

## LAW SUMMARY

# “Show Me” Your Legal Status: A Constitutional Analysis of Missouri’s Exclusion of DACA Students from Postsecondary Educational Benefits

BRITTENY PFLEGER\*

### I. INTRODUCTION

More than 130 years ago, Emma Lazarus penned these legendary words: “Give me your tired, your poor, Your huddled masses yearning to breathe free . . . .”<sup>1</sup> This passage from the poem *The New Colossus* embodies the Statue of Liberty’s optimistic “welcome” to the world’s disenfranchised people.<sup>2</sup> Its meaning gives a sense of hope to the roughly 1.2 million undocumented young people<sup>3</sup> who were given the opportunity to become legally present in the United States through the Deferred Action for Childhood Arrivals (“DACA”) program.<sup>4</sup> Through the DACA program, undocumented young people can receive a social security number, obtain a work permit, and register for state benefits, such as in-state tuition and state scholarships.<sup>5</sup>

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\* B.S., University of Missouri, 2014; J.D. Candidate, University of Missouri School of Law, 2017. Associate Managing Editor, *Missouri Law Review*, 2016–2017. I would like to thank Professor Christina Wells for her guidance and support in the development of this Note. I would also like to thank Dean Robert Bailey and Mr. Roger Geary for their mentorship and guidance. Finally, I would like to thank my family for their love, support, and inspiration throughout the years.

1. *A Young Poet Captures the Essence of Lady Liberty*, STATUE LIBERTY-ELLIS ISLAND FOUND., INC., (quoting EMMA LAZARUS, *THE NEW COLOSSUS* (1883)), <http://www.libertyellisfoundation.org/the-new-colossus> (last visited Mar. 24, 2016).

2. *Id.*

3. “Young people” as used in this Note refers to DACA applicants between the ages of fifteen and thirty-four. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015) (the executive order creating the DACA program requires applicants to be born on or after June 16, 1981 and be at least fifteen years old at the time of application).

4. Zenen Jaimes Pérez, *How DACA Has Improved the Lives of Undocumented Young People*, CTR. AM. PROGRESS (Nov. 19, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/11/BenefitsOfDACABrief2.pdf>.

5. *Id.*

Juan Sanchez, a Kansas resident who emigrated with his family from Mexico at the age of two, is one such undocumented individual granted DACA status.<sup>6</sup> Sanchez graduated with honors from Kansas City Kansas Community College in the spring of 2015.<sup>7</sup> Through the University of Missouri-Kansas City Metro Rate program,<sup>8</sup> Sanchez enrolled in the Henry W. Bloch School of Management at the University of Missouri-Kansas City as an in-state resident.<sup>9</sup> Sanchez worked two jobs to pay for his full-time tuition.<sup>10</sup> However, Missouri's new budget bill swiftly put an end to Sanchez's, and other Missouri DACA recipients', ability to afford a college education.

Missouri passed House Bill 3 ("HB 3") in the spring of 2015, becoming one of two states to exclude DACA recipients from in-state tuition and state scholarship funding.<sup>11</sup> The higher education budget bill declared that public institutions would receive state funding provided that no public institution offered a student with unlawful immigration status less than the international tuition rate, nor expended scholarship money on his or her behalf.<sup>12</sup> Senate Bill 224 ("SB 224"), a proposal requiring that individuals who receive the A+ Scholarship have legal status, was subsequently passed the same year.<sup>13</sup> As DACA students claim lawful presence but not lawful status, they are subject to increased tuition and receive no funding, despite meeting Missouri's residency requirements.

This Note discusses how Missouri's exclusion of in-state tuition and state scholarship funding affects DACA students and concludes the Missouri legislature's proposal violates the Fourteenth Amendment's Equal Protection Clause. Part II explores the DACA program and its effects on both DACA individuals and society; it then lays out Missouri law on higher education

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6. Mará R. Williams, *Missouri Immigrant "Dreamers" are Still Seeking Help for In-State Tuition Fight*, KAN. CITY STAR (July 24, 2015), <http://www.kansascity.com/news/local/article28671514.html>.

7. *Id.*

8. See *UMKC Metro Rate for Neighboring Counties*, U. MO.-KAN. CITY, <http://www.umkc.edu/metrorate/> (last visited Mar. 24, 2016) ("That's why we say Border Schmorder and offer the UMKC Metro Rate to eligible\* UNDERGRADUATE and GRADUATE students in 11 neighboring Kansas Counties.").

9. Williams, *supra* note 6.

10. *Id.*

11. H.R. 3, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015). The proposed budget for the 2016–17 fiscal year contains identical language in the preamble. H.R. 2003, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016). House Bill 2003 has passed in both the Missouri House of Representatives and the Senate. *Activity History for HB 2003*, MO. HOUSE OF REPS., <http://www.house.mo.gov/billactions.aspx?bill=HB2003&year=2016&code=R> (last updated Apr. 4, 2017). It is awaiting approval of amendments in the House before being sent to the Governor for his signature. *Id.*

12. *Id.*

13. See S. 224, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015); MO. ANN. STAT. § 160.545 (West 2016).

benefits, both prior to and after the passage of HB 3 and SB 224. Next, Part III details the process used to evaluate equal protection claims based on immigration status. Part IV scrutinizes the legislation under equal protection case law, ultimately concluding in Part V that HB 3 and SB 224 violate the U.S. Constitution and deprive DACA students, such as Sanchez, of their right to equal protection of the law.

## II. DACA, MISSOURI, AND THE EFFECTS OF CHANGES IN THE LAW

This Part explores the creation of the DACA program and the impact of lawful presence on both undocumented immigrants and American society. It then discusses Missouri's historically inclusive laws granting education benefits to lawfully present individuals. Finally, this Part lays out the recent changes in Missouri law excluding lawfully present individuals from receiving in-state tuition and state financial aid.

### A. *Deferred Action for Childhood Arrivals*

On June 15, 2012, President Obama announced a new executive order deferring deportation actions for undocumented youth who immigrate to the United States.<sup>14</sup> Upon fulfilling governmental requirements to receive DACA status, an applicant to the program becomes legally present for two years.<sup>15</sup> Roughly 1.2 million undocumented young people were eligible for

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14. See Pérez, *supra* note 4. The President announced an expansion of DACA in November 2014, shortening the required period of presence in the United States from 2007 to 2010 and eliminating the requirement that an immigrant must be born after 1981. *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/immigrationaction#top> (last updated Apr. 15, 2015). Nevertheless, a federal court's temporary injunction, issued February 16, 2015, suspended the expansion. *Id.* The Supreme Court has agreed to consider whether (1) states have the right to file a lawsuit against an executive order and, if so (2) whether the Obama administration has the authority to create new immigration policy. Amy Howe, *Court will review Obama administration's immigration policy: In Plain English*, SCOTUSBLOG (Jan. 29, 2016, 4:39PM), <http://www.scotusblog.com/2016/01/court-will-review-obama-administrations-immigration-policy-in-plain-english/>. See also *United States v. Texas*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/united-states-v-texas/> (last updated Mar. 8, 2016). For the purposes of this Note, the DACA statistics exclude individuals eligible under the 2014 requirements.

15. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 3. Requirements to be eligible for DACA status include: (1) must be under the age of 31 as of June 15, 2012; (2) came to the United States before reaching the age of 16; (3) physically present in the United States on June 15, 2012 and had no lawful status; (4) currently in school, completed high school or obtained a GED, or honorably discharged from the Armed Forces or Coast Guard of the United States; and (5) no felony or significant misdemeanor convictions. *Id.* DACA recipients can apply for renewal during the existing period of DACA status if it is expiring. *Id.*

the DACA program in 2012.<sup>16</sup> As of June 30, 2015, the U.S. Citizenship and Immigration Services (“USCIS”) granted DACA status to 770,873 applicants.<sup>17</sup> In Missouri, an estimated 13,000 students were eligible for DACA status in 2015; approximately 6000 students were immediately eligible for DACA status.<sup>18</sup> In June 2015, the USCIS granted DACA status to a cumulative total of 3033 first-time Missouri applicants.<sup>19</sup>

The federal government considers DACA individuals to be lawfully present in the United States for the two years they hold DACA status.<sup>20</sup> By receiving DACA status, an individual stops accruing unlawful presence, a factor used by immigration officials when processing visas to the United States.<sup>21</sup> Lawful presence is different than lawful status: individuals with lawful status are legally recognized individuals authorized to reside in the United States.<sup>22</sup> While the DACA program confers legal presence, it does not change an individual’s unlawful status.<sup>23</sup> Instead, the U.S. Department of Homeland Security (“DHS”) grants DACA individuals “periods of stay.”<sup>24</sup>

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16. Pérez, *supra* note 4.

17. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 3.

18. Children under the age of fifteen are not immediately eligible, but will age into the program. *See* Pérez, *supra* note 4. Including these children, an estimated 13,000 eligible people reside in the state. *Public Hearing #2 – St. Louis, Mo. DEP’T HIGHER EDUC.* (Dec. 11, 2015), <http://dhe.mo.gov/documents/PublicHearing2STLSummary.pdf>.

19. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 3.

20. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated June 15, 2015).

21. *See* Interoffice Memorandum from Donald Neufeld, Lori Scialabba, & Pearl Chang, U.S. Citizenship & Immigration Services to Field Leadership (May 6, 2009), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/revision\\_redesign\\_AFM.PDF](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF). Congress created three- and ten-year bars to admissibility based on the amount of unlawful time an individual spends in the United States. *Id.* If an alien is unlawfully present for more than 180 days, but less than one year, he or she cannot be admitted to the United States for three years. *Id.* Aliens who are unlawfully present for more than one year will be denied admittance to the United States for ten years. *Id.* A minor does not accrue unlawful presence for purposes of this bar until his or her eighteenth birthday. 8 U.S.C.A. § 1182(a)(9)(B)(iii) (West 2016).

22. *See* 6 C.F.R. § 37.3 (2015) (“A person in lawful status is a citizen or national of the United States; or an alien lawfully admitted for permanent or temporary residence in the United States . . .”).

23. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 20.

24. *Id.*

Upon approval, DACA immigrants can apply for two-year temporary work permits and Social Security numbers.<sup>25</sup> Lawful presence allows undocumented young people to "achieve better economic opportunity, attain higher education, enroll in health insurance, and participate more in their local communities."<sup>26</sup> In a 2014 survey, seventy percent of DACA recipients reported getting their first job or starting a new job.<sup>27</sup> More than half of participants opened their first bank account, and more than one-third obtained their first credit card.<sup>28</sup>

However, according to a report conducted by the American Immigration Council, forty-two percent of DACA respondents reported not completing their higher education on time due to financial limitations and familial obligations.<sup>29</sup> Further, undocumented students are three times more likely to "stop out" (leave college for a certain period of time with the intention to return) than U.S. citizens and documented individuals due to financial difficulties.<sup>30</sup>

As of July 2015, sixteen state legislatures opened in-state tuition policies to students with unlawful status in order to reduce "stopping out."<sup>31</sup> Five of these states also offered state financial assistance.<sup>32</sup> Additionally, four state university systems established policies offering in-state tuition to unauthorized immigrant students.<sup>33</sup> For DACA students in these states, efforts to relieve financial burdens create access to higher education. Yet, for students who live in one of the two states that bars lawfully present DACA students from in-state benefits, financial barriers still obstruct entrance to postsecondary education.<sup>34</sup>

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25. Pérez, *supra* note 4.

26. *Id.*

27. *Id.*

28. *Id.*

29. ROBERTO G. GONZALES & ANGIE M. BAUTISTA-CHAVEZ, AM. IMMIGRATION COUNCIL, *TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA* (June 2014), [http://www.immigrationpolicy.org/sites/default/files/docs/two\\_years\\_and\\_counting\\_assessing\\_the\\_growing\\_power\\_of\\_daca\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf).

30. *Id.*

31. *Tuition Benefits for Immigrants*, NAT'L CONF. ST. LEGISLATURES (Sept. 19, 2015, 5:46 PM), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>. The state legislatures that enacted laws to allow in-state tuition include California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington. *Id.*

32. *Id.* The five states that offer state financial assistance are California, New Mexico, Minnesota, Texas, and Washington. *Id.*

33. *Id.* The four university systems with an in-state tuition policy for undocumented immigrants include the University of Hawaii Board of Regents, the University of Michigan Board of Regents, the Oklahoma State Regents for Higher Education, and Rhode Island's Board of Governors for Higher Education. *Id.*

34. *Id.*

Alongside the individual benefits DACA applicants receive, federal, state, and local economies also thrive when immigrants receive DACA status. Lawfully present immigrants, such as those enjoying the benefits of DACA status, earn higher wages, which results in overall growth of the U.S. Gross Domestic Product (“GDP”).<sup>35</sup> The Center for American Progress estimates the resulting increase in GDP will lead to an increase in income for all Americans - roughly \$124 billion in the next decade.<sup>36</sup>

Likewise, under President Obama’s executive order, DACA recipients must comply with current tax laws and contribute to the tax revenue.<sup>37</sup> Unauthorized immigrants in Missouri, including those lawfully present without legal status, contributed \$44 million in state and local taxes in 2010, including \$8.3 million in income taxes, \$31.7 million in sales tax, and \$4.1 million in property taxes.<sup>38</sup> However, in spite of the contribution of immigrant tax dollars to Missouri’s public programs, the ability of immigrants to tap into these resources exists in a state of flux.

### *B. Missouri In-State Residency Legislation and Interpretation Prior to 2015*

Missouri law delegates the establishment of policies and procedures regarding in-state residency status to the coordinating board of the Missouri Department of Higher Education (“MDHE”).<sup>39</sup> The MDHE promulgated that students shall receive in-state tuition if they establish: (1) presence within the state of Missouri for at least the past twelve months (2) with the intent to make Missouri a permanent home for an indefinite time period.<sup>40</sup> In addition,

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35. The GDP is estimated to increase cumulatively by \$230 billion over the next ten years. *Assessing the Economic Interests of Granting Deferred Action Through DACA and DAPA*, CTR. FOR AM. PROGRESS (Sept. 19, 2015, 6:23 PM), <https://www.americanprogress.org/issues/immigration/news/2015/04/02/110045/assessing-the-economic-impacts-of-granting-deferred-action-through-daca-and-dapa/>.

When President Obama issued an executive order to expand DACA in 2015, he announced nineteen other immigration directives, including Deferred Action for Parents of Americans and Lawful Permanent Residents. *Id.* These recipients are also reflected in these numbers. *Id.*

36. *Id.*

37. MATTHEW GARNER ET AL., THE INST. ON TAXATION & ECON. POLICY, UNDOCUMENTED IMMIGRANTS’ STATE & LOCAL TAX CONTRIBUTIONS 5 (Apr. 2015), <http://www.itepnet.org/pdf/undocumentedtaxes2015.pdf>.

38. *The Political and Economic Power of Immigrants, Latinos, and Asians in the Show-Me State*, AM. IMMIGRATION COUNCIL (Jan. 1, 2015), <http://www.immigrationpolicy.org/just-facts/new-americans-missouri>.

39. MO. REV. STAT. § 173.005.2(7) (Cum. Supp. 2013) (“The coordinating board shall establish policies and procedures for institutional decisions relating to the residence status of students . . .”).

40. MO. CODE REGS. ANN. tit. 6, § 10-3.010(9)(C) (2016).

noncitizens "must possess resident alien status, as determined by federal authority, prior to consideration for resident status."<sup>41</sup>

For purposes of determining "resident alien status," Missouri looks to the Internal Revenue Service ("IRS") rather than immigration law.<sup>42</sup> The IRS considers anyone a resident of the United States for tax purposes if they meet the "substantial presence test" for the calendar year.<sup>43</sup> Under this test, an immigrant will be considered a resident alien if he or she is physically present thirty-one days during the current year and 183 days during the past three years.<sup>44</sup> Because DACA applicants are required to live in the United States continuously since June 15, 2007,<sup>45</sup> they fulfill the requirements of "resident alien status" described by the IRS, therefore qualifying for in-state tuition.<sup>46</sup>

Under Missouri law, postsecondary educational institutions may award public education benefits, including institutional financial aid and state-administered grants and scholarships, to students lawfully present in the United States upon verifying their documentation.<sup>47</sup> DACA students who present certification from the DHS qualify for Missouri's postsecondary public benefits.<sup>48</sup> However, some state scholarships, such as Missouri Access and Bright Flight, explicitly require lawful status to receive assistance.<sup>49</sup>

In 2014, the question arose as to whether lawfully present students who otherwise meet the residency requirements would be eligible for funding from the A+ Scholarship Program.<sup>50</sup> The A+ program grants scholarships to "graduates of A+ designated high schools who attend a participating public community college or vocational/technical school."<sup>51</sup> The MDHE recognized

41. *Id.* § 10-3.010(7)(A).

42. E-mail from Anthony Rothert, Legal Dir., ACLU, to author (Oct. 29, 2015, 9:43 AM) (on file with author).

43. See *Determining Alien Tax Status*, IRS, <https://www.irs.gov/Individuals/International-Taxpayers/Determining-Alien-Tax-Status> (last updated Dec. 1, 2015).

44. See *Substantial Presence Test*, IRS, <https://www.irs.gov/Individuals/International-Taxpayers/Substantial-Presence-Test> (last updated Dec. 16, 2015).

45. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 20.

46. See *Tuition Benefits for Immigrants*, *supra* note 31, at 8.

47. See MO. REV. STAT. § 173.1110 (Cum. Supp. 2013).

48. Coordinating Bd. for Higher Educ., *Agenda Item Summary*, MO. DEP'T HIGHER EDUC. (Sept. 4, 2014, 9:00 AM), <http://dhe.mo.gov/cbhe/boardbook/documents/BB0914.pdf>. See also § 173.1110.2(7) ("The following documents . . . may be used to document that a covered student is . . . lawfully present in the United States: . . . Any document issued by the federal government that confirms an alien's lawful presence in the United States.").

49. See *Access Missouri Financial Assistance Program*, MO. DEP'T HIGHER EDUC. (Sept. 21, 2015, 9:32AM), <http://dhe.mo.gov/ppc/grants/accessmo.php>. See also *Bright Flight Program*, MO. DEP'T HIGHER EDUC. (Sept. 21, 2015), <http://dhe.mo.gov/ppc/grants/brightflight.php>.

50. Coordinating Bd. for Higher Educ., *supra* note 48.

51. *A+ Scholarship Program*, MO. DEP'T HIGHER EDUC., <http://dhe.mo.gov/ppc/grants/aplusscholarship.php> (last visited Mar. 24, 2016).

that the statute outlining the program did not limit lawfully present students from obtaining A+ funding; however, the MDHE's administrative rules required a student's good faith effort to obtain federal need-based aid.<sup>52</sup> As a student must have lawful status to receive educational aid from the federal government, DACA students were not eligible prior to 2015 for the A+ Scholarship.<sup>53</sup>

Accordingly, the MDHE voted to amend the administrative rule, guaranteeing that otherwise eligible<sup>54</sup> DACA students were not prohibited from participation based solely on their inability to obtain federal aid.<sup>55</sup> The MDHE's rule became effective March 30, 2015,<sup>56</sup> making DACA students eligible to receive A+ Scholarship funding for the Summer 2015 term and breaking down another barrier to postsecondary scholarship.<sup>57</sup> However, it was a short-lived victory.

### C. *The New Missouri Law: Requiring Legal Status*

In 2014, St. Louis Community College announced its intention to charge in-state tuition to lawfully present students who met the Missouri residency requirements.<sup>58</sup> The Missouri legislature responded by passing two bills, HB 3 and SB 224, restricting in-state tuition and public financial benefits to only students with lawful status and removing DACA students from eligibility.<sup>59</sup>

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52. Coordinating Bd. for Higher Educ., *supra* note 48.

53. *Id.*

54. The A+ Scholarship fund provides scholarship funds to high school students who attend public community college or vocational school. *A+ Scholarship Program*, *supra* note 51. To be eligible, a high school student must, among other things: (1) "Attend a designated A+ high school for 3 consecutive years immediately prior to graduation[.]" (2) "Graduate with an overall grade point average of 2.5 or higher on a 4.0 scale[.]" (3) have at least a 95% attendance record overall for grades 9-12[.]" and (4) "Perform at least 50 hours of unpaid tutoring or mentoring . . . ." *Id.*

55. Coordinating Bd. for Higher Educ., *supra* note 48.

56. E-mail from Jeremy Knee, Gen. Counsel, Mo. Dep't of Higher Educ., to author (Sept. 17, 2015, 11:43 AM) (on file with author).

57. *See id.*

58. Telephone Interview with Scott Fitzpatrick, Representative, Mo. House of Representatives (Sept. 18, 2015).

59. *See* H.R. 3, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015). *See also* MO. ANN. STAT. § 160.545 (West 2016).



### 1. HB 3 Changes Existing Law and Limits Legally Present Students from In-State Tuition and State Scholarships

In March 2015, the Missouri legislature enacted HB 3.<sup>60</sup> HB 3's main purpose was to apportion the MDHE's budget for the upcoming year.<sup>61</sup> However, unlike previous budget bills, an amendment attached to the preamble of the bill declared, "no funds shall be expended at public institutions of higher education that offer a tuition rate to any student with an unlawful immigration status in the United States that is less than the tuition rate charged to international students."<sup>62</sup> In addition, the preamble asserted, "no scholarship funds shall be expended on behalf of students with an unlawful immigration status in the United States."<sup>63</sup>

The addition to the budget bill excluded all nonimmigrant students with lawful presence in Missouri, including those with DACA classifications.<sup>64</sup> According to the amendment's sponsor, the purpose behind the amendment was two-fold: (1) preserve the state's finite resources for citizens and legal residents and (2) decrease the attractiveness of moving to Missouri for undocumented immigrants.<sup>65</sup> The overall goal was to use the savings to provide more aid to eligible students and expand scholarship availability to U.S. citizens currently ineligible for state scholarships.<sup>66</sup> In addition, the Missouri legislature believed that by reducing public benefits available to people with unlawful status, the overall unlawful immigration population would decrease.<sup>67</sup> No concrete predictions have been made as to how many students this affects, but the estimates range from as few as fifty to as many as a few hundred.<sup>68</sup>

HB 3's authority is unclear. The MDHE determined the preamble "does not appear as legally binding language in the body of HB 3 or elsewhere in statute."<sup>69</sup> The language in the preamble of the bill is not operative; it alerts the reader of what is in the bill, but it does not form part of the enactment.<sup>70</sup> The MDHE relied on the holding in the Supreme Court of Missouri case *Doemker v. Richmond Heights* that held the only reason a court should con-

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60. *Activity History for House Bill 3*, MO. HOUSE REPRESENTATIVES, <http://www.house.mo.gov/BillActions.aspx?bill=HB3&year=2015&code=R> (last visited Mar. 24, 2016).

61. *See* Mo. H.R. 3.

62. *Id.*

63. *Id.*

64. *Id.*

65. Telephone Interview with Scott Fitzpatrick, *supra* note 58.

66. *Id.*

67. *Id.*

68. E-mail from Jeremy Knee, *supra* note 56.

69. Memorandum from David Russell, Commissioner, Mo. Dep't of Higher Educ., to Presidents, Chancellors, and Directors of A+ Eligible Postsecondary Education Institutions (July 13, 2015) (on file with Mo. Dep't of Higher Educ.).

70. E-mail from Jeremy Knee, *supra* note 56.

sult the title of a bill is if ambiguity arises from the body of a statute.<sup>71</sup> The MDHE reasoned that because HB 3 is a budget bill containing a straightforward appropriation of money, there is no ambiguity, and the title of the bill cannot be used in interpreting the bill.<sup>72</sup>

However, others view the bill as binding because it directs the use of the funds appropriated in the bill.<sup>73</sup> Public institutions heeded HB 3, raising the tuition cost of their students with unlawful status. For example, the University of Missouri-Columbia raised the tuition rate for its current students affected by the change in law.<sup>74</sup> Despite meeting the university's in-state tuition requirements, students without lawful status will now pay the out-of-state tuition rate.<sup>75</sup> The 2015 tuition rate per year for in-state students is \$10,586, whereas the tuition rate for international students amounts to \$25,198.<sup>76</sup> The \$14,612 difference over four years equates to a \$58,448 increase for students with unlawful status, effectively re-constructing the barrier to postsecondary education for DACA students.<sup>77</sup>

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71. *Id.*

72. *Id.*

73. Telephone Interview with Scott Fitzpatrick, *supra* note 58.

74. E-mail from Christian Basi, Assistant Dir., News Bureau Div., Div. of Marketing & Communications, Univ. of Mo., to author (Sept. 17, 2015) (on file with author). *See also* E-mail from John Fougere, Chief Communications Officer, Univ. of Mo. Sys., to author (Sept. 18, 2015) (on file with author) (“Our position on this issue has been consistent, in that it is our intention to follow the will of the legislature with regards to HB 3.”).

75. E-mail from Casey Baker, Dir. of External Relations, Univ. of Mo. Sch. of Law, to author (Sept. 17, 2015) (on file with author).

76. *Costs: Undergraduate Cost of Attendance 2015-16*, U. MO. ADMISSIONS, <http://admissions.missouri.edu/costs-and-aid/costs/> (last visited Mar. 24, 2016). This calculation reflects fourteen credit hours each semester, and it does not reflect additional course fees for specific colleges. *Id.* It includes both the fall and spring semesters. *Id.*

77. With the help and support of the ACLU, three DACA students filed three separate suits against: (1) the University of Missouri, (2) St. Louis Community College, and (3) the Metropolitan Community College in Kansas City. Anthony Rothert et al., *Immigrant Students Sue Missouri Schools*, ACLU, <http://www.aclu-mo.org/legal-docket/immigrant-students-sue-missouri-schools/> (last visited Mar. 24, 2016).

## 2. Reversing the MDHE by Denying A+ Scholarships Through Legislation

On September 16, 2015, the Missouri legislature overrode Governor Nixon's veto and approved SB 224.<sup>78</sup> In passing this bill, the Missouri legislature added a stipulation to receiving A+ funding: the recipient must be a citizen or permanent resident of the United States.<sup>79</sup>

Legislators noted that two other Missouri scholarships, Bright Flight and Access Missouri, required individuals to hold lawful status.<sup>80</sup> Legislators felt while the A+ Scholarship language was silent on the issue of legal status, it was important to clarify that all three Missouri scholarships required the same level of documentation.<sup>81</sup> For reasons similar to those supporting HB 3, the legislators emphasized the importance of preserving finite resources for citizens who currently do not have access to A+ funding.<sup>82</sup> The bill went into effect on October 16, 2015; any DACA student granted an A+ Scholarship must now look to alternate funding.<sup>83</sup>

Both HB 3 and SB 224 exclude otherwise qualified students from in-state tuition and state aid based on their immigration status. While the Missouri legislature justifies its actions as benefiting citizens of Missouri, a key question must be asked: Are these bills constitutional under the Equal Protection Clause?

### III. EQUAL PROTECTION CHALLENGES: SCRUTINY AS APPLIED TO ALIENAGE

The Equal Protection Clause declares: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>84</sup> The Supreme Court of the United States has long established this provision to be universal, applying to "all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."<sup>85</sup> This pledge

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78. *Senate Action for 9/16/2015*, MO. ST. SENATE, [http://www.senate.mo.gov/15info/BTS\\_Web/Daily.aspx?SessionType=R&actionDate=9/16/2015](http://www.senate.mo.gov/15info/BTS_Web/Daily.aspx?SessionType=R&actionDate=9/16/2015) (last visited Mar. 24, 2016).

79. MO. ANN. STAT. § 160.545 (West 2016).

80. Audio tape: Newsroom Daily Audio and Video Clips, Missouri Senate Newsroom (Sept. 17, 2015), <http://www.senate.mo.gov/newsroom/Pages/dailyaudiovideo.html>.

81. *Id.*

82. Telephone Interview with Scott Fitzpatrick, *supra* note 58.

83. E-mail from David Russell, Comm'r, Mo. Dep't of Higher Educ., to author (Sept. 17, 2015, 11:27 AM) (on file with author).

84. U.S. CONST. amend. XIV, § 1.

85. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

promises both the “equal protection of the laws” and “the protection of equal laws.”<sup>86</sup>

### A. *Levels of Constitutional Scrutiny*

When analyzing the constitutionality of state legislation under the Equal Protection Clause, courts use three different levels of scrutiny based on the group or classification under review: (1) rational basis, (2) intermediate review, or (3) strict scrutiny.<sup>87</sup> The Supreme Court determined that legal alienage is a suspect class, and laws discriminating against a suspect class are generally subject to strict scrutiny.<sup>88</sup> However, a current question exists as to whether the suspect classification refers to lawful aliens as a group or only to a subclass of aliens with legal permanent residence.<sup>89</sup>

Traditionally, the states retained “broad discretion” under equal protection rules “to classify as long as its classification ha[d] a reasonable basis.”<sup>90</sup> Accordingly, a statute under review that did not implicate a suspect class or fundamental right would be scrutinized under the rational basis test.<sup>91</sup> Courts are reluctant to overturn a law using the rational basis test unless the varying treatment of different groups serves no legitimate purpose.<sup>92</sup> Therefore, under a rationale basis test, a state law is presumed valid, and the challenger has the burden to negate all possible rational bases related to the state’s interest.<sup>93</sup>

By contrast, a law that “impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class” is reviewed using a strict scrutiny standard.<sup>94</sup> Few cases survive strict scrutiny, as the government must prove both (1) its interest is sufficiently “compelling” to support its classification and (2) the law is “narrowly tailored” to serve such a compelling interest.<sup>95</sup> If the Court deems “the classification

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86. *Id.*

87. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 699 (5th ed. 2015).

88. *See* *Graham v. Richardson*, 403 U.S. 365 (1971).

89. *Compare* *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), *and* *League of United Latin Ame. Citizens (LULAC) v. Bredesen*, 500 F.3d 523 (6th Cir. 2007), *with* *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).

90. *Graham*, 403 U.S. at 371 (citations omitted). This issue will be discussed further in Part IV of this Note.

91. *Gregory v. Ashcroft*, 501 U.S. 452, 470–71 (1991).

92. *Id.* at 471.

93. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83 (1940)) (“The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.”).

94. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Suspect classifications include race, alienage, and national origin. *Id.*

95. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 390 (4th ed. 2010).

need not be employed to achieve [the state's interests], the law will be held to violate the equal protection guarantee."<sup>96</sup>

Intermediate scrutiny is used to evaluate classifications that bear some, but not all, of the characteristics of a suspect class.<sup>97</sup> A court will uphold a state's law if the law serves important governmental goals and if the law is *substantially* related to achieving those goals.<sup>98</sup> The "important" standard required in intermediate scrutiny is less exacting than the "compelling" standard found in strict scrutiny.<sup>99</sup> Moreover, the "substantially related to" specification lessens the government's burden of proof compared to strict scrutiny's "narrow tailoring" requirement.<sup>100</sup> However, intermediate scrutiny is not easily satisfied; the "burden of justification is demanding" and "it rests entirely on the State."<sup>101</sup>

### B. Supreme Court Precedent Based on Alienage

The Supreme Court reasoned that classifications based on alienage are inherently suspect because they are a "discrete and insular minorit[y]" for whom heightened judicial solicitude is appropriate.<sup>102</sup> The Court first applied strict scrutiny to this classification in *Graham v. Richardson*, a case considered to be "the lodestar of the Court's alienage discrimination doctrine."<sup>103</sup> In *Graham*, legal residents claimed state laws denied them equal protection by excluding legal residents from access to otherwise available state benefits.<sup>104</sup> The Court held states could not limit expenditures for public programs by creating discriminatory distinctions between citizens and immigrants.<sup>105</sup> It appeared unassailable that the Court viewed alienage as a suspect class entitled to strict scrutiny.

However, in 1977, the Supreme Court determined strict scrutiny applied only to legal aliens; a separate level of scrutiny applied to the children of undocumented immigrants.<sup>106</sup> In *Plyler v. Doe*, undocumented school-aged children challenged the Texas statute denying them the free public education it provided to its citizens and legally admitted aliens.<sup>107</sup> The Court reasoned undocumented aliens could not be a suspect class as their presence was in

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96. *Id.*

97. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 162–63 (1984).

98. Intermediate classes include gender and illegitimacy. *Id.*

99. CHEMERINSKY, *supra* note 87, at 699.

100. *Id.*

101. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

102. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–153 & n.4 (1938).  
*Accord Graham v. Richardson*, 403 U.S. 365, 371 (1971).

103. *Dandamudi v. Tisch*, 686 F.3d 66, 73 (2d Cir. 2012).

104. *Graham*, 403 U.S. at 367–68.

105. *Id.* at 376.

106. *See Plyler v. Doe*, 457 U.S. 202 (1982).

107. *Id.* at 206.

violation of federal law.<sup>108</sup> Yet, the Court felt it inappropriate to rule under a rational basis test, opting for a heightened form of rational basis.<sup>109</sup> The Court reasoned that while parents elect to enter the country in violation of U.S. law, the children are not “comparably suited.”<sup>110</sup> The Texas statute was found to “impose[] its discriminatory burden on the basis of a legal characteristic over which children can have little control,” and it was therefore “difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”<sup>111</sup> The Court based its decision on the effect of denying children basic education: a lifetime of hardship for a discrete class of children not accountable for their disabling status.<sup>112</sup>

After *Plyler*, it became clear that alienage did not always rise to the level of strict scrutiny. Today, courts face the question: What level of scrutiny is required in evaluating discriminatory laws against other types of immigrants?<sup>113</sup>

### C. Federal Circuit Decisions and Nonimmigrant Status

Federal circuit courts are split on what level of scrutiny to apply to nonimmigrants' status. The U.S. Court of Appeals for the Fifth Circuit faced a similar question regarding nonimmigrants – immigrants with temporary visas that acquire status while their visa is current<sup>114</sup> – in *LeClerc v. Webb*.<sup>115</sup>

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108. *Id.* at 223 (“Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”).

109. *Id.* at 224 (“[T]he discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State.”). Some scholars believe the Court impliedly used intermediate scrutiny in *Plyler*, finding support for this argument in Justice Powell’s concurring opinion. CHEMERINSKY, *supra* note 87, at 809 (“[T]he Court also made it clear that it was using more than rational basis review.”).

110. *Plyler*, 457 U.S. at 220.

111. *Id.*

112. *Id.* at 223.

113. The Court had a chance to determine the level of scrutiny required for equal protection claims brought by nonimmigrants in *Toll v. Moreno*. 458 U.S. 1 (1982). Instead, the Court found the University of Maryland’s policy to refuse in-state tuition to nonimmigrants with a G-4 visa violated the Supremacy Clause, and the Court “therefore ha[d] no occasion to consider whether the policy violate[d] the . . . Equal Protection Clauses.” *Id.* at 10. While the Supremacy Clause may trigger preemption in DACA equal protection claims, this is not within the scope of this Note.

114. See *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/working-united-states/temporary-workers/temporary-nonimmigrant-workers> (last updated Sept. 7, 2011). Once the visa expires, or is denied renewal, nonimmigrants who continue to live in the United States accrue unlawful presence. See *How Do I Extend My Nonimmigrant Stay in the United States?*, U.S. CITIZENSHIP & IMMIGRATION SERVICES (Oct. 2013), <http://www.uscis.gov/sites/default/files/USCIS/Resources/C1en.pdf>.

The Fifth Circuit found two distinct differences between the immigrants in *Graham* and the nonimmigrants in *LeClerc*: (1) nonimmigrants lack the same legal protections as immigrants due to their transient connection with the state; and (2) nonimmigrants do not reflect the functions of resident aliens, who pay taxes, support the economy, and serve in the military.<sup>116</sup> Further, the court refused to apply the heightened rational basis test utilized in *Plyler* to nonimmigrants, interpreting the heightened rational basis standard to apply only to the unique circumstances of that case.<sup>117</sup> The Fifth Circuit opted for the ordinary rational basis test.<sup>118</sup> The Sixth Circuit mirrored this decision two years later in *LULAC v. Bredesen*.<sup>119</sup>

Conversely, the Second Circuit refused to adopt the Fifth Circuit's view in *Dandamudi v. Tisch*.<sup>120</sup> Unlike the Fifth and Sixth Circuits, the Second Circuit found "little or no distinction between [legal permanent residents] and the lawfully admitted nonimmigrants plaintiffs [in this case]."<sup>121</sup> Instead, the court found nonimmigrant aliens were transient "in name only"; in reality, a large number of nonimmigrants apply for, and obtain, permanent residence.<sup>122</sup> Further, nonimmigrant residents contribute to society in a similar manner to residents: nonimmigrants "may live within a state for many years, work in the state and contribute to the economic growth of the state."<sup>123</sup> Thus, the Second Circuit adopted a strict scrutiny test in direct contention with the Fifth and Sixth Circuits' decisions.<sup>124</sup>

The Supreme Court has yet to assign a firm level of scrutiny to any immigration class, save legal permanent residents. DACA individuals are a unique class apart from nonimmigrants; while nonimmigrants retain legal status until their visas expire, DACA students obtain lawful presence after

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115. *LeClerc v. Webb*, 419 F.3d 405, 410–11 (5th Cir. 2005).

116. *Id.* at 417.

117. *Id.* at 416 n.27. See also *Plyler*, 457 U.S. at 239 (Powell, J., concurring) ("In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests.").

118. *LeClerc*, 419 F.3d at 415 ("Despite some ambiguity in Supreme Court precedent, we conclude that because Section 3(B) affects only nonimmigrant aliens, it is subject to rational basis review.").

119. 500 F.3d 523, 533 (6th Cir. 2007) ("We find the analysis set forth in *LeClerc* to be persuasive. . . . This case presents no compelling reason why the special protection afforded by suspect-class recognition should be extended to lawful temporary resident aliens.").

120. 686 F.3d 66, 75 (2d Cir. 2012).

121. *Id.* at 78.

122. *Id.*

123. *Id.* at 75 (quoting *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

124. *Id.* at 70 ("Applying strict scrutiny, therefore, and finding, as the state concedes, that there are no compelling reasons for the statute's discrimination based on alienage, we hold the New York statute to be unconstitutional.").

receiving the DHS's approval.<sup>125</sup> Yet, both types of immigrants face the same equal protection challenges, and they await a final declaration from the Court as to the level of scrutiny to which they will be subjected.

#### IV. DISCUSSION

All equal protection claims ask the same basic question: Is the government's classification justified by a sufficient purpose?<sup>126</sup> It is commonly understood in constitutional law that the legislature is allowed to classify groups of people, but a law will not be upheld if it is "based upon impermissible criteria or arbitrarily used to burden a group of individuals."<sup>127</sup> To determine if a sufficient purpose exists, the courts apply a three-part test: first, the court must determine the classifications created by the statute; second, the court decides the appropriate level of scrutiny by considering several established factors; and third, the court analyzes whether the government action withstands the level of scrutiny required.<sup>128</sup> Under this three-part test, HB 3 and SB 224 fail to pass constitutional muster.

##### A. *HB 3 Classifies Individuals Based on a Suspect Class*

HB 3's amendment declares that public institutions will lose their state funding if they offer in-state tuition or scholarships to students with unlawful immigrant status.<sup>129</sup> DACA recipients, while considered lawfully present, do not enjoy lawful status.<sup>130</sup> As such, HB 3 specifically denies access to in-state tuition and scholarship money to DACA students applying for admission to Missouri public institutions, while allowing citizens and legal immigrants, otherwise similarly situated, to receive in-state tuition and scholarship benefits.

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125. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 20 ("An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.").

126. CHEMERINSKY, *supra* note 87, at 697.

127. NOWAK & ROTUNDA, *supra* note 95, at 384.

128. CHEMERINSKY, *supra* note 87, at 698.

129. H.R. 3, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

130. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 20 ("An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.").



The classification found in HB 3 distinctly separates DACA students based on their alienage. Under Missouri law, Missouri high school graduates whose parents are regarded as residents of Missouri<sup>131</sup> are considered residents for in-state tuition purposes if they resided in Missouri for the past twelve consecutive months with the intent to make Missouri a permanent home.<sup>132</sup> Moreover, an out-of-state student can change his or her residency status for tuition purposes by remaining in Missouri for twelve consecutive months coupled with proof of intent to make Missouri a permanent home.<sup>133</sup>

Many DACA students qualify as a resident for in-state tuition purposes. Regardless, DACA students who do not qualify for in-state tuition have the capability of becoming residents. Although DACA recipients in Missouri can qualify for in-state tuition, they are barred from obtaining it by Missouri law.

HB 3 and SB 224 both block DACA students from receiving state scholarship funds otherwise available to them through the MDHE and public institutions.<sup>134</sup> The MDHE provides several scholarships tailored to *lawfully present* students, such as the Minority Teaching Scholarship and Minority and Underrepresented Environmental Literacy Scholarship.<sup>135</sup> HB 3 prevents DACA students from receiving this type of financial benefit, yet expects DACA students to pay the international tuition rate to attend school. The result is a practically insurmountable barrier to higher education.

### *B. Legally Present Aliens Should Receive Strict Scrutiny*

Once a court establishes a challenged statute's classification, the court must determine the applicable level of scrutiny.<sup>136</sup> The courts analyze several factors in determining whether a law affects a "discrete or insular minority"; if so, the court will find a suspect class and apply strict or intermediate scruti-

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131. To be a resident of Missouri, one must be domiciled in Missouri – have a permanent home with intentions to return whenever absent – and either (1) maintain a permanent place of residency in Missouri or (2) spend more than thirty days in Missouri. *Resident or Nonresident*, MO. DEP'T REV., [http://dor.mo.gov/pdf/nonres\\_flowchart.pdf](http://dor.mo.gov/pdf/nonres_flowchart.pdf) (last visited Mar. 24, 2016). Importantly, federal law does not prohibit individuals granted deferred action from establishing domicile in the United States. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 20.

132. MO. CODE REGS. ANN. tit. 6, § 10-3.010(9)(C) (2016).

133. *Id.*

134. Mo. H.R. 3.

135. *Grants & Scholarships*, MO. DEP'T HIGHER EDUC., <http://dhe.mo.gov/ppc/grants/> (last visited Mar. 25, 2016). The Minority Teaching Scholarship awards students entering the field of teaching while the Minority and Underrepresented Environmental Literacy Program is available to students studying in an environmental field. *Id.* Other scholarships available to DACA students include the Kid's Chance Scholarship Program (available to children of workers who were seriously injured or died in a work-related accident) and the Wartime Veteran's Survivors Grant (available to children whose parents were injured in combat). *Id.*

136. CHEMERINSKY, *supra* note 87, at 699–700.

ny.<sup>137</sup> If the court finds the affected group is not part of a suspect class, the suspect class will merely receive rational basis review.<sup>138</sup> DACA individuals meet the heightened rational basis test applied in *Plyler v. Doe*, but should receive the strictest form of scrutiny as a suspect class due to the similarities between DACA individuals and the nonimmigrants found in *Graham* and *Dandamudi*.

### 1. At Least Heightened Rational Basis Applies to the DACA Population

DACA individuals share a similar plight to the undocumented children in *Plyler v. Doe* and, therefore, should at least receive *Plyler*'s heightened rational basis test. The Court believed that imposing disabilities on innocent, undocumented children was "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."<sup>139</sup> Similarly, the parents, not DACA recipients, are responsible for the legal burdens resulting in undocumented status because DACA individuals, as required by executive order, arrive in the United States before the age of sixteen.<sup>140</sup>

The *Plyler* Court felt compelled to protect undocumented students because without an education, undocumented children, who are already "disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable prejudices[,] . . . will become permanently locked into the lowest socioeconomic class."<sup>141</sup> The Court recognized that education was more than some social welfare benefit, but was also an essential component to productivity in society.<sup>142</sup> While HB 3 and SB 224 focus specifically on post-secondary opportunities to in-state tuition and scholarships, the concept of denying a state public education benefit to otherwise qualified individuals conforms to *Plyler*'s holding.

In today's labor market, a high school diploma is no longer sufficient; higher education is essential to competing for sustainable work.<sup>143</sup> The St. Louis Federal Reserve Bank found Hispanic,<sup>144</sup> four-year college graduates

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137. *Id.*

138. *Id.*

139. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

140. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 3.

141. *Plyler*, 457 U.S. at 207–08.

142. *Id.* at 220–21.

143. David H.K. Nguyen & Zelideh R. Martinez Hoy, "Jim Crowing" *Plyler v. Doe: The Re-Segregation of Undocumented Students in American Higher Education through Discriminatory State Tuition and Fee Legislation*, 63 CLEV. ST. L. REV. 355, 359 (2015).

144. The limitation to figures regarding Hispanic income and net wealth reflect the DACA population present in the United States. Audrey Singer & Nicole Prchal Svajlenka, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*,

earned \$37,943 more per year than non-college graduates.<sup>145</sup> Yet, four-year Hispanic college graduates' median debt-to-income ratio, which measures a person's ability to repay borrowed money,<sup>146</sup> rests at 134.3%, over 100% higher than their non-college counterparts.<sup>147</sup>

Missouri's HB 3 and SB 224 exacerbate an already bleak situation. DACA students who want to obtain an education to increase their household income face increasing debt due to the price hike between in-state and international tuition when unassisted by public scholarship funding. The result will raise an already distressingly high debt-to-income ratio among college-educated Hispanics even higher while lowering the number of DACA individuals who can afford to attend college. This scenario strikes at the heart of *Plyler's* conclusion: DACA students, through no guilty action of their own making, are locked into the lowest socio-economic class due to their inability to obtain an education. Therefore, Missouri courts should at least apply *Plyler's* heightened rational basis test.

## 2. Strict Scrutiny Is the Most Appropriate Level of Scrutiny for DACA Classifications

While DACA individuals at least meet the heightened rational basis standard applied in *Plyler*, courts should analyze equal protection claims made by DACA individuals using strict scrutiny. While the Supreme Court considers alienage to be a "discrete and insular" minority" for permanent residents, the Court has rejected this analysis for undocumented individuals

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BROOKINGS METROPOLITAN POLICY PROGRAM (Aug. 14, 2013), [http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca\\_singer\\_svajlenka\\_final.pdf](http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca_singer_svajlenka_final.pdf). Seventy-five percent of DACA applicants in the United States were born in Mexico, ten percent were born in Central America, and 6.9% were born in South America. *Id.* A majority of applicants in the Midwestern states are Mexican born. *Id.*

145. William R. Emmons & Bryan J. Noeth, *Why Didn't Higher Education Protect Hispanic and Black Wealth?*, FED. RES. BANK ST. LOUIS (Aug. 2015), <https://www.stlouisfed.org/publications/in-the-balance/issue12-2015/why-didnt-higher-education-protect-hispanic-and-black-wealth>. On average, Hispanic four-year graduates earn 2.2 times more in family income than Hispanic non-college graduates. *Id.* The median Hispanic family net worth of four-year college graduates increased \$37,446 over their non-college graduate counterparts. *Id.* Hispanic four-year college graduates have a family net worth 4.1 times greater than non-college graduates. *Id.*

146. *What is a debt-to-income ratio? Why is the 43% debt-to-income ratio important?*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/askcfpb/1791/what-debt-income-ratio-why-43-debt-income-ratio-important.html> (last updated Dec. 20, 2015). The debt-to-income ratio ("DTI") is calculated by taking a person's monthly debt payments and dividing it by a person's monthly income. *Id.* The higher the DTI, the more likely a person will have trouble making payments to lenders. *Id.* The Consumer Financial Protection Bureau recommends a DTI of no more than a forty-three percent. *Id.*

147. Emmons & Noeth, *supra* note 145.

due to their voluntary action of entering the country illegally.<sup>148</sup> The Court has not decided the issue regarding individuals with lawful presence, but should consider DACA recipients to be a suspect class because: (1) they do not enter the country on their own volition, yet (2) they contribute to the overall economic and social wellbeing of the United States.

Similar to the *Graham* and *Dandamudi* Courts' analyses of legal residents and nonimmigrants, DACA individuals pay taxes as well as have the potential to live, work, attend school, and contribute to the economic growth of a state for many years.<sup>149</sup> In addition, DACA individuals are subject to the same civil and criminal laws, yet do not have the ability to elect the individuals that create and enforce those laws.<sup>150</sup> Unlike the undocumented children in *Plyler*, DACA individuals receive social security numbers and temporary work permits that authorize the government to collect income and property taxes.<sup>151</sup> These documents transform DACA individuals from undocumented to a unique "DACAmended" status classified by the federal government as creating legal presence.<sup>152</sup> As DACA students are similarly situated to both nonimmigrants and legal residents, they should receive the same protections afforded to their counterparts.

The Fifth Circuit would not make such a finding. It argued nonimmigrants are a different subclass than that found in *Graham*, and the nonimmigrant subclasses' "lack of legal capacity . . . is tied to their temporary connection to this country."<sup>153</sup> The *Dandamudi* court debunked this fiction, reasoning lawfully admitted nonimmigrants intend to remain in the United States much longer than the term on their visa by applying for and ultimately obtaining permanent residence.<sup>154</sup> The Second Circuit declared the Fifth Circuit's argument to be "wholly unpersuasive" and "disingenuous."<sup>155</sup> The Supreme Court has also previously concluded, "the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States."<sup>156</sup>

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148. Compare *Graham v. Richardson*, 403 U.S. 365, 372 (1971), with *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

149. See *supra* Part II.A.

150. See U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . ."). See also U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state . . .").

151. See *supra* Part II.A.

152. Pérez, *supra* note 4.

153. *LeClerc v. Webb*, 419 F.3d 405, 417 (5th Cir. 2005).

154. *Dandamundi v. Tisch*, 686 F.3d 66, 78 (2d Cir. 2012).

155. *Id.*

156. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

Admittedly, DACA individuals obtain legal presence for only two years, with the option to renew at the discretion of the DHS.<sup>157</sup> Moreover, a future administration can end DACA policy, returning these individuals to their unlawful status and its constant risk of deportation.<sup>158</sup> However, DACA individuals arguably present a stronger intent to remain in the United States than the nonimmigrants in *Dandamudi*. DACA individuals come to the United States at or before the age of sixteen.<sup>159</sup> They attend primary and secondary school with their peers, unaware of their immigration status until they apply for a part-time job or college admissions.<sup>160</sup> Many use the DACA platform as a way to secure lawful presence until they can petition for legal residency.<sup>161</sup> As a result, DACA individuals demonstrate the same, if not stronger, intent to remain in the country they perceive as home.

The Supreme Court found alienage to be a "discrete and insular class," and as such, "the power of a state to apply its law exclusively to its alien inhabitants as a class is confined within narrow limits."<sup>162</sup> A DACA individual is part of the same discrete and insular minority ascribed by the *Graham* court to legal permanent residents. The government grants no protection from the majoritarian political process despite a history of invidious discrimination, key factors in determining the existence of a suspect class.<sup>163</sup> As such, the Missouri courts should use strict scrutiny when considering HB 3 and SB 224's constitutionality.

### *C. HB 3 and SB 224 Should Be Found to Violate the Equal Protection Clause*

A court should find that both HB 3 and SB 224 violate the Fourteenth Amendment's Equal Protection Clause. Under strict scrutiny, Missouri's laws cannot support a compelling interest or be considered narrowly tailored. Even if a court were to use the heightened rational basis review utilized in *Plyler*, the state's interests could not significantly weigh against the DACA students' interests in obtaining in-state tuition and state scholarships.

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157. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, *supra* note 20.

158. *Id.*

159. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 3.

160. Nguyen & Hoy, *supra* note 143, at 369.

161. See Pérez, *supra* note 4 ("DACA has laid the groundwork for future comprehensive immigration reform by starting the process of registering undocumented young people for potential legal status.").

162. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). See also *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

163. See CHEMERINSKY, *supra* note 87, at 700.

### 1. HB 3 and SB 224 Fail Strict Scrutiny Analysis

In order for a statute to survive strict scrutiny, it must prove the challenged legislation is narrowly tailored to meet a compelling state interest.<sup>164</sup> The Missouri legislature passed HB 3 and SB 224 with two purposes in mind: (1) to discourage unlawful immigration into Missouri and (2) to use the money previously spent on lawfully present students to expand scholarship programs to citizens not currently eligible for scholarship funds.<sup>165</sup> In evaluating Missouri's compelling interests in HB 3 and SB 224, a court should find neither of Missouri's stated purposes meet the narrow fitting of a compelling state interest.

The Missouri legislature intended to discourage immigration into Missouri by making Missouri an unattractive place for DACA college students. Yet, the legislature failed to determine the number of students the action would affect. Even though the USCIS approved 3033 DACA applications, only two DACA students attend the University of Missouri-Columbia, and an estimated thirty-four attend the University of Missouri-Kansas City.<sup>166</sup> The result of the legislation has relatively little impact on the number of incoming undocumented immigrants who enter the state, yet disparately impacts the few individuals who seek higher education.

Moreover, the Supreme Court previously determined state and local laws that classify persons "on the basis of U.S. citizenship for the purpose of distributing economic benefits . . . [are] subject to strict judicial scrutiny."<sup>167</sup> In *Graham v. Richardson*, the Court rejected the state's argument it had a legitimate state interest in preserving welfare benefits for its citizens who participated in the state's economic activity and generated tax revenue.<sup>168</sup> In doing so, the Court declared that "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify [the state's discriminatory laws]."<sup>169</sup> While the Court recognized a state has a valid interest in preserving the fiscal integrity of its programs, it cannot accomplish its purpose using "invidious discrimination."<sup>170</sup>

The legislature's desire to reduce scholarship funding to DACA individuals in order to expand the scholarship program to currently unqualified citizens reflects the invidious discrimination rejected in *Graham*. The bill's sponsors noted the limited amount of money in the budget reserved for state

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164. See NOWAK & ROTUNDA, *supra* note 95, at 390 ("[T]he Court will not uphold the classification unless the classification is necessary, or 'narrowly tailored,' to promote the compelling interest.").

165. Telephone Interview with Scott Fitzpatrick, *supra* note 58.

166. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 3; Williams, *supra* note 6. See also E-mail from Christian Basi, *supra* note 74. Other schools' statistics were not found by the author at the time of this Note.

167. NOWAK & ROTUNDA, *supra* note 95, at 458.

168. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

169. *Id.*

170. *Id.* at 374–75 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

scholarships and explained the state must prioritize citizens over non-citizens.<sup>171</sup> Yet, this is inadequate to justify discrimination against DACA individuals.<sup>172</sup> The legislature's desire to expand scholarships to eligible students that currently do not qualify must be funded through alternative, less restrictive means that do not invidiously discriminate against eligible, lawfully present students.

Even if a court were to find the state's interests to be compelling, it could not find the legislation narrowly tailored. When Missouri expanded HB 3 and SB 224 from excluding only those with unlawful presence to excluding all those with unlawful status, the Missouri legislature created an overinclusive law – i.e., one that includes individuals who need not be included to achieve the legislature's purpose.<sup>173</sup> Unlike undocumented individuals, a DACA student's receipt of legal documentation allows the state to collect income and property taxes in a similar fashion to individuals with legal status.<sup>174</sup> The effect of Missouri's law on the small percentage of DACA individuals who decide to attend college would not deter undocumented immigrants themselves from entering Missouri. By including DACA individuals in the law, the Missouri legislature unnecessarily includes a class of people in its attempt to fulfill the purposes of this law. Therefore, a court should conclude the law is not narrowly tailored and cannot be found constitutional.

## 2. HB 3 and SB 224 Fail Heightened Rational Basis Test

Even if the Supreme Court uses *Plyler's* heightened rational basis to evaluate DACA equal protection claims, both HB 3 and SB 224 fail to meet it. Similar to *Plyler*, both Missouri laws apply to the children of undocumented immigrants, thus impacting those "not accountable for their disabling status."<sup>175</sup> The Court in *Plyler* rejected the state's law, claiming, "[the law was] directed against children, and impose[d] [a] discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States."<sup>176</sup>

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171. Telephone Interview with Scott Fitzpatrick, *supra* note 58.

172. *Graham*, 403 U.S. at 375 ("Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*.").

173. CHEMERINSKY, *supra* note 87, at 702.

174. *See supra* Part II.A.

175. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

176. *Id.* at 224–25 ("[W]e are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education.").

In addition, the *Plyler* Court analyzed the countervailing costs to innocent victims associated with the state's law, finding the denial of education foreclosed the opportunity to contribute to the progress of the United States.<sup>177</sup> Similarly, the Missouri law forecloses blameless DACA individuals from contributing to Missouri's progress by creating a practically impassable impediment to higher education. Yet, the exclusion of DACA students cannot be said to outweigh the costs. While the loss of state scholarships and simultaneous increase in tuition greatly impact individual students, the state will save little money and will deter few undocumented immigrants from entering Missouri. The scale between state interests and the interests of DACA students leans heavily toward DACA individuals. Therefore, the court should find HB 3 and SB 224 cannot "weigh significantly" to balance the state's interests with discrimination against DACA individuals.

## V. CONCLUSION

The Missouri legislature's passage of HB 3 and SB 224 infringes upon the equal protection rights guaranteed to the suspect class of alienage. By denying legally present students the opportunity to attend public institutions at the in-state rate while withholding state scholarship funds, the legislature created a practically insurmountable barricade to higher education. Missouri claims the money saved by denying these benefits to legally present students will both reduce immigration into the state and allow other citizens to benefit from state aid. Yet, the benefits to the state cannot outweigh the costs to DACA individuals now effectively denied access to higher education.

Through the generosity of private donors, the University of Missouri-Kansas City has secured enough money to cover the difference between in-state and out-of-state tuition to Juan Sanchez and twenty other newly admitted DACA students.<sup>178</sup> Unfortunately, this funding only covers one semester; DACA students must find another solution to pay this large sum of money or quit school.<sup>179</sup> Students legally present in Missouri must now confront a new reality: "Give me your tired, your poor, your huddled masses yearning to breathe free" – but first, show me your legal status.

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177. *Id.* at 223–24.

178. Williams, *supra* note 6.

179. *Id.*



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