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Not Very Collegial: Exploring Bans on Illegal Immigrant Admissions to State Colleges and Universities

Marcia A. Yablon-Zug

University of South Carolina - Columbia, zug@law.sc.edu

Danielle R. Holley-Walker

University of South Carolina - Columbia, holleydr@law.sc.edu

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NOT VERY COLLEGIAL: EXPLORING BANS ON UNDOCUMENTED IMMIGRANT ADMISSIONS TO STATE COLLEGES AND UNIVERSITIES

Marcia A. Yablon-Zug & Danielle R. Holley-Walker***

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I. INTRODUCTION

Freddy Vasquez is an eighteen year old who was brought to the United States by his parents at the age of five. Freddy's parents entered the United States illegally, and once they

* Marcia A. Yablon-Zug is a graduate of Dartmouth College and Yale Law School. As Assistant Professor of Law at the University of South Carolina School of Law, Professor Zug's teaching areas include Family Law, Domestic Relations, and American Indian Law. She has published articles on American Indian property rights, the Indian Child Welfare Act, family based bankruptcy exemptions, and the role of women in Twenty-First Amendment jurisprudence. Her ongoing research interests include American Indian Law, Family Law, and Land Use.

** Danielle Holley-Walker is Associate Professor of Law at the University of South Carolina School of Law. Professor Holley-Walker teaches Civil Procedure I and II, Race and the Law, Administrative Law, and Federal Practice. She has published numerous articles on issues of civil rights and education, including recent articles on No Child Left Behind, charter school policy, desegregation plans, and affirmative action in higher education. Professor Holley-Walker earned a B.A. from Yale University and her law degree from Harvard University.

arrived, they worked, paid taxes, and Freddy attended Virginia public schools. Freddy worked hard in school and attained a high grade point average in high school and an excellent SAT score. During his senior year, he applied to many public universities in Virginia, only to be rejected. Freddy was not rejected based on a lack of academic credentials, but simply because his parents entered the United States illegally. Freddy's story is an increasingly common one. There are an estimated 65,000 students of undocumented immigration status each year who graduate from high school and become eligible to attend two or four year colleges.¹

The election of Barack Obama, the first African-American president, has ushered in a period of self-congratulations. Regardless of whether one likes his politics, his election was roundly considered proof that Americans' votes were based on the candidate's policy positions and not on the color of his skin. Such self-congratulations were perhaps strongest with regard to the South, where local and national media outlets repeatedly pointed to Obama's wins in Virginia² and North Carolina³ as signifying the "death of the Old South"⁴—a South historically hostile to Democrats for "advancing the cause of black people."⁵ Although Obama's wins in these states are unquestionably historic,

1. See NATIONAL IMMIGRATION LAW CENTER, 2005 ANNUAL REPORT 4 (2005), http://www.nilc.org/nilcinfo/2005_nilc_annual_report.pdf (last visited Feb. 27, 2009); see also JEFFREY S. PASSEL, THE URBAN INSTITUTE, FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT (2003), http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf (noting that, according to Current Population Surveys of March 2000-2002 and Census 2000, an estimated 80,000 undocumented immigrants who have lived in the U.S. for more than 5 years reach the age of 18 each year, but only 65,000 of those immigrants complete high school and thus become eligible to enroll in college).

2. See, e.g., Liz Halloran, *Barack Obama Wins Conservative Virginia*, U.S. NEWS AND WORLD REPORT, Nov. 4, 2008, available at <http://www.usnews.com/articles/news/campaign-2008/2008/11/04/barack-obama-wins-conservative-virginia.html> (last visited Mar. 27, 2009).

3. See, e.g., Associated Press, *Obama Wins North Carolina*, CHARLOTTE BUS. J., Nov. 6, 2008, available at <http://www.bizjournals.com/charlotte/stories/2008/11/03/daily45.html> (last visited Mar. 27, 2009).

4. Bonnie Erbe, *Obama's Win Spells Death of Old South*, DESERET NEWS (Salt Lake City, Utah), Nov. 9, 2008, at G05.

5. *Id.*

whether these wins show that the South has discarded its racist past or has simply changed its scapegoat is less clear.

Anti-immigrant policies are gaining strength throughout the country, but the South is fighting to lead the charge. In particular, Southern states are at the forefront of the movement to bar undocumented immigrants from attaining higher education. This past spring, North Carolina instituted a policy banning such students from community college.⁶ One month later, Alabama instituted a similar policy.⁷ During this same period, South Carolina enacted a total ban on undocumented immigrants attending any state institution of higher education. In addition, Virginia, which already had a policy of not admitting undocumented students, extended this policy to deny in-state tuition to the American citizen children of illegal immigrants.

This essay will argue that although such bans may be constitutional, the reasons Southern states give for enacting these bans are disingenuous and do not withstand scrutiny. Consequently, it appears more likely that unstated reasons of racism and discrimination are motivating such policies. If correct, then not only are these policies socially and economically questionable, they are also morally reprehensible.

II. OVERVIEW OF SOUTHERN STATE POLICIES OF ILLEGAL IMMIGRANT ADMISSION TO UNIVERSITIES

The issues surrounding undocumented immigrants and higher education have fluctuated dramatically in recent years. However, until recently, the primary question raised by undocumented immigrants attending institutions of higher education was what level of tuition they should pay. A number of

6. Mary Beth Marklein, *Immigrants Face Tuition "Threat,"* U.S.A. TODAY, July 7, 2008, at A1.

7. Associated Press, *Alabama Board Bars Undocumented Students from Community Colleges*, DIVERSE: ISSUES IN HIGHER EDUCATION, Sept. 29, 2008, available at http://www.diverseeducation.com/artman/publish/article_11743.shtml (last visited Feb. 27, 2009); Posting of Katherine Mangan to THE CHRONICLE OF HIGHER EDUC. News Blog, *Alabama Board Bars Illegal Immigrants From State's 2-Year Colleges*, <http://chronicle.com/news/article/5222/Alabama-board-bars-illegal-immigrants-from-states-2-year-colleges> (Sept. 25, 2008).

states permit undocumented students to pay in-state tuition, but these decisions have been challenged as unconstitutional under the Equal Protection Clause.⁸ The argument raised in these challenges is that two groups of out-of-state students—undocumented students and out-of-state citizen students—are being treated differently. However, at no point in this debate has the ability of undocumented students to attend state universities by paying out-of-state tuition rates ever been seriously questioned. That is changing, and it is the South that is spearheading this change.

Within the past year, four Southern states have instituted policies or proposed legislation to bar undocumented students from attending state colleges and universities. North Carolina⁹ and Alabama¹⁰ bar undocumented students from attending community colleges. In South Carolina, undocumented students are prevented from attending any public college or university,¹¹ and in Virginia, a similar bill that would have codified its well-established practice of barring undocumented students from attending state colleges and universities was presented to the legislature, although it failed to pass.¹²

8. Ashley Zaleski, *In-State Tuition for Undocumented Immigrants*, STATE NOTES: TUITION AND FEES (Educ. Comm'n of the States, Denver, Colo.), Mar. 2008, at 1, available at <http://www.ecs.org/clearinghouse/75/53/7553.pdf>; see, e.g., *Day v. Bond*, 511 F.3d 1030 (10th Cir. 2007); *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008).

9. Marklein, *supra* note 6. It is interesting to note that it was also a Southern politician, North Carolina Representative Sue Myrick, who introduced the Secure Education for Americans Today (SEAT) Act of 2008, which would bar institutions that admit undocumented students from receiving grants directly from the government. See H.R. 6886, 110th Cong. (2008); see also Govtrack.us, H.R. 6886: SEAT Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=h110-6886> (noting that Myrick is a North Carolina representative).

10. See *Alabama Board Bars Undocumented Students from Community Colleges*, *supra* note 7; see also Posting of Katherine Mangan, *supra* note 7.

11. Marklein, *supra* note 6.

12. This bill would have codified what is already Virginia's practice with regard to the right of undocumented immigrants to attend public universities. The bill passed the house but did not survive the senate. Tyler Whitley, *Tough Work Awaits Va. Lawmakers*, RICHMOND TIMES-DISPATCH, Feb. 3, 2008, at A1. A similar bill was presented to the Georgia legislature in 2006 but was ultimately withdrawn. Rhonda Barnett, *Illegal Immigrant Enrollment Bill*

In addition to enacting policies to bar outright undocumented students from attending public universities, some Southern states have instituted other policies aimed at reducing the likelihood of undocumented students attending all state colleges and universities. This past fall, Arkansas began requiring students to present Social Security numbers and proof of residency to register.¹³ In May 2008, Georgia enacted laws to prevent undocumented students from receiving state scholarships or loans.¹⁴ Additionally, and most disturbingly, in March 2008, Virginia extended the ban that prohibited undocumented immigrants from receiving advanced degrees to the American citizen children of those undocumented immigrants.¹⁵

Since 2002, it has been Virginia's policy to advise Virginia's public universities to deny admission to illegal immigrants.¹⁶ However, the American citizen children of undocumented immigrants are now being targeted. Virginia Attorney General Bob McDonnell explained in a memo that a student's domicile or residency is based on the status of their parents and that undocumented immigrants are not state residents.¹⁷ Consequently, according to McDonnell, the American citizen children of undocumented immigrants are presumed not to be state residents.¹⁸ Although students may overcome this

Dropped in Georgia Senate, SIGNAL & URBANITE (Atlanta, Ga.), Jan. 17, 2006, available at <http://media.www.gsusignal.com/media/storage/paper924/news/2006/01/17/News/Illegal.Immigrant.Enrollment.Bill.Dropped.In.Georgia.Senate-1761899.shtml> (last visited Feb. 27, 2009).

13. Marklein, *supra* note 6.

14. *Id.*

15. See Editorial, *McDonnell's Opinion Strikes Tuition Balance*, VIRGINIAN-PILOT (Norfolk, Va.), Apr. 1, 2008, at B6 (discussing Virginia's new documentation requirements).

16. Memorandum from Alison P. Landry, Assistant Attorney Gen., Commonwealth of Virginia, to Presidents, C., Rectors, Registrars, Admissions Dirs., Domicile Officers, and Foreign Student Advisors, and the Executive Dir. of the State Council for Higher Educ. in Va. (Sept. 5, 2002), available at <http://schev.virginia.gov/adminfaculty/immigrationmemo9-5-02APL.pdf>.

17. See *McDonnell's Opinion Strikes Tuition Balance*, *supra* note 15.

18. *Id.* An interesting parallel can be drawn between this policy and a 1960's Wisconsin rule which "refused to grant in-state residency for tuition purposes to young women, born and raised in Wisconsin, who were married to

presumption by proving residency through other methods, such as state drivers licenses or voter registration, the policy means that these children have to jump through additional hurdles.¹⁹ Further, in many cases these additional requirements may prove significant obstacles to school attendance, if providing such “proof” would draw attention to the parents’ undocumented status.²⁰

III. CONSTITUTIONAL ANALYSIS

A. United States Constitution and Federal Law

In *Plyler v. Doe*,²¹ the Supreme Court struck down a Texas statute that banned undocumented immigrant children from receiving public elementary and secondary schooling. The Supreme Court found that the Equal Protection Clause of the Fourteenth Amendment protects the rights of all individuals in the United States, not just U.S. citizens or immigrants granted legal immigration status.²² *Plyler* is thought to be the high-water mark for Supreme Court protection of Latino rights.²³ The case, however, did not address whether undocumented immigrant students have a right to attend state colleges and universities.

More recently, federal courts have considered whether banning undocumented immigrants from state higher education violates the United States Constitution. In *Equal Access Education v. Merten*,²⁴ the Eastern District of Virginia held that Virginia’s ban on undocumented immigrants attending its colleges and universities did not contravene the Constitution.

soldiers fighting in Vietnam. Those women were wives, and wives had their domicile . . . wherever their husbands were.” HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 17 (2000). In both cases the residency rule was used to prevent undesirable students from taking advantage of higher education.

19. See *McDonnell’s Opinion Strikes Tuition Balance*, *supra* note 15.

20. *Id.*

21. 457 U.S. 202 (1982).

22. *Id.* at 211-12.

23. Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 *LA RAZA L.J.* 42, 43-44 (1995).

24. 305 F. Supp. 2d 585 (2004).

The plaintiff in *Merten* was an organization representing the interests of immigrant and minority students, as well as two students brought by their parents to this country illegally as children who sought to enroll in a state university after having received a public school elementary and secondary education.²⁵ The plaintiff argued that the Virginia Attorney General's memo advising Virginia colleges not to allow their admission violated the Supremacy Clause, the Foreign Commerce Clause, and the Due Process Clause of the Fourteenth Amendment.²⁶ The district court rejected all of these arguments and held that the Virginia ban did not amount to a regulation of immigration that is preempted by federal immigration law.²⁷ The court also found that the Virginia ban did not interfere with foreign commerce by keeping immigrants in low-paying jobs that would prevent them from making higher international remittance payments to family in the immigrant's home country.²⁸ Finally, the court held that the plaintiff had no recognized property interest in attaining higher education, and therefore, there was no violation of the Due Process Clause.²⁹

Despite the holding in *Merten* that such bans do not violate the United States Constitution, the federal government has nevertheless acknowledged that federal law does not require states to ban undocumented immigrants from state colleges and universities. After *Merten*, the North Carolina Attorney General Roy Cooper sought guidance from federal officials regarding whether permitting undocumented immigrants to attend North Carolina's community colleges violated federal law.³⁰ The state was subsequently informed by the Department of Homeland Security that federal law does not bar the admission of undocumented students and that states may make their own determinations on this issue. However, even after receiving this answer, the North Carolina Community College Board did not

25. *Id.* at 592.

26. *Id.* at 593-94.

27. *Id.* at 604-05.

28. *Id.* at 609-10.

29. *Id.* at 612-13.

30. *N.C. Board Approves Funds for Immigrant Policy Review*, COMMUNITY C. WK., Oct. 6, 2008, at 3.

eliminate the ban.³¹ Instead, the Board approved \$75,000 for a study of its policy barring illegal immigrants from admission.³²

B. State Constitutional Law

Cases such as *Plyler* and *Merten* demonstrate that a federal constitutional challenge to these recent policies will likely fail. However, it is possible that a state constitutional challenge might have a better chance for success. In recent years, there has been a movement to expand rights and access to education through guarantees in state constitutions. In many states, parents and students have brought suits arguing that their respective state constitutions guarantee students an adequate education.

For example, in South Carolina, the state supreme court found that the South Carolina constitution guarantees every student the right to a “minimally adequate education.”³³ While these adequacy suits have focused on K-12 education, there may be an opportunity to argue that state constitutional provisions guarantee equal access to undocumented immigrants seeking admission to state colleges and universities.

1. Purported Policy Reasons for These Practices

The widespread approval of such anti-immigrant policies is overwhelming. In the recent North Carolina election for governor, both the Republican and Democratic candidates expressed their approval of the community college ban, demonstrating that support for such policies crosses party lines.³⁴ In addition, this is an issue with both local and national appeal for Southern voters. In North Carolina, not only was this a major issue in the governor’s race, but it was also a central

31. *Id.*

32. Rob Christensen, *Obama Steps into N.C. Debate; Opposes Ban on Illegal Immigrants in College*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 30, 2008, at B1.

33. *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 541 (S.C. 1999).

34. See Benjamin Niolet, *Q Citizen*, THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 25, 2008, at B4. In fact, it was only Michael Munger, the Libertarian candidate, who expressed any disapproval of this policy.

component of North Carolina Congresswoman Sue Myrick's reelection campaign.³⁵

Throughout the South, proponents of these educational bans all make similar arguments. The most common argument focuses on the illegality of the students' presence. Supporters of education bans argue that financial resources should not be spent educating undocumented students whose very presence in this country is a criminal offense. As Representative Myrick stated, "[o]ur higher education system is set up so that our country's resources go to those who are here legally—not those who are breaking our laws."³⁶ North Carolina Lieutenant Governor Beverly Perdue expressed similar sentiments. Speaking on her behalf, Perdue's chief of staff explained that "[w]hile education is one of the worthiest goals of state and local governments, it is hard to justify the expenditure of state funds to train workers who cannot reasonably expect to remain in the country, let alone the state."³⁷

South Carolina lawmakers have expressed similar sentiments. One legislator, Representative Thad Viers, assigned to the Immigration Bill Conference Committee, stated that the South Carolina ban was meant to fill a void in federal immigration law. He argued that if the federal government will not secure the borders, states should create an "unfriendly climate" for undocumented immigrants to encourage "self-deportation" out of South Carolina.³⁸

Another common argument questions the purpose of educating undocumented students whose immigration status will prevent them from being hired after they obtain their degrees. Governor Perdue made this argument stating that "[t]he

35. *Bill Targets Admission of Illegal Immigrants*, COMMUNITY C. WK., Oct. 6, 2008, at 9.

36. *Id.*

37. David Pluviose, *Learning While Undocumented: North Carolina Community College Students Are Caught in the Cross Hairs of Illegal Immigration Opponents*, DIVERSE ISSUES IN HIGHER EDUC., Oct. 2, 2008, at 28, available at http://www.diverseeducation.com/artman/publish/printer_11770.shtml.

38. Robert Morris, *S.C. Bill May Block College for Illegal Immigrants*, MYRTLE BEACH SUN NEWS, Apr. 6, 2008, at A1 (Statement of Rep. Thad Viers).

community college is the linchpin for retraining, GEDs, [and] college prep classes. With limited dollars, we can't support educating people who will never be able to work here legally."³⁹

In addition, both of the above arguments are based on a third argument, which is that educating these students costs state taxpayers money and that they are receiving a benefit at someone else's expense. As the same Representative Viers explained, undocumented immigrants "should not get the benefits of the citizens of the state."⁴⁰ At first glance, all three of these arguments appear cogent and persuasive; however, the question is whether they can withstand deeper examination.

2. Policy Arguments Against the Ban

The first argument mentioned above is one based on blame and culpability. This argument asks: Why should people who break United States law be entitled to any United States benefits? The unsympathetic protagonist in this scenario is the immigrant who, dissatisfied with his situation in his home country, makes the decision to illegally cross the United States border with the intention of availing himself of generous United States benefits. Whether one condones or condemns such actions (or even agrees with this characterization of the "typical undocumented immigrant") is largely irrelevant to this particular education debate. The majority of undocumented immigrants attempting to enroll in public colleges and universities never chose to enter this country illegally; they were children whose parents made that decision for them. It is estimated that 65,000 foreign born children of illegal immigrants graduate from American high schools annually.⁴¹ These are children who had no part in the illegal acts of their parents and call no other country home. Consequently, blaming them for their

39. Sarah Newell Williamson, *Governor's Candidate Makes Stop in Hickory*, HICKORY DAILY REC. (Hickory, N.C.), Sept. 10, 2008, available at <http://www2.hickoryrecord.com/content/2008/sep/10/governors-candidate-makes-stop-hickory/news/>.

40. See Morris, *supra* note 38, at A1.

41. Frank X. Mullen, *Undocumented Students Worry About School, Careers—and Deportation*, RENO GAZETTE-J., Sept. 21, 2008, at 16A.

undocumented status and withholding higher education as punishment is clearly unjust.

The second proffered argument is based on the assumption that there is no purpose in educating undocumented students because they will never be able to work. However, this is a highly questionable conclusion. It is widely recognized that undocumented immigrants brought to this country as children must be given a path to citizenship.⁴² With the election of Barack Obama as President of the United States, the likelihood of a path to citizenship for undocumented immigrants is now closer to a reality. During a campaign stop in North Carolina, President Obama weighed in on the illegal immigrant education debate stating that, “[w]e want them contributing, and it makes sense for us to provide them some pathway.”⁴³ During Obama’s tenure as President, it is very likely that many undocumented workers will become eligible for citizenship.

Specifically, legislation such as the Development, Relief, and Education of Alien Minors Act (“DREAM Act”)⁴⁴ demonstrates the likely path of such recognition. Under the DREAM Act, undocumented immigrants who were brought here as young children would have a path to citizenship.⁴⁵ The DREAM Act would permit high school children of illegal immigrants to obtain permanent residency by attending college or serving in the armed forces.⁴⁶ Unlike these recent state bans on higher education, the DREAM Act would encourage college attendance by providing legal status as an incentive. The Act recognizes that educating these students is something to encourage, not prevent, and the fact that so many Southern states do not recognize this is astonishing.

In states with a fast-growing, technology-based economy like

42. See, e.g., Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 225 (2007).

43. See Christensen, *supra* note 32.

44. See Development, Relief, and Education for Alien Minors Act of 2007 (DREAM Act), S. 2205, 110th Cong. § 3 (2007).

45. *Id.*

46. The Act was presented to Congress in 2003, 2005, and 2007 and has never passed.

North Carolina, the need for trained technology workers is unquestionable. Recognizing this growing need, many of the state's largest employers, such as IBM, Novartis, Credit Suisse, and EA Associates, have all partnered with the community college system to help keep employees trained in the latest technology.⁴⁷ Further, a recent study indicates that North Carolina will likely face a critical shortage in the number of nurses, teachers, and biotechnology workers needed to sustain the state's economic growth, and training through North Carolina's community colleges is the best means to alleviate this projected shortage.⁴⁸ Consequently, preventing undocumented immigrants from receiving an education may have the effect of crippling the growth of Southern economies in the future.

The third argument against educating these students, which for many people is the most convincing, is that it will result in significant financial cost to state citizens. However, like the previous two arguments, this argument—that the state loses money educating undocumented students—is also faulty. Undocumented students in these states are ineligible for in-state tuition rates. Consequently, such students pay the full out-of-state tuition costs. In North Carolina, the out-of-state tuition rate for its community colleges is \$7,400 a year, one of the highest in the country.⁴⁹ According to Stephen Scott, president of the North Carolina Association of Community Colleges, “the state would actually make about \$2,000 per illegal or undocumented student.”⁵⁰ Further, the amount of taxpayer dollars being devoted to higher education is decreasing rapidly.⁵¹ Many state colleges and universities that were formerly dependent on state appropriations are increasingly funded through tuition and private donors.⁵² Thus, the actual public

47. See Pluviose, *supra* note 37, at 27.

48. *Id.*

49. *Id.* at 28.

50. *Id.*

51. See David A. Tandberg, *The Politics of State Higher Education Funding*, 5 HIGHER EDUC. IN REV. 1, 3 (2008) (stating that state spending for public higher education has been declining as a proportion of state general fund expenditures).

52. *Id.*

expenditures that go toward colleges is becoming a smaller percentage of state budgets, and only a tiny percentage of these expenditures would benefit undocumented students.

The number of undocumented students attending state and public universities is extremely small, further belying the argument that their presence is a significant state expense.⁵³ In North Carolina, it is estimated that just 112 undocumented degree-seeking students were enrolled in the community college system during the 2006-2007 year—"less than one-half of 1 percent of nearly 300,000 students in that category."⁵⁴ Similarly, in Alabama, the likely number of illegal immigrants attending such schools is so small that Chancellor Bradley Byrne could not even provide a rough estimate, although he acknowledged that he did not "think there were a lot of illegal immigrants enrolling at two-year colleges."⁵⁵

The number of undocumented students attending public colleges and universities is currently low and can be expected to remain low regardless of the presence of education bans. Undocumented students are barred from receiving federal financial aid, and in most Southern states,⁵⁶ they are also prevented from receiving in-state tuition rates.⁵⁷ The result is that the cost of a college education will be unattainable for most undocumented students irrespective of specific bans.⁵⁸

53. See Pluviose, *supra* note 37, at 28.

54. *Id.* In Virginia, the estimate is slightly higher. According to the state council for higher education for Virginia, an estimated 500-1,000 illegal immigrants attend Virginia public universities out of a total student population of 370,000. Aaron Applegate, *House Ok's Bill to Block Illegal Immigrants from Attending State Colleges*, VIRGINIAN-PILOT (Norfolk, Va.), Feb. 2, 2008, at B4.

55. Associated Press, *Alabama Board Bars Undocumented Students from Community Colleges*, Sept. 29, 2008, available at http://www.diverseeducation.com/artman/publish/article_11743.shtml (last visited Feb. 27, 2009).

56. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623(a) (2006).

57. Zaleski, *supra* note 8.

58. See Catherine Hausman & Victoria Goldman, *Great Expectations*, N.Y. TIMES, Apr. 8, 2001, at ED26 ("About 25,000 illegal immigrants are enrolled in American public universities and community colleges, with only 200 at private institutions, according to Michael A. Olivas, director of the Institute for Higher Education Law and Governance at the University of Houston Law Center. "There are probably another 50,000 to 75,000 undocumented students who are

Consequently, the concern that a flood of undocumented students will invade institutions of higher education, thereby draining tax dollars and using up scarce resources, is a red herring.

Lastly, even considering the possibility of a slight increase in cost due to the education of a handful of undocumented immigrants, the undocumented Hispanic population is still an overall net financial gain for Southern states. For example, in a recent report, "The Economic Impact of the Hispanic Population on the State of North Carolina," it was determined that North Carolina's Hispanic population, 45% of which is undocumented, costs the state \$61 million in education and other expenses but contributes over \$9 billion to the economy through taxes, purchases, and other contributions.⁵⁹ The state of North Carolina would have to spend more than \$50 billion providing higher education to undocumented students before their education could come close to being considered a financial loss for the state.

The above discussion casts significant doubt on the commonly proffered reasons for undocumented immigrant higher education bans. Despite arguments to the contrary, permitting undocumented students to receive higher education will benefit Southern states, increasing such students' abilities to make significant social⁶⁰ and economic contributions⁶¹ to their respective states. The question that remains, however, is given this fact, why are so many Southern states so opposed to permitting their education? The unfortunate answer may be that

qualified and desirous of a college education,' he said, but they are discouraged from applying because of fear of the I.N.S. and soaring tuitions.").

59. Pamela G. Senegal, *A Politically Charged Wedge Issue*, DIVERSE ISSUES IN HIGHER EDUC., Oct. 2, 2008, at 29 (citing JOHN D. KASARDA & JAMES H. JOHNSON, JR., KENAN INSTITUTE OF PRIVATE ENTERPRISE, THE ECONOMIC IMPACT OF THE HISPANIC POPULATION ON THE STATE OF NORTH CAROLINA, at ix (2006), available at http://kenan-flagler.unc.edu/assets/documents/2006_kenaninstitute_hispanicstudy.pdf).

60. The social consequences of not educating these students may be dire. It is well established that uneducated populations have higher incidences of adverse health behaviors such as drinking and smoking, and also have higher incidences of crime. See Pluviose, *supra* note 37, at 28.

61. When a community encourages the education of all of its citizens, the result is prosperity. *Id.*

prejudices and stereotypes about this population provide the necessary justification for consigning them to the fringes of society with no possibility of advancement.

IV. ETHNIC BIAS AS MOTIVE

If, as the research indicates, educating undocumented workers would not increase tax payer costs and would in fact be financially and socially beneficial to a state, why then is there such opposition to the practice? Unfortunately, the answer appears to be based in the history of the Old South rather than the new. Racism seems to be the driving motivation behind anti-immigrant policies in the South.

The ramped-up animosity⁶² towards illegal immigrants in the South may stem from the changing role of Hispanics in Southern states. For example, in Johnson County, North Carolina, the local sheriff, Steve Bizzell, was captured on record making derogatory statements about Hispanics, including a comment that “illegal immigrants breed like rabbits.”⁶³ When Hispanic immigrants were simply seen as lowly workers performing unenviable tasks, they were seen as “angelic, hard working

62. Banning undocumented immigrants from higher education is not the only anti-immigrant action occurring in Southern states. In Beaufort County, North Carolina, efforts are underway to eliminate other public programs that serve undocumented immigrants. Kristin Collins, *Voices Join in Call for Inclusion*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 8, 2008, at B1. In Virginia, a bill was passed in the House and in the Senate to deny bail to illegal immigrants charged with serious crimes. Jen McCaffery & Richard Quinn, *A Batch of Bills Met with Mixed Reviews*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 6, 2008, available at <http://hamptonroads.com/2008/03/bushel-immigration-bills-met-mixed-reviews>. Georgia, for example, passed in 2006 “the most sweeping immigration reform bill ever passed by any state.” Stephanie A. Bohon, *Georgia's Response to New Immigration*, in IMMIGRATION'S NEW FRONTIERS, 67 (Grey Aurig, Jr. & Tova Andrea Wang eds., 2006). Among other things, the law requires proof of citizenship to access state services and to vote.

63. Rick Martinez, Op-Ed., *Let Bizzell's Words Open a Dialogue*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 10, 2008, at A13, available at <http://www.newsobserver.com/2756/story/1212985.html>; see also Collins, *Voices*, supra note 62. In addition, the spraying of migrant workers with pesticides in the tomato fields of North Carolina, which resulted in severe birth defects, nearly went unpunished. Thomas W. Krause, *Company Settles Birth Defects Case: Parents Exposed to Farm Pesticides*, TAMPA TRIB., Apr. 17, 2008, at METRO 3.

people willing to risk their lives to feed their families.”⁶⁴ Now, as more Hispanic immigrants are trying to attain better jobs, this benevolent attitude is changing.⁶⁵

V. CONCLUSION

As discussed earlier, the Supreme Court’s landmark decision of *Plyler v. Doe*⁶⁶ has not been extended to higher education. However, there is some glimmer of hope that in the future, higher education may be thought of as an essential duty of states, much the way K-12 education is considered today. These glimmers have already appeared in some of the Supreme Court’s more recent higher education cases. In *Grutter v. Bollinger*,⁶⁷ the University of Michigan affirmative action case in which the Supreme Court upheld the university’s decision to use race conscious policies to enhance student body diversity, Justice O’Connor, writing for the majority, explained the important role of state universities in American society:

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society. This court has long recognized that “education . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”⁶⁸

64. *Id.* (quoting Tony Asion, El Pueblo executive director).

65. *See id.* (suggesting the change began with the introduction of North Carolina’s version of the DREAM Act which would have permitted anyone who attended a North Carolina high school for four years and earned a diploma to become eligible for in state tuition).

66. 457 U.S. 202 (1982).

67. 539 U.S. 306, 331-32 (2003).

68. *Id.* at 331-32 (internal citations omitted).

This passage in the *Grutter* opinion cites *Plyler* for the proposition that education plays a fundamental role in maintaining the fabric of American society. *Grutter* also links many of these sentiments to the benefit of education for American citizens. By applying *Plyler's* basic notion that education is one of the most important governmental functions in a higher education context, *Grutter* provides a potential avenue for extending *Plyler's* holding that this education must be provided to undocumented immigrants.

There are also potential legal strategies that have not been explored in the federal cases that have already been decided. For example, in *Merten*, the plaintiffs challenging the ban relied primarily on a due process argument.⁶⁹ *Merten* does not address an Equal Protection Clause challenge to these policies. While the *Washington v. Davis*⁷⁰ standard of proving intentional discrimination to make out an Equal Protection challenge to a facially neutral statute presents a high barrier, if there is increasing evidence of a racial and ethnic animus by lawmakers, an Equal Protection challenge may provide an additional legal theory to dismantle these policies.

Finally, the state constitutional provisions that guarantee education have not been interpreted to include higher education. In the changing global economy, with higher education becoming more of a necessity, the best avenue for dismantling these policies may likely be through state constitutional reform. This is an especially appealing avenue for education reform because in the K-12 adequacy suits we have seen more progress in securing basic education rights that were foreclosed by the United States Supreme Court in *San Antonio v. Rodriguez*.⁷¹ If states have become the forerunners in K-12 adequacy litigation, perhaps the state legislatures and state courts will begin to take the lead in invalidating bans on illegal immigrants' entrance into colleges and universities.

69. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 611-12 (E.D. Va. 2004).

70. 426 U.S. 229 (1976).

71. 411 U.S. 1 (1973).

