

# RECENT DEVELOPMENT

## THE DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS (DREAM) ACT

*I am prepared to work with Republicans and Democrats to protect our borders, enforce our laws and address the millions of undocumented workers who are now living in the shadows. I know that debate will be difficult. I know it will take time. But tonight, let's agree to make that effort. And let's stop expelling talented, responsible young people who could be staffing our research labs or starting a new business, who could be further enriching this nation.*

—Barack Obama, State of the Union Address, January 25, 2011<sup>1</sup>

### I. INTRODUCTION

The Development, Relief and Education for Alien Minors Act of 2010 (“the 2010 DREAM Act” or “the Act”) is the most recent casualty in a series of failed federal legislative efforts to provide a path to citizenship to immigrants brought to the United States illegally as children—either through obtaining a degree from an institution of higher education or through military service.<sup>2</sup> The Act would have also made these immigrants eligible for certain tax credits, Social Security, Medicare benefits, and federal student loans.<sup>3</sup> The DREAM Act implicates contentious domestic policy issues—among them immigration, jobs, education, and public benefits—at both the federal and state levels. The debate over its enactment has highlighted the divergent views on how the United States should handle immigration reform, separating, along one axis, those who prioritize enforcement from those who support assimilation measures, and, along a second axis, those who favor a comprehensive approach to immigration reform from those who support piecemeal legislation. As the history of the DREAM Act demonstrates, these divisions have not always fallen along partisan lines.<sup>4</sup>

Proponents of the legislation argue that young people who were brought to the United States should not be punished for their parents’ choices. They point to cases like that of Mark Farrales, a high school valedictorian, Harvard University graduate, and now doctoral candidate at University of California, San Diego, who spent several months awaiting

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<sup>1</sup> President Barack Obama, Remarks by President in State of the Union Address (Jan. 25, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

<sup>2</sup> See S. 3992, 111th Cong. (2010).

<sup>3</sup> See *id.*

<sup>4</sup> See *infra* notes 69–98 and accompanying text.

deportation to the Philippines.<sup>5</sup> Or they point to Elizabeth Lee, who was almost deported to Peru just prior to beginning her first semester at University of California, Berkeley.<sup>6</sup> Mark Farrales and Elizabeth Lee are among the lucky students whose cases garnered sufficient public attention to pressure Immigration and Customs Enforcement (“ICE”) into declining to deport them.<sup>7</sup> Such case-by-case extensions through discretionary stay or cancellation of removal,<sup>8</sup> or by private bill in Congress, are currently the only hope for students facing deportation.<sup>9</sup> The DREAM Act would provide a structured solution for these individuals, and hopefully prevent others like them from falling through the cracks and being deported.<sup>10</sup> Because the Act would apply only to immigrants who arrived in the United States before they reached the age of sixteen,<sup>11</sup> supporters argue that it would only benefit those who cannot fairly be held responsible for their families’ choices to come to the United States illegally. DREAM Act advocates argue that passage of the bill would ultimately benefit the United States, resulting in “tens of thousands of highly-qualified, well-educated young people [enlisting] in the Armed Forces,”<sup>12</sup> and boosting the economy through increased productivity.<sup>13</sup>

In contrast, opponents of the DREAM Act characterize it as “a back-door amnesty”<sup>14</sup> that will reward the violation of immigration laws, encourage “chain migration” and “exponential population growth” and “transfer [higher education] seats and tuition subsidies to illegal aliens.”<sup>15</sup>

<sup>5</sup> See Elizabeth Aguilera, *Reprieves Postpone Student Deportation; UCSD Case Among Few in Which Immigrants Receive Special Deferrals*, SAN DIEGO UNION-TRIBUNE, Jan. 13, 2011, at B1.

<sup>6</sup> See Erin Allday, *Student Faces Deportation After Arrest of Mother*, S.F. CHRON., Jan. 7, 2011, at C4.

<sup>7</sup> See *id.*

<sup>8</sup> Currently, the U.S. Attorney General has discretionary authority to cancel removal procedures and grant legal permanent resident status to an alien if the alien has been in the United States for at least ten years, has been a person of good moral character, has not been convicted of any serious crimes, and establishes that removal would result in exceptional and extremely unusual hardship to a family member who is a citizen or permanent resident. See 8 U.S.C. § 1229b(b)(1) (2006).

<sup>9</sup> See Allday, *supra* note 6.

<sup>10</sup> See *id.*

<sup>11</sup> See *infra* note 29 and accompanying text.

<sup>12</sup> See *infra* note 30 and accompanying text.

<sup>13</sup> See Press Release, Office of U.S. Senator Michael F. Bennet (D-Colo.), Bennet Urges Senate to Support DREAM Act (Dec. 8, 2010), available at <http://bennet.senate.gov/newsroom/press/release/?id=3d7a1f43-90b5-41ac-8369-c84289cb9cd2> (arguing that children who excel in the classroom, if given the opportunity to attend college, can become productive, taxpaying citizens and help create a stronger workforce, resulting in a stronger economy).

<sup>14</sup> Russell Contreras, *Brown Emphasizes His Opposition to Dream Act*, BOS. GLOBE, Dec. 14, 2010, at 5, available at [http://www.boston.com/news/politics/articles/2010/12/14/brown\\_emphasizes\\_his\\_opposition\\_to\\_dream\\_act/](http://www.boston.com/news/politics/articles/2010/12/14/brown_emphasizes_his_opposition_to_dream_act/).

<sup>15</sup> Press Release, Fed’n for Am. Immigration Reform (FAIR), The DREAM Act Illegal Alien Amnesty: A Bad Idea at the Worst Possible Time, Says FAIR (Mar. 27, 2009), available at [http://immigration.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=immigration&cdn=news&tm=22&f=20&tt=2&bt=1&bts=1&zu=http%3A/www.fairus.org/site/News2%3Fpage%3DNewsArticle%26id%3D20209%26security%3D1601%26news\\_iv\\_ctrl%3D1741](http://immigration.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=immigration&cdn=news&tm=22&f=20&tt=2&bt=1&bts=1&zu=http%3A/www.fairus.org/site/News2%3Fpage%3DNewsArticle%26id%3D20209%26security%3D1601%26news_iv_ctrl%3D1741).

They believe that, notwithstanding its stringent eligibility requirements, the 2010 Act would “grant[ ] legal status for criminal aliens, creat[e] a safe harbor for illegal aliens facing deportation” and would not really require the completion of a college degree or military service.<sup>16</sup> Opponents also object to the fact that the bill does nothing to further secure the borders against illegal immigration.<sup>17</sup> They argue instead for reforms aimed at “securing the border,” “enforcement of immigration laws” and “emphas[izing] legal immigration.”<sup>18</sup>

Although a Gallup Poll showed that 54% of Americans supported the DREAM Act late in 2010,<sup>19</sup> a Senate filibuster comprised mostly of Republicans along with five Democrats defeated what many viewed as the last opportunity to pass such a bill before the Republicans took over the House.<sup>20</sup> The DREAM Act’s failure to pass reflected a shift among legislators, particularly Republicans, toward enforcement, and foreshadowed a 112<sup>th</sup> Congress that is unlikely to support any overhaul of the current immigration laws, particularly one that could be seen as “encourag[ing] more illegal immigration.”<sup>21</sup> Republicans have suggested that the bill that passed in the last House of Representatives is “extraordinarily unlikely” to succeed in the new House.<sup>22</sup> However, President Obama, Senate Majority Leader Harry Reid (D-Nev.) and other proponents of the bill have pledged their continuing support for the DREAM Act and broad immigration reform as a priority for the 112<sup>th</sup> Congress.<sup>23</sup>

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<sup>16</sup> Press Release, Office of Senator John Ensign (R-Nev.), Ensign Statement on Today’s Dream Act Vote (Dec. 18, 2010), available at [http://ensign.senate.gov/public/index.cfm?FuseAction=Media.PressReleases&ContentRecord\\_id=FA69f4ff-d77a-029d-b218-f63034f5d0f0&Region\\_id=&Issue\\_id=](http://ensign.senate.gov/public/index.cfm?FuseAction=Media.PressReleases&ContentRecord_id=FA69f4ff-d77a-029d-b218-f63034f5d0f0&Region_id=&Issue_id=).

<sup>17</sup> See *id.* (indicating that a lack of measures to secure the borders was a flaw of the bill and that comprehensive immigration reform is necessary to finding a “permanent solution”).

<sup>18</sup> Jena Baker McNeill, *Beyond DREAM: Getting Immigration Reform Right*, HERITAGE FOUND. (Dec. 21, 2010), <http://www.heritage.org/Research/Reports/2010/12/Beyond-DREAM-Getting-Immigration-Reform-Right>.

<sup>19</sup> Jeffrey M. Jones, *Slim Majority of Americans Would Vote for DREAM Act Law*, GALLUP (Dec. 10, 2010), <http://www.gallup.com/poll/145136/slim-majority-americans-vote-dream-act-law.aspx>.

<sup>20</sup> See *infra* notes 111–123 and accompanying text.

<sup>21</sup> Shankar Vedantam, *Next Congress Unlikely to Pass DREAM Act, Republicans Say*, WASH. POST, Dec. 24, 2010, at A2 (quoting House Judiciary Comm. Chairman Lamar Smith (R-Tex.)), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/23/AR2010122305377.html>.

<sup>22</sup> *Id.* (quoting Rep. Steve King (R-Iowa)); see also Brian Bennett, *Immigration Overhaul Effort Seems Dead*, L.A. TIMES, Dec. 27, 2010, available at <http://articles.latimes.com/2010/dec/27/nation/la-na-immigration-20101227> (predicting that after Republicans took control of the House the focus would shift to enforcement measures such as increased deportation and workplace verification).

<sup>23</sup> See Press Release, Office of Senator Dianne Feinstein (D-Cal.), Senator Feinstein Statement on the DREAM Act (Dec. 24, 2010), available at [http://feinstein.senate.gov/public/index.cfm?FuseAction=newsRoom.PressReleases&ContentRecord\\_id=04332db5-5056-8059-769b-20ebd0c3b0c2&Region\\_id=&Issue\\_id=](http://feinstein.senate.gov/public/index.cfm?FuseAction=newsRoom.PressReleases&ContentRecord_id=04332db5-5056-8059-769b-20ebd0c3b0c2&Region_id=&Issue_id=) (“I look forward to when I can cast my vote in favor of the DREAM Act again”); Press Release, Office of Senator Harry Reid (D-Nev.), Reid Discusses Priorities for 112th Cong. (Jan. 5, 2011), available at [http://reid.senate.gov/newsroom/010511\\_congress.cfm](http://reid.senate.gov/newsroom/010511_congress.cfm) (listing both securing the border and passing the DREAM Act as

This Recent Development analyzes the decade-long effort to enact the DREAM Act and assesses the future of such a measure, in light of the current political climate. Part II provides a detailed account of the provisions of the 2010 DREAM Act. Part III provides a history of efforts over the past decade to enact legislation aimed at providing a road to citizenship for illegal alien minors. Part IV lays out the main arguments for and against the Act and analyzes the merits of each. Part V analyzes the future of the DREAM Act and proposes several possible ways forward in light of the current landscape. It discusses potential concessions advocates of the bill could make to appease critics, but concludes that, even with further amendment, it is politically unlikely that such a bill will pass as a stand-alone piece of legislation. It might have success, however, as part of a political compromise that also includes passage of enforcement measures. Part V also discusses state legislation, both existing and pending, that might achieve some, but not all, of the aims of the federal DREAM Act.

## II. OVERVIEW OF THE 2010 DREAM ACT'S PROVISIONS

The DREAM Act has two main components, both of which are controversial. The first is a path to citizenship, as an alternative to deportation, for children who came to the United States illegally before reaching the age of sixteen. Ultimately, permanent residency is contingent on obtaining post-secondary education or serving in the military. The second component is the provision of public benefits, particularly higher education benefits, to those students who would qualify were it not for their lack of legal residency. This Part will address each of the main components in turn.

### A. *The DREAM Act's Alternative Route to Citizenship*

The Senate version of the 2010 DREAM Act provides a path to citizenship for select illegal immigrant students in three phases, culminating in naturalization after a minimum of thirteen years.<sup>24</sup> The first phase is a grant of conditional nonimmigrant status for a period of ten years, subject to termination for the violation of a number of conditions. This initial grant does not require completion of postsecondary education or military service.<sup>25</sup> The second phase provides for an adjustment of status to "alien lawfully admitted

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priorities); Obama Won't Give Up On DREAM Act, HUFFINGTON POST (Dec. 21, 2010), [http://www.huffingtonpost.com/2010/12/21/obama-wont-give-up-on-dre\\_n\\_799944.html](http://www.huffingtonpost.com/2010/12/21/obama-wont-give-up-on-dre_n_799944.html) (relating how, days after the defeat of the DREAM Act, Obama reiterated his support for the bill and told lawmakers that broader immigration reform should be a priority for the next Congress).

<sup>24</sup> S. 3992 § 5(a).

<sup>25</sup> S. 3992 §§ 4, 5; cf. H.R. 6497 § 5(a), 5(b)(2) (authorizing conditional nonimmigrant status for a period of only five years, which could be extended for an additional five years only if the alien has acquired a degree from an institution of higher education or completed at least two years in a bachelor's degree program or higher, or has served in the Armed Forces for at least two years and, if discharged, received honorable discharge).

for permanent residence” after nine years of conditional nonimmigrant status, provided the alien has completed two years at an institution of higher education or two years of military service in good standing.<sup>26</sup> Finally, the Act provides for naturalization upon compliance with all relevant provisions of the INA, and after three years of residence in the United States as a legal permanent resident.<sup>27</sup>

### 1. *The Initial Grant of Conditional Nonimmigrant Status*

Conditional nonimmigrant status enables the individual to obtain employment, and travel outside the United States and return without a visa.<sup>28</sup> The initial grant of conditional nonimmigrant status is available exclusively to individuals who were under the age of sixteen when they entered the United States<sup>29</sup> and have been physically present in the United States for a continuous period of at least five years.<sup>30</sup> The bill limits its retroactive application by requiring that any applicant have been under the age of thirty at the time of the bill’s enactment.<sup>31</sup> This is lower than the thirty-five year age limit that appeared in the 2009 version of the bill.<sup>32</sup>

The Act also contains a significant number of substantive eligibility criteria that an individual must meet before he or she will be considered for the first grant of conditional nonimmigrant status.<sup>33</sup> First, the applicant must have been admitted to an institution of higher education in the United States and have earned a high school diploma or a general education development (“G.E.D.”) certificate in the United States.<sup>34</sup> Even an individual who meets these requirements is disqualified if he or she would be otherwise inadmissible or deportable for reasons relating to public health risk,<sup>35</sup> criminal activity,<sup>36</sup> national security,<sup>37</sup> likelihood of becoming a public charge,<sup>38</sup>

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<sup>26</sup> S. 3992 § 6(d)(1)(D).

<sup>27</sup> S. 3992 § 6(k).

<sup>28</sup> S. 3992 § 5(a), 5(b)(2).

<sup>29</sup> S. 3992 § 4(a)(1)(A).

<sup>30</sup> *Id.*

<sup>31</sup> S. 3992 § 4(a)(1)(F).

<sup>32</sup> Compare S. 3992 § 4(a)(1)(F), with S. 729, 111th Cong. § 4(a)(1)(F) (2009). To be clear, this limit does not refer to the age of the applicant upon arriving in the United States. It is merely a cut-off age for determining who can take advantage of the bill’s passage.

<sup>33</sup> S. 3992 §§ 4(a)(1)(C)–(E).

<sup>34</sup> S. 3992 § 4(a)(1)(D).

<sup>35</sup> 8 U.S.C. § 1182(a)(1) (West 2011).

<sup>36</sup> 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) (West 2011). An applicant is also disqualified if he or she has been convicted of any State or Federal offense carrying a maximum prison sentence of one year or more, or three or more State or Federal offenses resulting in an aggregate term of imprisonment of ninety days or more. S. 3992 § 4(a)(1)(c)(iv).

<sup>37</sup> 8 U.S.C. §§ 1182(a)(3), 1227(a)(4).

<sup>38</sup> 8 U.S.C. §§ 1182(a)(4), 1227(a)(5).

participation in persecution,<sup>39</sup> and several other disqualifying provisions under the INA.<sup>40</sup>

The most broad-reaching and nebulous requirement is that the applicant be of “good moral character.”<sup>41</sup> The DREAM Act does not define “good moral character” but the INA states that an individual shall not be found to have good moral character if he or she: (1) is or was a habitual drunkard; (2) derives income principally from illegal gambling activities; (3) has been convicted of two or more gambling offenses; (4) has given false testimony for the purpose of obtaining any benefit under the INA; (5) has been incarcerated for 180 days or more as a result of conviction; or (6) has been convicted of an aggravated felony.<sup>42</sup> Finally, the INA states: “The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”<sup>43</sup> The Act therefore gives the Secretary of Homeland Security (“the Secretary”) discretion to have a more stringent definition of good moral character, but not a less stringent one. Furthermore, the Act states that the Secretary “shall” terminate conditional nonimmigrant status and return the individual to his or her previous status if the alien violates any of the aforementioned qualitative requirements.<sup>44</sup>

Notwithstanding the Act’s multiple requirements and potential disqualifiers, opponents argue that the DREAM Act has too many loopholes.<sup>45</sup> The waiver section of the Act is one such potential loophole. It authorizes the Secretary to waive grounds for inadmissibility or deportability for hu-

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<sup>39</sup> S. 3992 § 4(a)(1)(C)(iii) (prohibiting persecution of any person on account of race, religion, nationality, social group, or political opinion).

<sup>40</sup> These offenses include: (1) participation in smuggling, 8 U.S.C. §§ 1182(a)(6)(E), 1227(a)(1)(E); (2) violation of a student visa, 8 U.S.C. § 1182(a)(6)(G); (3) permanent ineligibility to citizenship, 8 U.S.C. § 1182(a)(8); (4) polygamy, child abduction, and unlawful voting, 8 U.S.C. § 1182(a)(10); and (5) marriage fraud, 8 U.S.C. § 1227(a). These provisions as well as the preceding §§ 212(a) and 237(a) of the Immigration and Nationality Act are incorporated into the DREAM Act under S. 3992 § 4(a)(1)(C). An applicant is also disqualified if he or she has been under a final administrative or judicial order of exclusion, deportation, or removal, received after attaining the age of sixteen years, and he or she did not remain in the United States under color of law after issuance of such order. S. 3992 § 4(a)(1)(E).

<sup>41</sup> S. 3992 § 4(a)(1)(B).

<sup>42</sup> 8 U.S.C. § 1101(f). The act also lists several offenses that would make an immigrant otherwise inadmissible or deportable, but these are also listed independently as disqualifiers under the DREAM Act. Such offenses include voter fraud, persecution, and other misdemeanors.

<sup>43</sup> *Id.*

<sup>44</sup> S. 3992 § 5(c)(1). In addition, the alien must have complied with all of the original requirements of conditional nonimmigrant status and cannot have abandoned his or her residence, as evidenced by an absence of more than 365 days without a valid excuse. S. 3992 § 5(b)(2).

<sup>45</sup> Press Release, Office of Senator Jeff Sessions (R-Ala.), Sessions: DREAM Act Mass Amnesty Would Be “A Disaster” (Dec. 6, 2010), available at [http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord\\_id=bda88b2d-cc2f-d152-6628-75dea3f4abd9&Region\\_id=&Issue\\_id=](http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=bda88b2d-cc2f-d152-6628-75dea3f4abd9&Region_id=&Issue_id=) (expressing concern that DREAM Act benefits would extend to individuals with criminal records and limited education as well as to those who have committed fraud).

manitarian purposes or family unity or when it is otherwise in the public interest.<sup>46</sup> The Secretary may not, however, waive requirements related to criminal history or national security.<sup>47</sup>

In addition to meeting these qualitative requirements, individuals seeking conditional nonimmigrant status face considerable procedural hurdles. The Act requires the Secretary to enact a regulation providing for a procedure by which eligible individuals can apply affirmatively for this status adjustment.<sup>48</sup> Applicants will have only one year after obtaining a high school diploma or G.E.D., enrolling in an institute of higher education or the effective date of the Act, whichever is latest, to apply.<sup>49</sup> The House version of the bill requires the Secretary to charge \$525 per application and any other fees necessary, to be deposited in the General Fund of the Treasury, to recover the full cost of adjudication and processing.<sup>50</sup> Applicants must submit biometric and biographical data, which the Secretary must use to conduct background checks to determine whether there are any criminal or national security threats, and undergo medical examinations.<sup>51</sup> Eligible applicants must also register under the Military Selective Service Act.<sup>52</sup>

## 2. *Adjustment of Status to Lawfully Admitted for Permanent Residence*

Conditional nonimmigrant status lasts for a period of ten years. After nine years as a conditional nonimmigrant, an individual may file an application for an adjustment of status to “alien lawfully admitted for permanent residence.”<sup>53</sup> The most important additional requirement for obtaining permanent resident status is pursuit of higher education or military service. The DREAM Act requires that applicants for permanent residence have acquired a degree from an institution of higher education or completed at least two years in a program for a bachelor’s degree or higher in the United States, or served at least two years in the Armed Forces and, if discharged, received honorable discharge.<sup>54</sup>

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<sup>46</sup> S. 3992 § 4(a)(2) (permitting waiver of grounds of ineligibility based on health, status as a public charge or immigration law violations, but not on criminal status or security threat).

<sup>47</sup> *Id.*

<sup>48</sup> S. 3992 § 4(a)(3); *see also* H.R. 6497, 111th Cong. § 4(a)(3) (2010). Until such a regulation is promulgated, an otherwise eligible immigrant can apply for conditional nonimmigrant status only in the context of removal proceedings; he or she cannot do so prospectively, in the absence of a threat of removal. *Id.*

<sup>49</sup> S. 3992 § 4(a)(4).

<sup>50</sup> H.R. 6497 § 4(a)(4).

<sup>51</sup> S. 3992 § 4(a)(5)–(7). The House bill states that the Secretary may not remove an alien who has a pending application for conditional nonimmigrant status and has established *prima facie* eligibility for that status. H.R. 6497 § 4(e).

<sup>52</sup> S. 3992 § 4(a)(8).

<sup>53</sup> S. 3992 § 6.

<sup>54</sup> S. 3992 § 6(d).

As with the conditional nonimmigrant status requirements, this second section contains a “loophole,” this time in the form of a “hardship exception.”<sup>55</sup> This provision authorizes the Secretary to waive the higher education or military service requirement if the alien can demonstrate both compelling circumstances for the inability to complete the requirements and that removal would result in an extremely unusual hardship to the alien or the alien’s spouse, parent, or child who is a citizen or a lawful permanent resident of the United States.<sup>56</sup>

### 3. *Naturalization*

An alien whose status is adjusted to that of legal permanent resident under the DREAM Act may be naturalized upon compliance with all the standard requirements of the immigration laws.<sup>57</sup> The only difference is that instead of waiting the required five years, a legal permanent resident under the DREAM Act may apply after only three years.<sup>58</sup> All told, the process of becoming a naturalized citizen of the United States under the DREAM Act takes at least thirteen years and, for most applicants, requires pursuit of higher education or military service.

This path to citizenship has been sharply criticized not only by those who oppose “amnesty” measures generally, but by those who believe that the Act sweeps far too many within its ambit—far more than merely the faultless, the best and the brightest.<sup>59</sup> The fact that, even during the first stage of conditional nonimmigrant status, the DREAM Act provides access to many of the benefits generally reserved for citizens of the United States greatly exacerbates these concerns. The following Section describes the benefits in detail.

#### *B. Higher Education Assistance and Other Benefits*

In the current atmosphere of severely strained state and federal budgets, many individuals are averse to granting additional entitlements, particularly to people in the country illegally, no matter how faultless and deserving the intended recipients.<sup>60</sup> The DREAM Act’s provision of public education funding for illegal immigrants has been one of the most controversial aspects of the bill.<sup>61</sup>

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<sup>55</sup> S. 3992 § 6(d)(2).

<sup>56</sup> *Id.*

<sup>57</sup> S. 3992 § 6(k).

<sup>58</sup> *Id.*

<sup>59</sup> See *infra* Parts IV.A & IV.B.

<sup>60</sup> See Press Release, Office of Senator Jeff Sessions, *supra* note 45 (charging that the bill would have “provide[d] illegal aliens with federal educations [sic] benefits such as work-study programs, federal student loans and access to public colleges that are already short on space and resources”).

<sup>61</sup> See *infra* Part IV.C.

Under the 2010 DREAM Act, an alien who is granted conditional non-immigrant status or lawful permanent resident status would become eligible for certain limited federal education assistance.<sup>62</sup> DREAM Act beneficiaries would be eligible for a range of student loan programs<sup>63</sup> and the federal work-study program.<sup>64</sup> Neither of these types of financial assistance involve an outright grant of money. Loans must be paid back, albeit on better terms than those of standard loans. The DREAM Act also makes beneficiaries eligible for certain “services” under the federal provision for “Grants to Students in Attendance at Institutions of Higher Education.”<sup>65</sup> The types of financial assistance available have been curtailed considerably since the introduction of the original version of the bill in 2001, likely in response to criticisms that the bill takes away money from deserving legal residents. Beneficiaries would not be eligible for affirmative grants such as Pell Grants, which were included in the 2001 bill and allegedly would have increased spending by over \$350 million in a three-year period.<sup>66</sup>

Beneficiaries of the Act are also considered lawfully present for all purposes except for certain premium tax credits and reduced cost sharing under the Patient Protection and Affordable Care Act.<sup>67</sup> The DREAM Act does not expressly address state higher education assistance, but the implications for states are perhaps the most ominous.<sup>68</sup>

### III. THE HISTORY AND POLITICS OF THE DREAM ACT FROM 2001 TO THE PRESENT

Although the DREAM Act is commonly associated with the Democratic agenda, its political history is far more bipartisan. Two Republicans first introduced the Act in 2001: Senator Orrin Hatch (R-Utah) and Congressman Chris Cannon (R-Utah).<sup>69</sup> It was not until 2005 that Democratic Senator Richard Durbin (D-Ill.) became the leader of efforts to enact the DREAM Act. The DREAM Act had bipartisan sponsorship until 2009.<sup>70</sup> Despite the DREAM Act’s bipartisan history the bill has become sharply divisive, mostly along party lines. Democratic Senators Durbin and Leahy introduced the 2010 DREAM Act without the support of former Republican

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<sup>62</sup> S. 3992 § 11.

<sup>63</sup> S. 3992 § 11(1); *cf.* H.R. 6497, 111th Cong. § 11(1) (2010) (failing to provide for this type of funding).

<sup>64</sup> S. 3992 § 11(2).

<sup>65</sup> S. 3992 § 11(3).

<sup>66</sup> CONGRESSIONAL BUDGET OFFICE, S. 1291 COST ESTIMATE 1 (2002), available at <http://www.cbo.gov/ftpdocs/36xx/doc3648/S1291.pdf>.

<sup>67</sup> S. 3992 § 12.

<sup>68</sup> See *infra* notes 163–166 and accompanying text.

<sup>69</sup> In the House, Congressman Chris Cannon, introduced the Student Adjustment Act, H.R. 1918, 107th Cong. (2001). Senator Orrin Hatch introduced the Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001).

<sup>70</sup> See S. 729, 111th Cong. (2009) (listing Republican Senator Richard Lugar as a cosponsor).

advocates such as Senator Hatch or Senator John McCain (R-Ariz.).<sup>71</sup> The tenor of the current debate highlights just how acrid relations between Republicans and Democrats, and, more broadly, proponents and opponents of the DREAM Act, have become, both with regard to the merits of the bill and the bill's political implications.

#### A. *The DREAM Act from 2001-2008*

The basic outline and goals of the DREAM Act have remained quite consistent throughout its decade of existence. The stated purpose of the bill Senator Orrin Hatch introduced in 2001 was to "allow children who have been brought to the United States through no volition of their own the opportunity to fulfill their dreams, to secure a college degree and legal status."<sup>72</sup> Access to education for illegal aliens had peaked in 1982 when the Supreme Court held in *Plyler v. Doe*<sup>73</sup> that states could not charge tuition for undocumented immigrants to attend public schools, or ban them from attending.<sup>74</sup> However, Congress considerably curtailed this right in the 1990s. Although an attempt to introduce federal legislation to completely overturn *Plyler* failed,<sup>75</sup> the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") restricted alien access to post-secondary education by providing that a State could only offer in-state tuition to an undocumented student residing in the state if it provided the same benefits to all citizens regardless of their state of residence.<sup>76</sup>

Since 2001, in almost every session of Congress both the Senate and the House have introduced legislation to repeal the IIRIRA provision regarding resident tuition for undocumented students and provide a path to citizenship for these students.<sup>77</sup> Senator Hatch's original 2001 bill would have repealed this provision, thus enabling states to provide in-state tuition to

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<sup>71</sup> See S. 3992, 111th Cong. (2010) (listing only Senators Durbin and Leahy as sponsors); see also Braden Goyette, *Senators Who Could Still Go Either Way on the DREAM Act*, CAMPUS PROGRESS (Dec. 7, 2010), [http://campusprogress.org/articles/senators\\_who\\_could\\_still\\_go\\_either\\_way\\_on\\_the\\_dream\\_act/](http://campusprogress.org/articles/senators_who_could_still_go_either_way_on_the_dream_act/) (discussing McCain's initial position on the bill).

<sup>72</sup> 147 CONG. REC. S8,581 (daily ed. Aug. 1, 2001) (statement of Sen. Orrin Hatch).

<sup>73</sup> 457 U.S. 202 (1982).

<sup>74</sup> See *id.* at 211.

<sup>75</sup> The Gallegly Amendment to the IIRIRA would have allowed states to deny public education or charge tuition to undocumented students in the United States. It passed in Congress but was removed from the final bill. See H.R. 4134, 104th Cong. (1996).

<sup>76</sup> 8 U.S.C. § 1621 (2006); 18 U.S.C. § 1623 (2006). Numerous states have since passed legislation granting undocumented students resident tuition or at least allowing them to attend at non-resident tuition rates. See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 15 BENDER'S IMMIGR. BULL. 1664 (2010).

<sup>77</sup> See, e.g., American Dream Act of 2006, H.R. 5131, 109th Cong. (2006); Development, Relief, and Education for Alien Minors Act of 2005, S. 2075, 109th Cong. (2005); Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. (2003); Student Adjustment Act of 2003, H.R. 1684, 108th Cong. (2003) (as introduced in the House); S. Rep. No. 108-224 (2004) (regarding the proposed amendment of the Illegal Immigration Reform Act of 1996).

illegal aliens residing there, without having to extend that tuition to all citizens.<sup>78</sup> It also provided an alternative route to citizenship similar to the one set forth in the 2010 version of the bill.<sup>79</sup> Although the cut-off age for applying was twenty-one (rather than thirty),<sup>80</sup> it had similar substantive requirements, and fewer disqualifying factors.

After the 2005 version of the bill failed, the DREAM Act's provisions were incorporated into two attempts at bipartisan comprehensive immigration reform—the Comprehensive Immigration Reform Acts of 2006<sup>81</sup> and 2007.<sup>82</sup> Both comprehensive acts ultimately failed, as did two subsequent attempts in 2007 to pass the bill, first as part of another comprehensive immigration bill entitled Security Through Regularized Immigration and a Vibrant Economy (“STRIVE”) Act of 2007,<sup>83</sup> and then as a stand-alone bill.<sup>84</sup> In September 2007, Senator Durbin proposed placing the DREAM Act in a defense bill as an amendment to the Department of Defense Authorization Bill of 2008.<sup>85</sup> He touted the bill as a partial solution to the military's “recruitment crisis”<sup>86</sup> and noted that “many in the Department of Defense believe . . . that the DREAM Act is an important part of making certain we have talented young men and women ready to serve in our military.”<sup>87</sup> Durbin quoted military scholars who stated that the DREAM Act “would be highly beneficial to the U.S. military.”<sup>88</sup> He explained that the education provisions were necessary because “it would be inconsistent with the spirit of our volunteer military to force young people to enlist as a condition for obtaining legal status.”<sup>89</sup> Ultimately, the amendment failed, despite the fact that it was supported by the military.<sup>90</sup>

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<sup>78</sup> S. 1291, 107th Cong. § 2 (2001). The House Bill contained similar terms. See H.R. 1918, 107th Cong. § 2 (2001).

<sup>79</sup> S. 1291 § 4.

<sup>80</sup> S. 1291 § 3(a)(1)(B).

<sup>81</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006). Senators Arlen Specter and John McCain co-sponsored this bill.

<sup>82</sup> Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

<sup>83</sup> Security Through Regularized Immigration and a Vibrant Economy (“STRIVE”) Act of 2007, H.R. 1645 §§ 621–32, 110th Cong. (2007); *Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2007).

<sup>84</sup> Development, Relief, and Education for Alien Minors Act of 2007, S. 2205, 110th Cong. (2007).

<sup>85</sup> 153 CONG. REC. S11,638 (daily ed. Sept. 18, 2007) (statement of Sen. Durbin).

<sup>86</sup> *Id.*

<sup>87</sup> Rick Maze, *Bill Would Grant Citizenship for Service*, ARMY TIMES, Jul. 16, 2007, at 13, available at [http://www.armytimes.com/news/2007/07/military\\_servicecitizenship\\_070716w/](http://www.armytimes.com/news/2007/07/military_servicecitizenship_070716w/).

<sup>88</sup> 153 CONG. REC. S11,639 (daily ed. Sept. 18, 2007) (statement of Sen. Durbin).

<sup>89</sup> Maze, *supra* note 87, at 13.

<sup>90</sup> See Donna Miles, *Officials Hope to Rekindle Interest in Immigration Bill Provision*, AM. FORCES PRESS SERVICE (June 11, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=46369> (expressing hope of senior defense officials that the DREAM Act would not “fall off the radar screen”).

It was clear at this point that bipartisan support, particularly for a stand-alone version of the DREAM Act, had begun to erode. Undeterred, Durbin along with co-sponsors Charles Hagel (R-Neb.), Patrick Leahy (D-Vt.) and Richard Lugar once again introduced the DREAM Act as a stand-alone bill.<sup>91</sup> Although the bill had the support of more than ten Republican Senators and the backing of labor unions, major corporations and universities,<sup>92</sup> it fell short of the “filibuster-proof” sixty votes needed to advance.<sup>93</sup> The Bush administration came out against the Act on the same day it was up for vote, which may have contributed to the failure.<sup>94</sup> The administration objected to the fact that the Act would give preference to a class of illegal aliens over other deserving aliens, including those who seek citizenship lawfully.<sup>95</sup> It expressed concern that the DREAM Act would allow beneficiaries to petition almost instantly to bring relatives into the country and would entitle beneficiaries to certain welfare benefits within five years.<sup>96</sup> Finally, it argued that the Act was indiscriminate, contained too many loopholes, and would permit large-scale fraud.<sup>97</sup> Shortly after this disappointing failure, the Obama administration took over, raising the hopes of DREAM Act supporters once more.

### B. *The DREAM Act During the Obama Administration*

Obama supported the Act as a Senator in 2005<sup>98</sup> and has been unequivocal in his support of the DREAM Act.<sup>99</sup> He promised to make immigration reform, including improving security and enforcement, a priority in his ad-

<sup>91</sup> S. 2205, 110th Cong. (2007).

<sup>92</sup> See Ryan Grim, *Dream Act to Get Vote on Senate Floor: Reid*, HUFFINGTON POST (Sept. 14, 2010, 4:11 PM), [http://www.huffingtonpost.com/2010/09/14/dream-act-to-get-vote-on-n\\_716698.html](http://www.huffingtonpost.com/2010/09/14/dream-act-to-get-vote-on-n_716698.html) (listing Bob Bennett (R-Utah), Sam Brownback (R-Kan.), Norm Coleman (R-Minn.), Susan Collins (R-Me.), Larry Craig (R-Idaho), Chuck Hagel (R-Neb.), Orrin Hatch (R-Utah), Trent Lott (R-Miss.), Mel Martinez (R-Fla.) and Olympia Snowe (R-Me.) as supporters).

<sup>93</sup> 153 CONG. REC. S13,306 (daily ed. Oct. 24, 2007) (recording vote on cloture motion).

<sup>94</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: S. 2205—DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2007 (2007), available at <http://www.aila.com/content/default.aspx?docid=23685>.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See S. 2075, 109th Cong. (2005).

<sup>99</sup> There is what I said was that we have to stand up for these issues when it's tough, and that's what I've done. I did it when I was in the state legislature, sponsoring the Illinois version of the DREAM Act, so that children who were brought here through no fault of their own are able to go to college, because we actually want well-educated kids in our country who are able to succeed and become part of this economy and part of the American dream.

2008 Democratic Debate in Los Angeles before Super Tuesday, ON THE ISSUES (Jan. 31, 2008), [http://www.ontheissues.org/Archive/2008\\_Dems\\_Super\\_Tuesday\\_Barack\\_Obama.htm](http://www.ontheissues.org/Archive/2008_Dems_Super_Tuesday_Barack_Obama.htm) (quoting Barack Obama).

ministration.<sup>100</sup> On March 26, 2009, Senator Durbin, with the support of Republicans Richard Lugar and Mel Martinez (R-Fla.), introduced another version of the DREAM Act.<sup>101</sup> The DREAM Act of 2009, along with a bill that would repeal the “Don’t Ask Don’t Tell” military policy, would attach to the National Defense Authorization Act for 2010; however, a Republican filibuster prevented the Defense Act and its amendments from reaching the floor.<sup>102</sup> This was the first time in forty-eight years that the Defense Authorization Bill failed to pass, which many attributed to the inclusion of the DREAM Act and Don’t Ask Don’t Tell provisions.<sup>103</sup> Political opponents criticized the use of the defense bill as a vehicle for these policies as “cynical and transparently political.”<sup>104</sup> The inclusion of these policies, they claimed, made the defense bill “needlessly controversial” and interfered with the nation’s defense by introducing partisan politics.<sup>105</sup> Still undeterred, Senators Durbin, Leahy, and Lugar attempted twice more to move the bill to the Senate floor, but both attempts failed.<sup>106</sup> Senator Durbin introduced the most recent and, in many ways, most restrictive version on November 30, 2010, without bipartisan sponsorship.<sup>107</sup>

The DREAM Act was one of multiple items on the Democrats’ legislative agenda that they postponed until after the November 2010 midterm election, which was predicted, correctly, to be a major defeat for Democrats.<sup>108</sup> The lame duck session, during which Congress reconvened to address unresolved issues such as setting a federal budget and deciding whether to extend the Bush tax cuts, provided an opportunity for Democrats to pass other non-essential legislation with the participation of members who had already lost their bids for reelection.<sup>109</sup> Some viewed this as a last-ditch effort by Democrats to exercise the political power they had previously held.<sup>110</sup>

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<sup>100</sup> See *Immigration*, ORGANIZING FOR AMERICA, [http://www.barackobama.com/issues/immigration/index\\_campaign.php](http://www.barackobama.com/issues/immigration/index_campaign.php) (last visited Feb. 27, 2011).

<sup>101</sup> S. 729, 111th Cong. (2009).

<sup>102</sup> See Elise Foley, *DREAM Act and Don’t Ask, Don’t Tell Repeal Derail Defense Bill Vote*, WASH. INDEP. (Sept. 21, 2010, 4:54 PM), <http://washingtonindependent.com/98206/dream-act-and-dont-ask-dont-tell-repeal-derail-defense-bill-vote> (noting that vote was 56-43 in favor, just four votes shy of a filibuster-proof majority).

<sup>103</sup> See *id.*

<sup>104</sup> See *Senators Expressing Opposition to DREAM Act Amendment to Defense Bill*, NUMBERSUSA (Sept. 16, 2010, 12:10 PM), <http://www.numbersusa.com/content/news/september-16-2010/senators-expressing-opposition-dream-act-amendment-defense-bill.html>.

<sup>105</sup> *Id.*

<sup>106</sup> DREAM Act of 2010, S. 3827, 111th Cong. (2010); DREAM Act of 2010, S. 3962, 111th Cong. (2010).

<sup>107</sup> See S. 3992, 111th Cong. (2010).

<sup>108</sup> See *GOP Roars Back to Take U.S. House; Democrats Cling to Senate Majority*, CNN.COM (Nov. 3, 2010), <http://www.cnn.com/2010/POLITICS/11/02/election.main/index.html#>.

<sup>109</sup> See “Lame Duck” Session, N.Y. TIMES (Jan. 4, 2010), [http://topics.nytimes.com/top/reference/timestopics/organizations/c/congress/lameduck\\_session/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/c/congress/lameduck_session/index.html).

<sup>110</sup> Press Release, Office of U.S. Senator Orrin Hatch, Hatch on Senate Consideration of Dream Act, Other Proposals (Dec. 8, 2010), available at <http://hatch.senate.gov/public/index.cfm/2010/12/hatch-on-senate-consideration-of-dream-act-other-partisan-proposals>.

The DREAM Act passed in the House on December 8, 2010 by a vote of 216-198 and the Senate was scheduled to vote on the bill on December 9, 2010.<sup>111</sup> In response to the continued strength of Republican opposition to the bill in early December, Democrats delayed the December 9 vote on the bill to try to muster the necessary sixty votes to advance the bill to the Senate floor.<sup>112</sup> Bipartisan support for the DREAM Act, however, appeared to have evaporated.<sup>113</sup> Ultimately, the Republicans, along with five Democrats, prevailed in the postponed Senate vote on December 18, 2010, killing the DREAM Act's hope for passage.<sup>114</sup> Former Republican co-sponsors of the DREAM Act, including Orrin Hatch and John McCain, vowed to vote against the bill.<sup>115</sup> Senator Kay Bailey Hutchison (R-Tex.), who had suggested that she would support the bill with some small changes, also voted no.<sup>116</sup> Senator Kay Hagan (D-N.C.), one of five Democrats to vote against the bill, opposed the DREAM Act on the ground that it lacked adequate enforcement measures.<sup>117</sup>

Efforts to tighten the bill from its 2009 incarnation—for example, by lowering the age cap for beneficiaries, increasing the possible disqualifications, and lengthening the “conditional nonimmigrant” period from six to ten years—also failed to appease opponents. Although the absence of Republican support likely had as much to do with politics as with the merits of the bill,<sup>118</sup> genuine opponents continued to stress that this would reward parents who violated immigration laws, transfer seats and tuition subsidies to illegal aliens at a time when state higher education budgets are especially tight, and give amnesty to far too many individuals because of its broad definition of “student,” and accelerate the chain migration and exponential population growth.<sup>119</sup> Senator Jeff Sessions (R-Ala.) stated:

The American people did not vote for amnesty in this past election. . . . [W]e have to have lawfulness in the immigration system

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<sup>111</sup> See Julia Preston, *House Backs Legal Status for Many Young Immigrants*, N.Y. TIMES, Dec. 9, 2010, at A38.

<sup>112</sup> See *Immigration ‘Dream’ Bill Deferred in Senate*, CHI. SUN-TIMES, Dec. 10, 2010, at 3.

<sup>113</sup> See Kathleen Hennessey, *GOP Shifts on DREAM Act: Immigration Measure Loses Support on Right*, CHI. TRIB., Dec. 12, 2010, at C45 (“Republicans have remained nearly unified in their opposition to the bill, underscoring just how far many in the GOP have traveled from an issue once considered a bridge to Latino voters.”).

<sup>114</sup> See Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, at A3.

<sup>115</sup> See Hennessey, *supra* note 114.

<sup>116</sup> See Edward Schumacher-Matos, Op-Ed., *Kay Bailey Hutchison’s Dream Act Dance*, WASH. POST, Dec. 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603283.html> (asserting that, despite Hutchinson’s support for a 2007 version of the bill, she has since rejected offers to negotiate that might have moved the bill through).

<sup>117</sup> See NUMBERSUSA, *supra* note 104.

<sup>118</sup> See Hennessey, *supra* note 114 (“Past Republican supporters of the bill are keeping their critiques away from the substance of the legislation, instead targeting Democratic tactics.”).

<sup>119</sup> See Press Release, Fed’n for Am. Immigration Reform, *supra* note 15.

before we start giving millions amnesty—as this bill will do. . . . This is not a good idea, it’s not well written, it does far more than its supporters say, and it will create litigation in massive amounts that will disrupt the entire ability of immigration officials to do their jobs.<sup>120</sup>

The Senate filibuster signaled the failure of a two-year effort by the Obama administration to demonstrate its commitment to immigration reform and, on a broader scale, the failure of a decade-long fight to enact a measure offering a path to citizenship for undocumented immigrants who entered the country as children.<sup>121</sup> It left the administration with nothing to show for its efforts—stepping up enforcement measures and deporting record numbers of illegal immigrants—to gain Republican support for the DREAM Act and other immigration reform.<sup>122</sup>

Immediately following this defeat, many, including President Obama, recognized that there might not be another opportunity to pass legislation aimed at providing a path to legalization for illegal residents until after the 2012 election.<sup>123</sup> It therefore came as a surprise when President Obama made clear in his State of the Union that the DREAM Act was still a current priority for the administration.<sup>124</sup> Obama framed the issue, not as an amnesty bill, but as part and parcel of the “Winning the Future” theme of reviving Ameri-

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<sup>120</sup> Michelle Malkin, *Document Drop: S. 3992, the Dem’s Latest Illegal Alien DREAM Act Bill*, MICHELLE MALKIN (Dec. 1, 2010, 1:26 PM), <http://michellemalkin.com/2010/12/01/document-drop-s-3992-the-dems-latest-illegal-alien-dream-act-bill/>.

<sup>121</sup> See Lisa Mascaro & James Oliphant, *111th Congress: Immigration and Arms Control: Dream Act was Key to a Bigger Plan: The Measure’s Failure Will Likely Sidetrack Obama’s Effort to Overhaul Immigration*, L.A. TIMES, Dec. 19, 2010, at A27 (“The [DREAM Act vote] brought the curtain down on a two-year drama in which the Obama administration and Senate Democrats assured activists that immigration reform was a top priority, only to see it never find any real legislative momentum.”); see also Roberto Suro, *A Lost Decade for Immigration Reform*, WASH. POST, Dec. 26, 2010, at B3 (calling deadlock surrounding the DREAM Act the “last gasp” of a decade in which “[i]mmigration policy got kicked around a fair bit but next to nothing got accomplished”).

<sup>122</sup> See Peter Slevin, *Record Numbers Being Deported: Rise is Part of Obama’s Efforts to Remake Immigration Laws*, WASH. POST, July 26, 2010, at A1 (discussing Obama’s efforts to persuade Republicans to support comprehensive immigration reform by increasing deportation).

<sup>123</sup> See Peter Nicholas & Brian Bennett, *Obama Takes Pragmatic Immigration View: A Path to Legal Status Might Not Happen Soon, He and Latino Lawmakers Agree*, L.A. TIMES, Dec. 22, 2010, at A13.

<sup>124</sup> Today, there are hundreds of thousands of students excelling in our schools who are not American citizens. Some are the children of undocumented workers, who had nothing to do with the actions of their parents. They grew up as Americans and pledge allegiance to our flag, and yet they live every day with the threat of deportation. . . . It makes no sense. Now, I strongly believe that we should take on, once and for all, the issue of illegal immigration.

President Barack Obama, Address Before a Joint Session of Congress on the State of the Union Address (Jan. 25, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/25/AR2011012506398.html>.

can competitiveness.<sup>125</sup> One of Obama's stated missions was "[r]eforming immigration laws to stop expelling talent."<sup>126</sup> He also declared, "[a]s we work to rebuild the economy, our ability to thrive depends, in part, on restoring responsibility and accountability to our immigration system."<sup>127</sup> Whether any concrete legislative achievements will spring from these priorities remains to be seen.

#### IV. ANALYSIS OF PROS AND CONS OF THE DREAM ACT

Opponents of the DREAM Act have been consistent in their criticism of the Act since its introduction in 2001. The broadest objection is to the general notion of "amnesty" for illegal immigrants, and concerns that passage of the DREAM Act would reward illegal behavior and result in a flood of illegal immigration.<sup>128</sup> A related concern is that the Act would allow many more than just the "best and the brightest" of illegal immigrant children to gain legal status, either because the provisions are too lenient or because of the potential for fraud.<sup>129</sup> Opponents also argue that once these individuals receive legal status in the United States, they will be able to petition for the admission of their relatives, regardless of whether those relatives would qualify under the provisions of the Act.<sup>130</sup> Another criticism is that the Act would grant beneficiaries access to certain higher education benefits and other public benefits, at the expense of deserving legal residents.<sup>131</sup> There is disagreement over whether the DREAM Act would boost the economy or whether it would ultimately cost the government money.<sup>132</sup> Finally, some object not to the substance of the bill but to the passage of any immigration provision that is not part of a comprehensive immigration overhaul.<sup>133</sup> Drafters of the 2010 DREAM Act tailored its provisions to address many of these concerns, but there are still loopholes that may contribute to the continued

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<sup>125</sup> Press Release, The White House, FACT SHEET: The State of the Union: President Obama's Plan to Win the Future (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/fact-sheet-state-union-president-obamas-plan-win-future> (declaring that America must maintain "leadership in a rapidly changing world so that our economy is competitive" and listing "[r]eforming immigration laws to stop expelling talent" as a means to that end).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *infra* Part IV.A.

<sup>129</sup> See *infra* Part IV.B.

<sup>130</sup> See *infra* Part IV.B.4.

<sup>131</sup> See *infra* Part IV.C.

<sup>132</sup> Compare Press Release, Office of U.S. Senator Jeff Sessions, *supra* note 45 (claiming that the bill would add \$5 billion to the federal deficit), with Press Release, Office of U.S. Senator Michael F. Bennet, *supra* note 13 (claiming that the bill would generate \$1.4 billion in savings over ten years and help reduce the deficit).

<sup>133</sup> See Op-Ed., *Pass the Dream Act*, CHI. TRIB., Sept. 20, 2010, at C16 ("Some feel the Dream Act should be part of a comprehensive immigration overhaul because its broader bipartisan support could offset more controversial parts of the bill.").

reluctance of tentative supporters to back the measure. The following Section addresses the merits of each of these major critiques in turn.

### A. General Opposition to Amnesty for Illegal Immigrants

Underlying much of the opposition to the DREAM Act is the belief that “at its fundamental core [the DREAM Act] is a reward for illegal activity.”<sup>134</sup> There is no question that the DREAM Act would, to some extent, sanction illegal immigration, no matter how faultless its immediate beneficiaries. It is not absurd to suggest that parents may see this as an incentive to bring their children to the United States illegally and try to get them enrolled in school or the military as an alternative to pursuing protracted and often fruitless legal channels of immigration.

Moreover, immigration “hawks” like Congressman Lamar Smith (R-Tex.) are not the only ones who question the wisdom and justice of allowing certain illegal immigrants to remain in the United States while others are deported, and while legal immigrants must pursue citizenship through protracted application processes. Some immigrants oppose the measure on the ground that everyone should have to apply for citizenship through the same channels no matter how hard-working they are or how much potential they show.<sup>135</sup> To refuse to address these criticisms at face value, and instead argue that the DREAM Act is a “no-brainer,” is a mistake and ignores valid concerns about how the United States should deal with illegal immigration.

These criticisms are not meritless but they ignore important realities, both moral and practical. Arguments about punishing illegal immigration ring hollow when applied to children who had no control over the decision to come to the United States illegally, and often did not even know they were without legal status until they tried to go to college or join the military.<sup>136</sup> Even those who reject a moral or “fairness” argument for granting legal citizenship to these students must respond to the argument that allowing these kinds of immigrants to stay in the United States and work and pay taxes like a legal resident will ultimately benefit the United States econ-

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<sup>134</sup> Scott Wong & Shira Toeplitz, *Immigration Legislation Fails to Pass Senate Vote Some Democrats Reject Dream Act*, THE STAR-LEDGER (Newark, N.J.), Dec. 19, 2010, at 3 (quoting Senator Jeff Sessions).

<sup>135</sup> See Hector Tobar, *Some Readers Celebrate the Demise of the DREAM Act*, L.A. TIMES, Dec. 24, 2010, at A2, available at <http://articles.latimes.com/2010/dec/24/local/la-me-1224-tobar-20101224> (quoting an elderly illegal immigrant who opposed the DREAM Act even for “fine, book-smart” young individuals).

<sup>136</sup> See Shankar Vedantam, *GOP to Fight Immigration Law Overhaul*, BOS. GLOBE, Dec. 25, 2010, at 14, available at [http://www.boston.com/news/nation/washington/articles/2010/12/25/gop\\_to\\_fight\\_immigration\\_law\\_overhaul/](http://www.boston.com/news/nation/washington/articles/2010/12/25/gop_to_fight_immigration_law_overhaul/) (quoting President Obama’s claim that many immigrants realize they lack legal status only after trying to enroll in college or enlist in the military).

omy.<sup>137</sup> Moreover, there is no reason a limited amnesty measure should be incompatible with measures strengthening enforcement of immigration laws generally.

Most comprehensive immigration reform proposals, even those recognizing that “[i]llegal immigration is wrong, and a primary goal of comprehensive immigration reform must be to dramatically curtail future illegal immigration” also recognize that there are immigrants residing illegally in the United States and it would be impractical and detrimental to attempt to deport them all. However, the fact that nothing in the bill promises better enforcement of immigration laws exacerbates concerns about encouraging illegal immigration. This is one of the main reasons that the DREAM Act might have more success as part of comprehensive reform that included enforcement.

*B. Fear that the Bill is Overbroad and Indiscriminate in its Eligibility Criteria*

Arguments that the bill would benefit many more than the most deserving and those most likely to contribute in a meaningful way to the United States strengthen general arguments against “amnesty” measures. Critics argue that the Act is indiscriminate in who it considers eligible for status adjustment, contains too many loopholes, and would enable fraud. Although the requirements of the bill appear stringent at first glance, there is some merit to these concerns and the DREAM Act could perhaps garner greater support, without sacrificing its targeted beneficiaries, if supporters eliminated some of these loopholes.

*1. Insufficiently Stringent Qualification Requirements*

The 2010 DREAM Act contains a broad range of procedural hurdles, educational requirements, and disqualifications.<sup>138</sup> The most recent version of the bill introduced in the Senate significantly limited eligibility and increased requisite qualifications, even from the 2009 version.<sup>139</sup> There remain, however, areas that could be tightened.

One possible critique is that the requirement that the individual have been under the age of sixteen when he or she arrived in the United States is too generous. A child who comes to the United States at fifteen may understand the concept of illegal immigration and, even if the child does not exercise ultimate control, it is harder to argue that fifteen year-olds had nothing to do with the actions of their parents. Moreover, this means that a child who

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<sup>137</sup> See Tobar, *supra* note 135 (discussing the benefits that illegal immigrants have long brought to the United States economy and suggesting that defeat of the DREAM Act will harm long-term American economic interests).

<sup>138</sup> See *supra* Part II.A.

<sup>139</sup> See *supra* notes 31–32 and accompanying text.

spent only one or two years in the United States school system will be eligible for conditional nonimmigrant status. This age limit encompasses many more children than only those who “came to the United States as small children” and “built their lives here.”<sup>140</sup>

The portion of the bill that deals with applicants’ backgrounds is also subject to criticism. Although the 2010 Act requires that applicants have demonstrated good moral character since the time they entered the United States, rather than since the time of application for status adjustment, as required by the 2009 version,<sup>141</sup> this remains a somewhat nebulous requirement and is not defined in the Act. Some might argue that this renders it ineffective, although the counterargument is that the provision’s vagueness would be as useful for excluding as it is for including. Moreover, the “good moral character” requirement is a catch-all that supplements the various other potential disqualifications in the Act.<sup>142</sup> The 2010 version adds public health risk, likelihood of becoming a public charge, abuse of student visas, polygamy, draft evasion, and persecution to the list of grounds for inadmissibility or deportability that may disqualify an applicant.<sup>143</sup> Under the 2010 Act applicants are also disqualified if they have committed a felony or three misdemeanors.<sup>144</sup>

Even with this long list of disqualifiers, and the catch-all requirement of “good moral character,” opponents of the measure such as Senator John Ensign (R-Nev.) worry that the act would benefit criminal alien minors. Critics may think that the bill’s allowance for minimal illegal activity is too lenient and that any illegal behavior should disqualify an applicant. They should, however, note that the Secretary would likely have the *authority* to refuse the application of an alien on the basis of lesser criminal activity under the “good moral character” requirement, even if such activity would not automatically disqualify the applicant.<sup>145</sup>

## 2. *Overly Lenient Waiver and Hardship Exceptions*

Another critique is that many of these seemingly stringent qualifications are, in fact, not requirements at all since the Secretary is authorized to waive many of them. The Secretary has broad authority to waive certain disqualifiers for “humanitarian purposes, family unity or where it is other-

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<sup>140</sup> Press Release, Senator Orrin G. Hatch, Dream Act Continues to Gain Support (Sept. 4, 2003), available at [http://hatch.senate.gov/newsite/index.cfm?FuseAction=PressReleases.Print&PressRelease\\_id=210215&suppresslayouts=true](http://hatch.senate.gov/newsite/index.cfm?FuseAction=PressReleases.Print&PressRelease_id=210215&suppresslayouts=true).

<sup>141</sup> Compare S. 3992, 111th Cong. § 4(a)(1)(B) (2010), with S. 729, 111th Cong. § 4(a)(1)(B) (2009).

<sup>142</sup> See S. 3992 § 4(a)(4)(C)(i)–(iv).

<sup>143</sup> Compare S. 3992 § 4(a)(1)(C), with S. 729 § 4(a)(1)(C).

<sup>144</sup> S. 3992 § 4(a)(1)(C)(iv).

<sup>145</sup> See *supra* note 44 and accompanying text.

wise in the public interest,” but this authority does not extend to criminal activity or issues of national security.<sup>146</sup>

Perhaps of greater concern is the “Hardship Exception,” which gives the Secretary discretion to waive the requirement that the applicant have been admitted to an institution of higher education or attained a high school diploma or a G.E.D. certificate if the applicant demonstrates “compelling circumstances for the inability to complete the requirements” and that “removal from the United States would result in exceptional and extremely unusual hardship to the alien or the alien’s spouse, parent, or child who is a citizen or a lawful permanent resident of the United States.”<sup>147</sup> It is difficult to justify this exception when the main argument in favor of the bill is that it is targeted towards not only the most ambitious and deserving of illegal immigrants but also those with the greatest potential to contribute to the betterment of the United States, based entirely on the criteria of military service and higher education. Consequently, provisions like this lend support to the argument that this is a “blanket amnesty.”

### 3. *Potential for Fraud*

Opponents like Congressman Lamar Smith also emphasize that the DREAM Act will actually grant amnesty to a far greater number of immigrants than estimated because of “how easy it is to claim that they arrived in the United States before the age of [fifteen].”<sup>148</sup> Moreover, “[o]nce an alien files an application, no matter how spurious, the federal government must stay their deportation under the Act.”<sup>149</sup>

Smith’s concerns are overstated. In fact, the Act provides that the Secretary must stay deportation of any alien with a pending application for conditional nonimmigrant status *only* if the alien establishes prima facie eligibility for cancellation of removal and conditional nonimmigrant status.<sup>150</sup> Furthermore, the 2010 legislation requires submission of extensive biometric and biographic data, requires background checks and medical examinations, and creates exceptions to confidentiality for criminal or national security purposes.<sup>151</sup> The Act also states that anyone who knowingly falsifies, misrepresents or conceals a material fact, or uses falsified documents “shall be fined in accordance with title 18, United States Code, imprisoned not more than 5

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<sup>146</sup> S. 3992 § 4(a)(2).

<sup>147</sup> *Id.* § 6(d)(2).

<sup>148</sup> Lamar Smith, Letter to the Editor, *The ‘Dream Act’ Proposal on Immigration*, N.Y. TIMES, Sept. 23, 2010, available at <http://www.nytimes.com/2010/09/24/opinion/lweb24immig.html>.

<sup>149</sup> *Id.*

<sup>150</sup> S. 3992 § 4(f).

<sup>151</sup> *Id.* § 4(a)(6)–(7).

years, or both.”<sup>152</sup> Finally, the Secretary is empowered to enact additional rules regulating applications.<sup>153</sup>

#### 4. *The Ability of DREAM Act Beneficiaries to Bring Otherwise Ineligible Relatives Into the United States*

One piece of the argument that the Act will unleash a flood of immigration is the assertion that DREAM Act beneficiaries will be entitled to petition to bring relatives into the country through an abridged immigration process. For various reasons, this concern is greatly exaggerated and unlikely to have the predicted effect of contributing to an influx of immigration.

Legal permanent residents of the United States may petition to have certain immediate family members become lawful permanent residents without having to go through the normal channels to obtain a green card.<sup>154</sup> But the category of family members for which this alternative process is available is narrow and does not even necessarily include parents.<sup>155</sup> Although naturalized citizens may, in some situations, petition for residence for their parents, relatives already living illegally in the United States may be ineligible to become permanent residents.<sup>156</sup> Because it is likely that many DREAM Act beneficiaries came to the United States illegally with their parents, most parents would probably not be eligible, even after the child has become a naturalized citizen.

Fears of a flood of status changes as a result of this provision are also mitigated by the requirement that each relative have a sponsor who is able to provide financial support.<sup>157</sup> Finally, the amount of time a DREAM Act beneficiary must wait before the beneficiary may even consider filing such petitions—ten years for the privileges for a legal permanent resident, thirteen for naturalization—and the qualifications that the beneficiary must meet make the possibility of large-scale negative consequences seem quite tenuous. This type of argument undermines the credibility of those who argue that the DREAM Act is a nightmare that will produce an influx of illegal immigrants.

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<sup>152</sup> *Id.* § 9.

<sup>153</sup> *Id.* § 4(e)(3).

<sup>154</sup> Legal permanent residents may petition for a husband or wife and any unmarried children. Only U.S. citizens may petition for a married child to become a permanent resident. See U.S. CITIZENSHIP AND IMMIGRATION SERV., I AM A PERMANENT RESIDENT, HOW DO I HELP MY RELATIVE BECOME A PERMANENT RESIDENT? 1 (2008), available at <http://www.uscis.gov/USCIS/Resources/BIen.pdf>.

<sup>155</sup> *See id.*

<sup>156</sup> *See id.* at 2 (“If [a relative] enters or stays without legal status, it will affect his or her eligibility to become a permanent resident upon reaching his or her place in line for issuance of a visa.”).

<sup>157</sup> *See id.* at 1 (explaining the requirement that anyone petitioning for a relative to be granted legal permanent resident status to provide proof that he or she could support the relative financially).

*C. Fears That the DREAM Act Will Strain Budgets and Take Opportunities and Resources Away From Deserving, Legal Citizens*

Another argument against the DREAM Act is that it would take away opportunities from equally deserving children living in the United States legally. Higher education benefits are the most contentious issue, although access to other public benefits raises concerns as well. In a period of high competition for jobs and extremely limited state budgets, DREAM Act advocates cannot afford to brush aside these concerns.

*1. Higher Education Benefits*

Each year, about 65,000 children of illegal immigrants graduate from high school.<sup>158</sup> The DREAM Act would make many of these children eligible for federal student loans and certain other federal education services.<sup>159</sup> This has angered some who believe that, “[i]n these difficult economic times, when unemployment rates are on the rise and government spending is unsustainable, the last thing legal, tax-paying American citizens need is to see their hard-earned money used to finance the education of illegal aliens.”<sup>160</sup>

In reality, a report by the Congressional Budget Office’s (“CBO”) on the economic impact of the bill suggests that this would not have a significant financial impact at the federal level. The CBO’s Cost Estimate suggests that the students who obtain conditional nonimmigrant status under the DREAM Act would be less likely to participate in federal student loan programs, both because they are more likely to attend lower-cost community colleges and because they would be less willing to submit the detailed financial aid forms required, for fear of exposing other family members who are unlawfully residing in the United States to deportation.<sup>161</sup> The CBO estimated that approximately fifteen percent of enrolled students would obtain student loans, which would have a negligible effect on federal funding over the course of a decade.<sup>162</sup>

The effect on the federal budget is not, however the only source of concern. State budgets are also implicated. The 2009 version of the DREAM Act would have repealed the federal law limiting states’ ability to provide in-

<sup>158</sup> UCLA CTR. FOR LABOR RESEARCH AND EDUC., UNDOCUMENTED STUDENTS, UNFULFILLED DREAMS 3 (2007), available at <http://www.labor.ucla.edu/publications/reports/Undocumented-Students.pdf>.

<sup>159</sup> S. 3992, 111th Cong. § 11 (2010).

<sup>160</sup> Press Release, Senator David Vitter (R-La.), Vitter Applauds Senate’s Rejection of DREAM Act (Dec. 9, 2010), available at [http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=cca03d13-0801-57ac-ed87-4b3334458612&Region\\_id=&Issue\\_id=](http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=cca03d13-0801-57ac-ed87-4b3334458612&Region_id=&Issue_id=).

<sup>161</sup> See CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 6497: DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2010, at 5 (2010), available at <http://www.cbo.gov/ftpdocs/120xx/doc12015/hr6497.pdf>.

<sup>162</sup> *Id.*

state tuition to undocumented immigrants.<sup>163</sup> Although the 2010 version eliminated this provision, states would still be required to offer in-state tuition rates to otherwise eligible students who received conditional nonimmigrant status under the DREAM Act. This is because while states are free to decide whether or not to admit illegal aliens to state post-secondary institutions, they are not at liberty to use their own definition of who is an illegal alien—they must use federal standards of immigration status.<sup>164</sup> This rule traces its roots to the Supreme Court's decision in *Toll v. Moreno*,<sup>165</sup> in which the Court held that any "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."<sup>166</sup> This holding would likely prevent states from treating students granted conditional nonimmigrant status under the DREAM Act differently than other state residents. At a time when state budgets are extremely constrained, this may generate increased opposition to the DREAM Act. Budget constraints have been responsible for the failure of similar legislation at the state level. Proponents of the bill will need to satisfy critics by showing that either the impact on states will not be large or, even if it is, that the benefits will outweigh the negatives.

One related but separate source of criticism comes from those who oppose, for reasons of fairness, allowing illegal aliens to compete for coveted places in educational institutions. If one assumes that state and federal resources are limited, then a DREAM Act beneficiary who receives certain aid or a place in a state university is potentially taking that opportunity away from a legal resident. In his 2011 State of the Union address President Obama recognized that higher education is a pre-requisite for a growing percentage of jobs; in an extremely competitive job market, people are likely to be more averse than ever to increased competition for coveted seats in institutions of higher learning.

The problem with this argument is that, if one accepts that DREAM Act beneficiaries are without fault in terms of their illegal status, it is hard to justify begrudging them an education if they outperform legal residents. Moreover, it is in the United States' best interest to increase competitiveness by ensuring that the most promising students attend these universities, re-

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<sup>163</sup> See S. 729, 111th Cong. § 3 (2009) (repealing § 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623 (2006)). This provision is absent from S. 3992. Therefore, the law providing that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any post-secondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident" would remain in force under the 2010 DREAM Act.

<sup>164</sup> See Letter from Jim Pendergraph, Exec. Dir., Office of State and Local Coordination, U.S. Immigration & Customs Enforcement, to Thomas J. Ziko, Special Deputy Attorney Gen., N.C. Dep't of Justice (July 9, 2008), available at <http://www.nacua.org/documents/AdmissionUndocAlien072008.pdf>.

<sup>165</sup> 458 U.S. 1 (1982).

<sup>166</sup> *Id.* at 12–13 (citing *De Canas v. Bica*, 424 U.S. 351, 358 (1976)).

ardless of how they became Americans. Furthermore, the Supreme Court has already held that states cannot deny illegal immigrants access to primary and secondary education;<sup>167</sup> by depriving them of the opportunity to take the next step and obtain a college education—either by directly excluding them or by refusing to provide financial aid—the United States loses the benefit of its investment at the very time when immigrants’ earning potential and productivity are at a peak.<sup>168</sup>

## 2. *Other Benefits*

Many of the same arguments regarding higher education assistance arise with respect to other public benefits. Limited resources arguments (as opposed to competition arguments) are strongest because most federal programs do not place a cap on the number of beneficiaries: they must provide for everyone who qualifies. DREAM Act beneficiaries would not become immediately eligible for Medicaid or the Supplemental Nutrition Assistance Program (“SNAP”)<sup>169</sup> but individuals who obtain legal permanent resident status and reside in a state that chooses to provide Medicaid benefits to legal permanent residents would, after a five-year waiting period, be eligible.<sup>170</sup> The CBO predicted that the legislation would not have a large impact on deficits in the first ten years, but that the eventual conversion of some conditional nonimmigrants to legal permanent resident status after ten years would lead to significant increases in spending for federal health insurance exchanges, Medicaid, and SNAP.<sup>171</sup> The Cost Estimate also predicted, however, that the DREAM Act would increase revenues by ten years after implementation; after accounting for spending, the CBO and Joint Committee on Taxation estimated that the bill would reduce deficits by about \$1.4 billion in the second decade of its existence.<sup>172</sup> One study suggested that students impacted by the DREAM Act could add between \$1.4 trillion to \$3.6 trillion in taxable income to the economy over the course of their careers, depending

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<sup>167</sup> See *Plyler v. Doe*, 457 U.S. 202, 228–29 (1982) (holding as unconstitutional under the Equal Protection Clause a Texas statute that purported to deny undocumented children free public education that was guaranteed to citizens).

<sup>168</sup> See Shankar Vedantam, *Md. to Weigh Own ‘DREAM’ Tuition Act*, WASH. POST, Dec. 30, 2010, at B01 (citing Maryland State Senator Victor Ramirez, arguing in favor of a Maryland state DREAM Act, as saying, “We’re working backwards. . . . We have said, ‘You can go to school for 12 years’- we have invested in you for 12 years’ . . . and when that investment is ripe for the picking, we say, ‘No more.’”).

<sup>169</sup> SNAP is a federal food assistance program enacted as part of the Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. (2008).

<sup>170</sup> See CONG. BUDGET OFFICE, *supra* note 161.

<sup>171</sup> CONG. BUDGET OFFICE, COST ESTIMATE, S. 3992: DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2010, at 2 (2010), available at <http://www.cbo.gov/ftpdocs/119xx/doc11991/s3992.pdf> (suggesting that the bill would increase projected deficits by more than \$5 billion in at least one of the four consecutive ten year periods starting a decade after implementation).

<sup>172</sup> See Javier Palomarez, Op-Ed., *Make the DREAM Act a Reality*, SUN-SENTINEL (Fort Lauderdale), Dec. 18, 2010, at 20A.

on how many ultimately gain legal status. Their incomes would be substantially higher than the incomes they would earn without a college education.<sup>173</sup>

In short, extending public benefits to beneficiaries of the DREAM Act does not seem particularly concerning if one assumes that the Act will be sufficiently restrictive so as to ensure that it only applies to individuals who will contribute more than they will take from the government—and that is the basic premise underlying the DREAM Act.

*D. Belief that the DREAM Act Should Be Part of a Comprehensive Immigration Reform*

In addition to expressing concerns about the specific provisions of the DREAM Act, several lawmakers have made clear that their support for the bill is contingent on its inclusion as part of a larger overhaul of the immigration system. For example, Senator Arlen Specter (D-Penn.) opposed passage of the DREAM Act in 2007 because he believed it would “weaken[ ] our position to get a comprehensive bill.”<sup>174</sup> The Bush administration opposed the 2007 DREAM Act at the last minute in part on the ground that “the Nation’s broken immigration system requires comprehensive reform.”<sup>175</sup> This includes “strong[er] border and interior enforcement, a temporary worker program [ . . . and] assistance for newcomers seeking to assimilate[.]”<sup>176</sup> The Bush administration also voiced support for “a program to bring the millions of undocumented aliens out of the shadows without amnesty and without animosity.”<sup>177</sup>

V. POSSIBLE WAYS FORWARD FOR THE DREAM ACT

Immigration reform generally, and the DREAM Act specifically, are still on the table in 2011. It is a politically contentious issue and both parties must play their cards carefully. With the 2011 election the Democrats lost the luxury of majority control over both wings of Congress.<sup>178</sup> If President Obama is to make good on his pledge that his administration “will not give up on the DREAM Act, or on the important business of fixing our broken

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<sup>173</sup> *See id.*

<sup>174</sup> 153 CONG. REC. S13,300–02 (daily ed. Oct. 24, 2007) (statement of Sen. Arlen Specter).

<sup>175</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: S. 2205—DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2007 (2007), available at <http://www.aila.com/content/default.aspx?docid=23685>.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See* Shailagh Murray, *Opening Day for Lawmakers*, WASH. POST, Jan. 5, 2011, at A1.

immigration system,”<sup>179</sup> the Democrats must compromise and cooperate with the newly empowered Republican Party. Some have expressed optimism that both parties will “recognize [that] they have a stake in what Congress produces” and cooperate better in this new session.<sup>180</sup>

Democratic leaders have indicated that overhauling the nation’s immigration laws is still on their agenda for the 112<sup>th</sup> Congress.<sup>181</sup> This may be an opportunity for DREAM Act supporters to make some concessions on the enforcement side of the issue, and perhaps push the DREAM Act through as part of a larger compromise. Many criticized the 2010 version of the DREAM Act for its complete lack of accompanying enforcement provisions.<sup>182</sup> Others objected to the timing of the bill for political reasons.<sup>183</sup> These individuals, who are not unequivocally opposed to the DREAM Act in principle, might support the legislation under different circumstances.<sup>184</sup> While proponents of the DREAM Act likely believe that an appropriate compromise was already reached in the 2010 version of the DREAM Act, they can still close loopholes and alter age limits and other requirements without sacrificing the basic substance of the bill. There are also several reasonable enforcement measures on the table that, if offered in conjunction with the DREAM Act, might form the basis for a reasonable compromise. Proponents will likely need to use all available tactics if a federal DREAM Act has any hope of passing. The following suggestions respond directly to several of the criticisms articulated above.

#### A. *Further Restrictions on Eligibility and Benefits*

Although dire predictions that the DREAM Act will result in a mass influx of immigration are exaggerated,<sup>185</sup> there are still weaknesses in the bill that opponents can point to as reasons for rejecting it. Moreover, Democrats and Republicans who were on the fence about the bill might agree to support it with some further restrictions on eligibility. The 2010 version of the bill could be tightened in several ways without sacrificing the real purpose of the bill: to provide a path to citizenship for promising individuals who came to this country as children, who think of themselves as Americans, and who

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<sup>179</sup> Lisa Mascaro & Michael Muskal, *Dream Act Fails to Advance in Senate*, L.A. TIMES, Dec. 18, 2010, available at <http://articles.latimes.com/2010/dec/18/news/la-pn-senate-dream-20101219>.

<sup>180</sup> Murray, *supra* note 178, at A1.

<sup>181</sup> *See id.* (“Democratic leaders say they could take up the cause of deficit reduction, urge a free-trade agreement with South Korea and advocate for an overhaul of the nation’s immigration laws.”).

<sup>182</sup> Senators Kay Hagan and Kay Bailey Hutchison, for example, suggested that they might support the legislation with some changes. *See supra* notes 116–117 and accompanying text.

<sup>183</sup> *See supra* notes 104–105 and accompanying text.

<sup>184</sup> *See* Murray, *supra* note 178, at A1 (noting that Senator Durbin has expressed this hope).

<sup>185</sup> *See supra* Part IV.B.

can significantly contribute to American society, whether through military service or through other types of productivity.

Critics rightly take issue with some of the “loopholes” in the bill, such as the hardship exception, which permits the Secretary to waive the higher education or military service requirement under extraordinary circumstances. It is not clear how these exceptions serve the stated purpose of the bill, as articulated in President Obama’s State of the Union speech.<sup>186</sup> Making such exceptions makes the bill look more like a pure amnesty bill and less like a measure aimed at improving the country. Moreover, it is not clear what “extraordinary circumstances” means. If advocates are unwilling to eliminate the provision, they should be more specific about what circumstances might justify a waiver and why those exceptions are an essential part of the bill.

Another concession DREAM Act advocates might make is to lower the age of eligibility from sixteen to thirteen. If the eligibility age were lowered to thirteen, then at least most eligible students will have attended all four years of high school in the United States. This would also ensure that only individuals who were blameless are eligible for the Act’s benefits, which cannot indisputably be said of a person who arrived in the United States at sixteen. In addition, the rather arbitrary cutoff age of thirty could be lowered further. It is not clear that these changes would be significant enough to sway even tentative supporters of the Act, but demonstrating a willingness to compromise on seemingly small points may open the door to negotiation over larger issues.

Criticisms pertaining to higher education and other benefits provisions<sup>187</sup> are more difficult to remedy without significantly undermining the purpose of the DREAM Act. For example, compromising further than DREAM advocates already have on issues such as federal and state higher education benefits would significantly undermine the goal of allowing undocumented students to obtain postsecondary education to secure better jobs. There is already at least a ten-year waiting period before DREAM Act beneficiaries would benefit from most other types of federal assistance and they would only be able to do so if they were contributing to these funds through payment of taxes and, hopefully, economic productivity.<sup>188</sup> At this point, further changes can be made to the eligibility requirements to ensure that only the “best and the brightest” receive this “amnesty,” but the benefits provided have been curtailed to a point where further limitations would sacrifice the underlying goals of the bill. Furthermore, while restricting eligibility may quiet criticism about the scope of the bill, entrenched opposition to “amnesty” measures makes it unlikely that the DREAM Act will pass with-

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<sup>186</sup> See *supra* notes 124–128 and accompanying text.

<sup>187</sup> See *supra* Part II.C.

<sup>188</sup> See *supra* Part IV.C.2.

out bipartisan compromise involving enforcement measures on the immigration agenda.

*B. Passing the DREAM Act as Part of Comprehensive Immigration Reform or Compromise*

Several newly-empowered Republican members of the House, including chairman of the House Judiciary Committee Lamar Smith, quickly established that their focus in 2011 will be on strengthening enforcement of current immigration laws.<sup>189</sup> The DREAM Act is compatible with many of these efforts—in fact, it may be complementary. Now that neither party has sufficient power to unilaterally implement an immigration agenda, immigration “advocates” and “restrictionists” should work together to pass mutually satisfactory immigration legislation. Both sides stand to gain from compromise. Moreover, Republicans may have the additional incentive of gaining Hispanic support by backing pro-immigration bills such as the DREAM Act, even if they are part of a compromise involving other more restrictive measures.<sup>190</sup>

Some of the proposed anti-immigration laws would unquestionably be unacceptable to DREAM advocates. For example, in early January of 2011, legislators from Pennsylvania, Arizona, Oklahoma, and Georgia unveiled proposed legislation that would deny “state citizenship” for children who are born in the United States but whose parents are both illegal immigrants.<sup>191</sup> It is unclear what advocates of such measures hope to gain from advocating laws that appear to violate the Fourteenth Amendment,<sup>192</sup> and are thus unlikely to succeed at anything other than further alienating increasingly important segments of the electorate. Other proposed measures, such as e-verify systems and other methods that ensure that businesses hire only workers who are in the country legally, already have sufficient support from

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<sup>189</sup> See Brian Bennett, *GOP Seeks Return of Workplace Raids: It Plans to Push for a Tougher Immigration Policy, Without a Path to Legal Status*, L.A. TIMES, Jan. 27, 2011, at A1 (“[W]ith illegal immigration likely to be a hot-button issue in the 2012 campaign season, House Republicans on the House Judiciary Subcommittee on Immigration Policy and Enforcement plan to hold hearings to criticize an administration they claim allows illegal immigrants to take American jobs.”).

<sup>190</sup> See Beth Reinhard, *Immigration Policy Bedevils GOP with Hispanics*, NAT’L J. (Jan. 15, 2011, 9:11 AM), <http://nationaljournal.com/politics/immigration-policy-bedevils-gop-with-hispanics-20110115> (arguing that the Republican party’s current position on comprehensive immigration reform may impede efforts to connect with Hispanic voters during the 2012 campaign).

<sup>191</sup> See Editorial, *Another Misguided Immigration Fight: Attack on Birthright Citizenship May Further Delay Reform*, STAR TRIB. (Minneapolis, Minn.), Jan. 14, 2011, at 12A; Letter to the Editor, *Who’s a Citizen?*, L.A. TIMES, Jan. 13, 2011, at A18.

<sup>192</sup> See U.S. CONST. amend. XIV § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”)

the Obama administration and the general public<sup>193</sup> and therefore may not be an effective bargaining chip. There are, however, other measures aimed at aggressive enforcement that, combined with a limited path to legal status, could be mutually acceptable to both parties.

When Lamar Smith became the head of the House Judiciary Committee, many feared that he would pursue a “scorched-earth immigration agenda.”<sup>194</sup> Smith’s early actions indicate a relatively moderate approach to immigration reform and perhaps willingness to compromise on issues like the DREAM Act.<sup>195</sup> Soon after the 2010 Republican triumph, Smith suggested that “the new House Republican majority plan[ne]d to attack the issue of immigration through the prism of jobs, rather than red meat for the base.”<sup>196</sup> He declined to set forth a clear agenda for the birthright citizenship question and stated that plans to reduce the level of legal immigration would not be the initial focus. Instead, he declared that the focus would be on “creating jobs and protecting jobs.”<sup>197</sup>

The underlying theme of Republican immigration policy, as articulated by Congressman Smith, is that “[c]itizens and legal immigrants should not be forced to compete with illegal workers for jobs.”<sup>198</sup> Any compromise that would allow the DREAM Act to pass would therefore likely require strong enforcement measures and possibly cutbacks on other sorts of legal immigration. It is not clear that pro-immigration advocates would support such compromises, particularly cutting back on legal channels for immigration. Workplace enforcement is a point of compromise that DREAM Act supporters should consider seriously. For example, a bill mandating private employers’ use of e-verify<sup>199</sup> might be an acceptable point of compromise. Border security is another issue that President Obama has recognized as an important component of immigration reform and which is another potential area for cooperation and compromise.<sup>200</sup>

Immigration advocates who at one time fought for much broader amnesty may be unwilling to support increased workplace raids and other drastic enforcement measures. However, both sides are going to need to make serious sacrifices if any immigration reform is going to have a chance.

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<sup>193</sup> See Carrie Budoff Brown, *Lamar Smith Avoids Hard Line on Immigration*, POLITICO, 2 (Dec. 23, 2010, 6:25 PM), <http://www.politico.com/news/stories/1210/46774.html> (pointing out that Lamar Smith believes that at least seventy percent of Americans would support efforts to expand E-Verify, a voluntary electronic system for checking immigration status of workers).

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* (quoting Steven Camarota, Director of Research for the Center for Immigration Studies, as saying he believes Smith might consider a modified DREAM Act if it was coupled with a cut in legal immigration and stronger enforcement).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*; see also Byron York, *To House GOP, Illegal Immigration is a Jobs Issue*, WASH. EXAMINER (Jan. 6, 2011, 8:05 PM), <http://washingtonexaminer.com/politics/2011/01/house-gop-illegal-immigration-jobs-issue>.

<sup>198</sup> Bennett, *supra* note 189.

<sup>199</sup> See *supra* note 193.

<sup>200</sup> See Bennett, *supra* note 189.

*C. Pushing the DREAM Through at the State Level*

American citizenship is a federal issue and immigration advocates would undoubtedly prefer a federal measure granting legal status to illegal immigrant students. However, following the defeat of the 2010 DREAM Act, certain states appear to have given up on the enactment of a federal measure and are taking matters into their own hands. These laws would allow illegal immigrants to qualify for in-state tuition, but they would not grant them citizenship and would, therefore, still leave them “living in the shadows” and at risk of deportation. These laws are a partial solution at best, but if enough states show their support them, that could increase pressure on Congress to pass a federal version of the Act.

Successful passage and implementation of these laws may also assuage the fear that such laws will result in a “nightmare” for states. Additionally, state legislation could act as a model for federal legislation. Unfortunately, if state legislative activity acts as a barometer for popular sentiment, the current trend appears, with a few exceptions, to be shifting away from increasing immigrant rights, and in some cases toward eliminating even the limited benefits they currently enjoy.

State legislation regarding postsecondary education benefits for illegal immigrants is not new. In 2001, Texas enacted the first law in response to federal restrictions on undocumented student access to in-state tuition,<sup>201</sup> enabling certain immigrant students to obtain “residency” for the purpose of obtaining eligibility for in-state tuition.<sup>202</sup> By 2010, ten states allowed undocumented students to qualify for in-state tuition.<sup>203</sup> The Supreme Court has rejected challenges to the validity of statutes granting undocumented students residency for the purpose of in-state tuition rates.<sup>204</sup>

After the 2010 DREAM Act failed to get through the Senate, several state legislators introduced legislation at the state level that would make undocumented students who attended state high schools and whose parents pay taxes in the state eligible for in-state tuition. By basing eligibility on local high school attendance, rather than residency, the laws circumvent the 1996 law that explicitly prohibits states from offering in-state tuition to undocumented immigrants unless they offer such benefits to all students, regardless

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<sup>201</sup> See *supra* note 76 and accompanying text.

<sup>202</sup> See TEX. EDUC. CODE ANN. § 54.052 (2006) (defining “resident status” as requiring that the individual have lived in the state for one year prior to the relevant academic term, graduated from public or private school in the state and lived continuously in the state for the three years prior to graduation from high school).

<sup>203</sup> See Olivas, *supra* note 76, at 3 (listing these states are California, Illinois, Kansas, Nebraska, New Mexico, New York, Texas, Utah, Washington, and Wisconsin). Additionally, Oklahoma granted this status and then rescinded it. See *Table One: State Legislation Allowing Undocumented College Student to Establish Residency (by Statute)*, U. OF HOUS. LAW CENTER, <http://www.law.uh.edu/ihelg/documents/Statute2010.pdf> (last visited Feb. 27, 2011).

<sup>204</sup> See *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007) (affirming District Court decision that rejected a challenge to a Kansas statute allowing undocumented students to establish residency status for tuition purposes), *cert. denied*, 128 S. Ct. 2987 (2008).

of state citizenship. The California Supreme Court recently upheld<sup>205</sup> California's version<sup>206</sup> of this legislation finding that because it was not based on residency, it did not violate any federal provision.<sup>207</sup> The court also rejected the arguments that it was impliedly preempted by federal law or that it violates the Privileges or Immunities clause of the Fourteenth Amendment.<sup>208</sup>

Along similar lines, Maryland Democratic State Senator Victor Ramirez planned to introduce a bill offering in-state college tuition benefits to undocumented immigrants who have attended state high schools for two years and whose parents are state taxpayers and express intent to seek legal status in the country.<sup>209</sup> Maryland Republican House Minority Leader Anthony J. O'Donnell opposed such a measure stating, "[t]he citizens of Maryland do not offer in-state tuition to their fellow Americans [who are not state residents]. Why would we offer in-state tuition to people who violated our laws to get here?"<sup>210</sup> New York, too, has seen the introduction of legislation that would permit undocumented immigrants to pay in-state tuition, and would, in fact, go further, by giving undocumented immigrants access to state financial aid programs, health insurance, certain state jobs, and driver's licenses.<sup>211</sup>

While the actions of New York and Maryland are promising, other states have gone in the opposite direction. South Carolina, for example, bans undocumented students from attending its public universities.<sup>212</sup> Some states take the middle ground, allowing them to enroll at non-resident tuition rates.<sup>213</sup> These restrictive laws are clearly permissible under IIRIRA.

Given the precarious condition of many state budgets, bills like those introduced in Maryland and New York may be just as unlikely to succeed as their federal counterpart. Several states have rejected these bills in the past, based on concerns that mirror the criticisms of the bill at the federal level. Governor Arnold Schwarzenegger vetoed the California DREAM Act, which would have allowed undocumented students to apply for financial aid administered by California's community and state colleges, in 2007 and

<sup>205</sup> See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010) (citing 8 U.S.C. § 1623 (2006)).

<sup>206</sup> CAL. EDUC. CODE § 68050 (2000); see also *id.* § 68130.5(a) (exempting from the requirement that nonresidents of California who attend the state's colleges and universities pay non-resident tuition students, including those not lawfully in the country, who meet certain requirements, primarily that they have attended high school in California for at least three years).

<sup>207</sup> See *Martinez*, 241 P.3d at 860.

<sup>208</sup> See *id.*

<sup>209</sup> See Pat McDonough, *M. To Weigh Own 'DREAM' Tuition Act*, WASH. POST, Dec. 30, 2010, at B1.

<sup>210</sup> See Vedantam, *supra* note 168, at B1.

<sup>211</sup> Kirk Semple, *Bill Seeks to Expand Rights for New York's Immigrants*, N.Y. TIMES, Mar. 24, 2011, at A26.

<sup>212</sup> See Olivas, *supra* note 76.

<sup>213</sup> See *id.*

2008.<sup>214</sup> Governor Schwarzenegger's 2008 veto message stated, "I share the author's goal of making affordable education available to all California students, but given the precarious fiscal condition the state faces at this time, it would not be prudent to place additional demands on our limited financial aid resources as specified in this bill."<sup>215</sup>

Other state officials believe that immigration law is in the purview of the federal government and that the states should not be the leaders in this area. Governor Jodi Rell of Connecticut vetoed a similar bill on different grounds in 2007, stating, "I understand these students are not responsible for their undocumented status, having come to the United States with their parents. The fact remains, however, that these students and their parents are here illegally and neither sympathy nor good intentions can ameliorate that fact."<sup>216</sup> Moreover, she stated that since "the underlying issues are a matter of national concern and need to be addressed by the Congress, the most prudent course for the State of Connecticut is to wait for resolution at the federal level."<sup>217</sup>

Perhaps the most salient example of growing anti-immigration sentiment is the fact that Texas, the first state to grant in-state tuition to undocumented students, is considering repealing its statute granting in-state tuition to qualifying immigrant students and barring non-legal residents from seeking in-state tuition at Texas colleges and universities.<sup>218</sup>

Even at their most generous, state laws can accomplish only a fraction of the aims of the federal DREAM Act. This does not mean, as Governor Rell suggested, that state lawmakers should wait for a federal resolution. If states show a willingness to deal with the financial impact of the DREAM Act on state budgets, this will lessen the additional impact of a federal act and demonstrate support for the measure.

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<sup>214</sup> See Alison Go, *California Governor Vetoes Dream Act*, U.S. NEWS & WORLD REPORT (Oct. 1, 2008), <http://www.usnews.com/education/blogs/paper-trail/2008/10/01/california-governor-vetoes-dream-act>.

<sup>215</sup> CAL. LEGIS. S. JOURNAL 5684, 5684–85 (Oct. 1, 2008) (statement of Governor Arnold Schwarzenegger), available at <ftp://www.leginfo.ca.gov/pub/senate-journal/sen-journal-0x-20081001-5621.PDF> (Veto Message on S.B. 1301).

<sup>216</sup> Press Release, Governor Jodi Rell, Governor Rell Vetoes Bill to Provide In-State Tuition to Illegal Aliens (Jun. 26, 2007), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=2791&Q=385102&pp=12&n=1>.

<sup>217</sup> *Id.*

<sup>218</sup> See Kyle Daly, *Texas Republicans Look to Repeal State DREAM Act, Base Argument on Questionable Economics*, WASH. INDEP. (Mar. 7, 2011, 6:18 PM), <http://washingtonindependent.com/106158/texas-republicans-look-to-repeal-state-dream-act-base-argument-on-questionable-economics> ("No fewer than three bills have been introduced in the Texas legislature that propose to follow Oklahoma's lead and roll back in-state tuition benefits to undocumented students.").

## VI. CONCLUSION

Illegal immigration is a real problem in the United States. The current economy and limited job market amplify concerns about introducing further job competition, particularly from individuals who entered the country illegally. However, it is neither feasible nor desirable to deport every individual residing in the United States illegally. It is not fruitful to frame the debate as: “will we have a system that encourages orderliness, legality, assimilation and basic rights or will we continue to maintain the current system of arbitrary restrictions, limited legality, unfair competition, diminished rights, and massive deportation?”<sup>219</sup> Any immigration reform at this stage will need to include enforcement measures in addition to assimilation measures.

The DREAM Act is an ideal assimilation measure, both because it benefits ambitious individuals who bear no fault for their illegal status, and because it has the potential to benefit the United States through increased productivity and military service. The DREAM Act should be further restricted to ensure that only the most deserving and faultless individuals may take advantage of the bill and it should be combined with increased enforcement measures aimed at other populations of illegal immigrants. President Obama’s plea for Democrats and Republicans to work together on this initiative, the relatively moderate agenda set so far by Republicans, and the continued support for the DREAM Act from Democratic senators all suggest that the DREAM Act still has a fighting chance.

—*Elisha Barron\**

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<sup>219</sup> Representative Luis Gutierrez (D-Ill.), *On Immigration, Are You a Lamar Smith-John Boehner-Steve King Republican?*, HUFFINGTON POST (Oct. 22, 2010, 11:18 AM), [http://www.huffingtonpost.com/rep-luis-gutierrez/on-immigration-are-you-a\\_b\\_772410.html](http://www.huffingtonpost.com/rep-luis-gutierrez/on-immigration-are-you-a_b_772410.html).

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