

DREAMING WITH DREAMERS WHEN DACA IS AT RISK: AN INNOVATIVE AND LEGALLY DEFENSIBLE STUDENT-COMMUNITY PARTNERSHIP MODEL TO BOLSTER FINANCIAL SUPPORT FOR UNDOCUMENTED COLLEGE STUDENTS

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Efforts to pass a federal Dream Act or other federal immigration law reforms remain frustratingly elusive in this era of political polarization. While undocumented students in the K-12 compulsory education context have a constitutionally protected right to public education under Plyler v. Doe, higher education is different. DACA (Deferred Action for Childhood Arrivals) faces legal jeopardy, notwithstanding the Biden administration's recent commitment to fortify DACA through formal rulemaking. Today, there are also more undocumented college students not eligible for DACA than with DACA eligibility, and the share of DACA-eligible college students will drop precipitously in the near future unless the final DACA regulation is both revised and upheld in legal challenges. Against this backdrop, over 400,000 undocumented students in U.S. colleges and universities remain ineligible for Pell Grants and federal financial aid. Similarly, the total amount of targeted private scholarships for undocumented students (despite growing and valiant efforts) is extremely small relative to the scale of need.

In this Article, I outline an innovative "private-ish" fundraising model for undocumented students that can work at public universities despite legal constraints on "public benefits" while disrupting orthodox assumptions and practices in higher education. This fundraising model is based upon three

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principles of design-driven innovation: 1) organizing around the underutilized human capital strengths of undocumented students and allies as social justice agents of change; 2) scaffolding onto a field-tested college structure that can help undocumented activist students and allies engage in organizing in ways that are woven into in a student's typical week of college; and 3) combining conditions of scale-up and public-private partnerships, including "infrastructure adjacency" and "force multipliers" to boost fundraising capacity.

Through the structure of a small "voluntary student fee" that requires individual pledges of support, undocumented student activists can take the leadership role in these difficult times while mobilizing support for their cause among their college classmates. The university has both a PayPal-like role in providing a reliable policy architecture for scale-up and efficiently collecting voluntary fees through its billing system and a matchmaker role in identifying philanthropic partners. For foundations looking to support U.S. undocumented students and immigrant communities, the "return on investment" potential is likely higher than most existing alternatives. Each dollar of matching support in this model will cycle through multiple rounds of student-to-student "hearts and minds" engagements, foster Dreamer resiliency and leadership, and contribute to long-term transformation of voter attitudes about Dreamers and other immigrants. A wide-ranging review of case law shows that the legal risks for a campus adopting this model are modest/acceptable, and in other analogous situations, private fundraising that is publicly facilitated does not run afoul of federal immigration law restrictions on "public benefits." This campus-level funding model has additional potential to help non-DACA students and undocumented students at the graduate and professional school levels. In fact, law schools and other professional school programs with tight-knit student bodies represent fertile ground for innovation along the lines of the partnership model described herein.

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No magic here.
 Only the heat of my desire to fuse
 what I already know
 exists. Is possible
 It is the intimacy of steel melting
 into steel, the fire of your individual
 passion to take hold of ourselves
 that makes sculpture of your lives,
 builds buildings.
 And I am not talking about skyscrapers,
 merely structures that can support us
 of trembling.
 —Cherrie Moraga, *The Welder*¹

I. INTRODUCTION

David first came to the United States from Mexico at age six and enrolled in public elementary school in Riverside, California. He graduated from high school with honors and was admitted into the freshman class at the University of California, Berkeley (UC Berkeley)—describing it with excitement after a campus visit as an experience “like being at Hogwarts.” However, he could not enroll due to financial hardship even after receiving a few small private scholarships. David suffered from depression and then enrolled at his local community college, where he did well academically. Two years later, he was able to enroll at UC Berkeley as a transfer student.² As an undocumented student who lacked both work authorization and federal

1. Cherrie Moraga, *The Welder*, in FEMINIST THEORY READER, 437, 436 (Carole R. McCann & Seung-Kyung Kim eds., 4th ed. 2016).

2. Evelyn Nakano Glenn, *Constructing Citizenship: Exclusion, Subordination, and Resistance*, 76 AM. SOCIO. REV. 1, 9, 12–13 (2011) (American Sociological Association presidential address by member

financial aid eligibility, in his junior year, David was barely able to scrape by with savings from tutoring jobs and informal fundraising efforts by friends and acquaintances that helped him raise a few thousand dollars.³

Even with California's AB 540 law⁴ allowing eligible undocumented students to pay in-state tuition rates, by his senior year of college, David simply did not have enough money to stay enrolled. What David did next was to improvise a life path—a bridge from the painful choices of today to the possibility of better choices and opportunities tomorrow—that would never have occurred to a white middle-class U.S. citizen student at Berkeley. David persuaded his professors to let him *informally* stay on their class lists. He attended class and completed all the exams and papers, including a senior thesis, even though he knew he was not receiving course credits towards his Bachelor's degree.⁵ While David struggled with periods of housing insecurity, eventually, his case came to the attention of the Chancellor, who partnered with supportive donors on fundraising efforts that helped David graduate from UC Berkeley. David went on to get a graduate degree at a prestigious East Coast institution. Today, he is working as a professional in an arts/humanities field.⁶

This Article is about the ecosystem of federal laws, state laws, university financial aid policies, and private scholarship initiatives that surround and constrain the choices and dreams of students like David. At the same time, this Article is also about how a more searching examination of the gritty “go for broke” entrepreneurial attitudes, social justice activism, and educational strategies of undocumented students might point the way toward nontraditional and scaled-up fundraising strategies to support the higher education dreams of undocumented college students. In other words, is a scholarship initiative designed around undocumented students' strengths and agency a way to 1) enlarge fundraising for undocumented college students and 2) build the social movement human capital and change in societal attitudes that can improve the long-term prospects for positive change with federal and state laws? On many college campuses today in both “red states” and “blue states,” the answer may be “yes,” if given the right set of attitudes and circumstances.

Today, in an American college or university classroom of one hundred students, there will typically be two undocumented students like David, one with DACA eligibility and one without DACA eligibility.⁷ America's

of the Berkeley faculty, recounting David's experience as one of her students). “David” may be a pseudonym chosen by Professor Nakano Glenn, but the facts described are real.

3. *Id.* at 12.

4. CAL. EDUC. CODE § 68130.5.

5. Glenn, *supra* note 2, at 13.

6. Email communication with Professor Evelyn Nakano Glenn (July 6, 2021) (on file with author).

7. *Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They?*, NEW AM. ECON. & PRESIDENTS' ALL. ON HIGHER EDUC. & IMMIGR. 2 (Mar. 2021), <https://perma.cc/94GG-SHAV> [hereinafter NEW AM. ECON. & PRESIDENTS' ALL.].

undocumented college students, many of whom have lived in the United States since they were young children or infants, face far greater economic precarity and lower levels of financial aid/support than their classmates. Section II provides an overall roadmap of the relevant federal laws and executive actions that surround the educational lives of undocumented students, including the unsuccessful efforts to pass comprehensive immigration reform, DACA, and two key immigration laws from a quarter-century ago: the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

Section III of this Article shows how undocumented students' lack of eligibility for federal financial aid is but one important feature of a complex opportunity structure that is also characterized by substantial variation from one state to the next. In addition, financing law school and other graduate and professional school programs is even more daunting for undocumented students than at the undergraduate level. Section IV lays the groundwork for the financial support model in this Article by showing how national college student survey data confirm a high degree of elasticity and movement over time in college students' attitudes of support for undocumented students. This is relevant to both short-term fundraising efforts and long-term transformation of voter attitudes necessary to overcome legislative gridlock on immigration reform.

Section V outlines a supplemental "private-ish" funding model based on the design principle that undocumented college students and their allies have resilient social justice-oriented human capital, an underappreciated natural advantage that can be further cultivated through a voluntary student fee pledge system. Section V further shows how a voluntary student fee for undocumented students can maximize new partnerships with private philanthropy through return on investment, scale-up opportunities, and force multipliers. Section VI evaluates the legal risks associated with this private-ish fundraising model for targeted scholarships, showing how this model is compatible with PRWORA and IIRIRA case law and should not constitute impermissible "public benefits."

Finally, Section VII concludes with broader mission-driven observations about the importance of university officials taking action *with* undocumented students. In fact, it is undocumented students' bold and creative perseverance in higher education that is a confirmation of how the "weapons of the spirit" can matter more than material advantages. Those fierce aspirations and voices of undocumented college students, I argue, can be advanced and amplified through the university and community partnership model and associated organic activism described herein. In other words, it is university officials who can learn a lot from undocumented students regarding the mindset necessary for social innovation and how to overcome status quo bias, particularly

in this area of great financial need that is made all the more difficult by legal constraints and ongoing federal legislative gridlock.

II. THE FEDERAL LANDSCAPE FROM *PLYLER* TO DACA AND BEYOND

In this section, I delineate three key points. First, the Supreme Court's landmark case of *Plyler v. Doe*⁸ does not directly apply to students in higher education, and in the current environment, the underlying *Plyler* legal strategy of constitutional equal protection is not a fruitful way to uphold the civil rights interests of undocumented college students. Second, over the past two decades, congressional gridlock has prevented passage of legislation providing a pathway to citizenship or other legal protections for undocumented young people in the United States. Third, while DACA is of vital importance, it covers less than half of the undocumented students in U.S. colleges today, and the present legal jeopardy of DACA adds considerably to this limitation. All of these points underscore the need to seek out alternative strategies to promote opportunities for undocumented youth at U.S. public universities and colleges (where four-fifths of undocumented students are enrolled).

At the K-12 public education level, the 1982 U.S. Supreme Court case of *Plyler v. Doe* is justifiably regarded by a wide range of legal scholars as a “watershed” decision in the area of immigrant rights,⁹ and *Plyler* has had a surprisingly durable impact over the past forty years. In *Plyler*, a 5-4 majority held that undocumented children had a right rooted in the Equal Protection Clause to attend public K-12 school, and the Court invalidated state and school district attempts to charge tuition to undocumented school children.¹⁰ Using powerful language, the *Plyler* Court observed that America's experience with prejudice and the teachings of the Fourteenth Amendment confirm that the imposition of special burdens “upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”¹¹

Despite the importance of *Plyler* over four decades, higher education was and remains different than the K-12 schooling context. Or, as legal scholar Rachel Moran puts it, “*Plyler*'s protections permit these youth to become de facto Americans through their early educational experiences, but [high school] graduation brings home the harsh reality of their de jure denial of citizenship.”¹² Relatedly, because *Plyler* represents a constitutional “anomaly”

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

9. See, e.g., Roberto G. Gonzales, Luisa L. Heredia & Genevieve Negrón-Gonzales, *Untangling Plyler's Legacy: Undocumented Students, Schools, and Citizenship*, 85 HARV. EDUC. REV. 318, 336 (2015); Nicole Ochi, *Reinventing Plyler: Undocumented Students, Public School Reform, and the DREAM Act*, 28 CHILD. LEGAL RTS. J. 1, 2 (2008); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 58 (1984).

10. *Plyler*, 457 U.S. at 210–30; see also MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND (2012).

11. *Plyler*, 457 U.S. at 216 n.14.

12. Rachel Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1917 (2020).

that has not been extended to other areas of federal immigration law, Plyler-based “constitutional arguments about equal protection hold little promise for vindicating the Dreamers’ rights.”¹³ As will be described more in Section II, undocumented students are barred from enrolling at public universities in a small number of states, while many undocumented students across larger numbers of states still face severe affordability challenges at colleges and universities today due to a combination of lack of federal financial aid eligibility and more limited state aid and private scholarship support.

In our U.S. political era of heightened (and asymmetric) polarization along with federal legislative gridlock, passage of immigration-related legislation has become especially difficult notwithstanding popular support among a majority of Americans.¹⁴ Political scientists highlight that this polarization in the United States not only represents a central ideological divide, but also reflects the worsening affective polarization.¹⁵ Previous versions of the proposed federal DREAM Act (the basis for the term “Dreamer”¹⁶) intended to provide a path to legal status for undocumented young people, including college students. These versions align with majority support of Americans in polls¹⁷ but have not yet been successful. Since 2001, the attempts to pass a

13. *Id.* at 1955.

14. *See, e.g.*, S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1477 (2012); NAT’L ACADS. OF SCIS., ENG’G & MED., *THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY* 49 (Mary C. Waters & Marisa Gerstein Pineau eds., 2015).

15. Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 143 (2019) (“In conclusion, we note that increasing affective polarization can have grave ramifications, especially during times of political turmoil Partisanship appears to now compromise the norms and standards we apply to our elected representatives, and even leads partisans to call into question the legitimacy of election results, both of which threaten the very foundations of representative democracy.”).

16. Regarding nomenclature in this Article and my use of both the terms “undocumented” and “Dreamer”: the original proposed DREAM Act stood for Development, Relief, and Education for Alien Minors, and the terms “Dream” and “Dreamer” have lasted over the years at both the federal and state levels notwithstanding evolving legislative conditions. Throughout the 2000s and 2010s, the “Dreamer” label and political frame have been important communication elements in the rise of the immigrant rights movement by and with undocumented students that is associated with shifts in public attitudes (discussed below in Section IV). At the same time, a significant number of undocumented student activists in the U.S. have become increasingly uncomfortable with being called “Dreamers” for a combination of socio-political reasons, including rejecting the “A” (for Alien) in the original proposed DREAM Act and the tacit “model minority” and “good immigrant versus bad immigrant” narratives that have come to be associated with the Dreamer political discourse. At the end of the day, there is a tradeoff between these two value-laden choices (strategic communications salience of “Dreamer” in the broader population/movement versus deference to preferred terminology within certain activist undocumented student circles). In this Article I use both “undocumented” and “Dreamer” interchangeably, understanding that doing so is unsatisfactory to many. Moreover, I generally use the term “undocumented” as the umbrella term covering both DACA-eligible and non-DACA eligible students. Some legal scholars and lawyers are correct that students with DACA are technically not “undocumented” in the sense that they have a temporary form of “lawful presence” in the United States, but this legally correct point occurs alongside the more predominant pattern (in education, ethnic studies, and other fields) to not use “undocumented” as mutually exclusive with DACA. I thus use the “majority rule” approach, consistent with the cross-disciplinary audiences I hope to reach with this Article. I occasionally use the term “DACA-mented” but that does not serve as an umbrella term.

17. With all surveys it is important to carefully examine issue framing (how questions are asked), representative sampling, consistency across polls/time and “house effects” (response bias and other subtle factors connected with the organization conducting the polls)—all points that are generally satisfied with

DREAM Act (including an especially frustrating near-miss in 2007, before party polarization further intensified) can be aptly summarized by immigration law scholar Michael Olivas as “a tale of legislative failure, reprised with different stories and the same unsatisfying conclusion.”¹⁸ Repeated legislative failure around different versions of the DREAM Act spurred growing mobilization among undocumented youth in the United States.¹⁹

The latest iteration is the American Dream and Promise Act²⁰ (H.R. 6), passed in the House of Representatives in March 2021 by a vote of 227-197. However, this bill faces slim chances of success in the U.S. Senate absent a change in current procedures requiring a filibuster-proof sixty vote majority. In recent years, both the House and the Senate have reflected what political scientist Frances Lee calls “insecure majorities”²¹—a situation that further contributes to gridlock because the two major political parties have even lower incentives for cooperative bipartisan action on major policy issues like immigration reform when the next election cycle can potentially reverse which party assumes majority control and which becomes the minority party.

Responding to years of impasse with the DREAM Act, in 2012, the Obama administration took executive action in the form of Deferred Action for Childhood Arrivals (DACA). Deferred Action under DACA built upon a longstanding practice of federal prosecutorial discretion. For those who met stringent criteria, DACA meant eligible undocumented immigrants would be spared the government’s deportation/immigration enforcement efforts for a two-year period, which could be renewed. In short, these individuals now had a legal presence (not the same as legal status) informally called “DACAmented,” which also afforded authorization for employment, eligibility for a social security number, and greater latitude to travel. Additionally, the interaction with some state laws and regulations opened up benefits such as driver’s licenses, eligibility for in-state tuition and financial aid, and more favorable conditions for professional licenses and credentials (e.g., lawyers, doctors, school teachers, etc.). Situated within a host of legal and other constraints described below, the focus of this Article is on bolstering local-level financial support for many of the roughly 427,000 DACA eligible and non-DACA eligible Dreamers (see Section III below) currently enrolled at U.S. higher education institutions.

respect to leading reputable polling on U.S. undocumented youth and are therefore not discussed further in this Article. An illustrative recent example of this large universe of polling data is Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), <https://perma.cc/39SR-WJ2Z>.

18. MICHAEL A. OLIVAS, *PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA* 38 (2020); *id.* at 24 (“Given that the DREAM Act’s subset of larger immigration, higher education, and tuition policies commands our attention, its politics are a useful bellwether for astute observers of domestic politics in the twenty-first century.”); *see also id.* at 48–51 (charting DREAM and DACA legislative history since 2001).

19. Moran, *supra* note 12, at 1920–22.

20. American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021).

21. FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 198–209 (2016).

In September 2017, the Department of Homeland Security (DHS) Secretary rescinded DACA, which began a slow strangulation of the program (i.e., no new DACA requests were being accepted), while multiple legal challenges churned through the courts. In an important 5-4 ruling in *Department of Homeland Security v. Regents of the University of California*²² in June 2020, the U.S. Supreme Court held that the specific circumstances under which the Trump administration DHS rescinded DACA were arbitrary and capricious vis-a-vis the Administrative Procedure Act (APA). Accordingly, the Court vacated the rescission of DACA.²³ One of the factors identified by the Court was the Trump administration failing to consider the reliance interests of DACA recipients and others that had accumulated since the program began in 2012.²⁴ The Court majority did not reach underlying questions about the legality of DACA given the posture of the *Regents* case, but the leading dissent (Justice Thomas, joined by Justices Alito and Gorsuch) staked out the view that DACA was unlawful because “DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process.”²⁵ Justice Kavanaugh, in a separate dissent, alluded to the underlying problem of legislative gridlock referenced above, declaring that the broader legal uncertainty of DACA recipients is “a result of Congress’s inability thus far to agree on legislation.”²⁶ It is also worth noting that the composition of Supreme Court justices shifted further to the right, months after the *Regents* ruling.

Pursuant to President Biden’s January 2021 directive to preserve and fortify DACA, DHS announced that it would move forward with a notice of proposed rulemaking (NPRM) process to fashion new DACA regulations.²⁷

Meanwhile, in July 2021, a federal judge in *Texas v. United States*—a federal constitutional challenge to the original 2012 DACA executive action by Texas and eight other states that was filed three years ago—ruled that DACA violates the APA. The judge enjoined DHS from processing any new DACA applications while permitting the continued processing of current DACA renewals.²⁸ Nationwide injunctions by a single district court judge are controversial.²⁹ For instance, the ruling by the Southern District of Texas appears to conflict with a DACA ruling in the Eastern District of New York in the recent

22. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

23. *Id.* at 1901–15.

24. *Id.* at 1913–15.

25. *Id.* at 1918–19.

26. *Id.* at 1935.

27. See *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)*, 2021 DAILY COMP. PRES. DOC. 64 (Jan. 20, 2021), <https://perma.cc/7RT9-7K5M>; *Statement by Homeland Security Secretary Mayorkas on DACA*, U.S. DEP’T OF HOMELAND SEC. (Mar. 26, 2021) <https://perma.cc/Q8FD-P8Q4>; *Preserving and Fortifying Deferred Action for Childhood Arrivals*, 86 Fed. Ref. 53,736 (Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

28. *Texas v. United States*, No. 18-CV-00068, 2021 U.S. Dist. LEXIS 133114, at *120 (S.D. Tex. Jul. 16, 2021).

29. See, e.g., Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017).

Batalla Vidal case.³⁰ The Department of Justice (DOJ) filed a notice of appeal to the Fifth Circuit in September 2021.³¹ MALDEF, representing a group of DACA recipients who are intervenors, likewise filed a notice of appeal in the case.³²

During both the Obama administration and the current Biden administration, DHS has interpreted DACA as conferring a temporary form of lawful presence, even though that is distinct from lawful status.³³ For this reason, DACA unlocks further tuition benefits in states that had not already passed separate in-state tuition laws, plus a host of other benefits, including employment authorization, driver's licenses, social security numbers, medical insurance, and the ability to travel internationally (see Section III below).

The Biden administration opened a sixty-day comment period (which closed at the end of November 2021) on its NPRM intended to “preserve and fortify DHS’s DACA policy.”³⁴ It is unclear at the time of this writing how the Biden administration’s NPRM and forthcoming final DACA regulations will shape the *Texas v. United States* case at the Fifth Circuit and/or beyond. Namely, will the Fifth Circuit panel view the Biden administration’s DACA regulations that went through formal notice-and-comment rulemaking as curing all (or only some) of the legal vulnerabilities of the original DACA? The substantive legal questions in the current *Texas* case are not the same as those raised in the June 2020 U.S. Supreme Court opinion focused on DACA rescission and administrative law.³⁵

Notwithstanding the substantial benefits of DACA,³⁶ the ideas explored in this Article—rooted in partnerships among Dreamer student activists,

30. See *Vidal v. Wolf*, 16-CV-4756, 2020 U.S. Dist. LEXIS 228328 (E.D.N.Y. Dec. 4, 2020).

31. Notice of Appeal, *Texas v. United States*, No. 18-CV-00068 (S.D. Tex. Sept. 10, 2021), ECF No. 581; see also *Statement by President Joe Biden on DACA and Legislation for Dreamers*, 2021 DAILY COMP. PRES. DOC. 588 (July 17, 2021), <https://perma.cc/7AJG-S6LD>.

32. Notice of Appeal, *Texas v. United States*, No. 18-CV-00068, (S.D. Tex. Sept. 10, 2021), ECF No. 582.

33. *Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMGR. SERVS., <https://perma.cc/6W8K-7P28> (last updated Aug. 31, 2021) (“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.”).

34. *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53,736 (Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, 274).

35. See, e.g., *Resources for DACA Recipients and Allies*, EMERSON COLLECTIVE, <https://perma.cc/GWX3-KYAR> (last visited June 7, 2021) (“DACA recipients, DACA-eligible people, and communities have spent years living in legal limbo as challenges to the program have zig-zagged through the courts. Last year’s Supreme Court decision restored DACA in full and provided a welcome—but temporary—reprieve. The Court ruled that the Trump Administration had failed to take the required procedural steps when it rescinded the program, but it carefully avoided the question of whether the program itself was legal.”).

36. *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. at 53,738 (“DACA recipients have obtained driver’s licenses and credit cards, bought cars, and opened bank accounts. In reliance on DACA, its recipients have enrolled in degree programs, started businesses, obtained professional licenses, and purchased homes For DACA recipients and their family members, the conferral of deferred action has increased DACA recipients’ sense of acceptance and belonging to a community, increased their sense

undocumented ally students, progressive philanthropic organizations, and college/university administrators—are crafted with the constraints of PRWORA and IIRIRA in mind for at least three reasons. The first reason is the legal risk currently facing the DACA program, as noted above.

Second, and still important even if there is a favorable eventual ruling in *Texas v. United States*, there are more undocumented students enrolled in U.S. colleges today who lack DACA eligibility than there are DACA-eligible Dreamers (approximately 246,000 versus 181,000³⁷). It is this larger non-DACA population that faces even greater financial and educational obstacles, even as it has garnered less attention among policymakers, scholars, and supportive philanthropic communities.³⁸ In fact, *even if* the NPRM version of DACA becomes federal regulation and is upheld in the courts, the proposed text in the NPRM would mean that, in the future, those who are not DACA-eligible will become an increasing share of the U.S. population of college-age individuals without “lawful status” for immigration purposes, and those who are DACA-eligible will become a smaller share of that population. This observation warrants explanation immediately below, as it may seem counter-intuitive to many readers less familiar with the “in the weeds” details of DACA and the eligible population.

Figure 1 below shows the annual number of DACA intake requests (i.e., those who could pay the application fee and submitted request forms) and highlights how after an initial surge in initial (new) DACA intakes in 2013, the number declined precipitously (to about 141,500) in 2014. DACA intakes declined each year between 2014 and 2017 until slowing to a trickle during the Trump administration DACA rescission years of 2018–20. Figure 1 also shows that the much larger number of intakes are renewals from existing beneficiaries. Since DACA intakes peaked in 2013, the two-year renewal period is the reason renewals are higher in 2015, 2017, and 2019, producing a saw-tooth pattern in Figure 1).

of hope for the future, and given them the confidence to become more active members of their communities and increase their civic engagement.”).

37. NEW AM. ECON. & PRESIDENTS’ ALL., *supra* note 7, at 1–2.

38. As Liz, a non-DACA student in Florida who struggles because she cannot afford to enroll full-time in college, noted: “There’s so many of us in school right now with no financial help, who don’t qualify for DACA. What can we do? There is no financial stability for us.” *Two Líderes Avanzando Fellows Explore the Benefits of Providing Financial Aid to Undocumented College Students*, UNIDOSUS: PROGRESS REP. BLOG (Apr. 14, 2021), <https://perma.cc/GY9K-SUVK>.

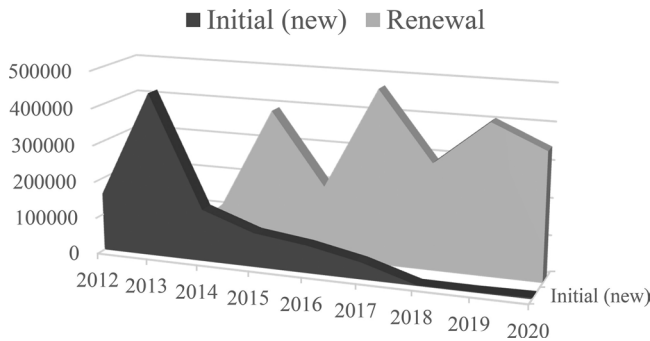


Figure 1. DACA Intake Requests in FY 2012 to 2020³⁹

Figure 1 provides a foundation for the observation that the multi-year pattern of decline in new DACA intakes, other things being equal, would certainly have continued in 2017–20 under a Democratic administration (though less than the extreme drop-off under the Trump administration). This is so because of the practical effects of the two threshold criteria in DACA that unfortunately continue in the Biden administration’s NPRM—1) the requestor “continuously resided” in the United States since June 2007 and 2) the requestor has been “physically present” in the United States since June 2012.⁴⁰ Between 2013 and 2016, new DACA intake requests/applications had a median age of fifteen. In 2016, fifteen-year-old applicants outnumbered twenty-year-old applicants among new intakes by 11:1. However, once intakes started to pick up again in 2021—after the *Regents* ruling and the change in administrations—there were more than twice as many intakes from twenty-year-olds as from fifteen-year-olds.⁴¹

The important implication is that those at the younger end of the Millennial Generation and at the older end of Generation Z have very different eligibility rates for DACA compared to those at the younger end of Generation Z, until finally “DACA requestors will stop ‘aging in’ to the policy in June 2022.”⁴² That is, even someone brought to the United States only a few weeks after they were born and who has resided in the United States ever since then will be unable to meet the “continuously resided” requirement of DACA. The upshot of such a criterion is that unless the final DACA

39. Deferred Action for Childhood Arrivals, 86 Fed. Reg. at 53,787 tbl.9.

40. *Id.* at 53,739, 53,766.

41. *Form I-821D, Consideration of Deferred Action for Childhood Arrivals Count of Receipts of I-821D Initials by Age and Fiscal Year Received August 15, 2012 to August 27, 2021*, U.S. CITIZENSHIP AND IMMGR. SERV., <https://perma.cc/N548-AD6N>.

42. Deferred Action for Childhood Arrivals, 86 Fed. Reg. at 53,786. I co-authored a public comment on the DACA NPRM on behalf of the UCLA Civil Rights Project that provides a detailed critique of this problem with the “continuously resided since June 2007” eligibility requirement in the proposed DACA regulations, which is in need of reform along with the “physically present” requirement. See UCLA Civil Rights Project & Proyecto Derechos Civiles, Comment Letter on DHS Docket No. USCIS-2021-006, Public Comment on Proposed Regulations to Fortify and Strengthen Deferred Action for Childhood Arrivals (Nov. 28, 2021), <https://perma.cc/CWK6-3TLW>.

regulations are modified (an open question at this time), for tomorrow's college students who are currently in junior high and high school, DACA may help many of their older siblings, but it will not help most of them. Thus, developing an ensemble of alternative opportunity strategies is needed now more than ever.

The third reason for the focus on an alternative scholarship fundraising model in this Article is that even fortified DACA regulations and extensive reliance interests among current DACA beneficiaries cannot preclude the possibility of DACA being rescinded by a future Republican administration in the White House. As current DHS Secretary Alejandro Mayorkas noted, the DACA NPRM is an "important step" but "only Congress can provide permanent protection."⁴³ Specifically, the sloppy departures from legal compliance by DHS during the previous administration (e.g., multiple "acting" DHS secretaries whom the courts ruled were not lawfully serving in the Secretary role⁴⁴) is the sort of thing that one cannot assume will happen again to the same extent in a future administration intending to rescind DACA. Moreover, the 2020 Supreme Court ruling in *Regents* serves as a guidebook for how to comply (or gesture at complying) with the APA procedural compliance⁴⁵ (again, with the caveat that only the NPRM and not the final regulations were known at the time of this writing).

The overall situation regarding legislative gridlock with the Dream Act over the past two decades also means that 1990s-era restrictive federal immigration laws continue to cast a long shadow over the lives of undocumented youth and college students today, while at the same time (and for related reasons) the longstanding status quo represented by the 1996 immigrations laws has tended to push more of the focus and activity on reforms at the state and local levels⁴⁶ (a focus consistent with the themes explored in this Article). To

43. Miriam Jordan & Eileen Sullivan, *Biden Administration Moves to Protect Undocumented Young Adults*, N.Y. TIMES (Sept. 27, 2021), <https://perma.cc/5HG5-4KXJ>.

44. See, e.g., Brian Frazelle, *No Light at the End of the Tunnel: Chad Wolf's Unlawful Homeland Security Policies Are Still Unlawful*, LAWFARE INST. (Jan. 28, 2021, 9:01 AM), <https://perma.cc/9N7L-WU5D> ("President Trump's use of 'acting' officers to advance his xenophobic agenda started to backfire once it became clear that neither Wolf nor his predecessor, McAleenan, was entitled to be the department's acting secretary. Every court to rule on the matter has agreed that their tenures violated the Homeland Security Act, one of the laws that governs vacancies in the secretary's office."); *Vidal v. Wolf*, 501 F. Supp. 3d 117 (E.D.N.Y. 2020).

45. See Hiroshi Motomura, *Making Immigration Law*, 134 HARV. L. REV. 2794, 2816–17 (2021) (reviewing *THE PRESIDENT AND IMMIGRATION LAW*, ADAM B. COX & CRISTINA M. RODRÍGUEZ (2020)); Edeline M. Burciaga & Aaron Malone, *Intensified Liminal Legality: The Impact of the DACA Rescission for Undocumented Young Adults in Colorado*, 46 L. & SOC. INQUIRY 1092 (2021).

46. See Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 318 (2017) (Several of the 1996 immigration laws, including PRWORA and IIRIRA, "ultimately created a paradigm where states and localities are exercising great power in shaping the lived experience of their residents as a result of their immigration status. This has happened at the very same time that immigration enforcement has ramped up and national borders have hardened. Consequently, state and local governments and their administrators have become both the primary enforcers of immigration law in the interior and the primary gatekeepers of social benefits for immigrants, including welfare, health care, and educational benefits."); OLIVAS, *supra* note 18, at 46 (Even if the DREAM Act passes tomorrow "it would not affect the ability of states to grant resident tuition, to enable them to award state scholarships and grants, and to allow them to withhold enrollment.").

be clear, this state of affairs represents a major policy failure at the federal level. Two laws enacted in 1996, PRWORA and IIRIRA, are highly relevant to the legal and financial issues addressed in this Article, for reasons detailed below in Section V and especially Section VI.

III. THE FINANCIAL AID AND TUITION LANDSCAPE: A STATE-BY-STATE OVERVIEW

Even with the crucial educational opportunities made possible by DACA, undocumented students face profound barriers in the United States on multiple fronts simultaneously (obstacles exacerbated during the COVID pandemic and recession⁴⁷), including exclusionary federal laws, restrictive state laws, and policies, overall lives of chronic precarity due to legal vulnerabilities, substantial anxiety, trauma and other mental health challenges, and limitations of financial support and employment.⁴⁸ Of the roughly 427,000 undocumented students enrolled in American institutions of higher learning in 2019, over two-fifths are DACA-eligible (43 percent) and four-fifths (81 percent) are enrolled at public colleges and universities rather than private institutions⁴⁹ (consistent with the primary focus in this Article on public institutions). 90 percent of Dreamers are enrolled in undergraduate programs/institutions, with 10 percent enrolled in graduate and professional school programs.⁵⁰ The racial and ethnic heterogeneity of today's undocumented college student population is worth highlighting, as that is underappreciated in the racially charged public discourse over immigration⁵¹: 49 percent are Latinx, 24 percent are Asian American and Pacific Islander, 13 percent are Black, and 13 percent are White.⁵² The California State University (CSU) system—America's largest public university system—enrolls about 10,000 Dreamers in its twenty-three campuses.⁵³

As summarized below in Table 1A, all Dreamer students cannot receive federal financial aid (e.g., Pell Grants), federal work-study, or federal

47. Moreover, the substantial role of undocumented workers in frontline health care responding to the COVID health care crisis underscores the policy importance of educational and career pathways for undocumented residents in the United States. See *Undocumented Immigrants and the Covid-19 Crisis*, NEW AM. ECON. (Apr. 4, 2020), <https://perma.cc/FQ68-SHQ9>.

48. See Roberto G. Gonzales, Carola Suárez-Orozco & Maria Cecilia Dedios-Sanguinetti, *No Place to Belong: Contextualizing Concepts of Mental Health Among Undocumented Immigrant Youth in the United States*, 57 AM. BEHAV. SCIENTIST 1174 (2013); Linda DeAngelo, Maximilian T. Schuster & Michael J. Stebleton, *California DREAMers: Activism, Identity, and Empowerment Among Undocumented College Students*, 9 J. DIVERSITY HIGHER EDUC. 216, 217 (2016).

49. NEW AM. ECON. & PRESIDENTS' ALL., *supra* note 7, at 4.

50. *Id.* at 5.

51. Laura E. Enriquez, *Border-Hopping Mexicans, Law-Abiding Asians, and Racialized Illegality: Analyzing Undocumented College Students' Experiences through a Relational Lens*, in RELATIONAL FORMATIONS OF RACE: THEORY, METHOD, AND PRACTICE 257, 257 (Natalia Molina, Daniel Martinez HoSang & Ramón A. Gutiérrez eds., 2019).

52. NEW AM. ECON. & PRESIDENTS' ALL., *supra* note 7, at 5.

53. President's All. on Higher Educ. & Immigr. & TheDream.US, *Dare to Dream: Dream Act Legislation & Opportunities for Advocacy*, at 06:48, <https://perma.cc/3L5P-PE7J>.

educational loans.⁵⁴ A related recent development was the federal CARES Act in spring 2020 in response to the COVID-19 pandemic, in which undocumented students were ineligible to receive emergency funding (a minority of universities were able to repurpose equivalent funds from other sources to offset this exclusion during the COVID-19 recession).⁵⁵

Approximately twenty states allow some form of in-state tuition for undocumented college students, and seven states allow Dreamers to be eligible for state-level financial aid. A handful of states either expressly ban Dreamers from in-state tuition eligibility or prohibit their enrollment at state colleges and universities (see Table 1B). The landscape of state laws remains highly dynamic for multiple reasons, such as new or rescinded laws, with change accelerating in the years after DACA.⁵⁶ In addition, there have been numerous legal challenges in this area in federal and state courts, including both pro-restriction challenges to in-state tuition laws or university programs and progressive legal challenges to restrictive laws and policies in other states.⁵⁷ Table 1A (federal) and Table 1B (by states and at private institutions) provides the high-level picture, but Table 1B simply cannot capture all the nuances between different state and university situations (e.g., in Arizona undocumented students must pay 150% of in-state tuition rates, but this is lower than out-of-state tuition rates).

54. See *Mashiri v. Dep't of Educ.*, 724 F.3d 1028, 1032–33 (9th Cir. 2013) (summarizing federal student loan statutes but declining to hold that a pending asylum claim could never create eligibility for a Stafford loan); Erica Regan & Anne McDaniel, *Examining DACA Students' Financial Experiences in College*, 48 EDUC. RESEARCHER 564, 564–65 (2019); Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1564 (2019) (“Federal law also prohibits undocumented students from accessing loans and grants under the Higher Education Act, a cornerstone of American higher-education finance.”).

55. *Undocumented Student Support and Student Experience*, REGENTS UNIV. CAL. 3 (Jan. 20, 2021), <https://perma.cc/SSZ5-HYXQ>.

56. A telling example is recounted by Professor Stella Flores, describing Tennessee (when she lived there as a Vanderbilt University faculty member):

By 2015, a bill to provide in-state resident tuition for undocumented immigrants failed to pass by only one vote – progress that was unimaginable in 2007. I had come to Tennessee as an expert on the effect in-state resident tuition policies had on undocumented student enrollment. My role as a scholar was to inform community activists, legislators, and families about the research, and recommend how to translate these results and the work of others into public policy. While I had advised national groups and other states on similar matters, my policy training told me this in-state tuition policy had a very low likelihood of passing in this part of the country. But likelihood is not necessarily destiny, and the outcome, a loss by one vote, showed there was indeed light at the end of the tunnel.

Stella M. Flores, *Breaking into Public Policy Circles for the Benefit of Underserved Communities*, 30 INT'L J. QUALITATIVE STUD. EDUC. 22, 29 (2016); see also OLIVAS, *supra* note 18, at 27–36.

57. See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 563 U.S. 1032 (2011) (AB 540 not preempted by federal law); *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). Additional cases are discussed below in Section VI.

TABLE 1A: FEDERAL FINANCIAL CONDITIONS FOR UNDOCUMENTED COLLEGE STUDENTS

Category	Summary Description
Federal grant aid (e.g., Pell Grants)	Not eligible at any postsecondary institutions in the United States, public or private
Federal work-study and loans	Not eligible at any postsecondary institutions in the United States, public or private
If new DACA applicant	DHS enjoined from processing new DACA applications per <i>Texas v. United States</i> (July 2021), appeal pending. Implications for eligibility to work and for some state-tuition laws (Table 1B below)
If current DACA recipient	Eligible to file DACA renewal for now, but still in future jeopardy from pending <i>Texas v. United States</i> case
Even if legal defense of DACA is successful, looming “age-in” problem	If the final regulations follow the initial NPRM, younger Generation Z students will soon be entirely excluded from DACA eligibility (see Section II), which implicates work authorization, college affordability and some state-tuition laws

TABLE 1B: FINANCIAL⁵⁸ SUPPORT CONDITIONS FOR UNDOCUMENTED COLLEGE STUDENTS: STATE-BY-STATE PUBLIC UNIVERSITIES AND AT PRIVATE COLLEGES

Category	States where authorized	States where restricted
In-state tuition eligibility ⁵⁹	CA, CO, CN, FL, HI*, IL, KS, KY, MD, MN, NE, NJ, NM. De facto restricted for non-DACA except in states noted above and in NY, OR, RI, TX, UT, WA, OK*, RI*, VA (only for DACA students in AK, MA, OH) (at some publics in DE, IA, MI, NV, PA including DACA-only in ID, IN, MA, MS)	De facto restricted for non-DACA except in states in column at left, expressly banned in AZ, AL, GA, MO, NH, NC, TN, WI (with total enrollment bans at publics in AL and SC)

58. *Higher Ed Guide to Tuition, Financial Aid, & Other Funding Opportunities for Undocumented Students: FAQs for Public and Private Colleges and Universities*, PRESIDENTS’ ALL. ON HIGHER EDUC. & IMMIGR. (updated Sept. 16, 2020), <https://perma.cc/L3UL-TZ8S>; *Undocumented Student Tuition: Overview*, NAT’L CONF. STATE LEGISLATURES (June 9, 2021), <https://perma.cc/Z7NL-6WA4>; OLIVAS, *supra* note 18, at 24–37. Note there are some interpretive differences in the sources above that all use contemporary cut-off dates; in general, I have defaulted to the Presidents’ Alliance reports because of the ease of linked verifiability data on specific state/university conditions. *See, e.g.*, HIGHER ED IMMIGR. PORTAL, <https://perma.cc/N43X-89C3> (last visited Feb. 17, 2022).

59. Because PRWORA/IIRIRA require enabling legislation (or its equivalent by a board of regents) to affirmatively permit in-state tuition laws, it is technically redundant for a state to pass a law prohibiting in-state tuition eligibility, but several states have done so as a matter of expressive political action. *See* OLIVAS, *supra* note 18, at 56. Asterisks in the left column signify in-state tuition eligibility policies

TABLE 1B: CONTINUED

Category	States where authorized	States where restricted
State financial aid and scholarships (e.g., Cal Grants, GA's Hope Scholarships)	CA, CO, CN, FL, HI*, IL, MD, MN, NJ, NM, NY, OK* OR, TX, UT, WA, DC	Again, de facto restricted for non-DACA except in states in column at left, expressly banned in AZ, AL, GA, MO, NH, NC, TN, WI (with total enrollment)
Public college's institutional aid pools	Similar to column above	Similar to column above
Private scholarships at both public and private colleges	A very small share of all U.S. scholarship programs are affirmatively open to undocumented students; ⁶⁰ dynamic situation with more and more U.S. colleges exhibiting readiness for change and innovation	
Overall situation at private universities and colleges	Best practice and growing trend is to treat undocumented students the same as documented (domestic) students for purposes of financial aid, ⁶¹ but there is a lot of variation in local context and practice. Moreover, this best practice does not address the separate challenge of undocumented students' enrollment choice/self-selection toward public institutions for reasons of affordability (and/or tuition "sticker shock" perceptions about affordability, loan aversion, etc.).	
Overall situation in professional/graduate school programs, public and private	Generally, a more difficult situation for undocumented students because the overall financial aid ecosystem/model involves higher tuition and higher share of loans versus grant aid. However, also a fertile area for innovation (e.g., akin to public interest loan forgiveness), even more so where a school has a tight-knit and socially justice-oriented student body.	

The provision of in-state tuition rates and some financial aid (reflected above in Table 1) has had the effect of increasing college enrollment for

enacted not through state legislatures, but by board of regents actions in Oklahoma, Rhode Island, the University of Hawaii and University of Michigan. Similarly, starting in 2014 the AG's office in Virginia started allowing in-state tuition for DACA-eligible undocumented students, and the Governor signed a law that took effect in July 2020. See NAT'L CONF. STATE LEGISLATURES, *supra* note 58; PRESIDENTS' ALL. ON HIGHER EDUC. & IMMIGR., *supra* note 58.

60. For a fairly comprehensive list, see *Scholarship Resource Guide*, MALDEF (last updated Sept. 28, 2021), <https://perma.cc/8JGE-QLXU>; *DREAMer Initiative*, HISPANIC NAT'L BAR ASS'N 2 (Aug. 2019), <https://perma.cc/GXS8-CL2T> ("Many private donors or scholarship funds may not be aware of the effects of requiring student applicants to be 'citizens' or 'residents'. You can urge them to drop any 'citizenship' requirement to any scholarships they fund directly or indirectly.").

61. PRESIDENTS' ALL. ON HIGHER EDUC. & IMMIGR., *supra* note 58, at 4 ("A growing number of private institutions consider undocumented students as domestic students for the purposes of admission and financial aid, and/or have identified specific institutional funds, external scholarships or other donor funds to support undocumented students. As noted in an earlier Presidents' Alliance FAQ, it is a best practice to treat undocumented students as domestic students for the purposes of admission and financial aid.").

undocumented students in the United States.⁶² Still, a great deal of additional work remains to level the playing field, especially in the area of graduation rates/retention.⁶³ This should not be surprising, given the broader research literature demonstrating the tuition “price sensitivity” of college students’ enrollment choices, particularly at flagship public universities.⁶⁴

In California, cumulative opportunities for Dreamer students are more favorable than many other states due to a combination of eligibility for in-state tuition (AB 540), eligibility of state and institutional need-based financial aid (AB 130, AB 131), and limited eligibility for Dream Loans (SB 1210, SB 354, SB 77).⁶⁵ Within the dynamic push-and-pull of federal and state laws and local conditions, university-level interventions can make a real difference in the outcomes and educational experiences of Dreamer students.⁶⁶ At the same time, even in states with more welcoming laws such as California, Dreamer students remain ineligible for many important programs. An illustrative example, in this era of increased awareness about food insecurity among college students, is that CalFresh food assistance benefits exclude undocumented students (DACA or otherwise) from eligibility because of the way these programs intersect with federal requirements.⁶⁷

62. Stella M. Flores & Catherine L. Horn, *College Persistence Among Undocumented Students at a Selective Public University: A Quantitative Case Study Analysis*, 11 J. COLL. STUD. RETENT.: RES., THEORY PRACT. 57, 58–59, (2009).

63. Victoria Ballerini & Miriam Feldblum, *Immigration Status and Postsecondary Opportunity: Barriers to Affordability, Access, and Success for Undocumented Students, and Policy Solutions*, 80 AM. J. ECON. & SOCIO. 161, 165 (2021) (“The advent of DACA and the extension of in-state tuition and financial aid to undocumented students in a growing number of states have increased college-going rates among undocumented students, yet these students still complete college at lower rates than their peers.”).

64. See, e.g., Steven W. Hemelt & Dave E. Marcotte, *The Impact of Tuition Increases on Enrollment at Public Colleges and Universities*, 33 EDUC. EVALUATION & POL’Y ANALYSIS 435 (2011); Kim Jiyun Kim, *The Effect of Prices on Postsecondary Access: An Update to Heller*, 7 HIGHER EDUC. REV. 23, 38, 41 (2010).

65. CAL. EDUC. CODE § 68130.5; *De Vries v. Regents of the Univ. of Cal.*, 211 Cal. Rptr. 3d 435 (2016); *Martinez v. Regents of the Univ. of Cal.*, 341 P.3d 855 (2010). Regarding the California Dream Loan program (a combination of funding from the State and UC), see *California DREAM Loan Program*, UNIV. CAL. ADMISSIONS, <https://perma.cc/D23J-F9RU> (last visited Feb. 18, 2022). Other related legislative efforts are constantly evolving (e.g., California passed SB 77 in 2019 authorizing scholarships from non-state funds, but this was allowed to expire in June 2021 when the 2020–21 legislative session may have been significantly impacted by the COVID lock-down and recession).

66. Laura E. Enriquez, Martha Morales Hernandez, Daniel Millán & Daisy Vazquez Vera, *Mediating Illegality: Federal, State, and Institutional Policies in the Educational Experiences of Undocumented College Students*, 44 L. & SOC. INQUIRY 679, 680 (2019) (“We find that DACA, state laws, and university resources facilitate educational access and belonging in distinct ways. Even in this supportive legal context, undocumented students face persistent barriers, including disrupted academic engagement and limited professional development. Though barriers cannot be fully eliminated without federal policy changes, institutional policies shape some of these consequences. In all, we argue that university policies help construct immigrant illegality and are a site for mediating its consequences.”); Federick Ngo & Samantha Astudillo, *California DREAM: The Impact of Financial Aid for Undocumented Community College Students*, 48 EDUC. RESEARCHER 5, 10–12 (2019).

67. Regents Univ. Cal. Special Comm. on Basic Needs, *The University of California’s Next Phase of Improving Student Basic Needs*, UNIV. CAL. OFF. PRESIDENT 29 (Nov. 2020), <https://perma.cc/TVJV-MPEK> (“Students must identify with at least one exemption in order to qualify for CalFresh. According to these requirements, a student must be a U.S. citizen to be eligible for exemption. Thus, international and undocumented students do not qualify for CalFresh and must rely on campus-based short-term resources for food.”); see also *CalFresh for Immigrants: Frequently Asked Questions*, S.F. HUM. SERVS. AGENCY, <https://perma.cc/2ZAS-5S3A>.

Federal policy reports purporting to offer solutions for food-insecure college students simply sidestep questions about the needs of undocumented students.⁶⁸

Turning to existing private scholarship initiatives focused on promoting college student success among undocumented students, notable programs include TheDREAM.US, Golden Doors Scholars,⁶⁹ the P.D. Soros Fellowship for New Americans,⁷⁰ Maná Scholarship Program,⁷¹ and scholarship America.⁷²

TheDREAM.US is far and away the largest private scholarship program for undocumented college students and presently awards substantial scholarships covering tuition and fees to approximately 6,000 (freshman-to-senior) students at U.S. colleges, including about 1,200 new freshmen each year.⁷³ TheDREAM.US is affiliated with about seventy partner colleges and receives financial support from a number of America's leading corporations and foundations.⁷⁴ Last year, 1,500 DREAM.US scholarship students earned either their A.A. or B.A./B.S. degrees. A couple of years ago, given the magnitude of the national challenge during the Trump era and the wide differences in opportunities between states, TheDREAM.US made the understandable but difficult decision to not continue new scholarships in states with favorable laws and institutional policies (California and Washington) and to redeploy those funds to states where undocumented students face even larger challenges.⁷⁵ By any measure, targeted private scholarships for undocumented students are currently only reaching a tiny fraction of the 427,000 undocumented students who are currently enrolled in U.S. higher education institutions and who are not eligible for Pell Grants and other forms of federal financial aid.

68. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-95, FOOD INSECURITY: BETTER INFORMATION COULD HELP ELIGIBLE COLLEGE STUDENTS ACCESS FEDERAL FOOD ASSISTANCE BENEFITS 50 (2018), <https://perma.cc/HLX8-V447> ("NPSAS does not contain detailed data about undocumented or international students, so we could not include this risk factor for food insecurity in our analysis.").

69. GOLDEN DOOR SCHOLARS, <https://perma.cc/HW7G-39RM> (last visited Feb. 17, 2022) (sponsoring 354 scholars at 21 partner schools).

70. See *Undocumented + DACA Recipient Applicants - Co-Hosted with My Undocumented Life*, PAUL & DAISY SOROS FELLOWSHIPS FOR NEW AMS., <https://perma.cc/57RX-QS97> (last visited Feb. 17, 2022) (awarding graduate fellowships to "outstanding immigrants and children of immigrants" and open to undocumented applicants).

71. *Maná Scholarship Program*, SCHOLARSHIP AM., <https://perma.cc/GB5F-EADU> (last visited Feb. 17, 2022) (awarding up to 15 scholarships to Latinx students, with undocumented students eligible).

72. *2021 Dream Award Scholars*, SCHOLARSHIP AM., <https://perma.cc/NVL5-YU8T> (awarding over twenty scholarships, including scholarships to undocumented students).

73. THE DREAM.US, <https://perma.cc/22JA-G8M5> (last visited Feb. 17, 2022); Interview with Tania Wilcox, Director of Partner College and Scholar Programs, TheDream.US, in San Jose, California (July 9, 2021) (on file with author).

74. THE DREAM.US, *supra* note 73.

75. Sadhana Singh, *Important News from TheDream.US in California*, THE DREAM.US (Sept. 14, 2020), <https://perma.cc/86J9-FZHC> ("Going forward, we will no longer award NEW scholarships to California DREAMers. California now has generous state aid, institutional aid, scholarships and loans that are available to DREAMers. This is not true in a number of other states – where DREAMers have little to no access to financial aid to help pay for college. We have decided that we need to shift our focus in helping DREAMers in these states.").

One in ten undocumented students are in professional school and graduate school programs and face unique financial challenges related to ineligibility for federal financial aid in combination with the fact that the underlying tuition/cost structure is substantially different from the undergraduate level. [Table 2](#) attempts to capture a major part of this dynamic in U.S. higher education by displaying the types of programs that are associated with the largest amounts of student debt among those who graduate. In [Table 2](#), half of the “top 20” programs are at the graduate and professional school level, including all the programs where graduates’ median debt is in the six figures (law, medicine, pharmacy, dentistry, and osteopathic medicine) and all of the programs with high debt/borrower ratios. For all of the educational debt challenges faced by U.S. citizens aspiring to be future lawyers and doctors and pharmacists, such choices still tend to be predominantly good investments and the pathway to prosperous long-term careers. However, for undocumented students with less resource support including private scholarships, less favorable loan choices, and greater loan/debt aversion,⁷⁶ these dynamics pose substantial barriers to entry and help explain (along with credentialing barriers) why there are so few undocumented students in these leading programs.⁷⁷

76. See generally Kate Sablosky Elengold, Jess Dorrance & Robert Agans, *Debt, Doubt, and Dreams: Understanding the Latino College Completion Gap*, UNIV. N.C. CHAPEL HILL & UNIDOSUS 28 (Nov. 18, 2020), <https://perma.cc/YV7C-P6DD> (“Another takeaway from this study is that ‘debt aversion’ is a complicated construct and is deeply connected to financial distress and inequalities. It is not a solution simply to encourage Latinos to borrow more. Rather, there must be a reckoning with the facts that not all loans are equal, not all debts are equal, not all programs are equal, and the current debt-financed higher education scheme is not set up to support all students.”).

77. For example, even at a private law school in California that can allow undocumented students to be eligible for institutional financial aid, and where undocumented law graduates can practice law, the financial aid office includes a disclaimer: “Undocumented students are eligible to apply for Alternative/Private loans. In order to do so, they must have a co-signer that is a credit worthy U.S. citizen.” *Undocumented/DACA Admissions Policy*, UNIV. PACIFIC: MCGEORGE SCH. L., <https://perma.cc/N3HQ-K6UD>.

TABLE 2: WHERE STUDENT BORROWERS TAKE ON EDUCATIONAL DEBT⁷⁸

Rank	Degree	Program of Study	% of Debt	% of Borrowers	Median Debt
1	Master's	Business Admin	4.3%	2.6%	\$ 46,045
2	Professional	Law	4.3%	1.0%	\$ 119,286
3	Bachelor's	Business Admin	3.7%	4.1%	\$ 25,308
4	Bachelor's	Nursing	3.3%	4.2%	\$ 21,812
5	Professional	Medicine	3.1%	0.5%	\$ 170,602
6	Bachelor's	Psychology	2.7%	3.3%	\$ 22,944
7	Master's	Nursing	2.5%	1.4%	\$ 49,817
8	Master's	Social Work	1.9%	1.1%	\$ 50,121
9	Associate's	Lib. Arts & Sci	1.9%	4.0%	\$ 13,048
10	Professional	Pharmacy	1.7%	0.4%	\$ 126,013
11	Bachelor's	Biology	1.6%	2.1%	\$ 22,009
12	Bachelor's	Criminal Justice	1.6%	1.8%	\$ 25,412
13	Professional	Dentistry	1.5%	0.2%	\$ 241,552
14	Associate's	Nursing	1.5%	2.3%	\$ 18,391
15	Professional	Osteopathic Med	1.4%	0.2%	\$ 232,053
16	Bachelor's	Teacher Educ.	1.2%	1.5%	\$ 24,163
17	Bachelor's	Communications	1.2%	1.5%	\$ 22,248
18	Bachelor's	Accounting	1.2%	1.4%	\$ 23,986
19	Master's	Allied Health Diagnostic	1.1%	0.3%	\$ 95,758
20	Master's	Clinical Psych	1.1%	0.5%	\$ 57,420

(U.S. Department of Education 2020 data)

Doctoral students who are undocumented or DACA-mented face distinct and substantial educational barriers. For example, Maria Ramirez Loyola, a DACA-mented doctoral student in psychological science at UC Merced, described her experiences during a recent discussion with the UC Regents.⁷⁹ Ms. Ramirez Loyola described how, even with achievements such as nationally recognized research and a teaching award, she experienced chronic anxiety, isolation, and fear that everything she is working for could be “snatched away” at any moment. She expressed frustration that she could not apply for

78. Adam Looney, *Dept. of Education's College Scorecard Shows Where Student Loans Pay Off... and Where They Don't*, BROOKINGS INST. (Nov. 10, 2020), <https://perma.cc/94ZF-U44P>. Table 2 is a simplified version of the first table appearing in the article. The underlying data are from the U.S. Department of Education's 2020 College Scorecard and “represent the weighted average of the median earnings and debt reported in the Scorecard” for 2014–15 and 2015–16 graduates.

79. *Academic and Student Affairs Committee*, REGENTS UNIV. CAL. (Jan. 20, 2021), <https://perma.cc/W63A-XUTA> (video recording of Maria Ramirez Loyola testimony begins at 2:28); *Minutes of the Academic and Student Affairs Committee*, REGENTS UNIV. CAL. 13 (Jan. 20, 2021), <https://perma.cc/DZ55-G4UW>.

federal funding and fellowships the same way as other doctoral students in her field. Moreover, Ms. Ramirez Loyola talked about how undocumented graduate students like her were more isolated. She explained that campus and university system-level support programming for undocumented students is designed for (the far larger number of) undocumented undergraduate students rather than providing workshops suitable to her (e.g., navigating applications in the post-Ph.D. academic job market). Even the graduate advisor often could not answer questions that were specific to her circumstances. Finally, unwelcoming comments such as a faculty member's joke that "she should just get married" made her strongly consider leaving her doctoral program and underscore the need for colleges to have a central repository of information and resources for faculty, many of whom will not be familiar with the myriad challenges encountered by undocumented students, including along the path to graduate/professional school.⁸⁰

One silver lining regarding the points above about professional school students is that a professional school with a tight-knit and social justice-oriented student body (e.g., many law schools, business schools with a flair for social justice entrepreneurship, public university teaching credential/Master's programs, nursing, social work, public health, etc.) represent "laboratories of experimentation"⁸¹ and design-driven "educational field stations,"⁸² where experimental ideas such as the partnership fundraising model to support undocumented students espoused in this Article might first take root. Moreover, the positive trend of undocumented students securing rights of professional licenses and credentials (to practice law, medicine, counseling, CPA, school teaching, pharmacy, nursing, etc. in some states) needs improved "critical mass" numbers of undocumented graduates of these professional school programs (i.e., bigger numbers than the amazing "one-offs" at some commencement ceremonies) in order to secure accelerating momentum and attention with lawmakers and professional licensing associations.⁸³

80. Here I am relying on Ms. Ramirez Loyola's remarks at the UC Regents meeting as well as my follow-up correspondence with her. She mentioned to me that she also felt very fortunate that her advisor and other allies at UC Merced "were willing to take the time" to figure out what important questions needed to be identified ahead of time and to work together to "brainstorm potential solutions for unexpected and unique hurdles." Email communication with Maria Ramirez Loyola (Aug. 10, 2021) (on file with author).

81. *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2214 (2016) ("[P]ublic universities, like the States themselves, can serve as 'laboratories for experimentation.'"); cf. Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279 (2017) (analyzing adjacent area of California's Agricultural Labor Relations Act as an example of state policy experimentation related to undocumented workers' rights in the shadow of federal laws on immigration).

82. Hugh Mehan & Cecil Lytle, *Creating Educational Field Stations: A Remedy and a Model for Diversity and Access in Higher Education* (Oct. 2006), <https://perma.cc/Y744-4FX7> Hugh Mehan, *Engaging the Sociological Imagination: My Journey into Design Research and Public Sociology*, 39 ANTHRO & EDUC. Q. 77, 79 (2008).

83. See Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. U. L. REV. 65, 86–87 (2017); OLIVAS, *supra* note 18, at 86–107; President's All. on Higher Educ. & Immigr., Catholic Legal Immigr. Network, Inc., fwd.us, Niskanen Ctr. & TheDream.US, *Expanding Eligibility for Professional and Occupations Licensing for Immigrants*,

Additional innovation ideas are discussed further below in Section V, outlining a voluntary fee idea with matching philanthropic support.

IV. CHANGING HEARTS AND MINDS IN THE STUDENT BODY: MEASURING SHIFTS IN ATTITUDES

Before discussing the key role of undocumented student activists and allies (see Section V), it is important to lay some groundwork regarding the potential for overall change in U.S. college students' attitudes in this area. This groundwork is relevant to (1) the workability of the proposal; (2) the attractiveness of private matching funds for the proposal; and (3) the larger social movement that could yield eventual change in voter sentiments sufficient to result in positive immigration law reforms. Included within this set of considerations are the attitudes of students who are not highly political, those who are not engaged with progressive student activism, and those who lean somewhat conservative.

In this vein, Table 3 shows evidence that points to optimistic possibilities over the long-term future. There is a substantial shift in U.S. college students' overall attitudes, which have swung decisively away from nativist immigration sentiments that would deny educational opportunities to undocumented students. Table 3 displays results for new freshmen from one of the largest (and nationally representative) surveys of U.S. colleges and universities. Importantly, these data do not reflect the further change in student attitudes that can result from the learning experiences, classmate interaction, and civic engagement over several years of college.

It used to be the case that Millennial college freshmen had roughly similar fifty-fifty attitudes opposing/supporting undocumented student access to public education and opposing affirmative action in college admissions.⁸⁴ However, in recent years, Generation Z college freshmen attitudes about undocumented students have changed considerably, even as attitudes about affirmative action have remained rather stable over the past two decades (see Table 3). Individual campus-level data from the same national survey show considerable variation depending on the demographics of the student body and regional differences in political identity.⁸⁵

President's All. on Higher Educ. 1, 7 (SEPT. 2019), [HTTPS://PERMA.CC/4D5E-GAEF](https://perma.cc/4D5E-GAEF); *IN RE GARCIA*, 315 P.3D 117, 132 (2014) (UNDOCUMENTED IMMIGRANT CAN SIT FOR THE BAR EXAM IN CALIFORNIA); S.B. 1159, 2020–2021 SEN., REG. SESS. (CAL. 2020) (AUTHORIZING BILL PASSED QUICKLY IN 2014 IN THE RUN-UP TO THE *IN RE GARCIA* RULING, BUT ALSO ADDRESSES LICENSING BEYOND ATTORNEYS); JENNIFER J. LEE, *REDEFINING THE LEGALITY OF UNDOCUMENTED WORK*, 106 CALIF. L. REV. 1617, 1654 (2018).

84. See, e.g., Jonathan Poullard, *What Is the Relationship Between Changing University Policy and Changing Student Norms?*, in *CONTESTED ISSUES IN STUDENT AFFAIRS: DIVERSE PERSPECTIVES AND RESPECTFUL DIALOGUE* 142, 147 (Peter M. Magolda & Marcia B. Baxter Magolda eds., 2013).

85. Examples of individual campus reports on these HERI-CIRP surveys (same as Table 2) with the question about undocumented students include CSU San Marcos and UC San Diego.

TABLE 3: CHANGING ATTITUDES AMONG U.S. COLLEGE FRESHMEN ABOUT UNDOCUMENTED STUDENTS (HERI/CIRP—THE AMERICAN FRESHMAN SURVEY)⁸⁶

% of American College Freshmen who “agree strongly” or “agree somewhat” that “Undocumented immigrants should be denied access to public education”								
	1996	2005	2007	2008	2011	2014	2017	2020* ⁸⁷
	56.3%	42.1%	48.1%	47.2%	43.0%	35.5%	28.4%	18.9%
% of American College Freshmen who “agree strongly” or “agree somewhat” that “Affirmative action in college admissions should be abolished”								
	1996	2005	2007	2008	2010	2013	2016	2019
	51.3%	48.5%	47.8%	47.6%	49.6%	52.0%	50.6%	50.2%

The overall degree of elasticity in college student attitudes reflected above in Table 3 should be of interest to progressive foundations, university officials, social justice activists/organizers, and undocumented student allies, as it represents a foundation upon which to build the undocumented student scholarship partnership model (see Section V below) as well as a broader social movement for the rights of undocumented students. A reasonably close and contemporary analogy is the dramatic shift in surveys of Americans’ attitudes about same-sex marriage, which had both generational and overall societal dimensions that are associated with changes in state and federal laws.⁸⁸

86. Table 3 displays selected years because neither of these survey items appear every year on this large nationally representative survey; adjacent years are listed in a couple places where the affirmative action question was not asked in exactly the same year that the undocumented question was posed. See Kevin Eagan, Ellen Bara Stolzenberg, Joseph J. Ramirez, Melissa C. Aragon, Maria Ramirez Suchard & Cecilia Rios-Aguilar, *The American Freshman: Fifty-Year Trends 1966–2015*, HIGHER EDUC. RSCH. INST., UCLA 87–88 (2016), <https://perma.cc/ZZ96-QN7Z>; Ellen Bara Stolzenberg, Kevin Eagan, Melissa C. Aragon, Natacha M. Cesar-Davis, Sidronio Jacobo, Victoria Couch & Cecilia Rios-Aguilar, *The American Freshman: National Norms Fall 2017*, HIGHER EDUC. RSCH. INST., UCLA 35 (Apr. 2019), <https://perma.cc/3Y3N-5SAS>.

87. The results for fall 2020 could not be “normalized” (adjusted to reflect national norms) by HERI due to COVID and lower survey participation rates, so the figure of 18.9% should be regarded as a “ball-park” figure with that background in mind. I thank the University of California Los Angeles HERI office for sharing this data point with me.

88. See, e.g., Hye-Yon Lee & Diana C. Mutz, *Changing Attitudes Toward Same-Sex Marriage: A Three-Wave Panel Study*, 41 POL. BEHAV. 701 (2019). Note that the relationship between public attitudes and Supreme Court rulings is complicated (e.g., not one-directional and not uniform across differently positioned states). See, e.g., Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728 (2017).

V. GRASSROOTS ACTIVIST FUNDRAISING AT SCALE: A VOLUNTARY FEE AND A NEW PARTNERSHIP MODEL⁸⁹ AMONG UNDOCUMENTED STUDENT ACTIVISTS, ALLIES, PHILANTHROPY, AND COLLEGES

Given the formidable legal and financial barriers for undocumented college students described in earlier sections of this Article, in this section, I set out a design-driven scholarship fundraising model intended to augment existing efforts and that revolves around the idea of “*think big, start small, scale fast*.”⁹⁰ This is a campus-level funding model that can be adopted and operationalized at interested public colleges and universities, where the vast majority of undocumented students enroll. This model can work at private colleges and professional schools, too, but the context is different due to factors including tuition, financial aid, and federal law under PRWORA. With DACA in legal jeopardy, and with the Biden administration’s proposed (but not finalized) DACA regulations set to adopt age restrictions that will exclude younger Generation Z students from eligibility, the fundraising idea in this section can apply to either non-DACA students or DACA-eligible students or *both*, depending on that college’s local context, state laws, and political facts-on-the-ground. This scholarship fundraising idea combines three tenets of design-driven innovation to support not only fundraising but also student activism and Dreamer students’ agency.

The first tenet of design-driven innovation in higher education I apply is to shrewdly identify one’s core strengths and to organize growth in areas where one’s college or program has natural advantages.⁹¹ This proposal takes seriously—as a true organizing principle, not a mere bumper sticker slogan—that undocumented college students and their allies have resilient social justice human capital and “funds of knowledge”⁹² constituting a natural advantage and a basis for building out a new supplemental scholarship fundraising structure that may be attractive to a subset of American university communities and their respective philanthropic partners. As noted by Roberto

89. See Kathleen Kelly Janus, *Governing in Partnership*, STAN. SOC. INNOVATION REV. (Dec. 3, 2020), <https://perma.cc/4RFB-TLYX> (Governor’s advisor describing four key takeaways: (1) “Partnerships provide a more expansive way of governing”; (2) “Partnerships produce innovative solutions”; (3) “Partnerships allow you to accelerate social change”; and (4) “Partnerships have a multiplier effect”).

90. David Harrison & Jennifer Anderson, *Collective Impact: Building Pathways to Student Success*, in STUDENT SUCCESS IN THE COMMUNITY COLLEGE: WHAT REALLY WORKS? 121, 133 (Terry U. O’Banion & Marguerite M. Culp eds., 2020).

91. Clark G. Gilbert, Michael M. Crow & Derrick Anderson, *Design Thinking for Higher Education*, STAN. SOC. INNOVATION REV. 36, 38 (2018); Tamara Zellars Buck & Pam Parry, *Sharpening a Competitive Edge: How HBCUs Leverage Their Strengths with Strategic Partnerships*, in REIMAGINING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES 89 (Gary B. Crosby, Khalid A. White, Marcus A. Chanay & Adriel Hilton, eds., 2021).

92. See, e.g., Gloria Itzel Montiel, *Navigating the Ivy League: Funds of Knowledge and Social Capital of Undocumented Ivy League Students*, 28 HARV. J. HISP. POL’Y 64, 73 (2016); Ali Borjian, *Academically Successful Latino Undocumented Students in College: Resilience and Civic Engagement*, 40 HISP. J. BEHAV. SCIS. 22 (2018); Nicholas Hudson, *Undocumented Latino Student Activists’ Funds of Knowledge: Transforming Social Movements* (Aug. 31, 2017) (Ed.D. dissertation, George Washington University) (ProQuest).

Gonzales, the undocumented college students who participated in the rise of student advocacy work “began to realize their own capacity as agents of change and the importance of the space they were creating, not only for themselves but also for other community members. . . . They saw their activism as a way to stake claim to a political world long the exclusive domain of citizens.”⁹³ Or as one young undocumented student who was involved in activism to successfully change an in-state tuition law succinctly explained, “What I learned about myself is that I can do more than what I thought I could. I learned that I cared about other people. [My activism involvement] wasn’t just about me going back to school. It was about others, too.”⁹⁴

Informing this focus on students’ human capital strength are the real-world lessons of DACA and Dreamer activism, including that, as Kevin Johnson observed, “DACA came to stand for much more than the limited relief that it extended to young undocumented immigrants. The policy ultimately became the focal point of a grassroots social movement seeking nothing less than a full vindication of the rights of immigrants”⁹⁵ Likewise, major funders for undocumented student scholarships like the Chan-Zuckerberg Initiative recognize that “progress must be supported by movements to be sustainable.”⁹⁶

A second design tenet focuses on identifying the right collaborative structure and partnerships. A challenge with existing patterns of undocumented student activism, which are geared toward state law legislative change and federal law/programs like DACA, is that organizing tends to naturally culminate in a series of all-or-nothing decision points. This can make it difficult to sustain conditions of movement connectedness and momentum even after a state law victory, and certainly after a string of defeats.⁹⁷ In this vein, a second innovation design challenge to work through (and an idea referenced in the Cherrie Moraga poem that begins this Article) is to identify the right kind of collaborative *structure*.⁹⁸ A collaborative structure should support undocumented students’ and allies’ agency, engagement, and immediate needs during lower-activity periods on a college campus, in between the less frequent

93. ROBERTO G. GONZALES, *LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA* 168–69 (2016).

94. Brad Forenza, Briana Rogers & David T. Lardier, *What Facilitates and Supports Political Activism By, and For, Undocumented Students?*, 49 URB. REV. 648, 662 (2017).

95. Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 349 (2018).

96. Mark Zuckerberg, *A Letter to Our Daughter*, FACEBOOK (Dec. 1, 2015), <https://perma.cc/8628-CLXZ>.

97. See, e.g., Veronica Terriquez, Tizoc Brenes & Abdiel Lopez, *Intersectionality as a Multipurpose Collective Action Frame: The Case of the Undocumented Youth Movement*, 18 ETHNICITIES 260, 273 (2018) (“After the movement as a whole turned much of its energy away from a federal DREAM Act [LGBTQ undocumented] young leaders actively injected immigrant and/or LGBTQ concerns into the agendas of other movements with some success.”).

98. Tua A. Björklund, Teo Keipi, Sine Celik & Kalevi Ekman, *Learning Across Silos: Design Factories as Hubs for Co-Creation*, 54 EUR. J. EDUC. 552, 553 (2019) (“However, the challenge remains as to how to incorporate design-driven, interdisciplinary collaboration in higher education institutions and their ecosystems. What types of practices and structures enable and hinder the development of such initiatives?”).

major organizing events.⁹⁹ Without the right structures of support and organization, designing a substantial student-led scholarship model can end up being conceptually amazing but unrealistic, like catching lightning in a bottle. The structure I identify below is a simple one that has been field-tested by generations of college student activists going back to the 1970s. Yet (perhaps surprisingly), it has never been applied—as best I can tell—to today’s challenge of undocumented college students’ unmet financial needs at public universities and colleges.

Included among the considerations about structure are issues about *structuring inclusiveness* in order to keep student activists positively engaged (and for other reasons too). As discussed in Sections II and III, there are more non-DACA undocumented college students enrolled today than students with DACA eligibility, and political organizing around defense of DACA can cause many non-DACA students to feel marginalized even if they “get it” about the long road ahead and service to the cause and collective good.¹⁰⁰ The fundraising idea at the center of this Article is not one that hinges on any eligibility conditions of DACA or other state law eligibility criteria. Rather, it can be applied flexibly on a campus based on a pragmatic assessment of state/local fundraising maximization considerations, which may be very different in Irvine, California; Austin, Texas; Fort Collins, Colorado; Newark, New Jersey; or Atlanta, Georgia. Moreover, there is a significant group of “silent Dreamers” out there, including perhaps a somewhat higher share of Asian American and Pacific Islander undocumented students, who are more apt to shy away from participating in large “undocumented and unafraid” protest rallies—how might campus organizers better engage with those students and have their talents and agency “on the team” on an average Wednesday?¹⁰¹

99. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. FORUM 546, 557 (2021) (“First, because small-scale, concrete victories are essential to successful organizing, and because organizing tends to be most successful among people with shared identities and existing relationships, we focus on reforms that enable organizing within particular structures of authority and resource relations”).

100. See, e.g., Enriquez, Hernandez, Millán & Vera, *supra* note 66, at 681 (wellbeing for DACA students is better than for non-DACA undocumented students and the DACA “program mediates some of the most negative consequence of illegality in the everyday lives of undocumented young adults”).

101. Zi Heng Lim, *For Asian Undocumented Immigrants, a Life of Secrecy*, ATLANTIC (May 43, 2013), <https://perma.cc/QJH5-HENG> (describing a Korean American Dream Act organizing campaign in New York, “These DREAMers are concerned about attracting bigger membership. They acknowledge there’s a large group of ‘silent DREAMers,’ people who will gladly make copies at the copy machine, but do not attend rallies and shout ‘I’m undocumented and unafraid.’ These are the people they want on their team.”). The topic of AAPIs’ activism levels in the undocumented student movement is politically and empirically complicated. On the one hand, significant research shows that AAPI activism efforts can be rendered less visible by virtue of dominant “model minority” stereotyping. See Loan Thi Dao, *Out and Asian: How Undocu/DACAmented Asian Americans and Pacific Islander Youth Navigate Dual Liminality in the Immigrant Rights Movement*, 7 SOCIETIES 1 (2017). On the other hand, we have less comprehensive/representative survey data on AAPI undocumented student activism compared to other disaggregated AAPI categories around levels of political engagement. Cf. Laura Wray-Lake & Julia Tang, *Are They Political? Examining Asian American College Students’ Civic Engagement*, 8 ASIAN AM. J. PSYCH. 31, 33 (2017) (“Undocumented status can be a motivating factor for political activism, and some first-generation immigrants are highly politically active.”).

A third essential design principle is capacity for scale-up.¹⁰² Student-organized and campus-organized private fundraising efforts for undocumented students are typically very modest in scale and have a one-off quality across time: banquet scholarship dinners, t-shirt and bake sales, auctions, individual crowdfunding pages, 5K runs, and so on.¹⁰³ By contrast, while a scaled-up version would be closer to the point of activity/community than GoFundMe pages, it would allow thousands of students to expressively say “yes” together based on shared social values and mutual care, throughout the academic year. Also important to scale-up is taking advantage of “infrastructure adjacency” with a supportive campus administration (which (as explained more below in Section VI is legally and conceptually distinct from other in-state tuition laws and state financial aid laws that are concededly “state or local benefits” under PRWORA/IIRIRA¹⁰⁴). The concept of force multipliers¹⁰⁵ (also commonly understood as “multiplier effects”¹⁰⁶) and the idea of small investments derived from authentic partnership opportunities,¹⁰⁷ in combination with the other aforementioned design elements, represent the maxim noted earlier: “*Think big, start small, scale fast.*”¹⁰⁸

With these three design principles in mind—organizing around Dreamers’ strengths, finding the right structure, and seeking out conditions of scale-up—I propose a scholarship fundraising model that is organized around a *student voluntary fee* for undocumented students.

The vast majority of university student fees familiar to students, parents, and university administrators are compulsory, even if initially approved by a student body referendum (to support athletics, or the student health center, or campus shuttle bus services, etc.). Yet a significant number of public colleges and universities (and university systems) also have voluntary fees for student-controlled entities like student government/student associations, student

102. Janus, *supra* note 89 (“Public-private partnerships also bring new ideas to government and test them out in ways that government could scale.”); Kevin James, *Scaling the Dream: How Philanthropy Can Use Income Share Agreements to Make College Possible for Millions of Dreamers 2* (2019) (“To avoid massive numbers of Dreamers missing out on the promise of higher education, practitioners and philanthropists must explore new tools, in addition to scholarships, to support Dreamers at scale.”).

103. Glenn, *supra* note 2, at 12–13; Enriquez, Hernandez, Millán & Vera, *supra* note 66, at 689.

104. *E.g.*, State *ex rel.* Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd., 395 P.3d 714, 721 (Ariz. Ct. App. 2017) (“[I]n-state tuition benefits fit within PRWORA’s definition of a state or local public benefit”), *aff’d in part, vacated in part*, 416 P.3d 803 (2018).

105. More often the concept of “force multipliers” comes up in other sectors like emergency management, threat assessment or the military, but it also has important applications in educational engagement contexts. See Catherine Greene Burnett & Eden Harrington, *Law Schools Working Together to Increase Access to Justice*, 51 S. TEX. L. REV. 689, 690 n.1 (2009) (contrasting individual initiatives in law school clinical education with “a paradigm in which all law schools in a state or major geographic region act collaboratively as force multipliers”); Mary Lord & Mark Matthews, *Force Multipliers*, 28 ASEE PRISM 22 (2019).

106. An example is how modest Pell Grant investments can result in larger levels of economic activity. See Maarten De Ridder, Simona M. Hannon & Damjan Pfajfar, *The Multiplier Effect of Education Expenditure* (Fed. Rsrv. Bd., Finance and Economics Discussion Series 2020-058, 2020), <https://perma.cc/R8LE-STGW>.

107. See Janus, *supra* note 89 (“Partnerships have a multiplier effect. Partnerships can also provide a model for policy change that can be replicated in other jurisdictions.”).

108. Harrison & Anderson, *supra* note 90, at 133.

environmental initiatives, and so on. Just as the current era appears to be a period of relatively robust student and community activism,¹⁰⁹ voluntary fees on U.S. colleges originated with the student activism of the 1970s.¹¹⁰ This activist heritage of voluntary fees includes efforts by college students with Ralph Nader to organize local chapters of student-led public interest research groups¹¹¹ and students' efforts to scale-up access to independent attorney advice and services with, for example, landlord-tenant matters.¹¹²

Note for present discussion that the term "voluntary fee" has a range of meanings in higher education. A small number of universities use the term for when students voted to approve the fee (at which point it became mandatory¹¹³). This less common definition is not the focus and meaning of the discussion below.

Existing examples and precedents of voluntary fees in university policies and state laws include the University of California,¹¹⁴ California State University,¹¹⁵ University of Washington¹¹⁶ and other colleges in Washington,¹¹⁷

109. Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J. FORUM 685, 686 (2021) ("By now it borders on cliché to note the similarities between 2020 and 1918, 1930, and 1968.").

110. Estelle A. Fishbein, *Legal Aspects of Student Activities Fees*, 1 J. Coll. & Univ. L. 190 (1974). A broader sampling of multiple voluntary fees in the 1970s is found in *Collection and Distribution of Student Fees by Institutions of Higher Education: Hearing Before the Subcomm. on Educ. of the S. Comm. on Lab. & Pub. Welfare*, 94th Cong. (1976) [hereinafter *Hearing*].

111. See RALPH NADER & DONALD ROSS, ACTION FOR A CHANGE. A STUDENT'S MANUAL FOR PUBLIC INTEREST ORGANIZING (1971); Fishbein, *supra* note 110, at 192–94. Not all universities welcomed this change. At SUNY Albany a two dollar/semester voluntary fee supporting the NYPIRG was supported by the majority of students, but the central administration opposed the fee. *Curran v. Benezet*, 360 N.Y. S.2d 582 (N.Y. Sup. Ct. 1974).

112. See *Historical Information on New Legal Services for Students*, UNIV. OF ILLINOIS AT URBANA-CHAMPAIGN <https://perma.cc/WNY8-CUJV>; *Student Legal Services Plan*, UNIV. OF ILLINOIS AT URBANA-CHAMPAIGN, <https://perma.cc/UK4B-HYZQ>.

113. E.g., *Student Governance and Policies Chapter 205*, UNIV. WASH. (May 12, 2011), <https://perma.cc/56JF-T98F>; WASH. REV. CODE § 28B.15.610 (2011).

114. *Guidelines for Implementing a Voluntary Student Fee Pledge System*, UNIV. CAL. (Dec. 28, 1992) [hereinafter UNIV. CAL., *Voluntary Fee Guidelines*], <https://perma.cc/NTR9-AZWW>; *Policies Applying to Campus Activities, Organizations and Students Section 90*, UNIV. CAL. (July 28, 2004) [hereinafter UNIV. CAL., *PACAOS Policy*], <https://perma.cc/2BPM-7C3X>.

115. In 2015, the CSU Board of Trustees passed a voluntary fee for student government after the Legislature amended the Education Code to allow CSU to set such fees for "voluntary membership in a statewide student organization that represents the students." CAL. EDUC. CODE § 89300(d); *Trustees of the California State University Meeting Agenda, January 26–28, 2015*, CAL. STATE UNIV. 227–30 (Jan. 28, 2015), <https://perma.cc/Y8DD-KQGE> (Agenda Item 2: Policy on Voluntary Statewide Student Involvement and Representation Fee (SIRF)).

116. *University of Washington Board of Regents' Meeting Minutes*, UNIV. WASH. 250 (May 7, 2015), <https://perma.cc/46VD-FQQB> ("Students are authorized to create or increase voluntary student fees for each academic year when passed by a majority vote of the student government or its equivalent, or referendum presented to the student body or such other process that has been adopted under this section. Notwithstanding RCW 42.17A.635 (2) and (3), voluntary student fees imposed under this section and services and activities fees may be used for lobbying by a student government association or its equivalent and may also be used to support a statewide or national student organization or its equivalent that may engage in lobbying.").

117. WASH. REV. CODE. § 28B.15.610 (2011) (voluntary fees of students); see also *Evergreen State College Board of Trustees' Meeting Minutes*, EVERGREEN STATE COLL. (June 2008), <https://perma.cc/G94Q-MRFS> (approval of a student lobbying voluntary fee).

Massachusetts,¹¹⁸ Rutgers University in New Jersey,¹¹⁹ Georgia Tech,¹²⁰ Southern Illinois,¹²¹ some State University of New York (SUNY) campuses,¹²² and Indiana University.¹²³ There is an additional group of states and universities with “close cousin” scenarios, such as the Texas Education Code, which allows for voluntary fees for activities that “directly involve or benefit students”¹²⁴ but seems to limit such voluntary fees to situations where the payers are *users* of the student service, or campuses with past experiences/precedent for student voluntary fees that were later restricted, including the University of Montana,¹²⁵ public colleges in Nevada,¹²⁶ and public universities in Florida.¹²⁷ Many of these college student fees for student government, for example, do not neatly array into a “red states” and “blue states” dichotomy.¹²⁸

Some voluntary fees fall into a “you can opt out” variety that requires an affirmative act by the student to not pay, which is more efficient for raising

118. MASS. GEN. LAWS ch. 15A, § 29 (2006) (describing “waivable fee” for student organizations); MASS. GEN. LAWS ch. 73, § 1F (2019).

119. *Fee Descriptions*, RUTGERS UNIV., <https://perma.cc/DA2E-E92M> (last visited Feb. 18, 2022) (“NJPIRG campus chapters are funded by a voluntary fee and adopted by student referendum. If you do not wish to pay this fee, you may deduct the NJPIRG amount from your balance due”).

120. Georgia Tech uses a VF for part-time students and other purposes like the campus recreation center. *See Voluntary Student Fees*, GA. INST. TECH., <https://perma.cc/SUWN-448T> (last visited Feb. 16, 2022).

121. *Miscellaneous Fees and Fee Policies*, S. ILL. UNIV., EDWARDSVILLE (Nov. 1, 2002), <https://perma.cc/928B-TPXB>.

122. For example, SUNY Cortland has an alumni fee that is voluntary (students can opt out). *Alumni Fee*, SUNY CORTLAND, <https://perma.cc/CR5B-TSWA> (last visited Feb. 16, 2022). Note that SUNY is not uniform with respect to the meaning of voluntary fees. *Hearing, supra* note 110, at 65–78, details the SUNY system’s complicated attempt to revise fee policies in the Vietnam War protest era. *Cf. Curran v. Benezet*, 360 N.Y.S.2d 582 (1974).

123. *Indiana University Student Association Records, 1953–2010*, IND. UNIV., <https://perma.cc/9KMH-WQEV> (last visited Feb. 16, 2022) (multiple entries between 1989 and 2010 for the Rape Crisis Fund, a voluntary fee).

124. TEXAS EDUC. CODE § 54.503 (2005); *see also* TEXAS EDUC. CODE § 54.513 (2005), <https://perma.cc/GM4K-5NG5> (UT Austin’s student service fees). The history of legislation related to voluntary fees in Texas higher education are detailed in the following attorney general opinion. Texas Att’y Gen. Dan Morales, Opinion No. DM 421 (Nov. 5, 1996), <https://perma.cc/8Q4Z-YPWF>.

125. The University of Montana Board of Regents rescinded the Montana PIRG voluntary fee in 2004 while claiming that it was opening the process to all student groups and was not prohibiting a campus-level voluntary fee to Montana PIRG or other groups. Liv Swenson, *Montana PIRG Loses Student Funding*, BADGER HERALD (Apr. 1, 2004), <https://perma.cc/Z8JM-P7WT>.

126. Nevada’s higher education system has historically allowed voluntary student fees, for example, for the student health center (later converted to a mandatory fee). *See Univ. Comm. Coll. System of Nev. Board of Regents’ Meeting Minutes*, UNIV. COMM. COLL. SYSTEM OF NEV. 47–50 (Jan 12, 1995), <https://perma.cc/ZE43-465J>.

127. James Harper, *Notebook*, TAMPA BAY TIMES (Oct. 5, 2005), <https://perma.cc/R4WF-7FHX> (discussing evolving Florida PIRG voluntary fee at the University of South Florida); Robert McClure, *State Student Affairs VPs Vote Against FPIRG Fees*, INDEP. FLA. ALLIGATOR (May 5, 1981), <https://perma.cc/MJL3-8DP9> (discussing 5-4 split among nine Florida university vice presidents of student affairs on Florida PIRG fees). Florida appears a bit more difficult to research than other examples noted above, perhaps because of the historical decentralization of the university system but that fact could be an advantage for organizers wanting to initiate a voluntary fee process for undocumented students on a Florida campus that has some support among university officials and private donors.

128. Christopher Bangs, *A Union for All: Collective Associations Outside the Workplace*, 26 GEO. J. ON POVERTY L. & POL’Y 47, 52 (2018).

student fees.¹²⁹ However, such an approach is less attractive and efficient for present purposes because it is not the driver of ongoing student organizing activity and associated motivation for philanthropic partners. The “pledge system”¹³⁰ type voluntary fee strikes the right balance of conditions for the student activism and scale-up goals of this model, especially for reasons of force multipliers in Figure 2 and discussed further below. The point is to give the right combination of “nudges”¹³¹ toward the goal of boosting overall undocumented scholarship fundraising as well as the Dreamer student activism and engagement with other students that can redound to the long-term benefit of what Dr. Martin Luther King Jr. called “the beloved community.”¹³²

Again, this voluntary fee idea for undocumented students has not been tried at U.S. colleges, as best I can tell. However, there appear to be a very small number of related efforts. For example, in 2015, the student government at Loyola University in Chicago—a private Jesuit school whose mission includes *cura personalis* (“care for the whole person”)—put forward a referendum that students “overwhelmingly approved” for a mandatory fee of \$2.50 per semester for a scholarship fund supporting undocumented students.¹³³ Loyola is a small college and this fee raised about \$50,000 per year, which was matched by Don Graham (former publisher of the *Washington Post* and a major supporter of DREAM.US scholarships).¹³⁴ Soon thereafter, the administration and students at Prescott College, a private liberal arts college in Arizona, supported a \$30/year mandatory fee for an undocumented student scholarship fund,¹³⁵ and at the private Illinois Institute of Technology, students organized a \$4.50 optional/voluntary fee for undocumented students.¹³⁶ The legal advantages of a voluntary fee at *public*

129. *Guide to Student Activity Fees*, CTR. FOR CAMPUS FREE SPEECH 5 (2006), <https://perma.cc/9X87-ATSD> (“The [voluntary fee] mechanisms that tend to provide the highest level of funding are refundable and waivable fee systems.”).

130. *Id.* at 6 (“The ‘pledge system’ is an attempt to have a fee that is decided upon by the individual, yet retains an element of the community decision found in most fee systems”).

131. Cass R. Sunstein, *The Ethics of Nudging*, 32 *YALE J. ON REG.* 413 (2015) (explaining that there is a stronger ethical basis for policy nudges when grounded in the promotion of welfare, autonomy, and dignity concerns).

132. *The King Philosophy – Nonviolence* 365, KING CTR., <https://perma.cc/YBK4-W882> (last visited Feb. 8, 2022) (quoting one of MLK’s 1966 Magazine articles, “I do not think of political power as an end. Neither do I think of economic power as an end. They are ingredients in the objective that we seek in life. And I think [the] end of that objective is a truly brotherly society, the creation of the beloved community.”).

133. *Magis Scholarship Fund*, LOYOLA UNIV. CHI., <https://perma.cc/GU96-XF4B> (last visited Sept. 2, 2021); Anna Gaynor, *Student Leaders Discuss New Magis Scholarship*, LOYOLA UNIV. CHI.: NEWS & FEATURES (2016), <https://perma.cc/TT9W-Y954>.

134. Gaynor, *supra* note 133.

135. Macy Salama, *Prescott College Enacts Student Fee to Raise Funds for Undocumented Student Scholarship*, INSIGHT INTO DIVERSITY (Apr. 12, 2016), <https://perma.cc/L59J-7X5V>; *Welcome Dreamers*, PRESCOTT COLL., <https://perma.cc/35CD-95RK> (last visited Feb. 18, 2022).

136. *Education Desk: Undocumented Students Push for Access*, NPR ILL. (Nov. 21, 2016, 1:03 PM), <https://perma.cc/8FZN-RLYR>.

universities are discussed below in Section VI, but that distinction matters less at private colleges and universities.

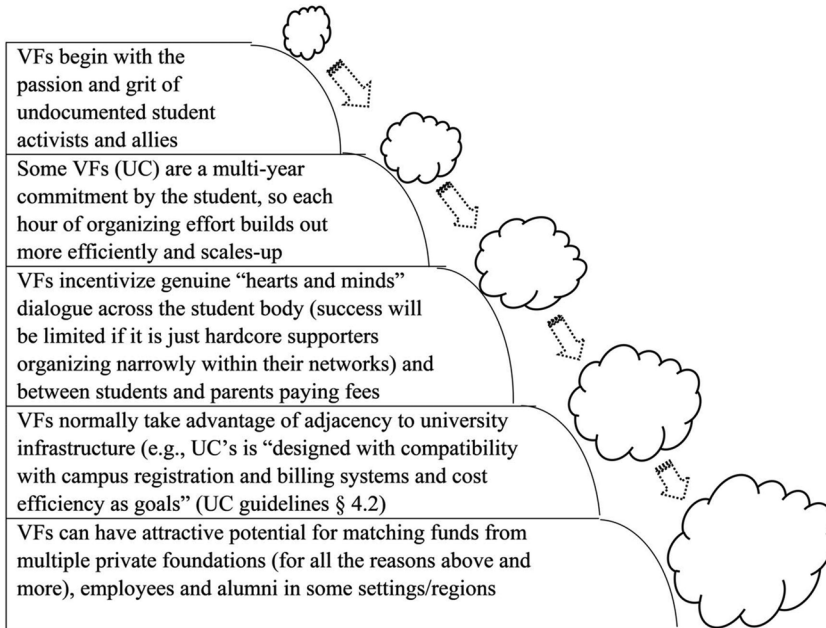


Figure 2. Force Multipliers Can Help a Small Voluntary Fee Effort for Undocumented Students “Snowball” to Much Larger Success

In the above model, it is the student organizers generating the core activity, which is buttressed by a natural incentive structure to engage other students (of all political views, not just those already supportive of the cause) in “hearts and minds” conversations about the experiences of and need to support undocumented classmates.¹³⁷ Such an approach activates engagement and attitudinal change along the lines of that described earlier in Section IV. At least some recent focus group research with Generation Z undocumented students regarding higher education affordability has indicated favorable attitudes and values about “pay it forward” concepts and programs.¹³⁸ Here, the idea might more specifically be called a “lift others as you climb” provision, in which undocumented students receiving these scholarships would commit

137. See, e.g., Gaynor, *supra* note 133 (Catalina Cipri, one of the sophomores who originated this scholarship idea, observed, “A lot of people would come up to me and Flavio and say, ‘Because of this initiative I’ve had great conversations on campus, in my classes, or with my friends,’ . . . It was great to see that we started a conversation, and that was what surprised me most.”).

138. James, *Scaling the Dream*, *supra* note 102, at 9 (“One of the strongest themes to emerge from the Better Future Forward (BFF)/Jain Family Institute (JFI) focus groups with Dreamer students was their emphasis on the ‘pay it forward’ aspect of a program. Students do not see a program like this as a purely commercial transaction in the way student loans are traditionally structured. Instead, students were strongly drawn to a program where the provider, ideally a nonprofit or the school itself, clearly cares about their success and where their payments back to the program are going to support future students following in their footsteps”).

to philanthropy for Dreamer college scholarships once they become established professionals.¹³⁹ A “lift as you climb” partnership ethos can be a force multiplier with both participating undocumented students and progressive philanthropic organizations and individual donors.¹⁴⁰

In this model, the University has three support functions: (1) acting in a role similar to “PayPal” by allowing the fundraising process to take advantage of the “infrastructure adjacency” of the student billing system, (2) providing the overall implementation architecture to ensure that the fee policy is followed and that the fees collected are disbursed on time, and (3) energetically acting as matchmaker with private donors.

Turning to practical questions about potential impact, while a pledge system voluntary fee for a campus public interest research group can typically be “successful” with only 15 to 20 percent support among the student body¹⁴¹ because of the limited scope of such activity, as outlined above, there are solid reasons to believe that a voluntary fee to support undocumented students could garner a *much higher* percentage of support on some American college campuses. This is especially so if it is both understood and visibly demonstrated to students that their voluntary fee pledges are generating much larger funding pools through philanthropy partnerships. For illustration purposes, at a leading University of California (UC) campus like the one David attended, if one-third of the students support a voluntary fee of \$12 per semester (or \$8 per quarter), and if foundations and other sources provide twice as much in matching funds, that would yield approximately \$1 million annually in new targeted scholarship funds/stipends for undocumented students (Figure 3).

What would another one million dollars for undocumented students mean in context on a flagship public university campus like the one in California reflected in Figure 3? While that amount is certainly smaller than the state and institutional financial aid undocumented students at this campus receive through California’s Dream Act (AB 130 and 131), it is a significantly larger amount than the *combined* annual funding this campus currently receives to support Dreamer students from private foundations (e.g., Evelyn and Walter

139. President Judy Sakaki, a longtime mentor of mine, often says, “When I speak to students, I talk about the responsibility to lift as you climb . . . I’ve been so impacted by people who believed in me—probably even before I believed in myself.” *Judy K. Sakaki*, CAL. STATE UNIV., <https://perma.cc/2HER-QJ3N> (Feb. 18, 2022).

140. *Cf.* James, *Scaling the Dream*, *supra* note 102, at 11 (in a Dreamer focus group about income-share agreements and the notion of her future financial contributions to a program could go to help other future undocumented students, as one undocumented college freshman said, “So it’s kind of like a chain and . . . wow, that’s amazing.”).

141. For example, in the UC voluntary fee system, at least ten percent support of students is necessary to keep a designated voluntary fee from being subjected to the need to recertify the voluntary student fee pledge system through a new student referendum. UNIV. CAL., *Voluntary Fee Guidelines*, *supra* note 114, at para. 6. Thus, an existing organization (e.g., CALPIRG) would want to stay comfortably above this minimum 10 percent support threshold or the fee would risk sunseting if the voluntary fee did not receive recertification.

Haas, Jr. Fund) and from the UC Office of the President.¹⁴² It is certainly vastly more than any UC campus is currently raising in terms of private targeted support for undocumented student scholarships. The recent DACA ruling in *Texas v. United States* adds to the urgency of having additional private (and private-ish) scholarship support for undocumented students.

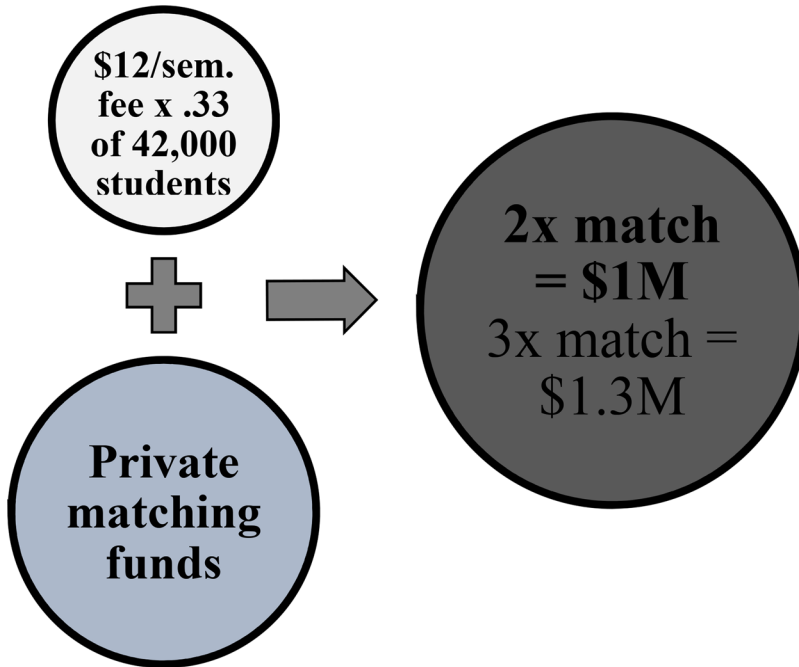


Figure 3. Modeling Annual Fundraising Impact at One Leading UC Campus

The scholarship funds raised under a voluntary fee can also be distributed each quarter or semester as “stipends” or “fellowships” by the student government if that has practical advantages on a campus compared to “scholarships.”¹⁴³ In the Appendix to this article, I present a set of five ethical and operational guidelines that can be woven into campus administration-student agreements for a voluntary fee to support undocumented college students. These guidelines are intended to lessen legal risk and to bolster the conditions of fiscal integrity, student and donor trust, and efficiency necessary to safeguard the long-term success of this funding source.

142. After reviewing IRS 990 statements and generously “topping off” from other small donor contributions that may be difficult to track, the annual private fundraising may be on the order of \$500,000 per year for Dreamer students (mostly for support programs, not scholarships) and the UC Office of the President provided \$240,000 in 2021–22 for undocumented student support services (the latter funds that may gradually decrease in future years).

143. IMMIGRANTS RISING, PRESIDENTS’ ALL. ON HIGHER EDUC. & IMMIGR. & THE DREAM.US, *How to Create Non-Employment Based Fellowships and Other Funding Opportunities for Undocumented Students*, PRESIDENTS’ ALL. ON HIGHER EDUC. & IMMIGR. (Apr. 2020), <https://perma.cc/3XQA-GVSH>.

VI. PRWORA/IIRIRA CASE LAW AND ANALYSIS OF LEGAL RISKS

The legal and political rationale underlying this particular voluntary fee model starts with the recognition that the continued harms associated with the 1996 PRWORA and IIRIRA laws run wide and deep. As a result, policy architects and immigrant rights activists in the United States benefit from, as identified by Jennifer Chacón, “both the clear-eyed realism needed to name social problems with accuracy, and the willingness to forge solutions—be they technocratic or radical—that generate a more inclusive and fair architecture of social belonging.”¹⁴⁴ This proposal around a voluntary fee model with matching funds is an attempt to forge a technocratic (and perhaps technocratic *and* radical) and inclusive solution to undocumented student scholarship fundraising and social belonging by keeping such work—to the extent possible—without weakening the goals of the proposal. With those goals in mind, on the legal side of things, the idea is to have a mechanism of *targeted* scholarship support for Dreamer students, while keeping such efforts out of the legal maw of PRWORA’s and IIRIRA’s restrictions on public benefits.¹⁴⁵

The analysis that follows in this section begins with a close look at the relevant statutory text of PRWORA and IIRIRA, which suggests that the congressional intent of these 1990s laws is *not* to prohibit the kind of fundraising idea at the heart of this Article. Next is an analysis of cases, beginning with the limited amount of caselaw on private scholarships for undocumented students, which also surfaces issues of standing (standing requirements in federal court would make it difficult for a non-beneficiary to mount a legal challenge to a voluntary fee program, though many states have more permissive standards for taxpayer lawsuits in state court). The third and most detailed part of this legal risk analysis looks at all the federal and state court cases (Arizona, California, New Jersey) that begin to touch upon PRWORA/IIRIRA and other factual situations that begin to approximate some of the features of the proposal in this Article for a “private-ish” (but somewhat “publicly facilitated”) voluntary fee model to support undocumented students. These cases cover a wide range of circumstances, from court-mandated child support to workers’ injury compensation funds, but the commonality across these cases is that a voluntary fee with philanthropic matching funds should not run afoul of PRWORA/IIRIRA. The final part of this analysis is a check on confirmation bias, by showing that the larger universe of higher education PRWORA/IIRIRA cases simply do not reach the esoteric “private-ish” fundraising idea advanced in this Article, and thus, these background cases do not appear to pose meaningful additional legal concerns beyond the modest legal risks already identified in this section.

144. Chacón, *supra* note 46, at 320.

145. *Cf. Feldman v. Ho*, 171 F.3d 494, 497 (7th Cir. 1999) (in a different context of academic freedom, declaring that “the only way to preserve academic freedom is to keep claims of academic error out of the legal maw.”).

The focus of this section is on federal and state cases touching upon PRWORA/IIRIRA “public benefits,” rather than additional state law barriers. This is because, as shown earlier in Table 1B, only a couple states (Alabama and South Carolina) flat out prohibit undocumented students from enrolling at public universities, which renders the ideas in this Article unworkable only in those two states. At the range of other states, by designing a scholarship model that tries not to get ensnared in PRWORA/IIRIRA restrictions, the result is that these states have much in common for purposes of the case law review below even if other aspects of the political milieu for Dreamers can be markedly different across different states.

Of practical and legal relevance here, the statutory text of PRWORA prohibits “state or local public benefits” defined as follows (italicizing key provisions):

(A) any grant, contract, loan, professional license, or commercial license *provided by an agency of a State or local government or by appropriated funds of a State or local government*; and

(B) any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by *an agency of a State or local government or by appropriated funds of a State or local government*.¹⁴⁶

PRWORA restricts undocumented individuals from state benefits, including “postsecondary education,” except in instances where post-1996 legislation affirmatively provides for such eligibility. In addition, IIRIRA states in relevant part:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for *any postsecondary education benefit* unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.¹⁴⁷

The plausibility for the response strategy in this Article comes right out of the congressional statement of national policy that accompanies PRWORA, in which Congress stated that undocumented individuals should “rely on their own capabilities and the resources of their families, their sponsors, and

146. 8 U.S.C. § 1621(c)(1).

147. 8 U.S.C. § 1623(a) (emphasis added).

private organizations.”¹⁴⁸ A voluntary fee organized by undocumented students with matching funds by progressive philanthropic partners fits rather naturally with what Congress described as a counterpoint to the prohibition on “public benefits” in PRWORA. This is particularly true where courts like the California Supreme Court have cautioned against adding prohibitive interpretations to PRWORA/IIRIRA that stretch beyond the text and statutory scheme of the 1996 immigration laws.¹⁴⁹

The next part of this analysis is branching out from the text of the statute to see how the relevant terms and concepts in PRWORA/IIRIRA are applied in the case law, beginning with college scholarship cases implicating PRWORA. This step provides “positive disconfirmation” evidence in the sense that the higher education cases which seemingly would be most relevant do not, in fact, reach any germane doctrinal questions. In *Marderosian Trust*, the estate of a donor’s private scholarship fund administered through the University of Illinois’s foundation energetically sought to exclude all non-citizens.¹⁵⁰ However, *Marderosian Trust* (a re-filed version of an earlier lawsuit¹⁵¹) was really in the service of a very attenuated claim of standing in an effort to enjoin the Illinois in-state tuition law for Dreamers. Thus, the district court dismissed the case for lack of standing without addressing any questions about private scholarships and PRWORA.¹⁵²

Marderosian is also a reminder of a broader point about standing in federal court. Here, the fact that any student (or parent) who is opposed to their college participating in a voluntary fee has—by definition—*zero obligation to pay the fee* should afford some protection against litigation in federal court, because Article III standing requires a “concrete and particularized” showing on an injury in fact rather than claiming some kind of inchoate resentment or conjectural injury.¹⁵³ *Day v. Bond* is an illustration of that federal court standing issue in the context of an unsuccessful challenge to an in-state tuition eligibility law benefiting undocumented students in Kansas.¹⁵⁴ Standing criteria

148. 8 U.S.C. § 1601(2)(A).

149. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 869–70 (Cal. 2010) (in context of PRWORA and IIRIRA, rejecting legal argument that AB 540, California’s in-state tuition law, violates the privileges and immunities clause of the Fourteenth Amendment that protect citizens where those arguments were reading beyond the text and statutory scheme of PRWORA and IIRIRA requirements).

150. *Ardash Marderosian Trust v. Quinn*, No. 12 C 6869, 2013 WL 5405705 (N.D. Ill. Sept. 25, 2013).

151. *Marderosian v. Topinka*, No. 1:12-cv-2262 (N.D. Ill. June 19, 2012).

152. *Quinn*, 2013 WL 5405705, at *2–4.

153. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39 (2016) (holding that a plaintiff invoking federal jurisdiction bears the burden of establishing standing that includes the injury-in-fact requirement, which requires a plaintiff to show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical”).

154. *Day v. Bond*, 500 F.3d 1127, 1131–34 (10th Cir. 2007) (rejecting plaintiffs’ theories of injury about “the burden of subsidizing illegal alien beneficiaries” and about “competition for scarce tuition resources” for lack of a concrete injury and granting summary judgment to the university on other parts of plaintiff’s claims for other reasons). This case was a challenge by out-of-state students and parents to a Kansas law allowing undocumented students to be eligible for in-state tuition law, where the University of Kansas officials prevailed on summary judgment on grounds about lack of injury in fact.

in state court vary, obviously, but California is an example of a state allowing broader taxpayer lawsuits (as we shall see below), at least for injunctive relief.¹⁵⁵

As will become clear in the remainder of this section, I am unable to identify (from both traditional legal research databases and wide-ranging Dreamer case law, tracking sources from Professor Olivas¹⁵⁶) any negative legal cases that are truly “on all fours” and that would cast serious doubt on the legal defensibility of this type of “private-ish” (but somewhat “publicly facilitated”) voluntary fee proposal to support Dreamer students. A broader sweep of PRWORA/IIRIRA higher education cases is captured further below in Table 4.

In Arizona, even after voters passed an initiative prohibiting Dreamers from being eligible for in-state tuition rates (a ballot decision affirmed in state court¹⁵⁷), it is still the case that Arizona State University (and ASU Online) worked to mitigate this obstacle with a privately funded DREAM Fund and Parsons Scholars program administered through the ASU Foundation, as well as a scholarship partnership with DREAM.US.¹⁵⁸ The relevant litigation in Arizona, including *Brnovich*, simply does not reach the question of private-ish scholarships and PRWORA. Moreover, ASU’s existing commitment is in the absence of the additional IIRIRA “safe harbor” law like exists in California (AB 130), which already authorizes certain Dreamers to receive “a scholarship derived from nonstate funds.”¹⁵⁹

In the absence of PRWORA cases “on all fours” in the higher education sector, the third step in this analysis is to survey cases that reach doctrinally relevant questions about PRWORA and boundary conditions of state/local “public benefits” in other contexts. There are some relevant and helpful

155. Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California’s Taxpayer Standing*, 98 CAL. L. REV. 1595 (2010); see also Laura Bakst, *Constitutionally Unconstitutional? When State Legislatures Pass Laws Contrary to Supreme Court Precedent*, 53 U.C. DAVIS L. REV. ONLINE 63, 88 (2019) (“With federal courts virtually foreclosed, some taxpayers have had success challenging state appropriations in state courts. While a minority of states have adopted the Supreme Court’s bar to standing, many take a more liberal approach.”).

156. OLIVAS, *supra* note 18, at Appendix 3. For an earlier website version of this appendix see Michael A. Olivas, *State and Federal Cases Involving Higher Education and Immigration, 2004–2014 and All Cases Citing Sections 1621/1623 (by Current Citation)*, UNIV. HOUS. L. CTR., <https://perma.cc/D5QW-7DLJ> (last visited Feb. 21, 2022). I rely on these supplemental resources because traditional methods such as notes of decisions for 8 U.S.C.A. § 1621 and state/local public benefits surface only a fraction of the far-flung state cases in this area.

157. *State ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 416 P.3d 803, 806 (Ariz. 2018) (“Because DACA recipients are not benefits-eligible under § 1621(a), we conclude they are not ‘lawfully present’ for purposes of § 1623(a).”).

158. *Update: DACA Message from ASU President Michael Crow*, ARIZ. STATE UNIV. (Sept. 17, 2017), <https://perma.cc/F3DK-PVPH>; *Financial Aid Resources for Students Regardless of Immigration Status*, ARIZ. STATE UNIV., <https://perma.cc/XRL7-ZRN7> (last visited Feb. 21, 2022); *Our Partner Colleges*, THE DREAM.US, <https://perma.cc/9LSC-DWRQ> (last visited Feb. 21, 2022).

159. A.B. 130, 2011 Assemb., Reg. Sess. (Cal. 2011) (codified as CAL. ED. CODE § 68130.7); see also Action Item E2, UNIV. CAL. REGENTS 2 (Nov. 14, 2014), <https://perma.cc/ZZE9-QDE3> (“Since AB 130 and AB 131 became effective in 2012 and 2013, respectively, officers of the University, acting under authority delegated by the Regents, have acted consistently with the policy expressed in those laws . . .”).

California unpublished cases. In *County of Alameda v. Agustin*,¹⁶⁰ a non-custodial father seeking to avoid paying child support argued to child services that he should not have to pay child support to the (reportedly) undocumented mother of his child because that would amount to an impermissible public benefit in violation of PRWORA. The California appellate court rejected this argument, ruling:

Child support payments clearly do not fall into this category. They are not “provided . . . by an agency of a State or local government or by appropriated funds of a State or local government.” Rather, they are payments made by private individuals. The fact that the County might assist in their collection does not change the private source of the payments. [citing *Campos v. Anderson*, 57 Cal. App. 4th 784, 788 (1997)¹⁶¹]. Accordingly, child support payments are not “public benefits” for purposes of section 1621(c)(1)(B).¹⁶²

The appellate court in *County of Alameda* found that the role of the County’s child support collection services was “a closer question,” but concluded that this did not violate federal law either because the activities were dissimilar from the types of public benefits prohibited by Section 1621 of PRWORA.¹⁶³

To overlay the *County of Alameda* case with our analysis of college voluntary fees, note that with at least some of these fee policies, such an “assist in their collection” legal claim about a PRWORA violation would be even weaker than in *County of Alameda* context, where this argument was already rejected and state tax dollars were obviously the fund source of the County’s child protective services activities. By contrast, as discussed earlier in Section V, some voluntary fee policies like the University of California already have what can be called a “cannot subsidize overhead costs” clause, such that the small administrative costs of collecting and disbursing the

160. *County of Alameda v. Agustin*, No. A115092, 2007 WL 2759474 (Cal. Ct. App. Sept. 24, 2007).

161. *Campos* has the benefit of being in a publishing decision, and the appellate court in *Campos* reached the same conclusion as *County of Alameda v. Agustin*, but under California law instead of PRWORA.

162. *County of Alameda*, 2007 WL 2759474 at *3. A parallel in a state with more difficult laws for undocumented students is *State ex rel. Brnovich v. Arizona Board of Regents*, 476 P. 3d 307, 313 (Ariz. 2020) where the state supreme court characterized as a relevant issue in the legal complaint by the state attorney general against the Board a question about “A.R.S. § 15-1664 (providing that ‘[a]ll monies for the use and benefit of an institution under its jurisdiction shall be expended under the direction and control of the Arizona board of regents’).” Thus, the question here would be distinguishing a voluntary fee from the non-collection of out-of-state tuition, for it is significantly easier to establish that a student voluntary fee with private matching is on its own terms not “under the direction and control” of the Board of Regents and substantively different from tuition for reasons similar to the findings in the *County of Alameda* and *Dicterow* and other cases discussed in this Section of the Article. *Garcia v. Dicterow*, No. G039824, 2008 WL 5050358 (Cal. Ct. App. Nov. 26, 2008).

163. *County of Alameda*, 2007 WL 2759474 at *3–4.

voluntary fees are charged back to the student organization receiving the voluntary fee funds, rather than being absorbed by the university.¹⁶⁴

Another relevant California case is *Garcia v. Dicterow*,¹⁶⁵ where the city of Laguna Beach designated a day laborer center on public land and used service fees to pay for a community assistance grant that went to a private non-profit that ran the day laborer center. Taxpayer plaintiffs claimed that the city violated Section 1621 of PRWORA, and that the non-profit was the “agent” of the city. However, the appellate court rejected these arguments, primarily because plaintiffs “failed to show the ‘essential characteristic of the right of control,’ [and thus] plaintiffs have not met their burden of proof to show South County is the City’s agent.”¹⁶⁶

Compared to *Dicterow*, like *County of Alameda*, the rationale for rejecting a PRWORA/IIRIRA public benefits argument against a voluntary student fee should be even more persuasive because the underlying fund source is voluntary fees, rather than taxpayer funds, and the associated voluntary fee policy architecture makes clear that the recipient of the funds is the student government/student organization that is not “controlled” by the University. For purposes of a California community college, California State University or University of California campus interested in this voluntary fee idea, the legal defense rationale is similar to guidance in California around Proposition 209 (which prohibits consideration of race, ethnicity, and gender) and efforts to facilitate (but not impermissibly involve the university in) private targeted scholarship fundraising for underrepresented groups.¹⁶⁷ Likewise, other states with laws similar to Proposition 209, including Washington, have similar

164. UNIV. CAL., *PACAOS Policy*, *supra* note 114, at § 90.13.

165. *Garcia v. Dicterow*, No. G039824, 2008 WL 5050358 (Cal. Ct. App. Nov. 26, 2008).

166. *Id.* at *3–7. There were similar facts in *Karunakarum v. Town of Herndon*, 70 Va. Cir. 208 (2006), a case that did not reach the merits.

167. *See Guidelines for Addressing Race and Gender Equity in Academic Programs in Compliance with Proposition 209*, UNIV. CAL. 5 (July 2015), <https://perma.cc/726V-B5NV> (“The University may provide routine assistance—such as information, incidental logistical support and access to campus facilities—to private organizations that target efforts on the basis of race or gender if (1) assistance is provided on a nondiscriminatory basis (that is, similar private organizations are eligible for similar assistance, regardless of the race or gender of the groups the private organization serves); (2) the University does not control or administer the private organization; and (3) the University is not involved in choosing recipients of the organization’s benefits.”).

The first factor (non-discriminatory basis) is satisfied because at least eight UC campuses have/had CALPIRG voluntary fee programs, which is affirmative evidence that other entities can and do use the same voluntary fee process (in the language of PRWORA) “without regard to” immigration status, if those groups put in the hard work to make it work. Under policy guidelines, the main requirement is the minimum ten percent support threshold among the student body. UNIV. CAL., *Voluntary Fee Guidelines*, *supra* note 114, at para. 6.

The second factor is satisfied because the voluntary fee policy (1) already requires a disclaimer that the support of the voluntary fee to the student organization “does not constitute sponsorship or endorsement by the University;” (2) administrative overhead costs are charged back to the organization; and (3) the voluntary fee is expressly disarticulated from financial aid, registration and overdue fee policies that are controlled by the university. UNIV. CAL., *PACAOS Policy*, *supra* note 114, at §§ 90.13–14; UNIV. CAL., *Voluntary Fee Guidelines*, *supra* note 114, at pars. 8, 10.1, 11. All voluntary fees end up needing a contractual agreement with the University, but that is conditional on the other terms of the policy/guidelines that make clear that the University does not endorse or control or administer the student organization nor the funds generated. *Id.* at para. 3.

policy experience with handling public university partnerships with private college scholarships that have elements of race-targeting.¹⁶⁸

New Jersey is also a state with relevant case law. If any undocumented student organizers or college administrators at Rutgers University have an interest in augmenting their privately funded DREAM.US scholarships and adapting their current voluntary fee policy with a Dreamer voluntary fee referendum (similar to the one for student activists supporting NJPIRG¹⁶⁹), *Caballero v. Martinez* is an encouraging case. *Caballero* involved a vehicle hit-and-run victims' fund paid for with fees levied on insurance companies. Here, the New Jersey Supreme Court stated in dicta that this victims fund did not run afoul of PRWORA, in part because the fund was administered by a private non-profit.¹⁷⁰

Nevada is another state with relevant case law, and like New Jersey, is a state that has some history with student voluntary fee policies.¹⁷¹ In *City Plan Development*, the Nevada Supreme Court rejected a contractor's claim that the prevailing wage element of a public works contract was rendered illegal because of PRWORA:

While the public works contract between the county and City Plan may constitute a public benefit under § 1621, the payment of the prevailing wage under that contract does not constitute such a benefit. City Plan is simply not the entity “providing” the public benefit contract under the statute and, therefore, is not included in the statute’s express terms excusing payment.¹⁷²

The third factor is also satisfied, as it is the voluntary fee referendum language/MOU advanced and voted upon by students (i.e., referendum or student government resolution) that identifies the class of recipients of the undocumented student scholarship/stipend, the recipients are not individually “chosen” by the university, and participating campuses “are not obligated to undertake responsibilities on behalf of the registered campus organization beyond those specified in these Guidelines.” *Id.* at para. 1, 12. Rather, the University simply issues a check/payment (e.g., once per quarter) to the student organization (or perhaps its larger non-profit fiscal agent), and then the student organization selects/distributes payment to individual undocumented students.

168. See *Regents Policy 34, Policy on Financial Aid, Including Scholarships, Grants, and Fellowships, to Promote Student Diversity at the University of Washington*, UNIV. WASH. (July 11, 2019), <https://perma.cc/2LJN-JS3Y>. For guidance on race, diversity and financial aid scholarships more generally, see Arthur L. Coleman & Jamie Lewis Keith, *Federal Nondiscrimination Law Regarding Diversity: Implications for Higher Education Financial Aid and Scholarship Policies and Programs*, COLL. BD. 7 (2019), <https://perma.cc/4WPF-QYUL>.

169. *Fee Descriptions*, RUTGERS UNIV., <https://perma.cc/Z26K-D4JK> (last visited Feb. 19, 2022).

170. *Caballero v. Martinez*, 897 A.2d 1026, 1031 n.1 (N.J. 2006). This aspect of *Caballero* was contested in dicta by a federal magistrate judge in *Uriostegui v. Ala. Crime Victims Comp. Comm'n*, No. 2:10-cv-1265, WL 11613802, at *12 (N.D. Ala. Nov. 16, 2010), an unusual class action case where the parties' disagreement was about whether a certain crime victim compensation fund was a federal benefit or a state benefit for purposes of PRWORA and where the magistrate rejected (rather than giving deference to) the DOJ's 2010 interpretative guidance stating that VOCA Victim Compensation or Victim Assistance grants are not “federal public benefits” as defined by PRWORA. Most importantly for present purposes, *Uriostegui* does not discuss benefits administered by a non-profit, unlike *Caballero*.

171. For further discussion of Nevada's higher education system, see Section V of this Article.

172. *City Plan Dev., Inc. v. Off. of Lab. Comm'r*, 117 P.3d 182, 190 (Nev. 2005).

Connecticut enacted a law in 2018 making Dreamers eligible for state financial aid.¹⁷³ If one or more colleges in that state wanted to also adapt their voluntary student fee process¹⁷⁴ to support Dreamer scholarships, it is relevant that an appellate court in Connecticut ruled that distributing worker's compensation funds to an undocumented housekeeper is not impermissible because of PRWORA.¹⁷⁵

In Ohio, where some universities have voluntary student fees to support environmental sustainability,¹⁷⁶ the court reached the same conclusion: that undocumented individuals can receive worker's compensation benefits notwithstanding PRWORA.¹⁷⁷

I have tried to cover all relevant cases addressing the boundary conditions of private action versus public benefits and PRWORA/IIRIRA, rather than slanting discussion toward those cases that favorably align with my policy preferences. In that spirit, as an additional hedge against the risk of selection/confirmation bias, [Table 4](#) below lists higher education cases (with a cut-off of January 2021) referencing either PRWORA or IIRIRA. The point here is to show the universe of potentially relevant cases on PRWORA/IIRIRA. Since these cases simply do not reach (even in dicta) the esoteric question of “private-ish” benefits at the heart of this Article, [Table 4](#) provides a simple list of these cases without summarizing the holdings. [Table 4](#) allows legal counsel and others to satisfy for themselves that the cases analyzed above in this section are not cherry-picked in favor of my policy conclusions and recommendations.

173. Jacqueline Rabe Thomas & Clarice Silber, *Financial Aid for 'Dreamers' Becomes a Reality in Connecticut*, CT MIRROR (Apr. 25, 2018), <https://perma.cc/3YDW-5JYL>.

174. The University of Connecticut has a “you can opt out” voluntary PIRG fee. *Assessing and Completing the ConnPIRG Fee Waiver*, UNIV. CONN., <https://perma.cc/VXF9-WJWH> (last visited Feb. 19, 2022). Eastern Connecticut State University is a partner school of TheDream.US private scholarships for undocumented students. *Partner Colleges*, THE DREAM.US, <https://perma.cc/7RXT-SY66> (last visited Feb. 19, 2022).

175. *Dowling v. Slotnik*, 712 A.2d 396, 412 n.17 (Conn. 1998).

176. *Student Green Fund*, UNIV. TOLEDO, <https://perma.cc/5VJN-GD8U> (last visited Feb. 8, 2022).

177. *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 707 (Ohio Ct. App. 2004).

TABLE 4: HIGHER EDUCATION CASES MENTIONING SECTION 1621/1623 RESTRICTIONS BUT NOT REACHING PRIVATE BENEFITS AND THE BOUNDARY CONDITIONS OF STATE/LOCAL BENEFITS (IN CHRONOLOGICAL ORDER)

Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004)

Day v. Sebelius, 376 F. Supp. 2d 1022, 1026 (D. Kan. 2005) *aff'd sub nom, Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007)

McPherson v. McCabe, 2007 WL 4246582 (E.D.N.C. Apr. 10, 2007) *aff'd*, 241 F. App'x 963 (4th Cir. 2007)

Martinez v. Regents of the Univ. of Cal., 50 Cal. 4th 1277, 1292-1300 (2010)

Philips v. Bd. of Trustees of Montgomery Coll., No. C-342882 (Md. Cir. Ct. Aug. 16, 2011)

Sanchez v. Hall, 2011 WL 6369821 (E.D.N.C. Dec. 19, 2011)

Thomas v. Henry, 260 P.3d 1251 (Okla. 2011)

A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth., 427 N.J. Super. 389 (N.J. (App. Div. 2012)

Doe v. Maryland State Bd. of Elections, 53 A.3d 1111 (Md. 2012) (implied in discussion of in-state tuition)

Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012)

Lone Star Coll. Sys. v. Immigration Reform Coal. of Texas, 418 S.W.3d 263 (Tex. App. 2013)

Mashiri v. Dep't of Educ., 709 F.3d 1299 (9th Cir. 2013), *amended and superseded on denial of rehearing*, 724 F. 3d 1028 (9th Cir. 2013)

De Vries v. Regents of the Univ. of California, 6 Cal. App. 5th 574 (2016)

Montana Immigrant Justice Alliance v. Bullock, 371 P.3d 430 (Montana 2016)

Doe v. St. Louis Comm. College, 526 S.W.3d 329 (Mo. App. 2017) (in dissenting opinion)

Foss v. Arizona Bd. Of Regents, 2019 WL 5801690 (Az. App., Nov. 2019)

Estrada v. Becker, 917 F.3d 1298 (11th Cir. 2019)

Arizona ex rel. Brnovich v. Arizona Board of Regents, 476 P.3d 307 (Ariz. 2020) (finding the lower court “prematurely” dismissed the claim that the Board illegally subsidized tuition for undocumented students)

VII. CONCLUSION: ENTREPRENEURIAL ACTIVISM AND THE “WEAPONS OF THE SPIRIT”

Even in the very difficult period under the Trump administration when Attorney General Jeff Sessions announced plans to rescind DACA, a grassroots media campaign strategy by undocumented students spread across many U.S. college campuses. Undocumented students posted photos of themselves on social media, at rallies and on university-affiliated websites holding signs stating, “I am undocumented and unafraid!”¹⁷⁸ Undocumented students such as Yael at UCLA and Areli at the University of Houston included a second provocation on their signs that is also of vital importance in supporting undocumented students’ agency and resiliency: “Educators, it’s time to take action with me.”¹⁷⁹

As a university administrator who has worked on undocumented student-related law-policy, financial aid, and wellness issues at public universities, I believe there is far more work to do with respect to the possibilities for taking action *with* undocumented students. This Article outlines one new entrepreneurial partnership model that, to borrow from Cherrie Moraga’s poem, is something “I already know exists. Is possible” and yet heretofore has not been attempted at any U.S. public college or university. For that to change on a college campus, tomorrow begins today, with a small cadre of tenacious undocumented student organizers, a mission-driven university leader with an appetite for innovation and moderate risk-taking, a small voluntary student fee on the order of five to ten bucks a quarter, and a couple of philanthropic organizations acutely interested in immigrant rights community partnerships. Adding to the mix of imagination, effective force multipliers, and burgeoning support from other students, allies, and faculty, the eventual result could be an order of magnitude increase in annual private scholarship support for talented and economically disadvantaged Dreamer students.

While this Article is focused on practical/operational policy and legal dimensions, raising additional “private-ish” scholarship funds for Dreamers through this novel model is also a means to other important long-term aspirational commitments. Undocumented students like David at UC Berkeley are a notable example of the seeming “underdog” who—as forcefully argued by Malcolm Gladwell in *David and Goliath*—in point of fact possess an abundance of valuable life experiences that are “powered by courage and faith” and entail nontraditional forms of power “in breaking rules [and] in

178. Teresa Watanabe, *With News of DACA’s End, UCLA Student Declares Herself ‘Undocumented and Unafraid,’* L.A. TIMES (Sept. 5, 2017, 1:00 PM), <https://perma.cc/KP3M-CY9D>; see also James Knutilla, *Undocumented and Unafraid*, UCLA MAG. (March 14, 2018, 2:45 PM), <https://perma.cc/6SEU-52HU>. The “undocumented and unafraid” messaging was building throughout the 2010s. See, e.g., Jamie Richards & Laura M. Bohorquez, *National Institutions Coming Out Day Toolkit*, UNITED WE DREAM NETWORK (2015), <https://perma.cc/WGP6-RVHU>.

179. Watanabe, *supra* note 178; Areli Tamayo, *Navigating Grad School for Undocumented Students*, UNIV. HOUS. 1, <https://perma.cc/SH23-WEP7> (last updated Jan. 16, 2021).

substituting speed and surprise for strength.”¹⁸⁰ As UCLA undocumented student Yael told the *L.A. Times* upon hearing of the decision to rescind DACA, “This is the time to hit the streets and organize. DACA does not define us. Our success doesn’t depend on legislation. We are human beings who deserve dignity, peace and justice above all.”¹⁸¹ The point of this Article is to hopefully open up new conversations about how to advance the fierce aspirations of students like David and Yael with, as Cherrie Moraga puts it, “structures that can support us of trembling.”¹⁸²

Whether DACA is upheld in future appellate court rulings or is deemed unlawful, whether the legislature in your particular state has passed a law supporting or restricting state financial aid for undocumented students, and whether the struggle to overcome congressional gridlock and pass major federal immigration reform is a goal for the medium-term or the long-term—in all of these contingent possibilities, the scholarship fundraising model described in this Article is fundamentally about finding ways to sharpen and activate what Gladwell and others across the ages refer to as the “weapons of the spirit,” the “things that are in your heart or your soul or your imagination” that can matter more than material advantages.¹⁸³ The sharpening and activation of undocumented students’ (and allies’) weapons of the spirit is also a mindset in the service of our ideals about democracy and education, and it deserves intentional cultivation by educators.¹⁸⁴ The roles of progressive philanthropy and university administrators in this scholarship funding model are (to extend the *David and Goliath* metaphor) like the skillfully applied sling¹⁸⁵ that with every additional rotation is building up more and more velocity and

180. MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* 13, 15 (2013).

181. Watanabe, *supra* note 178.

182. Moraga, *supra* note 1, at 436.

183. GLADWELL, *supra* note 180, at 275 (“You see the giant and the shepherd in the Valley of Elah and your eye is drawn to the man with the sword and shield and the glittering armor. But so much of what is beautiful and valuable in the world comes from the shepherd, who has more strength and purpose than we ever imagine.”); Issie Lapowsky, *Malcolm Gladwell: The Real Reason David Beats Goliath*, INC. (Feb. 6, 2020), <https://perma.cc/FKN4-GHNE> (“[T]his book is fundamentally about the weapons of the spirit. It’s about how the things that are in your heart or your soul or your imagination are every bit the equal of the material advantages that you’ve been given. . . . What you have are your ideas, your motivation, your perseverance, your excitement, your faith. This book is an attempt to appreciate those gifts for what they are. . . .”).

184. See, e.g., John Dewey, *Emerson—The Philosopher of Democracy*, 13 INT’L J. ETHICS 405, 407 (1903) (“reasoned thought” and pursuing “the paths by which truth is sought” are methods of philosophical inquiry involved in “manufacturing and sharpening the weapons of the spirit”); Linda Lantieri, *Waging Peace in Our Schools, in EQ+ IQ = BEST LEADERSHIP PRACTICES FOR CARING AND SUCCESSFUL SCHOOLS* 76, 79 (Maurice J. Elias, Harriett Arnold & Cynthia Steiger Hussey eds., 2003) (The thousands of young students in the Resolve Conflict Creatively Program “use weapons of the spirit—creative communication, appreciation for diversity, the ability to center themselves and manage their anger, and skills to resolve conflict nonviolently.”); *Weapons of the Spirit*, IMDB, <https://perma.cc/N9G3-8BT8> (last visited Feb. 17 2022) (documentary film chronicling the mountain villagers of Le Chambon, who sheltered several thousand Jewish refugees during World War II in Nazi-occupied France, and which had a unique sociocultural history that led these village folks to act upon a strong “moral consensus” when serving as a safe haven was a risky endeavor).

185. Wielding a sling effectively can take years of practice and skill development, GLADWELL, *supra* note 180, at 9, and that too is part of the goal—to develop structures of support for undocumented students

impact to undocumented students' and allies' agency and amplifying Dreamers' voices.¹⁸⁶

David's most audacious act as an undocumented student at UC Berkeley, born of his imagination and dreams accrued over a lifetime of schooling in the United States, was his decision to continue with his studies "off book" as a college senior, even though that goes against a host of University enrollment, tuition, and academic policies and the fruits of David's educational labor would not (alas) be officially documented. Similarly, in *David and Goliath*, the teenage shepherd's defiant act of imagination was to eschew the armor, weaponry, and expected social rules for combat. Instead, the teenage shepherd placed a stone into the leather sling that he used his whole life and sprinted boldly toward his gigantic opponent.¹⁸⁷ Both David the undocumented student at Berkeley and David of the allegorical story in the Bible made courageous choices in favor of their own assets, experiences, and "funds of knowledge"¹⁸⁸ when they lacked the luxury of other good choices. Not all such desperate choices work out well in the real world, of course, but sometimes the condition of struggling with only "bad" choices can unmoor us from the unhelpful substrata of assumptions that invisibly anchor us to the conventional wisdom and to status quo bias.¹⁸⁹

The continued fact of a Dream Act or comprehensive immigration reform being just out of reach in the near future, the DACA district court ruling in Texas now before the Fifth Circuit, and the proposed age requirements in the Biden administration's DACA NPRM that would exclude younger Generation Z students from future DACA eligibility all speak to how today's undocumented students do not have the luxury of good choices. Thus, in this exploratory Article, I have tried to take a step back from the conventional strategies of seeking to pass favorable state laws for Dreamers and of interlocking financial aid to undocumented students within the larger machinery of "public benefits" state and university financial aid pools (even though these are strategies *I support* and that the "hearts and minds of voters" transformational aspects of this model could also redound to the benefit of those

to hone their leadership skills through sustained engagement on campus and in their communities. See, e.g., Forenza, Rogers & Lardier, *supra* note 94, at 663–64.

186. Eric Ishiwata & Susana M. Muñoz, "They Tried to Bury Us": Scholar Advocacy in the Wake of the DACA Rescission, 40 NEW POL. SCI. 558, 573 (2018) (reflecting on Colorado State University's institutional responses to the rescission of DACA, with pragmatic takeaways about faculty contributions including "amplif[y]ing Dreamers' voices and effort through coaching, power sharing, and behind the scenes organizing" and "steer[ing] the university's stakeholder taskforce away from quick fix solutions").

187. GLADWELL, *supra* note 180, at 8, 11; cf. ROBERT PINSKY, THE LIFE OF DAVID 18, 20–21 (2005).

188. Gloria Itzel Montiel, "Hacerle la Lucha": Examining the Value of Hard Work as a Source of Funds of Knowledge of Undocumented, Mexican Ivy League Students, in FUNDS OF KNOWLEDGE IN HIGHER EDUCATION 125 (Judy Marquez Kiyama & Cecilia Rios-Aguilar eds., 2018); Delma Ramos & Judy Marquez Kiyama, *Tying it All Together: Defining the Core Tenets of Funds of Knowledge*, 57 EDUC. STUD. 429 (2021).

189. See, e.g., William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); Gilbert, Crow & Anderson, *supra* note 91, at 38 (defining the first kind of design-oriented transformation as being "about deliberate choice that every university confronts, where failure to choose is a de facto choice for expensive mediocrity").

conventional political strategies over a period of years). In so doing, I point out the underappreciated benefits (both economic and non-economic¹⁹⁰) of a supplemental fundraising strategy not dependent on favorable predicate conditions with DACA or state financial aid laws. This grassroots entrepreneurial strategy disrupts the traditional roles of “rescuers and recipients” by placing undocumented college student activism and agency at the center, with university officials and private philanthropic organizations in the roles of partners and catalysts. Moreover, this model is not about one student standing alone to battle against the giant obstacle of a broken immigration system. Rather, it is about thousands of such college students acting in coalition, bonded together by a shared commitment to educational opportunities for undocumented students in furtherance of what Dr. King called “the beloved community.”¹⁹¹

By contrast, conventional funding approaches by universities to assist undocumented students can at times seem to default to a “come to me”¹⁹² Goliath-like mindset with philanthropic partners that does not maximize fundraising opportunities and lacks agility. As noted in Section III of this Article, even America’s leading flagship public universities—precisely the type of universities the Court identified years ago in *Grutter v. Bollinger* as the campuses where “it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity”¹⁹³—typically do not have robust private donor/scholarship programs for undocumented students. In addition, some campuses with partnership programs with the largest private funds (several University of California, University of Washington, and California State University campuses) have had those private funds recently redirected to “red state” colleges with even greater challenges. Thus, new partnership models with nontraditional “price points” are needed if students, universities, and philanthropic organizations are going to clear open pathways of opportunity during this challenging era. Until such a time when talented undocumented students like David and Areli have robust opportunities to complete their university degrees and fully participate in

190. See Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 440 (2018) (“Eligibility for resident tuition rates and financial aid opens the door to higher education and professional opportunities. Other integration effects are intangible, but just as significant. These intangible effects include a feeling of local belonging, optimism about the future, and a sense of well-being.”).

191. See KING CTR., *supra* note 132.

192. See GLADWELL, *supra* note 180, at 14 (the powerful but lumbering Goliath, who likely has the medical condition of acromegaly and associated double vision, yells to David and the Israelites “Come to me” and “in that request there is a hint of his vulnerability. *I need you to come to me because I cannot locate you otherwise.*”).

193. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003); see also Susan Sturm & Olatunde C. A. Johnson, *Leadership, Citizenship, and Civic Capacity: The Imperative of Racial Diversity for Realizing Higher Education’s Public Mission*, in AFFIRMATIVE ACTION AND RACIAL EQUITY 21 (Uma M. Jayakumar & Liliana M. Garces eds., 2015); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 135 (2003) (“The task of constituting each [university] class is a political act because it implicates the institution’s sense of itself as a community, as well as the larger society’s sense of itself as a democracy”).

American democracy, a “come to me” posture with funders is not enough. Undocumented college students and their classmates deserve university leaders, faculty, administrators, and philanthropic program officers who will take action *with* them by dreaming beyond the bounds of today’s status quo,¹⁹⁴ especially when that status quo is always under threat, such as by the pending DACA litigation.

VIII. APPENDIX: RECOMMENDED FEATURES TO INCLUDE IN A CAMPUS VOLUNTARY FEE

Here are a set of five recommended ethical and pragmatic guidelines that can be woven into a campus Memorandum of Understanding for a voluntary fee to support undocumented college students. These recommendations are for college administrators and student leaders thinking about devising a voluntary fee program. These recommendations combine goals of lessening legal risk and of bolstering conditions of fiscal integrity, student and donor trust, and allocation efficiency:

1. Enrolled eligible undocumented students should all get an *equal share* of the funding pool that is collected each quarter/semester, a concept that should be codified in the ballot/fee language. The details of how to apply this principle on a campus with mostly full-time students will differ from a campus with many part-time students, such as a community college (where “equal” could be scaled to number of units enrolled). Perhaps eligibility can require a minimum level of volunteering with the pledge campaign (e.g., fifteen hours per quarter). However, it will be important to avoid creating a system where it is possible for individual student leaders to obtain more than their pro-rata share of the scholarship pool so as to avoid incentives for future abuse.¹⁹⁵ If a campus wants to allocate, for example, two-thirds of funds to non-DACA students (because of their greater economic precarity), that can be done, but within a principle of “equal shares among similarly situated” students, and the allocation rule should be uncomplicated and transparent.

194. Regarding the risk of status quo inaction and an adjacent finance idea to support undocumented students (income-share agreements), see James, *Scaling the Dream*, *supra* note 102, at 2 (“There is, of course, risk in testing a new idea with a population that already faces significant challenges. On the other hand, the risks of inaction are far more significant: Without better tools to support Dreamers’ access to college, a large fraction of this population will miss a critical opportunity to build a better future—a tragedy of opportunity and a tremendous loss of talent for the country.”). On a broader level, see, e.g., DAVID PETER STROH, *SYSTEMS THINKING FOR SOCIAL CHANGE* 5 (2015).

195. This logic is similar to the rules specifying that in class action litigation counsel are to represent the “best interests of the class as a whole” and not the interests of the named representative(s) of the class. FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment.

2. For reasons related to the first point, the college should not interlock the voluntary fee with its own system of financial aid rules (i. e., should not lower a student's financial aid package because a student is getting a voluntary fee scholarship/stipend). Doing otherwise would extinguish much of the motivation for undocumented student organizers and allies to work on a voluntary fee in the first place, and it would also entangle the university in essentially "controlling" the fee funds in a way that is legally risky for "public benefits" purposes (see Section VI above). Similarly, voluntary fees should not be treated the same as "overdue" or "enrollment hold" unpaid tuition/fees by the university's billing office.
3. Funds are normally controlled by the student government or registered student organization, not by the university (a distinction that matters legally, see Section VI above). Year-to-year turnover in student leaders and inexperience with fiscal controls/protocols can create a risk of consequential mistakes or worse in outlier cases (embezzlement¹⁹⁶), so the student organization with advice from campus administration could agree on a pre-designated and respected non-profit (e.g., the community foundation in your county/region, another non-profit or an entity specializing in large-scale private student scholarships). In a private college, the college's foundation/advancement office may be the best way to manage the funds. In contrast, for a public university, using its own foundation as the fiscal agent likely has disadvantageous "public benefits" implications (see Section VI above) such that a public college will want to make an informed risk calculation with its campus counsel before going in that direction.
Be transparent with students and parents. It is better if the voluntary fee is listed in an itemized way on a student's electronic billing statement, rather than being "bundled and buried" with other fees in a non-transparent way. Part of the point is for students to have conversations with their parents, including "difficult dialogue" conversations where a parent may be reluctant about paying such a fee.
4. Try to ensure adherence to your own campus policies by making implementation as simple and self-executing as possible. For example, UC's voluntary fee policy requires that the "actual costs" (i.e., overhead) be "borne by the Registered Campus Organization,"¹⁹⁷ so make a reasonable estimate of those overhead costs (e.g., 20 cents per \$15 charge) and get that automated in your student billing system. If you are unlucky enough to be in litigation three years later,

196. A simple Google search of "student government" or "associated students" and "embezzlement" or "fraud" highlights U.S. college examples of situations to be avoided.

197. UNIV. CAL., *PACAOS Policy*, *supra* note 114, at § 90.13.

automatic billing makes for a much better factual record than if you had a clumsy recharge system that the student organization or your new employee sometimes forgot to follow. Likewise, many public colleges on a self-supporting funding model for summer sessions (with higher share of “visiting” students in the summer) may choose to exclude summer, while another campus where summer is seamlessly integrated with everything else may wish to include summer in its voluntary fee collection and pledge campaigning.