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THE ILLINOIS DREAM ACT: A CONSTITUTIONAL NIGHTMARE

I. INTRODUCTION

In the wake of immigration reform debates across the country,¹ Illinois has enacted an ineffective piece of immigration legislation.² Illinois Senate Bill 2185, popularly named the Illinois DREAM Act, muddies the already murky waters surrounding immigration reform.³ Bill 2185 was signed into Illinois law by Governor Pat Quinn on August 1, 2011, codifying it as Public Act 97-233.⁴ While the paramount issue surrounding immigration reform is citizenship status,⁵ this Act mandates the creation of an Illinois DREAM Fund Commission to establish scholarships for students,⁶ create programs to train high school counselors on how to address “the needs of . . . children of immigrants,”⁷ and make college tuition savings programs available to anyone.⁸ Yet this legislation is a constitutional nightmare, and portions of it must be repealed. This Note will outline the violations of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution perpetrated by this Act so that the Illinois Legislature can remedy them before there is an embarrassing judicial mandate, which would expend time, money, and resources in unnecessary litigation. The Legislature must ensure that scholarship funds are administered to those who need and deserve them by a means that does not violate the United States Constitution.

1. See Sam Youngman, *Obama Urges Activists to Pressure Congress on Immigration Reform*, THE HILL (Apr. 19, 2011), <http://thehill.com/homenews/administration/156869-obama-urges-activists-to-pressure-congress-on-immigration>.

2. Illinois DREAM Act, Pub. Act No. 97-233 (2011).

3. *Id.*

4. S. 2185, 97th Gen. Assemb. (Ill. 2011), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2185&GAID=11&DocTypeID=SB&SessionID=84&GA=97>.

5. See Peter Nicholas, *Obama Looking to Give New Life to Immigration Reform*, L.A. TIMES (Mar. 4, 2010), <http://articles.latimes.com/2010/mar/04/nation/la-na-immigration5-2010mar05>.

6. 110 ILL. COMP. STAT. 947/67 (2011).

7. 105 ILL. COMP. STAT. 5/21-25(c)(5) (2011).

8. See 15 ILL. COMP. STAT. 505/16.5 (2011) (allowing anyone with a valid Social Security number or Taxpayer Identification Number to be eligible for these programs).

It is important to note that the Illinois DREAM Act⁹ should not be confused with the Federal DREAM Act;¹⁰ despite the similarity in title, these two pieces of legislation are, in fact, quite different. The Federal DREAM Act was, and may be,¹¹ an Act with the main purpose of adjusting the status of illegal immigrant-students who meet specific criteria, thereby allowing them to apply for residency status.¹² The Illinois Act,¹³ however, offers no means to adjust one's residency status.¹⁴

This Note's primary focus will be that of the Illinois DREAM Act, in particular its creation of the DREAM Fund Commission through the state¹⁵ in violation of the Equal Protection Clause.¹⁶ The statute charges the Commission with creating a scholarship giving specific guidelines on eligibility to receive these scholarships.¹⁷ The requirements are that a student must:

9. Illinois DREAM Act, Pub. Act No. 97-233 (2011).

10. See DREAM Act of 2011, S. 952, 112th Cong. (2011). This is the most recently proposed version of the DREAM Act. This version has only been introduced and has not been voted on in either chamber as of February 4, 2011. *Id.* The full title of the Act is the Development, Relief, and Education for Alien Minors Act of 2011, Bill Summary and Status, S. 952, 112th Cong. (2011), <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdfnHf:@/@/I.&summ2=m&|/home/LegislativeData.php>, and would allow an individual who does not have a legal status in the United States to "cancel [their] removal . . . and adjust to the status of an alien lawfully admitted for permanent residence on a conditional basis" if they meet various requirements, most importantly, having a high school diploma or equivalent, S. 952, 112th Cong. § 3(b)(1) (2011). The conditional permanent resident status would last for six years, during which time they would be eligible for citizenship status. *Id.* Sponsor Senator Richard Durbin envisions this Act as giving young people an opportunity to contribute to America, instead of punishing them for being "brought to the U.S. as children" without any say in the matter. *Passing the DREAM Act*, DICK DURBIN, US SENATOR FOR ILLINOIS ASSISTANT MAJORITY LEADER (Feb. 4, 2011), http://durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord_id=43caa136-a3de-4d72-bc1b-12c3000f0ac9. Regardless of the reasons or supporting arguments behind the proposed Bill, Senator Durbin puts forth a solution and does so through the proper channels that have the power, means, and authority to effectuate such a policy: Congress. LAURA HUNTER DIETZ ET AL., 3A AM. JUR. 2D *Aliens and Citizens* § 282.

11. See DREAM Act of 2011, S. 952, 112th Cong. (2011), <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdfnHf:@/@/I.&summ2=m&|/home/LegislativeData.php> (stating that the bill is still in committee).

12. See DREAM Act of 2010, S. 3992, 111th Cong. (2010) (passing the House of Representatives but stopped by a filibuster).

13. Illinois DREAM Act, Pub. Act No. 97-233 (2011).

14. See 110 ILL. COMP. STAT. 947/67 (2011) (nothing in the Act changing citizenship status).

15. See *id.* 947/67(a) (2011) (creating the Commission).

16. U.S. CONST. amend. XIV.

17. 110 ILL. COMP. STAT. 947/67(b) (2011).

- (1) Have resided with his or her parents or guardian while attending a public or private high school in [Illinois].
- (2) Have graduated from a public or private high school or received the equivalent of a high school diploma in [Illinois].
- (3) Have attended school in [Illinois] for at least 3 years as of the date he or she graduated from high school or received the equivalent of a high school diploma.
- (4) Have at least one parent who immigrated to the United States.¹⁸

These requirements create a classification based on national origin, violating the Equal Protection Clause, and, accordingly, must face strict scrutiny.¹⁹ The strict scrutiny test requires that a compelling government interest be served and that the means of achieving that interest be narrowly tailored to the compelling interest.²⁰ This statute fails to serve a compelling government interest and is not narrowly tailored even if such an interest did exist. For conflicting with the Fourteenth Amendment, this portion of the Act must be immediately invalidated for being unconstitutional.²¹

This Note will analyze the conflict between Illinois Compiled Statute Chapter 110, Act 947, Section 67—the portion of the Illinois DREAM Act creating a scholarship—and basic principles stated in the Fourteenth Amendment of the United States Constitution. Part I consists of a brief overview of the Equal Protection Clause and its general applicability. Part II addresses how the Act meets the state action requirements needed for an equal protection analysis. This is done by establishing the appropriate standard of review for this type of constitutional violation and addressing the classification created, the government's interest in this legislation, and how tailored the actions of the legislative body are in achieving their interest. Following the Part II analysis, the Conclusion will discuss the problems created by this legislation and how this analysis will affect legislation in other jurisdictions, as well as provide a suggested

18. *Id.* 947/67(c).

19. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (applying strict scrutiny analysis to “ethnic origin,” interchanging it with “national origin”).

20. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)) (articulating the strict scrutiny test).

21. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (statute invalidated for being inconsistent with the Fourteenth Amendment).

remedy of how the sponsors and co-sponsors of this bill could establish the proposed scholarship in a way that does not violate the Constitution.

II. EQUAL PROTECTION ANALYSIS

The Equal Protection Clause is found in section one of the Fourteenth Amendment and states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²² Historically, this allowed for separate treatment along class lines as long as it was equal,²³ until *Brown v. Board of Education* was decided, overruling the separate but equal ideology and paving the way for the current equal protection analysis.²⁴ The current analysis is such that there must be some form of state action²⁵ seeking to achieve a goal, by which a classification amongst its people is created. A subsequent analysis is then done to address the groups being classified to determine the appropriate level of scrutiny to apply to the classification.

A. State Action

The Fourteenth Amendment of the United States Constitution applies to state action, not “merely private conduct.”²⁶ When “enforcement of a statute, on its face, [is] racially discriminatory,”²⁷ “compliance with a statute [commands] a private entity to discriminate,”²⁸ or an “agent of the state” acts discriminatorily,²⁹ state action exists.³⁰ When private actors are performing a public function, they are also deemed to meet the state action

22. U.S. CONST. amend. XIV, § I.

23. See *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (allowing separate but equal treatment), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

24. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating separate but equal treatment).

25. Recent Developments, *Constitutional Law—State Action Doctrine Invoked as a Limitation upon the Reach of the Fourteenth Amendment*, 25 *VAND. L. REV.* 1237, 1237 (1972) (“[T]he Supreme Court has consistently held that state action is a necessary element of a fourteenth amendment violation”).

26. *Id.*

27. *Id.* at 1238.

28. *Id.*

29. *Id.*

30. *Id.* at 1239.

requirement.³¹ Additionally, courts can find the state action requirement satisfied under a theory of entanglement—where the private actor is entangled with the state³²—or entwinement—when the state encourages or has “a symbiotic relationship” with a private actor.³³

B. Classifications and Their Corresponding Tests

Once state action has been established, an analysis of the basis of the classification becomes necessary to determine constitutionality.³⁴ The process begins by identifying the source of the classification.³⁵ These classifications can be manifest in one of three ways: (1) Through a facially discriminatory statute or policy;³⁶ (2) Through a facially neutral, but administratively discriminatory statute;³⁷ or (3) Through a facially and administratively neutral statute that has a discriminatory impact coupled with a discriminatory intent.³⁸

After establishing the method of discrimination amongst the classifications, the characteristics that distinguish one group from the other must be scrutinized.³⁹ Different characteristics require different

31. Recent Developments, *supra* note 25, at 1239.

32. *See* *Evans v. Newton*, 382 U.S. 296, 301 (1966) (the state’s transfer of a park to a private trustee while the park was still being maintained by the state entangled the state sufficiently to meet the state action requirement).

33. *See* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 305 (2001) (Thomas, J., dissenting) (explaining entwinement: “a private organization’s acts . . . constitute state action . . . when the organization . . . created, coerced, or [is] encouraged by the government; or acted in a symbiotic relationship with the government.”).

34. *See* Jennifer A. Larrabee, “*DWB (Driving While Black) and Equal Protection: The Realities of an Unconstitutional Police Practice*,” 6 J.L. & POL’Y 291, 306 (1997) (illustrating how after state action is established, classification must be addressed).

35. *See* *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (emphasizing the need to identify the class being “disadvantaged” before analyzing it).

36. *See* *Craig v. Boren*, 429 U.S. 190 (1976) (illustrating a statute that is facially discriminatory: “prohibiting the sale of . . . beer to males under the age of 21 and to females under the age of 18”).

37. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 362 (1886) (showing that, while licensing is an example of a facially neutral law, rejecting only Chinese applicants demonstrates “discriminations in the administration of the ordinance”).

38. *See* *Washington v. Davis*, 426 U.S. 229, 230 (1976) (showing that police exam was acceptable despite having a discriminatory impact (blacks did worse than whites on the exam) because the exam was facially neutral, administered in a neutral way, and did not have an intentional discriminatory impact).

39. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (stating that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to

levels of protection, with the degree of protection contingent upon the ability of the class or group to protect itself politically or the biological differences inherent in those characteristics.⁴⁰ The classifications are as follows: suspect classifications, quasi-suspect classifications, and all other classifications. A classification based on a suspect classification,⁴¹ or fundamental right,⁴² requires the application of a strict scrutiny test.⁴³ The courts have articulated that these classifications are “in most instances irrelevant to any constitutionally acceptable legislative purpose”⁴⁴ and must be “narrowly tailored to further a compelling governmental interest.”⁴⁵ If a classification is drawn based upon gender, a quasi-suspect class, the method creating the classification is subject to intermediate scrutiny.⁴⁶ This requires that an important government interest must exist, and the method of achieving that interest must be substantially related to that interest.⁴⁷ The justification for this lower level of scrutiny is that courts have recognized that biological differences exist between the genders that would support sex-based classifications.⁴⁸ All other classifications, such as those based on “age, socioeconomic status, and mental disability are subject to rational basis review.”⁴⁹ Rational basis review requires that these non-suspect classifications

protect minorities, and which may call for a correspondingly more searching judicial inquiry” and thereby establishing that different classifications need to be afforded different levels of protection).

40. See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 139 (2011) (“[S]ome courts are exclusively concerned with the ‘discrete and insular’ nature of the group, others focus on immutability of the group’s characteristics, and still others are mostly concerned with the group’s history of discrimination” when addressing what level of scrutiny to apply).

41. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (identifying race, nationality, and alienage as suspect classifications).

42. *Id.* at 1 (stating that fundamental rights require a compelling interest).

43. See *Plyler v. Doe*, 457 U.S. 202, 217 (1982) (stating that suspect classes and fundamental rights need to be precisely tailored to a compelling government interest –the strict scrutiny test).

44. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 216 (1995).

45. *Shaw v. Reno*, 509 U.S. 630, 631 (1993).

46. See *United States v. Virginia*, 518 U.S. 515, 571 (1996) (“[W]e evaluate a statutory classification based on sex under . . . ‘intermediate scrutiny’”).

47. *Id.*

48. See *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001) (allowing gender classifications because of biological differences between males and females; a female is guaranteed to know about her child due to the fact that she will give birth to the child, while the father may not even know he has a child).

49. Strauss, *supra* note 40, at 146.

serve a legitimate government interest and be rationally related to that interest.⁵⁰ Classifications based on rational basis are rarely overturned,⁵¹ while classifications subject to strict scrutiny are usually “strict in theory, but fatal in fact,”⁵² making identification of the classification increasingly important in determining the outcome of an equal protection analysis.⁵³

III. THE ILLINOIS DREAM ACT: EQUAL PROTECTION ANALYSIS

A. Illinois’ State Action

Illinois Senate Bill 2185 was introduced by Senator John Cullerton on February 2, 2011.⁵⁴ The Bill was passed by the Illinois Senate on May 4, 2011 by a vote of forty-five to eleven.⁵⁵ The House of Representatives on May 30, 2011 approved the Bill in a vote of sixty-one to fifty-three.⁵⁶ The Bill was signed into law by Governor Quinn on August 1, 2011.⁵⁷ The moment the Bill was signed into law, the eligibility requirements for the scholarship limiting participation to certain individuals⁵⁸ became codified and enforceable, meeting the state action requirement for an equal protection analysis.⁵⁹

Alternatively, if state action is not established from mere codification, then the DREAM Fund Commission’s actions would meet the state action requirement under a public function theory.⁶⁰

50. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985).

51. Chaka M. Patterson, *Tips for the Due Process Civil Rights Case*, PRAC. LAW 7 (Dec. 1996).

52. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Powell, J., concurring) (citing *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 362 (1978)).

53. *Id.* (utilizing the “fatal in fact” phrasing to illustrate how strict scrutiny analysis are usually not overcome).

54. S. 2185, 97th Gen. Assemb. (Ill. 2011), <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2185&GAID=11&DocTypeID=SB&SessionID=84&GA=97>.

55. *Id.*

56. *Id.*

57. *Id.*

58. See 110 ILL. COMP. STAT. 947/67(c) (2011) (establishing standards for who is eligible to apply for the scholarship and who is not).

59. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (stating that state official’s involvement in a conspiracy provides state action).

60. See *Jackson v. Merro. Edison Co.*, 419 U.S. 345, 352 (1974) (“[S]tate action [can be] present in the exercise by a private entity of powers traditionally exclusively reserved to the state”); 110 ILL. COMP. STAT. 947/67(b) (2011) (outlining the Commission’s duties).

The public function theory requires that a “function performed [by a public entity be] exclusively and traditionally public” in order to impart state action.⁶¹ In *Krieger v. Trane Company*, the court indicated that a particular board was “entrusted with what has traditionally been a public function: coordinating the educational policy and programs”⁶² The court articulated that the board was doing more than administering over faculty at a single university and instead was involved in the “implementation of city-wide educational policy”—a public function.⁶³

While awarding a scholarship is not a public function,⁶⁴ the DREAM Fund Commission’s other duties, such as “establishing and administering training programs for high school counselors and counselors, admissions officers, and financial aid officers of public institutions of higher education,” are actions performed by the government or state.⁶⁵ While training programs can be private or public functions, the establishing of requirements and standards for public and government employees to participate in specific trainings goes beyond mere public training programs and rises to the level of administration within a state’s educational system to become a public function, as in *Krieger*.⁶⁶ By performing these duties, the Commission steps into the shoes of the state⁶⁷ and the administration of this scholarship becomes action attributable to the state.

In addition to a public function theory, the actions of the Commission could also be considered state action by means of the entanglement theory.⁶⁸ By mandating specific methods for scholarship eligibility,⁶⁹ raising money,⁷⁰ establishing specific

61. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 302 (2001).

62. *See Krieger v. Trane Co.*, 765 F. Supp. 756, 760 (D.D.C. 1991).

63. *Id.* at 761.

64. *Top 10 Tips for Financial Aid*, FASTWEB (Apr. 21, 2009), <http://www.fastweb.com/financial-aid/articles/354-top-10-tips-for-financial-aid>.

65. 110 ILL. COMP. STAT. 947/67(b) (2011).

66. *Krieger*, 765 F. Supp. at 760.

67. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (U.S. 1961) (articulating how private action imputed state action: “By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has [discriminated]”).

68. *Evans v. Newton*, 382 U.S. 296 (1966).

69. 110 ILL. COMP. STAT. 947/67(c) (2011).

70. *Id.* 947/67(b)(2).

programs,⁷¹ and operating methods and goals,⁷² the state, while selecting “private individuals”⁷³ to operate the Commission,⁷⁴ becomes entangled with the Commission such that the Commission’s actions are essentially those of the state, and therefore state action.⁷⁵ In essence, the state is behind the scenes pulling the strings, and when the Commission acts and selects specific groups of people for the scholarship,⁷⁶ it is as though the state is selecting them. Also, under an entwinement theory, state action will be found where conduct that is formally “private” becomes so intertwined with governmental policies or so impregnated with government character that the conduct becomes subject to the constitutional limitations placed upon state action. . . . In deciding the question whether state action existed, the court set out a three factor analysis:

- (1) to what extent the business is subjected to state regulations. However, the court asserted that the mere fact that a business is subject to state regulations does not by itself convert its actions into that of the state for purposes of the Fourteenth Amendment;
- (2) The sufficiency of a close nexus between the state and the challenged action of the regulatory entity, so that the action of the entity may be fairly treated as that of the state itself;
- (3) Whether the private decision involves such coercive power or significant encouragement, either overt or covert, by the state that the choice must in law be deemed that of the state.⁷⁷

This statute presents the three necessary factors for entwinement: state regulation, a close nexus between the state and the action challenged, and encouragement by the state in taking action.

In the case of the Illinois DREAM Act, the state regulates the DREAM Fund Commission by requiring that a separate government organization—the Illinois Student Assistance Commission

71. *Id.* 947/67(b)(7).

72. *Id.* 947/67.

73. *See* entwinement argument in preceding paragraph.

74. 110 ILL. COMP. STAT. 947/67(a) (2011) (“The Governor shall appoint with the advice and consent of the Senate, members to the Illinois DREAM Fund Commission.”).

75. *See* *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (illustrating how company that operates town is imputed with state action on its property when trying to make exclusions).

76. *See* 110 ILL. COMP. STAT. 947/67(c) (2011) (giving criteria for how the Commission will select recipients).

77. *Hawkins v. Nat’l Collegiate Athletic Ass’n*, 652 F. Supp. 602, 606 (C.D. Ill. 1987) (citation and internal quotation marks omitted).

(“ISAC”)—participate in the scholarship program⁷⁸ and sets specific guidelines on how the Commission is operated.⁷⁹ The nexus between the Commission and the state is so close that the members of the Commission are chosen by the Governor of the state.⁸⁰ Lastly, the state goes a step beyond encouragement by creating the Commission via statute and charging them with the duties therein.⁸¹

Ultimately, the state cannot avoid state action, and thereby an equal protection violation, by merely substituting private actors in the state’s place.⁸² The state attempts to do this through the use of two separate methods: appointing private actors to operate the Commission⁸³ and insisting that the funds for the scholarship be entirely operated from private donations.⁸⁴ The Supreme Court, however, has stated that when a city “remains entwined in the management or control [of something], it remains subject to the restraints of the Fourteenth Amendment.”⁸⁵ Here the State is maintaining control of the Commission by establishing guidelines within the Statute,⁸⁶ controlling membership of the Commission,⁸⁷ and having another state organization maintain the funding.⁸⁸ Additionally, the state is appointing individuals to the Commission, all for the purpose of carrying out the discriminatory policies of the scholarship, satisfying the entwinement theory, and, again, making

78. See 110 ILL. COMP. STAT. 947/67(d) (2011) (requiring Illinois Student Assistance Commission to create a fund to provide scholarships for the Commission).

79. See *id.* 947/67 (giving guidelines to the Commission for required duties).

80. See *id.* 947/67(a) (charging the Illinois Governor with the duty of selecting commissioners).

81. *Id.* (requiring the Illinois Student Assistance Commission to create the Illinois DREAM Fund Commission).

82. See *Evans v. Newton*, 382 U.S. 296, 299 (1966) (citing *Terry v. Adams* 345 U.S. 461 (1953)) (“[W]here a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. That is to say, when private individuals or groups are endowed by the State with powers *or* functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.”) (citation omitted and emphasis added).

83. 110 ILL. COMP. STAT. 947/67(a) (2011).

84. See *id.* 947/67(d) (“The Illinois DREAM Fund shall be funded entirely from private contributions”).

85. *Evans*, 382 U.S. at 301.

86. See *id.* 947/67. Statutes can be modified, amended, or rescinded and therefore subject to the control of the legislature.

87. See *id.* 947/67(a) (illustrating that the Illinois Governor controls who becomes a member of the Commission).

88. See *id.* 947/67(d) (requiring ISAC, a state organization, to control the Commission’s funding).

state action attributable to the Commission.⁸⁹

Additional control can be shown through the use of state funding. Not only has the state solicited private funds,⁹⁰ but the statute's play on words to fund the scholarship with private funding is a legislative sleight of hand.⁹¹ The statute only stipulates and mandates that the funds generating money for the *scholarships* be attained from private funding.⁹² This allows state money and resources⁹³ to be used,⁹⁴ which has already occurred, in the furtherance of this discriminatory scholarship.⁹⁵ Despite the state's attempt to circumvent state action through the use of private funds,⁹⁶ public funds are being used,⁹⁷ and, again, through a theory of entwinement, state action can be found, requiring application of an equal protection analysis.⁹⁸

State action must be found in the application of the Illinois DREAM Act; to not do so would allow the state to carry out discriminatory agendas, effectively destroying equal protection⁹⁹ and allowing legislative bodies to enact discriminatory statutes and

89. See *Evans*, 382 U.S. at 301 (transferring of park to private trustee did not remove state action).

90. See *Illinois DREAM Act*, ILLINOIS STUDENT ASSISTANCE COMMISSION (2012), <http://www.collegeillinois.org/illinois-dream-act/index.html> (showing that Illinois' resources and money are being utilized by having the Governor and state involved, utilizing the validity of the state's reputation for a purely private scholarship, and using state-funded and -operated websites for advertising and soliciting for Commission members, donations, and the program.).

91. See 110 ILL. COMP. STAT. 947/67(d) (2011) ("The . . . Fund shall be funded entirely from private contributions").

92. See *id.* (requiring that a fund be established to provide *scholarships* and that the fund be entirely from private contributions, therefore requiring that only the scholarship money be privately funded).

93. See *id.* 947/67(b)(2) (noting that the statute's establishment of a not-for-profit entity to raise funds for the administration of the section makes no reference to those funds being private nor limits its funding to a private source).

94. See *id.* 947/67(a) (requiring ISAC to set up a fund for the Commission).

95. See *Appointments, STATE OF ILLINOIS*, <http://appointments.illinois.gov/appointmentsDetail.cfm?id=417> (last visited Oct. 8, 2011) (showing that Illinois' resources and money have been used to further the program by hosting applications on the state's servers, pay for someone to publish the posting, and maintain the webpage).

96. 110 ILL. COMP. STAT. 947/67(d) (2011).

97. *Appointments*, *supra* note 95.

98. See *Evans v. Newton*, 382 U.S. 296, 302 (1966) (analogizing the transfer of the park in *Evans* to the transfer of the program and scholarship to the Commission).

99. See Recent Developments, *supra* note 25 (stating that state action is required for an equal protection analysis).

policies by means of third parties to circumvent and avoid the state action requirement for equal protection analysis.¹⁰⁰ The state's establishment of discriminatory guidelines and selection of trustees to act on its behalf in applying these guidelines¹⁰¹ are the reasons why the courts have articulated the theories of entanglement¹⁰² and entwinement¹⁰³ and why state action should be found.

Whether state action is found from the Bill's codification or under an alternative theory, sufficient state action exists to give rise to an equal protection analysis. The state's role as puppet-master in the manipulation of this act mandates the application of the Federal Constitution to overcome this injustice. Accordingly, the Fourteenth Amendment's Equal Protection Clause applies.

B. Method of Discrimination

Continuing with the equal protection analysis, after state action has been met, the application or method that creates the discriminatory policy must be addressed.¹⁰⁴ Here the statute facially creates the classification advancing the equal protection analysis.¹⁰⁵ However, if the statute were found to be facially neutral, it would still be discriminatory in its effect because of its intent and results.

A classification is deemed to be facially discriminatory when the discrimination can be found in the plain language of the statute.¹⁰⁶ In the Act before us, one of the requirements is that a recipient must "have at least one parent who immigrated to the United States."¹⁰⁷ The groups created are a class of children who have one parent that immigrated to the United States and a class of children whose parents did not immigrate to the United States,¹⁰⁸ thus creating the

100. *Id.*

101. *See* 110 ILL. COMP. STAT. 947/67(a) (2011) (authorizing a state actor, the Governor, to select the commissioners, who, in turn, select the scholarship recipients).

102. *Evans*, 382 U.S. 296.

103. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

104. *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (illustrating that equal protection applies to laws that are both facially discriminatory and facially neutral with discriminatory impact).

105. *See Plessy v. Ferguson*, 163 U.S. 537, 538 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (stating that a law making it illegal for people to not sit in seats other than those assigned to them based on their race is facially discriminatory).

106. *Id.*

107. 110 ILL. COMP. STAT. 947/67(c)(3) (2011).

108. *Id.*

classification in the language of the Bill. Therefore, the statute will be deemed facially discriminatory for purposes of an equal protection analysis.¹⁰⁹

Should a facially discriminatory argument be unsuccessful and the statute found facially neutral, the equal protection analysis is still proper under a discriminatory application theory.¹¹⁰ The Commission is required by law to select individuals for scholarships based on the given criteria of the statute.¹¹¹ By carrying out its duties, the Commission will only be able to award the scholarship to those who have at least one parent that immigrated to the United States.¹¹² This would have the same effect and outcome as the facially discriminatory argument, again, advancing the equal protection analysis.¹¹³

In the event that neither of these theories is successful, a third theory exists where the statute is facially neutral and neutrally applied but produces discriminatory results coupled with a discriminatory intent.¹¹⁴ Proving this theory requires the same scenario used under the previous theory, in which there are discriminatory results for the recipients of the scholarship, but not because of the selection process. If these results occur, looking at the legislative debate before the Act was passed can satisfy the discriminatory intent prong.¹¹⁵ Senator Cullerton, who sponsored and submitted the bill,¹¹⁶ indicated that the intent of the Bill was to make available to non-citizen individuals “the same programs that the citizens can avail themselves of right now,”¹¹⁷ suggesting that the focus of this Bill was to aid non-citizen individuals. Additionally, Senator Johnson emphasized the purpose of the Bill as being for “children of immigrants who came here

109. *See id.* 947/67(c) (creating other classifications; however, for the purposes of this Note, Subsection (c)(4) is the relevant classification).

110. *Miller*, 515 U.S. 900.

111. 110 ILL. COMP. STAT. 947/67(c)(3) (2011).

112. *Id.* (requiring the Commission to follow the guidelines in the statute).

113. *Miller*, 515 U.S. 900.

114. *Washington v. Davis*, 426 U.S. 229 (1976).

115. Marrin J. O'Hara, *Is It A Crime to Live in Public Housing? A Proposal to the Illinois General Assembly to Amend the Automatic Transfer Statute*, 27 J. MARSHALL L. REV. 855, 876 (1994).

116. S. 2185, 97th Gen. Assemb. (Ill. 2011), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2185&GAID=11&DocTypeID=SB&SessionID=84&GA=97> (noting that Senator Cullerton sponsored the Bill).

117. S. FLOOR DEBATE, 97th Ill. Gen. Assemb., Gen. Sess. 23 (May 4, 2011).

probably not by their own choice, but because . . . of their parents.”¹¹⁸ This furthers the non-citizen contention,¹¹⁹ emphasizing the intent of the Bill to be for children of immigrants and not non-immigrants.¹²⁰ Senator Delgado also indicated that the focus of the Bill was to specifically aid those that “don’t enjoy the . . . status of citizenship.”¹²¹ While Senator Delgado did not emphasize the children-of-immigrants aspect, he still stressed a discriminatory intent for the Bill to apply to either non-citizens or children of immigrants and not others. The discussions during the floor debate did not argue against this framework and instead consisted of verbal support for the Bill.¹²² While senators may vote on a bill for different reasons, the uniformity of the comments that arose and the lack of contradiction indicate that distinguishing between immigrants and non-immigrants was at least one view of the Bill’s intended purpose.¹²³

C. Classifications Created

Under an equal protection analysis, the classification used by the state determines what test should be applied in order to determine if the classification is constitutional or unconstitutional.¹²⁴ Courts must look at the impact of a statute, as well as the wording of the statute itself, in identifying along what lines classifications are being drawn.¹²⁵ This particular Act creates classifications based on alienage¹²⁶ or, alternatively, national origin.¹²⁷

118. *Id.*

119. *Id.*

120. *Id.* at 26.

121. *Id.* at 28.

122. See H.R. FLOOR DEBATE, 97th Ill. Gen. Assemb., Gen. Sess. 179 (May 30, 2011) (emphasizing that the Illinois House of Representatives comments mirrored those of the Senate through the House sponsor Representative Acevedo’s response to “[C]an any student apply for this . . . scholarship?” being “[U]ndocumented, yes,” as well as Representative Mulligan’s statement regarding immigrants: “it would be to educate the best and the brightest to go on, particularly to help their families and maybe be the first person that’s gone to college . . .”).

123. See *id.* (noting that no one spoke in opposition to the Bill).

124. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) (“[T]he Court has evolved more than one test, depending upon the interest affected or the classification involved”).

125. See *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974) (“In determining whether the challenged . . . provision violates the Equal Protection Clause, we must first determine what burden of justification the classification created”).

126. 110 ILL. COMP. STAT. 947/67(c) (2011) (focusing on the citizenship implications associated with the statute’s use of the word immigrants).

I. Alienage

The way the statute is phrased, stating that that the scholarship is eligible for people who have a “parent who immigrated to the United States,”¹²⁸ draws a divide based on alienage.¹²⁹ Black’s Law Dictionary defines alienage as “the condition or state of an alien”¹³⁰ and an alien as “a foreigner; one born abroad; a person resident in one country, but owing allegiance to another.”¹³¹ Additionally, federal legislation has articulated a statutory definition of an alien as “any person not a citizen or national of the United States.”¹³² These definitions articulate the characteristics necessary for a classification based on alienage. For this Act, the parent of the individual must have been an alien (someone born abroad) who came to the United States¹³³ in order for the individual to be eligible to receive the scholarship.¹³⁴

Looking at the floor debates results in the same interpretation for the purposes of articulating the basis of the classification as being grounded along alienage lines. Throughout the floor debates, in both the Illinois House of Representatives and the Illinois Senate, it was repeated and emphasized that the Act was going to aid the children of illegal immigrants and to give undocumented children a chance to further their educations by making funding available to allow them to attend higher education facilities.¹³⁵ These expressions indicate that the intention of the Act is to create a classification between citizens and non-citizens or, put into the equal protection framework, a classification based on alienage.¹³⁶

127. *Id.* (requiring parents’ immigration creates a national origin requirement).

128. *Id.*

129. *Id.*

130. *Alienage Definition*, BLACK’S LAW DICTIONARY, <http://blackslawdictionary.org/alienage/> (last visited Nov. 24, 2011).

131. *Alien Definition*, BLACK’S LAW DICTIONARY, <http://blackslawdictionary.org/alien-ny/> (last visited Nov. 24, 2011).

132. See 8 U.S.C. § 1101 (2011).

133. 110 ILL. COMP. STAT. 947/67(c)(4) (2011).

134. *Id.* 947/67(c).

135. See H.R. FLOOR DEBATE, *supra* note 122.

136. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (stating that classifications based on citizenship are discriminations based on alienage), *superseded by statute on other grounds as stated in Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936 (7th Cir. 2011).

While the statute does not explicitly state that the dividing lines are based on alienage, this is not a requirement.¹³⁷ If that were the case, legislative and government bodies could avoid Fourteenth Amendment scrutiny by not using wording that directly identifies one of the classifications.¹³⁸ This statute's classification is based on a parent's alienage, rather than the alienage of the actual recipient, but this distinction is immaterial.¹³⁹ The statute on its face is classifying someone based on the recipient's parent's classification and this generational removal is still a classification based on alienage.¹⁴⁰

Classifications based on alienage are typically subject to a strict scrutiny analysis.¹⁴¹ Exceptions exist that have allowed for a less strict analysis when alienage is a relevant trait.¹⁴² The courts have articulated that when dealing with an interest in the democratic process, such as voting,¹⁴³ elections,¹⁴⁴ certain public offices,¹⁴⁵ police officers,¹⁴⁶ and primary or secondary education teaching positions,¹⁴⁷ one's citizenship status affects one's ability to carry out those roles and thus becomes relevant.¹⁴⁸ The Illinois DREAM Act, however, is not affected by such an application of the classification because receiving a scholarship is not "intimately related to the

137. See *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 353 (5th Cir. 2011) (Jones, J., concurring) ("What matters is the government's intentional use of racial classification").

138. See *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1344 (9th Cir. 1980) ("Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of law from . . . explicit classifications").

139. See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) ("Congress intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination solely because of their ancestry").

140. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (indicating that a law during the separate but equal era applied to an individual who was one-eighth black, much like this law, which grants scholarship eligibility as long as an individual is at least a quarter-immigrant).

141. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) ("[A] state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny.").

142. *Id.* at 224 (recognizing citizenship status as being a factor for democratic self-government roles and situations).

143. *Id.* (functioning that is deemed political not held to strict scrutiny).

144. *Id.* (following that electable positions would also fall into this category).

145. *Id.* (involving those with the "day-to-day functioning of state government" but not notaries).

146. *Foley v. Connelie*, 435 U.S. 291 (1978).

147. Gregory A. Scopino, *A Constitutional Oddity of Almost Byzantine Complexity: Analyzing the Efficiency of the Political Function Doctrine*, 90 CORNELL L. REV. 1377, 1379 (2005) (listing teachers and several other positions as also falling within this exception).

148. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

process of democratic self-government.”¹⁴⁹

Furthermore, alienage classifications preventing aliens from receiving in-state tuition have been struck down in the past.¹⁵⁰ While the Supreme Court has stated that “undocumented aliens” are not themselves a suspect classification,¹⁵¹ the wording of the Act allows for documented and undocumented aliens to receive this scholarship,¹⁵² thus preventing that from affecting the classification or which test to apply.

2. *National origin*

In the alternative, the Act also classifies applicants along lines of national origin. National origin classifications, instead of focusing on citizenship status like alienage,¹⁵³ focus on “the country from which you or your forebears came.”¹⁵⁴ Classifications “[distinguishing] between citizens solely because of their ancestry [is] odious to a free people whose institutions are founded upon the doctrine of equality,”¹⁵⁵ and the Act classifies directly along those lines.

The Illinois DREAM Act’s language requiring that an individual “have a parent who immigrated to the United States”¹⁵⁶ expressly inquires into one’s ancestry to determine if one meets this requirement and is therefore eligible for this scholarship.¹⁵⁷ This type of inquiry and classification of individuals “implicates the same grave concerns as a classification specifying a particular race by name.”¹⁵⁸

149. See *id.* at 216 (“[T]he standard of review is lowered when evaluating the validity of exclusions that entrust only to citizens important elective and non-elective positions whose operations go to the heart of representative government.”).

150. *Toll v. Moreno*, 458 U.S. 1, 910 (1982) (striking down the discriminatory policy based on the Supremacy Clause and not the Equal Protection Clause).

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

152. See 110 ILL. COMP. STAT. 947/67(c) (2011) (allowing an illegal alien with an immigrant parent to be eligible for the scholarship also allows a United States-born child with an immigrant parent to be eligible for the scholarship).

153. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (stating that classifications based on citizenship are discriminations based on alienage), *superseded by statute on other grounds as stated in Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936 (7th Cir. 2011).

154. *Id.* at 89 (quoting the definition of national origin).

155. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 294 (1978) (quoting *Loving v. Virginia*, 388 U.S. 1 (1967)).

156. 110 ILL. COMP. STAT. 947/67(c)(4) (2011).

157. *Id.*

158. *Rice v. Cayetano*, 528 U.S. 495, 496 (2000) (discussing ancestry as a classification relevant to the Fourteenth Amendment, although decided on Fifteenth Amendment grounds).

This has the effect of using the national origin of one's parents to determine one's eligibility. If both parents' national origin is that of the United States, the individual is not eligible for the scholarship.¹⁵⁹

An unpublished federal case from the District Court of New Jersey addressed the national origin relationship by stating that the national origin of an individual "born in the United States is determined by looking only to his ancestry."¹⁶⁰ This articulation dispels the possibility of the state contending that the Act is not a national origin case by arguing that the Act does not address the individual's national origin, but instead focuses on parentage.¹⁶¹ Even if such an argument is accepted, the parentage here only applies because the applicant is looking to his parent's national origin; it does not focus on his relationship to his parents.¹⁶² This creates a chain where, even if the classification is drawn along parentage lines, the ultimate classification still rests on the national origin roots of the parents. To allow the state to overcome a national origin classification by simply removing the classification by a matter of generations, or degree of separation, would permit classifications based on one's race to be enforceable as long as states phrase legislation to depend on one's past generations,¹⁶³ which again, the courts have not allowed.¹⁶⁴

The most important case in establishing an equal protection analysis for a classification based on national origin is *Korematsu v. United States*.¹⁶⁵ In *Korematsu*, a curfew-relocation order was enacted for people of Japanese ancestry, barring them from leaving their houses during certain hours, much as the Illinois DREAM Act is a scholarship-eligibility bar against those whose ancestry does not

159. 110 ILL. COMP. STAT. 947/67(c)(4) (2011) (requiring a parent to have immigrated to the United States).

160. See *English v. Misys Int'l Banking Sys., Inc.*, 2005 WL 1703199, at *6 (D.N.J. July 20, 2005).

161. 110 ILL. COMP. STAT. 947/67(c) (2011) (hypothetically arguing that the plain language revolves around a parental relationship).

162. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001) (discussing parentage as the form of the relationship to the parent, the issue in this case being eligibility for citizenship status because the father was a U.S. citizen).

163. See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1178 (1997) (discussing the implications of defining blacks in certain parts of the United States as "anyone who was one-sixteenth Black" and being subject to discrimination).

164. *Rice v. Cayerano*, 528 U.S. 495, 496 (2000).

165. *Korematsu v. United States*, 323 U.S. 214 (1944).

go outside the borders of the United States.¹⁶⁶ Ironically, Korematsu, who was subject to internment because of his parent's national origin,¹⁶⁷ would be eligible for a scholarship under the Act, but his children would not.¹⁶⁸ This type of discriminatory classification—classification based on the national origin of one's parents—is subject to “the most rigid scrutiny,”¹⁶⁹ requiring the application of strict scrutiny.¹⁷⁰

D. Strict Scrutiny Application

The next step in the equal protection analysis is to determine what level of scrutiny to apply: strict scrutiny, intermediate scrutiny, or rational basis review. Given the varying difficulties of the government in overcoming the analysis, the level of scrutiny is crucial, with strict scrutiny being the toughest.¹⁷¹ While an Equal Protection Clause claim can be brought under either classification pursuant to this analysis—alienage or national origin—the appropriate test is the same regardless.¹⁷² The Supreme Court in the *City of Cleburne, Texas v. Cleburne Living Center* grouped classifications based on race, alienage, and national origin together because

[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon

166. *Id.* at 217.

167. WENDY S. WILSON & GERALD H. HERMAN, CRITICAL THINKING USING PRIMARY SOURCES IN U.S. HISTORY 80 (2000). Korematsu was born in the United States, but his parents immigrated to the United States from Japan. *Id.* His wife Kathryn Korematsu was born in South Carolina. SAN LEANDRO MAYORAL PROCLAMATION: KATHRYN KOREMATSU DAY (Mar. 14, 2012), available at http://www.sanleandro.org/depts/cityhall/council/commendations_proclamations_and_ceremonial_resolutions.asp (illustrating that even if the Korematsu's child met the other requirements, she would still be ineligible for the scholarship because neither of her parents are immigrants).

168. 110 ILL. COMP. STAT. 947/67(c) (2011) (requiring recipients to have an immigrant parent).

169. *Korematsu*, 323 U.S. at 216.

170. *Id.*

171. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating that strict scrutiny is “strict in theory and fatal in fact”).

172. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

rectified by legislative means, these laws are subject to strict scrutiny¹⁷³

As such, strict scrutiny requires a compelling government interest for the classification, and the implementation of the classification must be narrowly tailored to meet that interest.¹⁷⁴

Aside from the justification of the view set forth in the *City of Cleburne, Texas*, the Court has stated that alienage, race, and national origin should further be protected because, in addition to not being reflective of their “ability to contribute to society,”¹⁷⁵ these classifications are “characteristic[s] determined by causes not within the control of the [individual]”¹⁷⁶ Furthermore, the Constitution will not allow these classifications, either, which is why the Act must be struck down under equal protection for punishing children based on characteristics of their parents.¹⁷⁷

While this statute may appear to be “beneficial” discrimination by aiding minorities, the Supreme Court has already addressed this theory.¹⁷⁸ Ultimately it has been decided that

[t]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.¹⁷⁹

Therefore, strict scrutiny applies regardless of how beneficial this discriminatory statute is considered.¹⁸⁰ The Courts have, however, recently articulated that the majority party would not pass legislation to their own detriment unless they deemed it satisfactory.¹⁸¹ This

173. *Id.*

174. *Id.*

175. *See Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

176. *Id.*

177. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“[W]e have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents”).

178. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 270 (1978) (stating that strict scrutiny applied even if the discrimination was being used to aid minorities).

179. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (pointing out that discrimination, even if beneficial to one race, burdens another). *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (“The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.”).

180. *Parents Involved*, 551 U.S. at 752 (2007).

181. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

argument fails to take into consideration other reasons that may exist for passing legislation, such as pandering to certain groups for votes.¹⁸² While strict scrutiny has been referred to as “strict in theory, but fatal in fact,”¹⁸³ an analysis of the test must still be done to determine if the state has a compelling interest that is narrowly tailored.¹⁸⁴

I. Compelling interest

The state does not have a compelling interest in establishing the DREAM scholarship program based on a suspect classification. The offered intent of the act is to “help [the applicants’] families and maybe be the first person that’s gone to college.”¹⁸⁵ Few compelling interests exist to justify legislation that utilizes suspect classifications.¹⁸⁶ That said, courts have recognized compelling interests in the past:¹⁸⁷ first, to remedy past discrimination¹⁸⁸ and second, to provide a diversity of perspectives within education.¹⁸⁹ Unfortunately, neither of these interests is present within this Act.

While this statute creates a scholarship for students to aid them in funding their education,¹⁹⁰ merely being related to education does not make the Act sufficient to meet the compelling interest of diversity of perspectives in education found in *Grutter v. Bollinger*.¹⁹¹ *Grutter* addressed a university’s practice of considering an applicant’s race in admissions as one factor to encourage diversity

182. *Id.* (illustrating other reasons for passing this type of legislation, such as garnering support from a particular segment of the population).

183. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).

184. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) (overcoming a strict scrutiny analysis).

185. *See* H.R. 0060, 93d Gen. Assemb. 181 (Ill. 2003), *available at* <http://www.ilga.gov/legislation/billstatus.asp?DocNum=0060&GAID=3&GA=93&DocTypeID=HB&LegID=195&SessionID=3&SpecSess=>.

186. *Adarand Constructors*, 515 U.S. at 275 (emphasizing that strict scrutiny is “fatal” in fact because it is supposed to weed out legitimate uses from illegitimate uses when faced with a suspect classification).

187. *Id.*

188. *See* *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 479 (1986) (affirming the use of a remedy for past discrimination as a valid interest).

189. *Adarand Constructors*, 515 U.S. 200.

190. 110 ILL. COMP. STAT. 947/67(c) (2011).

191. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (indicating that policies will still be scrutinized even though they address educational benefits).

in its law school.¹⁹² Unlike *Grutter*, this Act does not assure diversity in an educational institution. The applicants could go to a school that is already diverse or not provide diversity at all, as eligibility is based on the parents' and not the applicant's status. Furthermore, and most importantly, "race and national origin [can be considered], but . . . cannot [be used to] . . . render a judgment solely on that basis," as is the case here, leaving the Act without a compelling interest.¹⁹³

Aside from diversity at an educational institution, the Court has found programs that rectify past discrimination against suspect classes to be a compelling interest.¹⁹⁴ Illinois State Representative Eddie Acevedo stated, "This is going to be a fund that's going to be available not only to undocumented immigrants but to all immigrants here in Illinois."¹⁹⁵ However, there is no evidence that this segment of the population has been discriminated against in funding.¹⁹⁶ In fact, some of the senators and representatives themselves may potentially be eligible for the scholarship, having immigrant parents.¹⁹⁷ Therefore, a scenario of discrimination against immigrant populations must have existed in Illinois in order to pass legislation to remedy that past discrimination.¹⁹⁸

192. *Id.* at 339.

193. *Nahhas v. Ridge*, 2003 WL 22849146, at *4 (N.D. Ill. Dec. 1, 2003).

194. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 479 (1986).

195. Charles Thomas, *Quinn Signs Illinois Dream Act*, ABC 7 NEWS (Aug. 1, 2011), <http://abclocal.go.com/wls/story?section=news/local&id=8281827>.

196. *See* H.R. 0060, 93d Gen. Assemb. (Ill. 2003), available at <http://www.ilga.gov/legislation/billstatus.asp?DocNum=0060&GAID=3&GA=93&DocTypeID=HB&LegID=195&SessionID=3&SpecSess=> (granting in-state tuition to non-citizens if they "graduated from a high school in [Illinois], among other conditions."). *See also* Chi. Pub. Schs. Coll. & Career Preparation, *Undocumented Students, Section 7: Scholarships for Undocumented Students*, CHOOSE YOUR FUTURE, <http://www.chooseyourfuture.org/college/undocumented-students#scholarship> (last visited Dec. 25, 2012) (indicating that "[r]here are [already] scholarships available for undocumented students through private organizations," as well as scholarships that do not use immigrant status as criteria for eligibility).

197. *See* S. FLOOR DEBATE, *supra* note 117, at 26 (quoting Senator T. Johnson stating that "the children of my grandparents had no choice but to come with their parents to this country," indicating that his parents immigrated to the United States, and, therefore, if he met the other requirements, he would be eligible for the DREAM scholarship).

198. *See Local 28*, 478 U.S. 421.

Additionally, while the Court in *Korematsu* did find that a compelling interest existed in detaining those with Japanese ancestry, the interest was predicated on the fact that the United States was at war with Japan,¹⁹⁹ and there are presently no wars against immigrants to justify such a classification.²⁰⁰ Furthermore, Congress decided that “the decision in *Korematsu* lies overruled in the court of history,”²⁰¹ significantly limiting the weight a compelling interest stemming from *Korematsu* could be given.

2. *Narrowly tailored*

The Supreme Court requires that suspect classifications with a compelling interest must be narrowly tailored in order to limit the effects of the discrimination.²⁰² Therefore, even should a compelling state interest be found in the case of the Illinois DREAM Act, the statute as written is not narrowly tailored to meet such an interest. If the interest is grounded in making education more available to citizens who would otherwise be unable to attend college, it fails to do so in a narrowly tailored manner, as the statute’s wording allows individuals who suffer no financial hardships or burdens to apply for the scholarship.²⁰³ Allowing wealthy students or those with college expenses paid through other means to take advantage of the scholarship may deprive those whose only prohibition is cost of a scholarship opportunity.²⁰⁴ Furthermore, economic hardships do not distinguish based on national origin, race, or alienage. These hardships afflict all segments of the population, and if the state’s interest was to make education more affordable to its citizens, non-financial-based classifications curtail that goal.²⁰⁵ Instead, the Act is

199. *Korematsu v. United States*, 323 U.S. 214 (1944).

200. *See id.* (decided as a compelling interest because the United States was at war with Japan and Japanese individuals were treated differently. This classification, however, does not treat differently Iraqis or any other group with which the United States is at war; for a compelling interest to exist in this case, the United States would have to be involved in a war on immigration).

201. S. Res. 126, 109th Cong., 151 CONG. REC. 7954 (Apr. 21, 2005).

202. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 265, 283 (1986) (stating that a narrowly tailored fit needs to be “less intrusive”).

203. 110 ILL. COMP. STAT. 947/67 (2011) (noting no financial hardship requirements).

204. *Id.* (assuming a scenario where because financial hardship is not an inquiry, an individual fully capable of paying for college receives the scholarship over someone who cannot afford college).

205. *See* The Henry J. Kaiser Family Found., *Poverty Rate by Race/Ethnicity, States (2009-2010)*, U.S. (2010), STATEHEALTHFACTS.ORG,

tailored for immigrants and gives no attention to making higher education more available to the economically deprived—immigrant or not.²⁰⁶

At the same time, the Act is also overly broad, providing superfluous assistance to some individuals and not others who are similarly situated.²⁰⁷ Prior to the statute, the state already had financial aid assistance programs in place for citizens, as well as reduced tuition rates at public universities to make college more affordable.²⁰⁸ Following the public act creating this statute, those same assistance programs were made available to immigrant students who filed for a taxpayer identification number.²⁰⁹ By allowing everyone within the state regardless of alienage or national origin access to the same financial assistance for higher education, the state was not and is not creating *any* classification. It is the portion of the Act mandating that a scholarship be payable to certain individuals distinguishable on the basis of national origin and alienage that creates the problem. Thus, opening funding puts everyone on equal footing, rendering creation of the scholarship a separate and unnecessary action not narrowly tailored to the compelling interest.

If the state is successful in articulating that the interest it purports to establish is found in educational diversity²¹⁰ even though the state is not an educational institution,²¹¹ the Act would still likely not be narrowly tailored. First, the Act does not require applicants to attend universities with an underrepresented group of students whose parents are immigrants; thus, there is no assurance of creating the

<http://www.statehealthfacts.org/comparebar.jsp?ind=14&cat=1> (last visited Feb. 4, 2012) (illustrating that the distribution of poverty in the United States is 14% white, 36% black, 35% Hispanic, and 23% percent for other).

206. 110 ILL. COMP. STAT. 947/67 (2011).

207. *Id.* 305/7c-5 (2011). *See also* 15 ILL. COMP. STAT. 505/16.5 (2011).

208. H.R. 0060, 93d Gen. Assemb. (Ill. 2003), *available at* <http://www.ilga.gov/legislation/billstatus.asp?DocNum=0060&GAID=3&GA=93&DocTypeID=HB&LegID=195&SessionID=3&SpecSess=>

209. 110 ILL. COMP. STAT. 305/7c-5 (2011) (making in-state tuition available to citizens, residents, and non-residents who submit an affidavit stating an intent to become a permanent resident “at the earliest opportunity the individual is eligible to do so.”).

210. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) (articulating that educational diversity is a compelling interest).

211. *See* H.R. 0060, 93d Gen. Assemb. (Ill. 2003), *available at* <http://www.ilga.gov/legislation/billstatus.asp?DocNum=0060&GAID=3&GA=93&DocTypeID=HB&LegID=195&SessionID=3&SpecSess=> (noting that the Act serves to modify the operating of public universities, illustrating how the state itself is not an educational institution).

diverse array of views in which the state takes an interest.²¹² Nor is the state in the best position to create diverse educational settings, as universities determine admissions and are most knowledgeable about the diversity of their student bodies. Additionally, the same day *Grutter* was decided to allow educational diversity as a compelling interest, the Court ruled on the attempt in *Gratz v. Bollinger* to apply that interest.²¹³ In *Gratz*, the interest was deemed to not be narrowly tailored because the admissions program gave so much weight to race that it became the deciding factor in admitting students.²¹⁴ The difference between *Gratz* and *Grutter* as the Court articulated it is that seeking to achieve diversity in the educational setting is fine, but race cannot overshadow other qualifications.²¹⁵ Like in *Gratz*, the Illinois DREAM Act uses a suspect classification as the determining factor for eligibility and fails to be narrowly tailored to achieve any alleged diversity goal. Furthermore, in *Grutter*, the Court emphasized the need to treat people as individuals²¹⁶ and not just as members of groups.²¹⁷ While this Act purports to be selecting individual applicants, it does so only after preventing other groups from applying, again making it far from narrowly tailored.²¹⁸

Likewise, the Act will not succeed in an argument of remedying past discrimination. The Act is over-inclusive, allowing children who are immigrants themselves,²¹⁹ undocumented aliens,²²⁰ and United States citizens to apply,²²¹ while also leaving open the possibility for any one of these to be ultimately ineligible.²²² Therefore, the statute cannot be narrowly tailored in remedying past discrimination when

212. 110 ILL. COMP. STAT. 947/67 (2011) (noting no university stipulation attached to scholarship guidelines).

213. *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003).

214. *Id.* at 246.

215. *Id.*

216. *See Grutter v. Bollinger*, 539 U.S. 306, at 334 (2003) (emphasizing the need for individual review instead of grouping).

217. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007).

218. 110 ILL. COMP. STAT. 947/67(c) (2011).

219. *Id.* (allowing someone who was born abroad but moved here with a parent to be eligible).

220. *Id.* (allowing someone who was born abroad but moved here illegally with a parent to be eligible).

221. *Id.* (allowing someone who was born here after parents already immigrated here to be eligible).

222. *Id.* (making someone ineligible if their parents did not immigrate to the United States, even if they fall into one of the other three categories).

members of the group formerly discriminated against are both included and potentially excluded at the same time under the application of the remedying law.²²³

IV. CONCLUSION

As identified in this Note, to establish a violation of the Equal Protection Clause, the first requirement is that some form of “state action” exists.²²⁴ Illinois’ Public Act 097-0233 is by definition and in its nature an Act passed by the process of bicameralism and presentment and, therefore, constitutes “state action.”²²⁵ The Illinois Senate proposed and approved Senate Bill 2185,²²⁶ the Illinois House of Representatives approved the bill,²²⁷ and the Governor of Illinois signed it into law.²²⁸ These acts—proposing, approving, enacting, and eventually enforcing—are direct actions taken by the state and thus “state action” for purposes of an equal protection analysis.

The state meets the second requirement by creating a classification by drawing distinctions along class lines in the wording of the statute. The classification created is one established under alienage or national origin,²²⁹ which are suspect classifications requiring the application of the strict scrutiny test.²³⁰ The statute, falling short of meeting a compelling state interest or being narrowly tailored to achieve any such interest if one did exist, fails the strict scrutiny test.²³¹

223. *Id.* (noting that because the Act does not address the individual applying, similar people in similar situations will be treated differently based on their parents’ statuses).

224. Recent Developments, *supra* note 25, at 1237.

225. Illinois DREAM Act, Pub. Act No. 97-233 (2011).

226. H.R. 2185, 97th Gen. Assemb. (Ill. 2011), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2185&GAID=11&DocTypeID=SB&SessionID=84&GA=97>.

227. *Id.*

228. *Id.*

229. *Supra* Part III.C.

230. *Id.*

231. *Supra* Part II.D.

While compelling interests have been found in suspect classifications in the past under equal protection analyses,²³² this does not give a legislative body or government free reign to blindly “discriminate on the basis of race” to achieve a “worthy goal.”²³³ The statute draws from “immutable characteristics determined solely by the accident of birth”²³⁴—characteristics beyond personal control. In fact, the Supreme Court in *Plyler v. Doe* articulated the exact situation this Act creates: “children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status.’”²³⁵ The children eligible for the DREAM Act scholarship are just like the children ineligible for this scholarship; to treat them differently does them an injustice before their journey into higher education even begins. Public Act 97-233 needs to be repealed before it is found unconstitutional for violating the Fourteenth Amendment. Allowing it to continue wastes resources as well as time of both the state and the individual applicants whose efforts will be for naught once the statute is deemed unconstitutional.²³⁶

The Illinois DREAM Act has implications outside of Illinois and the United States Constitution, too. When legislative acts like this are executed on unstable foundations, they give false hope and security to the people who rely on them.²³⁷ Student applicants, who are potentially undocumented immigrants, run the severe risk of being ousted after revealing their alien status, feeling that programs like this are aimed to help them.²³⁸ While it may be true that such laws are being created to aid undocumented students, their legal statuses cannot be modified or changed by the state,²³⁹ as adjustment of legal

232. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (overcoming strict scrutiny analysis).

233. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007).

234. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

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

236. *Appointments*, *supra* note 95 (the more time the state continues on this endeavor, the more money it will spend on it, in addition to whatever may happen to the recipients when this is deemed unconstitutional).

237. See *Passing the DREAM Act*, *supra* note 10 (postings by individuals who are relying on the Federal DREAM Act).

238. *Id.* (postings on Senator Durbin’s website include names. Additionally, because the Illinois DREAM Fund Commission is operated in part through ISAC, it may be subject to Freedom of Information Act requests, potentially making applicants’ immigration statuses known to the public).

239. See DIETZ ET AL., *supra* note 10.

status requires federal action.²⁴⁰ Thus, state programs are creating potentially troubling situations²⁴¹ with little to gain when the programs are based on unconstitutional grounds.

Other states already implementing or considering similar legislation²⁴² should consider this analysis, as it may also apply to their acts. Given the importance of these bills to the individuals being assisted, ensuring their constitutionality and ability to be upheld is of the utmost importance.²⁴³ One individual is believed to have taken his life because he believed he could no longer pursue his dream after a version of the Federal DREAM Act failed to pass.²⁴⁴ While state acts serve significantly different goals than the proposed Federal Act and the previous example is likely extreme, the emotions that surround the state bills are still very important to potentially affected individuals.²⁴⁵ Illinois and any state considering this type of legislation should remedy constitutional violations prior to giving false hope or awarding monies to individuals. This will prevent other individuals from experiencing similar letdowns and tragedy when such acts are found unconstitutional.²⁴⁶

This Act's fatal flaw is the state's participation; without that participation, the Act is not subject to an equal protection analysis.²⁴⁷ The Illinois legislators adamant about aiding the situation of immigrant and undocumented children alike²⁴⁸ have taken the first step by making already-existing higher education funding available to

240. *Id.*

241. *See Passing the DREAM Act, supra* note 10.

242. *See* Aswini Anburajan, *State-by-State Push for a Dream Act*, THE AMERICAN PROSPECT (Mar. 28, 2011), <http://prospect.org/article/state-state-push-dream-act> (stating that several states, such as Maryland, New York, and California, have passed or have pending "Dream Act-like bills").

243. *See Passing the DREAM Act, supra* note 10. *See also* Ill. Coalition for Immigrant & Refugee Rights, *Day Before DREAM Vote Students Talk About DREAM Act & Suicide* (Dec. 7, 2010), <http://icirr.org/es/content/day-dream-vote-students-talk-about-dream-act-suicide>.

244. Bryan Ilenas, *Family Stands by Claim that Teen Killed Himself Over DREAM Act*, FOX NEWS LATINO (Dec. 5, 2011), <http://latino.foxnews.com/latino/news/2011/12/05/suicide-letter-confirms-teen-killed-himself-over-dream-act-family-says/>.

245. *See Passing the DREAM Act, supra* note 10.

246. *See* Ilenas, *supra* note 244.

247. Recent Developments, *supra* note 25, at 1238.

248. *See* H.R. 2185, 97th Gen. Assemb. 20 (Ill. 2011), *available at* <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2185&GAID=11&DocTypeID=SB&SessionID=84&GA=97>; H.R. FLOOR DEBATE, *supra* note 122, at 179.

all Illinois citizens.²⁴⁹ The scholarship portion of the Act—the only portion violating equal protection—should be severed from the Act, and the same legislators should form a private organization, privately run and privately funded, to provide DREAM scholarships. Given that the existing scholarship is already “privately funded,”²⁵⁰ the organization would be in the same position for acquiring contributions, and, because the organization would be private, it could be established in a relatively short period of time.²⁵¹

Additionally, state universities are in a better position to administer scholarships to undocumented or immigrant children. The interests laid out in *Gutter* establish that a university “has a compelling interest in attaining a diverse student body,” and therefore is the proper avenue to implement such scholarships.²⁵² While a university cannot implement the same program as the one enacted by the state, it can begin taking into consideration undocumented or immigrant statuses of individuals and potentially offer these students scholarships to entice them to come to a particular university in order to encourage diverse viewpoints in the educational setting.²⁵³

By enacting programs that afford assistance to immigrant and undocumented students, the state is providing a positive message on how the state sees and values such individuals.²⁵⁴ However, enacting unconstitutional legislation to further that view serves no one, no matter how strong the desire to promote it. The portion of this Act that puts *everyone* in the state on equal footing is a commendable effort, and the state should not let that progress be overshadowed by the unconstitutional portions of the Act. Instead, Public Act 97-233,

249. 110 ILL. COMP. STAT. 305/7e-5 (2011) (making in-state tuition available to citizens, residents, and non-residents who submit an affidavit stating an intent to become a permanent resident “at the earliest opportunity the individual is eligible to do so.”).

250. See *Appointments*, *supra* note 95.

251. However, the old organization should not be transferred outright to the private organization, as there may still be state action. See *Evans v. Newton*, 382 U.S. 296, 301 (1966) (“[W]e cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.”).

252. *Gutter v. Bollinger*, 539 U.S. 306, 309 (2003).

253. *Id.*

254. See *Governor Quinn Signs Illinois DREAM Act*, ILLINOIS GOVERNMENT NEWS NETWORK (Aug. 1, 2011), <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9587> (quoting Senator Cullerton: “Immigrants are a driving force in our city’s cultural and economic life,” emphasizing the value Illinois places on its immigrant population).

creating the Illinois DREAM Fund Commission, should be repealed by the state before being repealed in the courts.

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* William Wojnarowski is a third-year law student at Northern Illinois University College of Law. While he is not eligible for the scholarship outlined in this Act, both his girlfriend and father are, initially making him question the constitutionality of the Act. He would like to thank his family and girlfriend for their love and support, as well as his mentor Bernardo Isacovici, whom he has worked with to defend individuals in deportation removal proceedings. Mr. Wojnarowski would like to see a constitutional resolution to immigration reform.