entered the U.S. unlawfully . . . children are subject to deportation”); see also supra Part I.
IX. CONCLUSION

While the rationale articulated in *Plyler* has not led to the grant or recognition of greater rights related to education, the arguments articulated in the landmark 1982 case still resonate today within the U.S. constitutional framework as well as within the international human rights framework. The need for educational reform and non-discriminatory education policies that were articulated in *Plyler* is still present today, and passage of the 2011 DREAM Act would be a symbolic step in improving educational policies and ending discrimination. The spirit and message of *Plyler*, as articulated through the passage of the DREAM Act, would help certain undocumented students achieve a measure of educational parity. The solution to the continued rights violation at the U.S. constitutional level is the extension of *Plyler* and the recognition of education as a fundamental right, as well as the promise of equal educational opportunity throughout America through the passage of the DREAM Act and other such measures. The solution at the international level is the U.S.’s ratification of the CRC.

198. *See supra* Parts III–VII.