The DREAM Act and the Right to Equal Educational Opportunity: An Analysis of Ashley Feasley
The DREAM Act and the Right to Equal Educational Opportunity: An Analysis of U.S. and International Human Rights Frameworks as They Relate to Education Rights

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I. Introduction

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

The story of the Pulitzer-Prize winning journalist and undocumented immigrant, Jose Antonio Vargas gives a face to the controversial and political debate about the educational rights of undocumented children who come as minors to live illegally in the United States with their parents. These undocumented children, approximately 65,000, grow up as socially and culturally American as the American citizen children they sit next to in school. However, due to these children’s undocumented and illegal status, their future opportunities are much bleaker than their American citizen classmates: under the current U.S. immigration laws, undocumented children face deportation and are frequently denied access to higher education, either through state legislation that prohibits their enrollment into college in their home state or through the exorbitant costs for tuition for which they are denied access to federal aid and loans.
In 2001, American legislators introduced a bill called the Development, Relief, and Education for Alien Minors (“DREAM”) Act. The DREAM Act has never been made law and has been re-introduced in almost every subsequent federal legislative session. The DREAM Act, as it stands today, would provide conditional permanent residency to certain illegal alien applicants who graduate from U.S. high schools, are of good moral character, arrived in the U.S. illegally as minors, and have been residing in the U.S. continuously for at least five years prior to the bill’s enactment. The reaction to the proposed DREAM Act has been divisive and highly-politicized. Failure to pass a version of the DREAM Act at the federal level has opened the door for many state legislatures to address the issue of undocumented students and their access to higher education on a state-by-state basis. Some states’ responses, such as New York’s and California’s, with the proposed New York Dream Act, and the California Dream Act, (part of which was recently signed into law), have allowed for undocumented students to receive access to educational opportunities such as those provided for in the DREAM Act. Other state responses, such as Alabama’s, with the recent passage of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, contain provisions that deny undocumented students access to higher education and verge on racial profiling.

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

An evaluation of the international human rights framework highlights an individual
rights-based approach that identifies particular social, cultural, political, and economic rights as they pertain to children and reinforces the importance and fundamentality of the individual rights themselves, primarily, the right to education, and the right to be free from discrimination. An evaluation of the U.S. domestic legal framework yields a less-defined human rights system, that while centered on the “best interests of the child” standard does not embrace the protection of individual (positive or negative) education rights. Indeed the U.S. has not ratified the Convention on the Rights of the Child nor has it recognized a fundamental right to education. Given these limitations, the basis for passing the DREAM Act and granting undocumented students rights to higher education seems to stem from the Equal Protection Clause, in the US legal framework, and freedom from discrimination in the international human rights framework. This article argues that by denying undocumented children access to higher education, the U.S. government is violating their obligations under the UDHR and UCCPR, as they relate to discrimination of social groups or on the basis of national origin. Furthermore, by denying undocumented students access to higher education which is afforded their American contemporaries, and is provided by the DREAM Act, these undocumented students are being discriminated against participating and contributing in American society and civic life and are being denied the equality of educational opportunity. Education, although not a fundamental right, is an integral aspect of participation in the American community and helps to provide abolition of castes and a non-discriminatory society. For this reason, the United States Congress should pass the DREAM Act.

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

II. The DREAM ACT of 2011

1. Legislative History of DREAM Act

In 2001, a very similar bill to the DREAM Act was introduced during the 107th Congress as H.R.1918 and S.1291 in the House of Representatives and in the Senate respectively. The 2001 bill did not successfully pass through the House or the Senate. On July 31, 2003, Senators Orrin Hatch and Richard Durbin first introduced a bill named the “DREAM Act” in the 108th Congress. The DREAM Act initially passed through the Senate Judiciary Committee in October 2003, by a 16-3 vote. The final version of the DREAM Act that actually passed through the Senate Judiciary Committee in 2003 also included controversial amendments proposed by Senators Charles Grassley (R-IA) and Dianne Feinstein (D-CA).
During the 108th Congress, there was never a full Senate vote on the DREAM Act, leading to the Act’s reintroduction in the 109th Congress on November 18, 2005. In 2006, the DREAM Act appeared as an amendment to the Comprehensive Immigration Reform Act of 2006, a bill designed to produce long-term solutions to illegal immigration problems. On May 25, 2006, the Senate passed the Comprehensive Immigration Reform Act by a 62-36 vote. However, the Comprehensive Immigration Reform Act failed to become law. With the failure of the Comprehensive Immigration Reform bill, Senator Durbin made the passage of the DREAM Act a top priority for 2007. In September 2007, Durbin filed to place the DREAM Act as an amendment to the Department of Defense Authorization Bill (S. 2919).

On October 18, 2007, Durbin, along with Republican co-sponsors Senators Charles Hagel and Richard Lugar, introduced a new version of the DREAM Act. A vote was scheduled on October 24, 2007, to debate the DREAM Act in the Senate. In order to overcome the Republican’s filibuster, the passage of the 2007 DREAM Act required sixty votes. However, the 2007 DREAM Act fell short of the required votes.

On September 21, 2010 the Senate voted again on the DREAM Act. This time around, due to the majority the Democrats had in Congress, the Democrats needed only one Republican vote to have the sixty votes necessary to take up the Act without threat of filibuster. Democrats hoped Senator Susan Collins of Maine, would cross the aisle but ultimately she voted with her party, and the DREAM Act failed again.

In December 2010, for the second time in three months, the Senate tried and failed again to pass the DREAM Act. In September 2010, the Senate majority leader, Senator Harry Reid, tried to attach the DREAM Act to a defense reauthorization bill. But Republicans thwarted that plan and effectively killed the DREAM Act for 2010. As of December 2010 the fate of
the DREAM Act was uncertain, despite President Obama’s personal lobbying efforts in support of the bill.\textsuperscript{xxv}

On May 11, 2011, Senator Reid reintroduced the DREAM Act in the Senate, shortly after President Obama called on Congress to take steps forward on a comprehensive immigration reform bill that would put the nation’s 11 million undocumented immigrants on a pathway toward citizenship.\textsuperscript{xxvi} The DREAM Act faces dim prospects again this session.\textsuperscript{xxvii} With Republicans now in control of the House, longtime supporter and co-architect Senator Durbin, acknowledged a "long, long journey" ahead.\textsuperscript{xxviii}

2. Provisions of the 2011 DREAM Act

The Dream Act of 2011 provides a conditional permanent resident status for certain long-term residents who entered the United States illegally as children.\textsuperscript{xxix} The requirements state that the applicant must: have been continuously physically present in the United States since at least five years before the date of enactment of the DREAM Act 2011;\textsuperscript{xxx} have been fifteen (15) years of age or younger on the date they initially entered the United States;\textsuperscript{xxxi} be a person of good moral character since the date they entered the United States;\textsuperscript{xxxi} have not ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;\textsuperscript{xxxi} have not been convicted of any offense under Federal or State law punishable by a maximum term of imprisonment of more than one year\textsuperscript{xxxi}; have not been convicted of three (3) or more offenses under Federal or State law for which the they have been convicted on different dates for each of the three offenses and imprisoned for an aggregate of ninety (90) days or more\textsuperscript{xxv}; must be admitted to an institution of higher education in the United States or have earned a high school
diploma or obtained a general education development (GED) certificate in the United Statesxxxvi, and must be thirty-five years of age or younger on the date of the Act’s enactment.xxxvii An applicant applying for permanent resident status on a conditional basis must establish that they have registered under the Military Selective Service Act if they are subject to that Act.xxxviii A careful examination of the text of the 2011 DREAM Act shows that the criteria are very specific and tailored and apply to a small group of individuals.

3. States’ Response to the DREAM Act

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

In 2001, nine states passed laws permitting certain undocumented students to enroll and also pay in-state tuition at state universities.xlii By 2009, Texas, California, Utah, Washington, New York, Maryland, Oklahoma, Illinois, Kansas, Nebraska, and New Mexico had laws that provided for in-state tuition to undocumented students who were state residents and who had attended and graduated from the state’s secondary schools.xliii Four of the above-mentioned
states (New York, Texas, California, and Illinois) are among the states that have the most potential DREAM Act beneficiaries and large undocumented immigrant populations generally. These states generally require undocumented students to: 1) attend schools in the state for a certain number of years; 2) graduate from high school in the state; and 3) sign an affidavit stating that they will apply to legalize their status as soon as they are eligible to do so. Nine other states (Colorado, Connecticut, Florida, Iowa, Massachusetts, Mississippi, Missouri, Oregon, and Rhode Island) are currently considering similar legislation. All of the existing state laws extending educational benefits to legal permanent residents are in compliance with federal law. Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prohibits states from providing any higher education benefit based on residency to undocumented immigrants unless they provide the same benefit to U.S. citizens in the same circumstances. The 11 states that grant undocumented students in-state tuition also provide U.S. citizens or legal permanent residents who meet the requirements, but who no longer live in the state, with in-state tuition rates.

A. New York and California Dream Acts

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

On July 25, 2011, California Governor Jerry Brown signed into law legislation that would allow undocumented college students in California to receive privately financed scholarships for California state universities. The bill, part of package known as the California Dream Act, would entitle those students to the same kind of state aid that California legal residents can receive. The California governor also signaled that he was likely to back a more controversial measure allowing those students to seek state-funded tuition aid in the future. The California Dream Act has passed the California state Assembly, but has not come to the floor for a vote in the Senate. Assemblyman Gil Cedillo of Los Angeles, and the author of the California Dream Act, is pressing ahead with a more expansive measure that would make certain undocumented students eligible for the state’s Cal Grants and other forms of state tuition aid. The California Dream Act has drawn strong support across the California Latino community, and is seen as a civil rights issue in the Latino community, especially for young people.

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

The Alabama state legislature has recently moved to drastically curtail the rights of Alabama’s undocumented children and students. On May 5, 2011, the Beason-Hammon
Alabama Taxpayer and Citizen Protection Act (“H.B. 56”) was introduced to the Alabama State Senate, and was signed by Alabama Governor Robert Bentley into law on June 9, 2011. H.B. 56 is an anti-immigrant bill. H.B. 56 makes it a criminal offense in Alabama to rent a house or an apartment to undocumented immigrants or to knowingly give an undocumented immigrant a ride.

The text of H.B. 56 is uniformly anti-immigration, and takes particular aim at the rights of undocumented children in the Alabama public schools. H.B. 56 states that “an alien who is not lawfully present [in the United States] shall not be permitted to enroll in or attend any public post-secondary education institution in the state of Alabama.” H.B. 56 effectively turns Alabama public school teachers and administrators into immigration officials as it targets undocumented students’ presence at public schools and requires that school officials collect information about the status of these students and their parents.

H.B. 56 also puts an unprecedented demand upon schools and educators by making school officials and teachers personally responsible to facilitate the law. Schools have the responsibility to report undocumented students and their parents. H.B. 56 states that every public elementary and secondary school must determine whether the student attempting to enroll in school was born outside the United State’s jurisdiction and/or whether that child is the child of an alien not lawfully present in the United States. H.B. 56 further requires that these students and/or parents submit either the student’s original birth certificate or a certified copy of the birth certificate to the school. If the student does not have such documentation, the school official “shall presume . . . that the student is an alien unlawfully present in the United States.”

Section 28 of H.B. 56 requires a public school official to make a legal conclusion about a student’s status within the United States. Such a status determination by non-professionals could
be incorrect and as a result be very damaging to the future of a student and their family. H.B. 56 ostensibly claims to be collecting this information to analyze and identify the effects upon the standard and quality of education provided to students residing in Alabama and the costs of undocumented children upon the school system. However, commentators are arguing that the reporting requirement that H.B. 56 puts upon Alabama public school officials and teachers is not simply to assess costs but to prevent undocumented children’s access to primary and secondary education and will inevitably lead to the type of racial profiling in education that is currently seen in law enforcement.

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

III. Overview of Education Law in the U.S.

1. U.S. Does Not Guarantee A Fundamental Right to Education

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

The United States Constitution does not expressly mention education nor is it guaranteed 
as a right to children. While children have certain fundamental constitutional rights such as a 
Thirteenth Amendment right not to be enslaved, rights under the Due Process Clause, and a right 
not to be deprived arbitrarily of life or liberty, children have enjoyed only a minimal set of 
constitutional entitlements and education has not been one of them. The United States 
Supreme Court rejected an argument that education is a fundamental constitutional right in San 
Antonio Independent School District v. Rodriguez. In Rodriguez, the Supreme Court refused 
to recognize a federal right to education because it determined that the Constitution neither 
explicitly nor implicitly recognized education. Furthermore, the Court found that education’s 
individual importance, as well as its relationship in promoting other protected “political” rights, 
such as the right to free speech, and to vote, was insufficient to transform education and access to 
education into a federally-protected fundamental right within the United States.

2. Plyler: Striking Down Discrimination of Undocumented Students

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

3. After Plyler: Papasan and Back-Tracking

After Plyler, where the Court ruled that undocumented students had the right to receive the same basic education as other students, the Supreme Court declined to recognize or deny a federal right to “minimally adequate” education in Papasan. In Papasan, the Court considered whether a curtailed fundamental right to a minimally adequate education existed at all. Students brought an action against state officials challenging Mississippi’s distribution of public school land funds, claiming that the distribution resulted in a disparity in school funds from one section of schools as compared to other schools. The students claimed the disparity in the funds led the children of the affected school section to receive a less than “minimally adequate” education. Plaintiffs in Papasan did not put forth the issue of a fundamental right to education, as in Rodriguez, (nor did they attempt a straight-forward Equal Protection claim as in Plyler) but instead addressed the issue of education rights through a less-than-fundamental liberty interest, that of a minimally adequate education. Some legal scholars argue that the Supreme Court’s unwillingness to strike down the “minimally adequate” standard signified progress towards education being identified as a fundamental right; however, there remains no federally recognized right to education.
IV. Application of U.S. Constitutional Framework to the DREAM Act

1. Papasan’s “Minimally Adequate” Standard Is Inadequate

Even if the Supreme Court were to recognize a “minimally adequate” education standard, undocumented students would not likely receive the right to the type of higher education that the DREAM Act provides. One of the reasons for this has to do with the arbitrariness of the “minimally adequate” standard itself. A “minimally adequate education” is an unclear and imprecise standard that would need constant updating and evaluating in order to be current. For example, a modern “minimally adequate education” would include higher standards and competencies than what constituted a “minimally adequate education” when Rodriguez, Plyler, or Papasan were decided. Today, there is ostensibly a greater need today for young people entering the workforce to have a college education and degree, than there was thirty years ago. However, the Supreme Court will likely never recognize the right to a college education as part of a “minimally adequate” education. But in the context of the DREAM Act, it can be argued the need is not for the U.S. to formally recognize a federal fundamental right to education, but instead to recognize or protect an “equal educational opportunity” right. It is in this context that Plyler, with its analysis of education rights through an Equal Protection perspective is most aligned with the ideas behind the DREAM Act.

2. Plyler’s Relevance to the DREAM Act

The argument in Plyler, that undocumented students have a right to the same basic education as other students, reflects the reasoning behind the DREAM Act. The DREAM Act, similar to Plyler, invokes the right to equal opportunity and to be free from discrimination.
Much of the language used to describe the Court’s reasoning in *Plyler* can be applied to the rationale behind the DREAM Act. The Court in *Plyler* noted that the children at issue did not independently choose to come to the United States illegally but instead were brought to the United States by their parents. As a result, the Court reasoned that punishing the children for the acts of their parents or guardians violated fundamental notions of justice. This factual point also applies to the background of the children who qualify for the DREAM Act, as many of them were also brought illegally to the United States as children by their parents.

Additionally, the Court in *Plyler* noted that education provides the basic tools by which individuals might lead economically productive lives that benefit society and that education has a fundamental role in maintaining the fabric of society. Indeed it is this belief in education as a means to advance members of American society that is the ethos behind the creation of the DREAM Act. However, it is Justice Blackmun’s concurrence that perhaps best articulated concerns about the undocumented students at issue in *Plyler*, and could be applied to the undocumented students who stand to benefit from the DREAM Act: that “children who are denied an education will be placed at a permanent and insurmountable competitive disadvantage, as an uneducated child is denied even the opportunity to achieve.”

3. Denying Undocumented Students Equal Educational Opportunities in the Public School System and the Workforce

A. Linguistic Barriers

Justice Blackmun’s fear articulated in the concurrence of *Plyler* has unfortunately become a reality. Race, language, and income-based achievement gaps have come to underscore the lack of equal access to education in the United States. By the end of high school, the average
Latino\textsuperscript{xcv} student scores at approximately the same level as the average white 8\textsuperscript{th} grader.\textsuperscript{xcvi} Minority and undocumented children are less likely to be in gifted and talented programs and are more likely to be in special education programs for children with emotional or behavioral needs.\textsuperscript{xcvii} Latinos have higher drop-out rates and lower high school completion rates than African American or White-Anglo students.\textsuperscript{xcviii} The drop-out rate for Latino students is 28\% as compared with 7\% for White-Anglo students.\textsuperscript{xcix} Education gaps are becoming more prevalent and starting to occur even earlier as a greater number of immigrant children enter the American public school system. The overall percentage of minority students in public schools increased by 17\% between 1972 and 2000, and slightly more than 10\% of that increase was attributable to Latinos.\textsuperscript{c} Additionally, limited English proficiency (“LEP”) students are the fastest growing population in U.S. public elementary schools.\textsuperscript{ci} Between 1993 and 2003, the total number of LEP students in the U.S. schools increased by more than 50\% from 2.8 million to an increase of more than 4 million children.\textsuperscript{cii} Between 1980 and 2000, the number of children in the United States speaking a language other than English at home more than doubled, from 5.1 million to 10.6 million,\textsuperscript{ciii} 2.6 million of those students are LEP, representing 5\% of all students in United States schools.\textsuperscript{civ} B. Cost Barriers

The obstacles preventing undocumented students from achieving higher education grow greater as they progress to higher levels of education. A recently published longitudinal study of 15,000 eighth-grade students in the United States shows that, on average, Latinos are overrepresented with respect to higher education risk factors. Such figures show how unprepared these students are for postsecondary education.\textsuperscript{cv} In particular, the study found Latinos are overrepresented in the following risk areas: having parents without a high school
degree (“educational legacy”); having a low family income; having siblings who have dropped out of school; being held back in school; having a C or lower grade point average; changing schools; and having children while still in high school. Even if undocumented students are able to succeed and make it through the American primary and secondary education system, their prospects of attending and graduating college are very slim. Nearly one-fourth of all LEP students ages 16-24 who enroll in the U.S. schools drop out.

One of the factors attributed to this statistic is the prohibitive cost of higher education to undocumented students. For many low-income families, the largest barrier to post-secondary education is the cost. The average tuition and fees at public four-year institutions reached $7,605 per year in 2010 for in-state students, up from $4,115 in 2002. These in-state “discount” tuition rates are not typically available to undocumented students. Tuition and fees at private non-profit four-year college costs rose to an average of $27,293, and tuition and fees at public two-year colleges were, on average, $2,713 in 2010. As costs rose during the 1990s and early 2000s, the percentage of academically qualified low-income high school graduates attending four-year colleges fell, from 54 percent in 1992 to 40 percent in 2004, and the percentage of qualified moderate-income students dropped from 59 percent to 53 percent.

Prohibitive costs and legal barriers to entry (in some states) make higher education impossibility for many undocumented students. For this reason, the DREAM Act offers so much hope and opportunity. Higher education has become something that is viewed almost as a necessity in the United States. Fifty years ago, 48 percent of recent high-school graduates enrolled in a college or university. In 2009, that number was more than 70 percent, a historic high. A 1999 survey sponsored by the Educational Testing Service found that 87 percent of Americans felt the lack of a college education to be a disadvantage in life. “Education has
been central to the American Dream since the time of the nation’s founding,” Drew Gilpin Faust, the president of Harvard, wrote in 2009. But in the decades since World War II, it has been college, not just elementary or high school, as before, that has become “fundamental to cherished values of opportunity.”

4. Is Denying Higher Education Opportunities Denying an Opportunity to Participate in Society?

Higher education, particularly a college degree or training (like what the DREAM Act provides) has been proven to be an indicator of greater financial stability, health, and contribution to society. A 2007 study by the College Board found that, over the course of his or her working life, the average college graduate earns in excess of 60 percent more than a high-school graduate, and workers with advanced degrees earn two to three times as much as high-school graduates. As of 2006, workers without a high-school diploma earned only $419 per week and had an unemployment rate of 6.8 percent. In comparison, workers with a bachelor’s degree earned $962 per week and had an unemployment rate of 2.3 percent, while workers with a doctoral degree earned $1,441 per week and had an unemployment rate of 1.4 percent. Salaries are not the only form of compensation correlated with education level: college graduates are more likely than other employees to enjoy employer-provided health and pension benefits.

In addition to the tangible benefits that come with attainment of higher education, college graduates have greater opportunities. Accordingly, denying the possibility of achieving higher education takes away opportunity and effectively discriminates. Educational equity means an actual guarantee of fair access to some level of educational opportunity. The impact of the DREAM Act is all the more meaningful in light of the evolving, fast-paced, complex nature of the global economy. Education no longer prepares youth for participation in local factory or
farming economies; today's children will face future economic challenges as part of a shared national enterprise. The need for a college education is becoming more necessary as the U.S. economy and industry change from a worker economy to a service-based economy. The Bureau of Labor Statistics (BLS) “estimates that many of the occupations that will be most in demand in years to come will rely on highly educated workers.” Of the 15 occupations projected to grow at least twice as fast as the national average (13 percent), 10 require an associate degree or higher. Seen in this light, discrimination against undocumented children practiced by states or by the U.S. federal government profoundly threatens our national vitality as the lowest achieving states fall further and further behind and as uneducated peoples in these states inflict an ever larger burden on the nation, draining valuable national resources. Failing to recognize the state's responsibility to provide the conditions for children's future well-being simply leaves millions of children vulnerable to the long-term adverse effects of wealth inequality in the United States. As the states and the federal government of struggle to provide quality educational opportunities for their children, the resulting harms are increasingly exported unto other states, imposing a social deadweight loss to the detriment of America as a whole. The Supreme Court's rationale in Plyler regarding the unfairness of penalizing undocumented children for their parents' illegal acts, as well as the concern over the creation of a permanent caste of undocumented residents, would seem to be applicable to the undocumented student seeking access to higher education in this day and age. Commentators have similarly suggested that public policy supports the desirability of federal activity in furtherance of providing higher education opportunities for undocumented students. For this reason, I argue that not allowing undocumented children to pursue higher education under the
DREAM Act or in some other meaningful way amounts to discrimination of undocumented children and prevents them from fully participating and engaging in modern American society.

V. The Intersection of Human Rights Law and U.S. Law as Related to Education Rights and the DREAM Act

The ideas articulated in Section IV supra are inconsistent with current U.S. constitutional law as it relates to assessing human rights and liberties. As Goodwin Liu has recently observed, “the idea that our Constitution guarantees affirmative rights to social and economic welfare has for some time been out of fashion.” Other rights theorists have concluded “that rights, as conceived and employed in at least United States liberal and constitutional jurisprudence, are fundamentally at odds with any purported state obligation to ensure the material preconditions of a good society.” The Supreme Court has recognized some affirmative constitutional rights, most in the realm of procedure such as the right to a speedy trial or to habeas corpus, but for the most part the Constitution is treated as a charter of negative liberties.

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

Modern internationalization of human rights has given rise to multilateral treaties which deal
in issues once left exclusively to the purview of sovereign nations.\textsuperscript{cxxxii} Agreements such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child are examples of treaties that affect the fundamental rights of people in signer nations.\textsuperscript{cxxxiii} In the United States, most of the human rights issues covered in treaties like these are either guaranteed to citizens through the Bill of Rights and its subsequent interpretation by U.S. courts, or they are left to the people or to the individual States to legislate upon appropriately through the Ninth and Tenth Amendments.\textsuperscript{cxxxiv} A right to education or an equal educational opportunity right is not guaranteed in the Bill of Rights or the Constitution generally, and the states have initiated a veritable patchwork of rights and regulations as evidenced by Alabama, New York and California.\textsuperscript{cxxxv} However, the U.S. has obligations relating to education and children under the obligations under the UDHR and ICCPR.\textsuperscript{cxxxvi}

VI. International Human Rights Framework

1. History of UDHR, ICCPR, ICESCR

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

2. Protection of Children within the UDHR, ICCPR, ICESCR

The international community has acknowledged the special and precarious status of children and has taken measures to protect them. Children receive rights from the general international human rights framework and are also defined in an individual capacity. Children are recognized as having rights both in the ICCPR and the ICESCR. The ICCPR states that every child shall have, without discrimination, the right to measures of protection as are required by his or her status as a minor, on the part of his or her family, society, and state and that every child should have a right to nationality. The ICESCR assigns more extensive rights to children, as it recognizes that the family is responsible for the care and education of dependent children and prohibits discrimination against children for reasons of parentage or other conditions.

3. Convention on the Rights of the Child

While the general international human rights framework of the UDHR, ICCPR, and the ICESCR address children’s rights in an individual context, the most commonly discussed international human rights documents concerning children’s rights are the Declaration of the Rights of the Child (“Declaration”) and the Convention on the Rights of the Child (CRC). The origins of the CRC began with the Geneva Declaration of the Rights of the Child, which was adopted by the League of Nations in 1924. Previous to 1924, there had been growing discussion about the need for a comprehensive human rights instrument dedicated to
enumerating and protecting the rights of children. In 1959, there was the creation of the Declaration of the Rights of the Child (“Declaration”). The Declaration was a document that contained ten main principles that expanded on the rights set forth in the 1924 Geneva Declaration. The Declaration, in its Preamble, recognizes that children have special needs and provides that a “child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection…” The Declaration contains ambiguous and very optimistic goals for protection of children’s rights, but the Declaration created the standard of the “best interests of the child,” and set the stage for later children-focused human rights documents, including the CRC.

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

VII. Right to Education Under Human Rights Framework

1. Right to Education Under UDHR, ICCPR, ICESCR
The UDHR, ICESCR, and ICCPR all identify and protect the right to education. Article 26 of the UDHR states that everyone has the right to education and that the education shall be free in the fundamental stages. Article 13 of ICESCR requires parties to recognize that everyone has the right to education and that education shall be free to all. The right to education included in the ICESCR may arguably be viewed as the most important formulation of the right to education in an international agreement. Additionally, Article 13 of ICESCR lays out standards regarding access to the different levels of education in an effort to further achieve the full realization of the right to education.

Article 13(a) provides that primary education shall be compulsory and available and free to all; Article 13(b) states that secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; and Article 13 (c) states that higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education. ICESCR binds parties to guarantee that the rights enunciated in the covenant will be exercised without discrimination of any kind as to . . . national or social origin or other status.

2. Right to Education Under the CRC

Articles 28 and 29 of the CRC discuss states’ obligation with respect to children’s rights to education. Article 28 mandates that “state parties must recognize the right of the child to education.” It is important to note that this right under the CRC includes undocumented alien children as well. The CRC requires states to provide free, compulsory primary education to every child and to encourage children’s regular school attendance. Article 29 requires state
parties to direct education to the development of a child to his/her fullest potential to the respect for fundamental human rights, and to the respect for the child’s parents and cultural identity.\textsuperscript{clxviii} Article 2 of the CRC forbids state parties from discriminating against children, “irrespective of the child’s or his or her property, disability, birth or other status.”\textsuperscript{clxix} The CRC accordingly forbids ratifying countries from restricting children’s access to education and imposes affirmative duties on nations to promote education for all children within their borders.

VIII. Applicability of International Human Rights Law Framework to the DREAM Act

1. United States’ Non-Ratification of the CRC and ICESCR

While the provisions set forth in the UDHR, ICCPR, ICESCR, and CRC devote substantial attention to the rights of children and families and the right to education generally, a straightforward application of these treaties and protected rights to the United States domestic legal schema remains an impossibility as the United States has not ratified several of these documents. The United States has not ratified the CRC.\textsuperscript{clxx} Indeed, only two nations, the United States and Somalia have not ratified the CRC.\textsuperscript{clxxi} Although the United States signed the CRC in 1995, it has not ratified it.\textsuperscript{clxxii} Additionally, the United States has not ratified the ICESCR.\textsuperscript{clxxiii} Because the United States has not ratified either the CRC or the ICESCR, the rights that are incorporated in those human rights treaty instruments do not have full effect upon the United States.\textsuperscript{clxxiv} However, this article suggests that despite the United States’ non-ratification of the ICESCR and the CRC, a persuasive argument can be made that other elements of both international law and American domestic law\textsuperscript{clxxv} can be used to protect undocumented student’s rights to higher education as it appears in the form of the DREAM Act of 2011.

2. United States’ Responsibilities under the UDHR and ICCPR
The United States has obligations under the UDHR and ICCPR, as related to
discrimination and education and citizenship which the U.S. government has not honored. It can
be argued that the current Alabama bill, H.B. 56, and the denial of the 2011 DREAM ACT is a
violation of the UDHR. The UDHR is a significant document because of its extensive
application (to all nations) and its status as the codification and acceptance of international legal
custom.\textsuperscript{clxxvi} As a resolution, the UDHR does not need to be ratified like a convention or other
treaty body (such as the CRC, ICCPR, ICESCR) and is accordingly applicable to every nation,
irrespective of a nation’s UN membership or ratification of a treaty.\textsuperscript{clxxvii} However, the UDHR is
not a legally binding document and is arguably only enforced through political and social
pressure.\textsuperscript{clxxviii} Nonetheless, the United States is expected to adhere to the principles stated in the
text of the UDHR. The rights articulated in the UDHR, particularly Article 26, which addresses
the right to education.\textsuperscript{clxxix} Article 26(1) of the UDHR does not put a limit or ceiling on the level
of education that is to be provided, instead Article 26(1) states, that professional education, shall
be made generally available and higher education shall be equally accessible to all on the basis of
merit.\textsuperscript{clxxx} Under the current American domestic legal framework, this requirement is clearly not
being followed at the federal or the state level as evidenced by both the failure to pass the
DREAM Act, as well as the existence of bills such as Alabama’s H.B. 56.\textsuperscript{clxxxi}

3. The United States’ Discrimination on the Basis of National Origin

Because the United State has not ratified either the CRC and the ICESCR, which provide
the basic international human rights foundation for children’s rights and the right to education,
respectively, a better rights based approach may be an examining the denial of higher education
opportunities for undocumented children as discrimination based on national origin. The United
States has ratified the ICCPR.\textsuperscript{clxxxii} ICCPR Article 24(1) states that every child shall have
without discrimination as to race, colour, sex, language, religion, national or social origin,
property or birth, the right to such measures of protection as are required by his status as a minor,
on the part of his family, society and the State.\textsuperscript{clxxxiii} Under this requirement, an argument could
be made that the United States’ federal government and certain state governments are
discriminating against the undocumented children of undocumented workers and preventing their
access to civic participation. Additionally, Article 24(3) of the ICCPR provides that “every child
has the right to acquire a nationality.”\textsuperscript{cclxxxiv} With the particular circumstance of deportation
frequently facing the undocumented children who move here with their parents and live here
illegally when they are children, programs such as the DREAM Act 2011, provide an
opportunity to acquire legal nationality and citizenship and should be made law. The federal
government’s refusal to enact the DREAM Act, as well as state measures such as H.B. 56 seem
to violate these undocumented students right to be free to acquire their American citizenship and
nationality.

IX. Conclusion

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

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ii An estimate of the number of undocumented students who will qualify for the DREAM Act. In the last five years the number of eligible students has been around 65,000. The actual number of undocumented students is difficult to determine because few public higher education systems track these students, and students themselves are reluctant to divulge their status for fear of deportation or other legal consequences. See Radha Roy Biswas, Access to Community College for Undocumented Immigrants: A Guide for State Policymakers: An Achieving the Dream Policy Brief, Jobs for the Future, Creating Strategies for Educational and Economic Opportunity, 2, (2005) available at http://www.achievingthedream.org/_images/_index03/Policy_brief-AccessstoCCUndoc.pdf.


viii The focus of this article is the legal bases to adopt the DREAM Act found in international human rights law and in the U.S. legal framework. However, this article acknowledges that there a variety of policy reasons to adopt the DREAM Act ranging from fiscal cost-saving arguments to national security interests. See e.g., 5 Reasons to Support the DREAM Act, America’s Voice Online, September 15, 2010, available at http://americasvoiceonline.org/research/entry/reasons_to_support_the_dream_act
Cost issues (an article discussing the benefits the military stands to gain from passage of the DREAM Act); Raul Hinojosa Ojeda and Paule Cruz Takash with Gerardo Castillo, Gilmar Flores, Adriana Monroy and Delroy Sargeant, No DREAMers Left Behind The Economic Potential of DREAM Act Beneficiaries, North American Integration and Development Center, UCLA, 2008, available at http://naid.ucla.edu/uploads/4/2/1/9/4219226/no_dreamers_left_behind.pdf (an article discussing the cost benefits of passing the DREAM Act).


xi S.2075, 109th Cong. (2005) (The DREAM Act was reintroduced in the 109th Congress without the sponsorship of Senator Orrin Hatch.)


xiii S.2075, 109th Cong. (2005)

xiv Comprehensive Immigration Reform Act of 2006, S. 2611 §§ 601(b), 621-32, 109th Cong. S.2611 attempted to grant undocumented workers who met certain requirements legal permanent residency and citizenship.

xv Id.


xvii Kelly Field, “The Dream Act Is Dead, at Least for Now”, The Chronicle of Higher Education, September 21, 2010, available at http://chronicle.com/article/The-Dream-Act-Is-Dead-at/124560/?q=y2xpY2t0aHJ1Ojo6c293aWRnZXQ6OjpjaGFubmVsbmVbdmVym1JbnQsYXJ0aWNsZTkZWZlcnJlZC1hZ2tpbMlZWSdGUC1m90ZS1pcy1sYXRlc3Qt2V0YmFjay1mb3ItZHJlYW0tYW0nOjo6Y2hhbmbibDpnb3ZlcmtZWS50LGFydGljbGU6GhlLWRyZWFlWFjc1pcy1kZWFlWF0LWkJXN0LWZvc1tub3c=

xviii Id.

xix Id.

xx Id.

xxi Id.

xxii Kelly Field, “Deferred Again: Senate Vote IsLatest Setback for ‘Dream Act’” The Chronicle of Higher Education, December 18, 2010, available at http://chronicle.com/article/Deferred-Again-Senate-Vote-Is/125744/?qid=Y2xpY2t0aHJ1Ojo6c293aWRnZXQ6OjpjaGFubmVsbmVbdmVym1JbnQsYXJ0aWNsZTkZWZlcnJlZC1hZ2tpbMlZWSdGUC1m90ZS1pcy1sYXRlc3Qt2V0YmFjay1mb3ItZHJlYW0tYW0nOjo6Y2hhbmbibDpnb3ZlcmtZWS50LGFydGljbGU6GhlLWRyZWFlWFjc1pcy1kZWFlWF0LWkJXN0LWZvc1tub3c=

xxiii Id.

xxiv Id.


Id. at §3(b)(1)(A)

Id. at §3(b)(1)(B)

Id. at §3(b)(1)(C)

Id. at §3(b)(1)(D)(ii)

Id. at §3(b)(1)(D)(iii)(I)

Id. at §3(b)(1)(D)(iii)(II)

Id. at §3(b)(1)(E)(i), (ii)

Id. at §3(b)(1)(F)

Id. at §3(b)(6)

The issue of state versus federal supremacy in granting and protecting education rights is an issue that is currently in flux as evidenced by the Obama administration’s recent efforts to wrest some of the state education controls that were implemented through the No Child Left Behind Act. See e.g. Sam Dillion “Overriding a Key Education Law” New York Times, August 8, 2011, available at http://www.nytimes.com/2011/08/08/education/08educ.html?scp=2&sq=arne%20duncan&st=cse.


Id.


See DREAM Act, Fast Check, supra note 42.

Id.

Id.

Id.; see also Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 505 (1996).

See DREAM Act Fast Check supra note 42.


Id.

Id.

Id.

Id.


See Medina supra note 57.
See Reston supra note 58.

Id. quoting Jaime A. Regalado, director of the Pat Brown Institute of Public Affairs.


See H.B. 56, see also Violand, supra note 63.

H.B. 56, §8. H.B. 56 specifically claims under §7(e)(1) that verification of lawful presence in the United States shall not be required (1) For primary or secondary school education, and state or local public benefits that are listed in 8 U.S.C. § 1621(B). It is important to note that H.B. 56 specifically recognizes the federally protected right for undocumented students to access primary and secondary school as mandated by 8 U.S.C. §1621(B). For more discussion on the distinction regarding the U.S. federal education rights protection, see section III infra.

See Violand supra note 63.

The trend of making teachers personally responsible for determining whether students are undocumented, possibly was influenced by stories like that of Jose Vargas, who claims that his teachers knew of his undocumented status and aided him despite his illegal status. See Vargas supra note 1.

See Violand supra note 63, see also H.B. 56 §2.

H.B. 56 §28 (a)(1)

Id. at § 28(a)(2)

Id. at § 28(5)

Id. at §§28(d)(3), 28 (d)(4).

See Violand, supra note 63.

See supra section II.3.A-B discussing California, New York, and Alabama state regulations.


Anne C. Dailey, CHILDREN'S CONSTITUTIONAL RIGHTS, 95 Minn. L. Rev. 2099, 2100 (2011).

It is important to note only those rights that are “explicitly or implicitly guaranteed by the Constitution” are fundamental for equal protection analysis. See also, Aaron Y. Tang, PRIVILEGES AND IMMUNITIES, PUBLIC EDUCATION, AND THE CASE FOR PUBLIC SCHOOL CHOICE, Geo. Wash. L. Rev., 1103, 1130 (2011)

Rodriguez. at 4-5.

Id. at 35.


Id. at 206.

Id. at 227-230.

Id. at 230.

Youngro Lee, To Dream or Not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act, 16 Cornell J. L. & Pub. Pol’y 231,240 (2006); see Shaugnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). (establishing that once undocumented immigrants are physically within the boundaries of the United States, they are considered a “person” for purposes of constitutional due process rights).


Papasan v. Allain, 478 U.S. 265, 285 (1986). In Papasan, the Court stated that it had “not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” Id.

Id.

Id.
Id.


Plyler at 227-230.

Id. at 222.

Id. at 234 (Blackmun, J., concurring)


Id.


See Fix and Passel supra note 105 at 22.

See Lopez supra note 100 at 1384; Watson Scott Swail et al., Latino Youth and the Pathway to College viii, available at http://www.educationalpolicy.org (June 2004). The higher risk factors faced by Latinos in higher education were brought to the attention of the Supreme Court in Gratz v. Bollinger, 539 U.S. 234 (2003); see Brief of Latino Organizations as Amici Curiae in Support of Respondents, Gratz v. Bollinger, 539 U.S. 234 (U.S. 2003) (No. 02-516), available at 2003 WL 536740

Id.


Id.

Id.


Id.

Id.

Id.


See Yang supra note 76 at 1145; Craig D. Jerald, Ctr. for Pub. Educ., Defining a 21st Century Education (2009) (describing the rapidly changing knowledge and skills that characterize our increasingly competitive global economy along with the changes in our educational approaches that will be necessary to keep pace).

Roberto Gonzales, Young Lives on Hold: The College Dreams of Undocumented Students, (College Board Advocacy, April 2009).

Id.


See Yang supra note 76 at 1146.

Plyler at 220.

Id. at 237.


See Dailey supra note 76 at 2168; Goodwin Liu, Rethinking Constitutional Welfare Rights, 61 Stan. L. Rev. 203, 204 (2008)


See U.S. Const. amend. IX; U.S. Const. amend. X

The U.S. has not ratified CRC or ICESCR. The U.S. has ratified ICCPR (although it claims that it is not self-executing, it still has obligations under the ICCPR) and the UDHR applies universally. Accordingly, the U.S. has obligations under these two international legal documents.


Id.; see also ICCPR supra note 154.

ICCR supra note 154 at art. 24(1).

Id. at art. 24(2)-(3).

ICECSR supra note 155 at art. 10(1)

Id. at art. 10(3)

Under the Convention on the Rights of the Child, Article 1, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Convention on the Rights of Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Nov.20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. This article posits that the discussion of the CRC and children’s rights are pertinent to the discussion of the DREAM Act, even though the students who would be eligible for the DREAM Act as it stands today would likely experience the benefits as individuals over the age of eighteen years. Because the DREAM Act seeks to address the educational rights of individuals who were brought to the United States as children under the age of eighteen and a provision of the proposed 2011
DREAM Act requires an applicant to have at least resided in the United States from the age of fifteen or younger, an examination of the undocumented students’ rights under the CRC is appropriate.


c1 Id. at Preamble.

cii Id. at Principle 2. Principle 2 of the Declaration states that the” The child should enjoy special protection and shall be given opportunities and facilities by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

ciii See CRC supra note 162.


cvi CRC supra note 162 at art. 27(3); see also Hernandez-Truyol and Luna, supra note 171 at 301. Hernandez Truyol and Luna discuss negative human rights law in conjunction with the CRC. Negative rights are rights of persons to be free from governmental interference. They give as an example, the 1st Amendment of the United States Constitution, which provides for freedom of persons from undue government interference with respect to free speech. U.S. Const., amend I.

cvii CRC supra note 162 at art 24(1). Hernandez-Truyol and Luna supra note 171 at 402. Hernandez-Truyol and Luna discuss positive rights as rights are those rights requiring affirmative action by government. They list as an example, the ICESCR, which creates duties on government to provide health care and education to its citizens. ICESCR supra note 155 at arts. 12 and 13.

cviii CRC supra note 162 at art. 27.

clx UDHR supra note 153 at art. 26(1)

c x The Universal Declaration of Human Rights: A Common Standard of Achievement xxxi (Gudmunder Alfredson & Asbjorn Eide eds., 1999); see also ICESCR supra note 155 at art. 13; Komada supra note 170 at 464.


cxii ICESCR supra note 155 at art. 13

cxiii Id. at 5.

cxiv See CRC supra note 162 at art. 28, 29.

cxv See CRC supra note 162 at art. 28.

cxvi Id. The CRC applies to all children in the State, including visitors, refugees, children of migrant workers and those in the state illegally.
Id. at 53; see also Rachel Hodkin & Peter Newell, UNICEF, Implementation Handbook for the Convention on the Rights of the Child 23 (3d ed. 2007); Komada, supra note 170 at 462.

See CRC supra note 162 at art. 29.

Id. at art. 2.


Id. The United States has given several reasons for not ratifying the CRC, including a rationale that CRC usurps the rights of parents. The argument that the CRC interferes with parents’ rights to raise their children according to their own morals, can be dismissed through a close reading of the CRC itself. The CRC expressly acknowledges the rights of parents and stresses the importance of the parent-child relationship. Article 5 of the CRC states that “States Parties shall respect the responsibilities rights and duties of parents or where applicable, the members of the extended family or community as provided for by local custom . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance . . . . See CRC, at art. 5. Clearly, this statement places a parental supremacy for the care and guidance of their children. Additional statements defending the rights of parent can be found throughout the CRC. Article 8, assures a child the right to “preserve his or her identity including nationality name and family relations as recognized by law without unlawful interference. See CRC at art. 8. Article 9 ensures that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review” determine that such action is necessary for the best interest of the child. See CRC at art. 9. Inherent principles such as these articulated throughout the CRC lead scholars to assert that instead of eroding the role and responsibility of parents, instead: “the very concept of legal rights of children is questioned, moreover on the grounds that it might erode the proper role of parents. . . By recognizing the role of parents, the CRC avoids becoming an instrument in which the state might replace the parent.” See e.g., John Quigley, United States and Its Participation in the Convention on the Rights of the Child, 22 St. Louis U. L. Rev. 401, 403 (2003).

Id.

See ICESCR supra note 155; see also United Nations Treaty Collection, Chapter IV, No.3 ICESCR, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en. (This website lists all of the countries who have ratified the ICESCR by alphabetical order.)


See Komada supra note 170.

Id.

See UDHR supra note 153 at art. 26(1).

Id.

H.B. 56, § 8.

The United States ratified the ICCPR in 1992. The United States, upon ratification made reservations, stating that none of the articles should restrict the right of free speech and association. The United States also addressed provisions involving capital punishment and "cruel, inhuman and degrading treatment or punishment" which they stated refers to those treatments or punishments prohibited by the
Fifth, Eighth and/or Fourteenth Amendments to the US Constitution. The United States additionally submitted five understandings, and four declarations. One of the “understandings” that the United States Senate stated: “That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

Clxxxiii ICCPR supra note 154 at art. 24(1).

Clxxxiv ICCPR supra note 154 at art. 24(3).