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## Unclear Authority, Unclear Futures: Challenges to State Legislation Providing In-State Tuition Benefits to Undocumented Students Pursuing Higher Education

Julia R. Kim

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**UNCLEAR AUTHORITY, UNCLEAR FUTURES:  
PREEMPTION CHALLENGES TO STATE  
LEGISLATION PROVIDING IN-STATE TUITION  
BENEFITS TO UNDOCUMENTED STUDENTS  
PURSUING HIGHER EDUCATION**

*Julia R. Kim\**

*Exercising its federal power to regulate immigration, Congress has responded to illegal immigration by enacting deterrent legislation that includes provisions denying public benefits to undocumented immigrants. One of these provisions, 8 U.S.C. § 1623, explicitly bars states from providing postsecondary education benefits to undocumented immigrants on the basis of in-state residency. As a consequence, undocumented young adults—many of whom grew up and received their primary and secondary education in the United States—are effectively barred from pursuing higher education by their ineligibility for in-state tuition rates and financial aid. Some states, however, have evaded the § 1623 bar by providing undocumented students with in-state tuition rates for which eligibility is not explicitly based on state residency.*

*This Note examines whether the states that choose to affirmatively provide in-state tuition benefits to their undocumented students are preempted from doing so by § 1623. It concludes that properly crafted state legislation is not preempted by federal law, though the most effective and sensible resolution to the conflicting views on this issue calls for Congress to repeal § 1623 and offer deserving undocumented students a pathway to lawful immigration status and the opportunity to pursue higher education.*

TABLE OF CONTENTS

INTRODUCTION..... 1015

I. FEDERAL AND STATE REGULATORY POWERS REGARDING  
UNDOCUMENTED IMMIGRATION AND POSTSECONDARY  
EDUCATIONAL OPPORTUNITIES FOR UNDOCUMENTED  
STUDENTS: CURRENT STATE AND FEDERAL CONTROVERSIES ... 1016

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A. <i>Federal Regulation of Immigration and the Undocumented Immigrant Population</i> .....	1017
B. <i>Educational Rights of Undocumented Immigrants</i> .....	1020
C. <i>The DREAM Act: A Proposed Repeal of 8 U.S.C. § 1623</i> .....	1022
D. <i>The Failure of the DREAM Act and State Regulation of Postsecondary Educational Opportunities for Undocumented Immigrants</i> .....	1024
E. <i>Standing As an Obstacle to Challenging State Laws Providing Undocumented Students with In-State Tuition Rates</i> .....	1027
1. <i>Standing Generally</i> .....	1027
2. <i>Standing to Challenge State Legislation Granting In-State Tuition Benefits to Undocumented Students: Federal vs. State Court</i> .....	1028
F. <i>Federal Preemption of Laws Relating to Undocumented Immigrants</i> .....	1030
1. <i>Preemption Doctrine Generally</i> .....	1031
2. <i>Preemption As Applied in the Immigration Context: <i>De Canas v. Bica</i></i> .....	1033
3. <i>Preemption Regarding Higher Education for Nonimmigrant Aliens</i> .....	1033
II. <i>ARE STATE LAWS PROVIDING POSTSECONDARY EDUCATION BENEFITS TO UNDOCUMENTED STUDENTS IN THE FORM OF IN-STATE TUITION RATES PREEMPTED BY FEDERAL LAW?</i> .....	1034
A. <i>Preemption Arguments Made In Legal Scholarship</i> .....	1034
1. <i>Arguments Against Preemption</i> .....	1035
2. <i>Arguments for Preemption</i> .....	1036
B. <i>Kansas: Day v. Bond</i> .....	1037
1. <i>Arguments That K.S.A. 76-731a Is Preempted by 8 U.S.C. § 1623</i> .....	1038
2. <i>Arguments That K.S.A. 76-731a Is Not Preempted by 8 U.S.C. § 1623</i> .....	1039
C. <i>California: Martinez v. Regents of the University of California</i> .....	1039
1. <i>Arguments That Section 68130.5 of the California Education Code Is Preempted by 8 U.S.C. § 1623</i> .....	1040
2. <i>Arguments That Section 68130.5 of the California Education Code Is Not Preempted by 8 U.S.C. § 1623</i> ..	1042
III. <i>STATES CAN PROPERLY CRAFT LEGISLATION GRANTING UNDOCUMENTED STUDENTS IN-STATE TUITION RATES IN COMPLIANCE WITH FEDERAL LAW</i> .....	1045
A. <i>In-State Tuition Rates for Undocumented Students Are Not Expressly Preempted by § 1623</i> .....	1045

B. *The Ability of States to Provide In-State Tuition Rates to Undocumented Students Is Not Field Preempted* ..... 1047

C. *The Ability of States to Provide In-State Tuition Rates to Undocumented Students Is Not Conflict Preempted* ..... 1047

D. *Judicial Deference and the Need for a Legislative Solution* .. 1048

CONCLUSION ..... 1049

INTRODUCTION

Congress has been attempting to control illegal immigration for decades.<sup>1</sup> Despite these efforts, millions of undocumented immigrants have continued to enter the United States and establish lives with their families.<sup>2</sup> Their children are educated in public schools and socialized into American culture, growing up to be indistinguishable from classmates who are citizens or otherwise lawfully present.<sup>3</sup> Many excel in school, develop their potential to contribute to society, and aspire to continue their education at the postsecondary level, only to find that their unlawful immigration status, federal laws, and a lack of financial resources prevent those dreams from becoming reality.<sup>4</sup>

An issue for Congress has been whether undocumented children should be provided with the opportunity to fulfill their dreams of higher education.<sup>5</sup> This debate represents the complex struggle between state regulation of educational opportunities and the need to deal with illegal immigration as a federal matter.<sup>6</sup> The debate has manifested itself in Congress’s attempts to pass the Development, Relief, and Education for Alien Minors (DREAM) Act,<sup>7</sup> which would provide eligible undocumented young adults with a gateway to a postsecondary education and lawful immigration status in the United States.<sup>8</sup> This legislation arose out of recognition of these young adults’ potential to contribute back to American society.<sup>9</sup>

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1. See HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 4 (2001).

2. See JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 9 (2010), available at <http://pewhispanic.org/files/reports/133.pdf>.

3. See WILLIAM PEREZ, WE ARE AMERICANS: UNDOCUMENTED STUDENTS PURSUING THE AMERICAN DREAM xii (2009).

4. See *id.* at xii–xiii.

5. See 147 CONG. REC. 15361 (2001) (statement of Sen. Orrin Hatch).

6. See Michael A. Olivas, *Storytelling Out Of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019, 1021–25 (1995).

7. DREAM Act, S. 1291, 107th Cong. (2001).

8. See *Id.*

9. See ORRIN HATCH, AMENDING THE ILLEGAL IMMIGRATION REFORM ACT OF 1996, S. REP. NO. 108-224, at 2 (2004).

Though Congress has attempted several times to pass the DREAM Act, it has failed to become law.<sup>10</sup> In response, many states have independently opened up postsecondary educational opportunities for undocumented students by offering them the benefit of in-state tuition rates.<sup>11</sup> In several instances, such state legislation has been challenged in the courts as being preempted by federal laws that proscribe the provision of public benefits to undocumented immigrants.<sup>12</sup>

This Note examines whether state laws providing in-state tuition rates to undocumented students are preempted by federal law in 8 U.S.C. § 1621 and § 1623, which prohibit the provision of public benefits, including postsecondary education benefits, to undocumented immigrants. Part I of this Note provides background on the regulation of undocumented immigration, and then explores federal and state laws and case law relating to the postsecondary education rights of undocumented students. Part I also looks at the standing and preemption doctrines that pervade the challenges brought in court against those state statutes that allow postsecondary education benefits to reach undocumented immigrants.

Part II then focuses on the arguments for whether § 1621 and § 1623 preempt state laws providing in-state tuition rates to undocumented immigrants. This Note explores the standing and preemption issues primarily through the lens of the litigation in *Day v. Bond*<sup>13</sup> and *Martinez v. Regents of the University of California*,<sup>14</sup> which both challenged such state laws.

Finally, Part III of this Note argues that federal law does not fully bar states from providing undocumented students with postsecondary education benefits, but that, nevertheless, the best resolution to the conflict would come through federal legislation providing undocumented students with better access to a postsecondary education and lawful immigration status in the United States.

I. FEDERAL AND STATE REGULATORY POWERS REGARDING  
UNDOCUMENTED IMMIGRATION AND POSTSECONDARY  
EDUCATIONAL OPPORTUNITIES FOR UNDOCUMENTED STUDENTS:  
CURRENT STATE AND FEDERAL CONTROVERSIES

Part I of this Note provides background on undocumented immigrant students in the United States and the federal and state powers to regulate matters concerning them, specifically in the area of postsecondary

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10. See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1793–1802 (2009).

11. *Undocumented Student Tuition: State Action*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 2011), <http://www.ncsl.org/default.aspx?tabid=12846>.

12. See generally *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007); *Immigration Reform Coal. of Tex. v. Texas*, 706 F. Supp. 2d 760 (S.D. Tex. 2010); *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011).

13. 500 F.3d 1127 (10th Cir. 2007).

14. 241 P.3d 855 (Cal. 2010).

education benefits. To that end, Part I.A discusses the growth of the undocumented immigrant population and Congress's efforts to deter illegal immigration. Part I.B then explores the education rights of the undocumented as presented in Supreme Court case law.

Next, Part I.C examines Congress's attempts to address the issue of undocumented students' access to a postsecondary education through the DREAM Act, which would repeal federal law proscribing the provision of postsecondary education benefits to undocumented immigrants. Part I.D then discusses various approaches at the state level to providing postsecondary education opportunities by offering in-state tuition rates to undocumented students.

Parts I.E and I.F then survey the issues relating to preemption challenges brought against state laws providing in-state tuition rates to undocumented students. Part I.E focuses on the standing challenges that have blocked such preemption challenges from being fully litigated. Part I.F then considers the preemption doctrine that has developed relating to federal immigration law in order to lay the foundation for its application to state laws providing undocumented students with in-state tuition rate benefits.

#### *A. Federal Regulation of Immigration and the Undocumented Immigrant Population*

The Constitution does not expressly authorize the federal government to regulate immigration.<sup>15</sup> Since the nineteenth century, however, the Supreme Court has considered immigration regulation to be an implied power, existing "as a part of those sovereign powers delegated by the Constitution" to the federal government.<sup>16</sup> The Supreme Court has thus consistently held that the regulation of immigration is a federal power.<sup>17</sup>

The federal statutory scheme regulating immigration classifies all lawfully admitted aliens as either immigrants or nonimmigrants.<sup>18</sup> Unlawfully present aliens are those who have entered the United States without valid entry or immigration visas, overstayed their nonimmigrant

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15. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 116 (5th ed. 2009).

16. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (upholding the plenary power of Congress to exclude noncitizens from the United States); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893) (upholding Congress's plenary power to deport noncitizens from the United States, stating that "[t]he question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject").

17. See *De Canas v. Bica*, 424 U.S. 351, 354–55 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power." (citing *Fong Yue Ting*, 149 U.S. at 748; *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1876); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 272–73 (1876); *Passenger Cases*, 48 U.S. (7 How.) 283, 483 (1849))).

18. See 8 U.S.C. § 1101(a)(15) (2006); LEGOMSKY & RODRÍGUEZ, *supra* note 15, at 250.

visas, or violated the terms of their admission in some way.<sup>19</sup> Due to the undocumented nature of their presence, having exact statistics on undocumented immigrants<sup>20</sup> in the United States proves difficult. Nevertheless, various studies give a sense as to the size and growth of the undocumented population.

Concerns with the size of the undocumented immigrant population in the United States began to develop in the mid-to-late 1970s, when it reached an estimated size of one million people.<sup>21</sup> The population continued to grow throughout the early to mid-1980s at a steady rate of approximately 200,000 people per year.<sup>22</sup> In 1986, after the undocumented population had grown to an estimated 2.5–3.5 million,<sup>23</sup> Congress responded with the Immigration Reform and Control Act (IRCA).<sup>24</sup> Congress designed IRCA to lay a basis for effective immigration law enforcement going forward by first “eliminating a voiceless, rightless permanent underclass.”<sup>25</sup> To that end, IRCA granted amnesty to certain undocumented immigrants already living in the country by giving them lawful immigration status,<sup>26</sup> and placed sanctions on employers who hired undocumented immigrants.<sup>27</sup>

Despite Congress’s efforts, it soon became clear that IRCA had failed to stop illegal immigration, as the undocumented population continued to grow steadily at rates of over 200,000 people per year.<sup>28</sup> The Immigration and Nationalization Service (INS) estimated that by 1996, there were approximately five million undocumented immigrants living in the United States, with over half (2.7 million) from Mexico.<sup>29</sup> Given the magnitude of the unauthorized immigrant population, Congress took stronger measures to restrict undocumented immigration by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>30</sup> IIRIRA

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19. See LEGOMSKY & RODRÍGUEZ, *supra* note 15, at 1140; see also JEFFREY S. PASSEL, PEW HISPANIC CNTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 16* (2006), available at <http://pewhispanic.org/files/reports/61.pdf> (“Virtually all unauthorized [immigrants] fall into two categories: those who overstayed their visas or those classified by the government as ‘entries without inspection,’ or EWIs.”).

20. This Note refers to unauthorized aliens using the term “undocumented immigrants” instead of the statutory term “illegal aliens,” which carries a pejorative connotation. See LEGOMSKY & RODRÍGUEZ, *supra* note 15, at 1140–41.

21. Jeffrey S. Passel, *Undocumented Immigration to the United States: Numbers, Trends, and Characteristics*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 27, 32 (David W. Haines & Karen E. Rosenblum eds., 1999).

22. *Id.* at 33.

23. *Id.* at 32 (estimate based on the 1980 Census).

24. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

25. Hayes, *supra* note 1, at 4.

26. See *id.*; see also 8 U.S.C. §§ 1160, 1187, 1188, 1255(a) (2006).

27. See 8 U.S.C. § 1324(a) (2006).

28. Passel, *supra* note 21, at 37.

29. *Id.*

30. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

aimed “to improve deterrence of illegal immigration to the United States.”<sup>31</sup> It worked in conjunction with the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which Congress had enacted six weeks prior to IIRIRA,<sup>32</sup> to discourage undocumented immigration by “dramatically chang[ing] the landscape [of federal benefits available to undocumented immigrants] in many areas of health and welfare.”<sup>33</sup> Section 411 of PRWORA, codified at 8 U.S.C. § 1621(a), specifically denied public benefits to noncitizens, including permanent residents, by stating that “an alien . . . is not eligible for any State or local public benefit.”<sup>34</sup> IIRIRA imposed other specific restrictions, such as section 505, codified at 8 U.S.C. § 1623, which specifically proscribes the availability of postsecondary education benefits to unauthorized immigrants.<sup>35</sup>

Nevertheless, the deterrent efforts behind PRWORA and IIRIRA proved ineffective, as evidenced by a study on behalf of the Pew Hispanic Center showing that the undocumented immigration population had grown to 11.1 million people by 2005, and that about two-thirds of them had arrived in the ten years since 1996.<sup>36</sup> Most came from Mexico, numbering at 6.2 million, or 56 percent of the unauthorized population.<sup>37</sup> Out of the total 11.1 million, 1.8 million, or 16 percent, were children.<sup>38</sup>

The size of the undocumented immigrant population has appeared to remain relatively stable in recent years after a slight decline from its peak at 12 million in 2007.<sup>39</sup> This decline has been attributed to the decrease in the influx of undocumented immigrants from Mexico.<sup>40</sup> In 2009, the Center for Immigration Studies (CIS) estimated that there were 10.8 million unauthorized immigrants present in the United States.<sup>41</sup> Within these 10.8 million, “roughly two-thirds of all adult illegal aliens are young, less-

31. H.R. REP. NO. 104-828, at 1 (1996) (Conf. Rep.).

32. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, §§ 400–51, 110 Stat. 2105, 2260–76 (1996) (codified in scattered sections of 8 and 42 U.S.C.).

33. Olivas, *supra* note 10, at 1763.

34. 8 U.S.C. § 1621(a) (2006).

35. *Id.* § 1623. The text of § 1623 reads:

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.

*Id.*

36. Passel, *supra* note 19, at 1–2.

37. *Id.* at 4 (noting that 22 percent came from the rest of Latin America, 13 percent from Asia, 6 percent from Europe and Canada, and the remaining 3 percent from Africa and other countries).

38. *Id.* at 8.

39. Passel & Cohn, *supra* note 2, at 9.

40. *See id.* at 10.

41. Steven A. Camarota & Karen Jensenius, *A Shifting Tide: Recent Trends in the Illegal Immigrant Population*, CENTER FOR IMMIGR. STUD. 1 (July 2009), <http://www.cis.org/articles/2009/shiftingtide.pdf>.

educated, Hispanic immigrants.”<sup>42</sup> According to a more recent study released by the Pew Hispanic Center in February 2011, of the estimated 11.2 million undocumented immigrants, approximately 1 million are children.<sup>43</sup>

These statistics make clear that there is, and will continue to be for some time, a significant number of undocumented immigrants who would benefit from access to a postsecondary education. There are currently an estimated 700,000 undocumented immigrants under the age of 30 who have graduated from high school in the United States, as well as an additional 700,000 currently under the age of 18 and enrolled in school.<sup>44</sup> Many of these undocumented students have spent almost their whole lives in the United States, living as Americans, indistinguishable from their citizen peers.<sup>45</sup> However, for those undocumented students with the desire to further their education at postsecondary institutions, there are usually insurmountable financial barriers due to the combination of high tuition costs and ineligibility for governmental grant, loan, and work assistance programs.<sup>46</sup> In addition, most states do not allow resident undocumented students to receive in-state tuition rates.<sup>47</sup> As a result, estimates of the number of undocumented students who have lived in the United States for five years or longer, graduated from a U.S. high school, and enrolled in a U.S. college in a given year number only in the thousands.<sup>48</sup> Immigration status clearly serves as an effective bar to the pursuit of a higher education for many long-term undocumented young adults.<sup>49</sup>

### B. Educational Rights of Undocumented Immigrants

Since *Brown v. Board of Education*,<sup>50</sup> the Supreme Court has affirmed a right to equal educational opportunities and the significant role that education plays in modern society. While *Brown* addressed the segregation of children in so-called separate-but-equal public schools,<sup>51</sup> the Court’s

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42. *Id.* at 3. Defining “young, less-educated, Hispanic immigrants” as “Hispanic immigrants 18–40 years of age with no more than a high school education living in the United States.” *Id.* More precisely, CIS estimates that three-fourths of the 6,703,000 young, less-educated, foreign-born Hispanic population present in the United States in 2009 were unlawfully present. *Id.* at 3–4.

43. Passel & Cohn, *supra* note 2, at 13.

44. *Up to 1.4 Million Unauthorized Immigrants Could Benefit from New Deportation Policy*, PEW HISPANIC CENTER (June 15, 2012), <http://www.pewhispanic.org/2012/06/15/up-to-1-4-million-unauthorized-immigrants-could-benefit-from-new-deportation-policy/>.

45. See Perez, *supra* note 3, at xii.

46. See LEGOMSKY & RODRÍGUEZ, *supra* note 15, at 1210.

47. See *id.*

48. See Jeffrey S. Passel, URBAN INST., *Further Demographic Information Relating to the DREAM Act*, CENTER HUM. RTS. & CONST. L., 2 (Oct. 21, 2003), <http://www.nationalimmigrationreform.org/proposed/DREAM/UrbanInstituteDREAM.pdf> (estimating that in 2003, college enrollment amounted to about 7,000–13,000 undocumented immigrants who have lived in the U.S. for five years or longer and have graduated from U.S. high schools).

49. See Perez, *supra* note 3, at xii.

50. 347 U.S. 483 (1954).

51. See *id.* at 493.

holding recognized the supreme importance of education in preparing children to survive and succeed in modern society.<sup>52</sup> The Court also found significant that segregated children would develop “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>53</sup>

The Court has nonetheless never taken steps toward opening access to a postsecondary education for undocumented students. Beginning in 1973 with *San Antonio Independent School District v. Rodriguez*,<sup>54</sup> the Supreme Court held that there is no fundamental right to education. While recognizing the “grave significance of education both to the individual and to our society,”<sup>55</sup> the Court held that education is not a fundamental right explicitly or implicitly afforded protection under the Constitution.<sup>56</sup>

Interestingly, while *San Antonio* continued to remain good law, the Court held six years later in *Plyler v. Doe*<sup>57</sup> that states could not deprive undocumented children of a K–12 education. At the time, Texas education laws withheld from local school districts state funds for the education of the children of unlawfully admitted immigrants, and they also allowed districts to deny these children enrollment in their public schools.<sup>58</sup> Analyzing the Texas statute under the Equal Protection Clause, the Court first emphasized that undocumented immigrants are persons within the state’s jurisdiction and are thus entitled to the equal protection of its laws.<sup>59</sup> Though declining to classify undocumented aliens as a suspect class,<sup>60</sup> Justice Brennan expressed his concern that the inability to bar unlawful entry into the country and employment of the unlawfully admitted had resulted in a “shadow population” or underclass of undocumented aliens.<sup>61</sup> Accordingly, the Court used a form of intermediate scrutiny<sup>62</sup> and held that

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52. *See id.* (“Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

53. *Id.* at 494.

54. 411 U.S. 1 (1973).

55. *Id.* at 30 (internal quotation marks and citation omitted).

56. *See id.* at 35.

57. 457 U.S. 202 (1982).

58. *See id.* at 205.

59. *See id.* at 210; *see also* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

60. *Plyler*, 457 U.S. at 219 n.19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class.’ . . . Unlike most of the classifications that we have recognized as suspect, entry into this class . . . is the product of voluntary action. Indeed, entry into the class is itself a crime.”).

61. *Id.* at 218–19 (“This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”).

62. *See* Olivas, *supra* note 6, at 1041–43 (discussing Justice Brennan’s choice of intermediate scrutiny over strict scrutiny because undocumented aliens were not a suspect class and education was not a fundamental right, as well as his rejection of minimal scrutiny).

depriving undocumented children of a public education, which would prepare them to be productive members of society, would penalize them.<sup>63</sup> The Court held that the Texas statute did not advance any substantial state interest,<sup>64</sup> thus reemphasizing the Court's recognition of the importance of education in providing children with an opportunity for success in life.<sup>65</sup> Moreover, the Court refused to limit the availability of a basic education for children who were brought unlawfully to the United States by no choice of their own, and for whom the opportunity to obtain legal status remained unclear.<sup>66</sup>

While the Supreme Court's decisions in *Brown*, *Rodriguez*, and *Plyler* do not directly reach the issue of undocumented students' access to a postsecondary education, it has become difficult to ignore the issue of whether hundreds of thousands of undocumented students who have received their primary and secondary education in the United States as a result of *Plyler* would nonetheless be barred from pursuing higher education.<sup>67</sup>

### C. *The DREAM Act: A Proposed Repeal of 8 U.S.C. § 1623*

The necessity of a higher education for success in society<sup>68</sup> has been well-recognized by those in Congress who have been working to pass the DREAM Act.<sup>69</sup> Senator Orrin Hatch first introduced this bill in 2001 to effectively repeal 8 U.S.C. § 1623, the portion of federal law prohibiting states from granting undocumented students in-state rates for tuition and fees based on in-state residency.<sup>70</sup>

The purpose of the DREAM Act, as introduced in 2001, was to ensure that long-term resident undocumented immigrant youths, who were brought

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63. *Plyler*, 457 U.S. at 220–21 (“[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”); *see also id.* at 222 (“The inestimable toll of th[e] deprivation [of the ability to read and write] on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.”).

64. *Id.* at 230.

65. *See id.* at 223 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

66. *See id.* at 230 (“[T]he record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”).

67. *See Perez*, *supra* note 3, at xii–xiii.

68. *See id.* at xxvi (citing Bureau of Labor Statistics data showing higher earnings to be tied to the credentials and skills associated with a postsecondary education).

69. DREAM Act, S. 1291, 107th Cong. (2001).

70. *See id.*; *see also supra* note 35.

to the United States through no choice of their own, would not be “left behind” from the opportunity to attain a higher education and better their lives.<sup>71</sup> Senator Hatch presented the DREAM Act legislation as a way of ensuring that, from among the 50,000 to 70,000 undocumented youths graduating from high schools in the United States each year, those most deserving have an opportunity to achieve the American dream.<sup>72</sup> Senator Hatch continued to emphasize that the DREAM Act’s function was not to be a form of blanket amnesty for undocumented young adult immigrants.<sup>73</sup> Rather, the legislation resolved a policy and fairness issue regarding the innocent and hard-working undocumented immigrants who have grown up as a part of American society and have potential to contribute value to the nation.<sup>74</sup> By repealing 8 U.S.C. § 1623<sup>75</sup> and leaving “[e]ach state . . . free to determine whom it deems a resident for the purpose of determining in-state tuition,” the DREAM Act would give states permission to provide undocumented students with access to a postsecondary education.<sup>76</sup>

While the DREAM Act in its various forms over the years has enjoyed some bipartisan support,<sup>77</sup> it has failed to become law due to the complexity and politics of immigration reform.<sup>78</sup> In the most recent vote on the DREAM Act in December 2010, the Act passed in the House 216–198, but failed by five votes in the Senate to reach the sixty it needed to overcome a filibuster and become law.<sup>79</sup> Thus, the states are still left with unclear

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71. 147 CONG. REC. 15361 (2001) (statement of Sen. Orrin Hatch) (“This legislation, known as the ‘DREAM Act,’ would allow children who have been brought to the United States through no volition of their own the opportunity to fulfill their dreams, to secure a college degree and legal status. The purpose of the DREAM Act is to ensure that we leave no child behind, regardless of his or her legal status in the United States or their parents’ illegal status.”).

72. *Id.*

73. See ORRIN HATCH, AMENDING THE ILLEGAL IMMIGRATION REFORM ACT OF 1996, S. REP. NO. 108-224, at 2 (2004).

74. See *id.* (“A great many grow up to become honest and hardworking young adults who are loyal to our country and who strive for academic and professional excellence. It is a mistake to lump these children together with adults who knowingly crossed our borders illegally. Instead, the better policy is to view them as the valuable resource that they are for our nation’s future.”).

75. See *infra* notes 84–85.

76. S. REP. NO. 108-224, at 4.

77. See Olivas, *supra* note 10, at 1793.

78. See *id.* at 1793–1802 (describing the failure to enact the DREAM Act of 2007, S. 2205, 110th Cong. (2007)—in large part due to the missing votes of four key senators on record as supporting the legislation and the reluctance of other senators willing to vote for the legislation only if it would be sure to pass—and the difficulty of passing DREAM Act legislation where Congress and the Obama administration currently appear to be taking an omnibus approach to immigration reform).

79. DREAM Act of 2010, H.R. 5281, 111th Cong. (2010). Without fail, the DREAM Act was reintroduced in the Senate in May 2011 by Senator Richard Durbin. See DREAM Act of 2011, S. 952, 112th Cong. (2011). This most recent version of the bill proposed granting conditional permanent resident status for long-term residents who entered the United States at the age of 15 or younger and have been continuously present, all the while demonstrating good moral character, earning a high school diploma and admission to a postsecondary institution in the United States. *Id.* at § 3. Upon acquiring a degree from a postsecondary institution or completing at least two years in good standing for a bachelor’s

authority as to whether and how they can regulate access to postsecondary education benefits for undocumented students.

*D. The Failure of the DREAM Act and State Regulation of Postsecondary Educational Opportunities for Undocumented Immigrants*

Though education has typically been considered an area of regulation left to the states,<sup>80</sup> the states' regulatory powers over education matters concerning undocumented immigrants were limited by Congress's immigration reforms in 1996.<sup>81</sup> Not only did PRWORA specifically deny public benefits to noncitizens,<sup>82</sup> it also defined public benefits to include postsecondary education benefits.<sup>83</sup> IIRIRA section 505, codified at 8 U.S.C. § 1623, specifically proscribed the availability of postsecondary education benefits, such as in-state tuition rates, based on residence to unauthorized immigrants.<sup>84</sup> Congress intended that § 1623 would make it so that "State or local governments may not treat an ineligible alien as a resident, if such action would treat the alien more favorably than a non-resident U.S. citizen."<sup>85</sup>

Confusion exists, however, as to the extent of the limitation on state powers to enact legislation granting undocumented students in-state tuition rate benefits, as PRWORA gives the states some authority to exercise discretion over undocumented immigrant eligibility for state and local public benefits in 8 U.S.C. § 1621. While § 1621(a) states that undocumented immigrants are ineligible for "any State or local public benefit,"<sup>86</sup> under § 1621(d)

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degree or higher, or upon having served in the armed services for at least two years, the resident would be eligible to have the conditional status lifted and made permanent. *Id.* at § 5.

80. See Brooke Wilkins, *Should Public Education Be A Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 272.

81. See *supra* notes 30–35 and accompanying text.

82. See 8 U.S.C. § 1621(a) (2006).

83. See *id.* § 1621(c). The statute provides:

"State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means—

(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.

*Id.*

84. See *supra* note 35 and accompanying text.

85. S. REP. NO. 104-249, at 22 (1996).

86. 8 U.S.C. § 1621(a). That statute provides:

Notwithstanding any other provision of law . . . , an alien who is not—  
(1) a qualified alien (as defined in section 1641 of this title),

[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.<sup>87</sup>

Within this context of the failed passage of the DREAM Act and the conflicting messages of § 1621 and § 1623, many states have taken it upon themselves to affirmatively provide postsecondary education benefits to undocumented students in the form of in-state tuition rates at their public colleges and universities. As of the writing of this Note, the states providing undocumented students with in-state tuition rates are: California,<sup>88</sup> Connecticut,<sup>89</sup> Illinois,<sup>90</sup> Kansas,<sup>91</sup> Maryland,<sup>92</sup> Nebraska,<sup>93</sup> New Mexico,<sup>94</sup> New York,<sup>95</sup> Rhode Island,<sup>96</sup> Texas,<sup>97</sup> Utah,<sup>98</sup> and Washington.<sup>99</sup>

As an example, Kansas's statute affirmatively offers undocumented students in-state tuition rates by stating that undocumented students who attended and graduated from Kansas high schools are essentially reclassified as residents for the purposes of tuition and fees.<sup>100</sup> On the other

(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

*Id.* (alterations in original).

87. *Id.* § 1621(d).

88. See CAL. EDUC. CODE § 68130.5 (West 2012).

89. See CONN. GEN. STAT. § 10a-29 (2012).

90. See 110 ILL. COMP. STAT. 305/7e-5 (2012).

91. See KAN. STAT. ANN. § 76-731a (2011).

92. See MD. CODE ANN., EDUC. § 15-106.8 (LexisNexis 2011) (contingent on referendum).

93. See NEB. REV. STAT. § 85-502 (2011).

94. See N.M. STAT. ANN. § 21-1-4.6 (LexisNexis 2012).

95. See N.Y. EDUC. LAW § 355(2)(h)(8) (McKinney 2012).

96. See *Residency Policy*, R.I. BD. OF GOVERNORS FOR HIGHER EDUC. (Sept. 26, 2011), <http://www.ribghe.org/residency1for2012.pdf>. Rhode Island's Board of Governors for Higher Education implemented an in-state tuition policy for undocumented students effective Fall 2012 without going through the state legislature. A bill is currently being held in the state legislature for further study. See H. 7340, 2012 Leg., Reg. Sess. (R.I. 2012).

97. See TEX. EDUC. CODE ANN. §§ 54.052–.053 (West 2012).

98. See UTAH CODE ANN. § 53B-8-106 (LexisNexis 2012).

99. See WASH. REV. CODE § 28B.15.012 (2012).

100. KAN. STAT. ANN. § 76-731a (2011). The Kansas statute provides:

Certain persons without lawful immigration status deemed residents for purpose of tuition and fees.

(a) Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance at such postsecondary educational institution.

(b) As used in this section:

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hand, California's statute does not explicitly declare undocumented students to be residents for the purposes of tuition and fees, but grants undocumented students in-state tuition rates by basing eligibility on other criteria, such as three years minimum attendance at, and graduation from, a California high school.<sup>101</sup> California also signed its own DREAM Act into state law in July 2011, allowing undocumented students to receive financial aid to attend state colleges and universities.<sup>102</sup> The challenges to California and Kansas state statutes that allow postsecondary education benefits to reach undocumented students form the basis of the preemption analysis of this Note.<sup>103</sup>

Conversely, there are also states that explicitly deny in-state tuition benefits to undocumented students. These states currently include Arizona,<sup>104</sup> Georgia,<sup>105</sup> and Indiana,<sup>106</sup> which prohibit undocumented

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(2) "individual" means a person who (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas, regardless of whether the person is or is not a citizen of the United States of America; and (C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or the person's parents have filed an application to legalize such person's immigration status, or such person will file such an application as soon as such person is eligible to do so or, in the case of a person with a legal, nonpermanent immigration status, has filed with the postsecondary educational institution an affidavit stating that such person has filed an application to begin the process for citizenship of the United States or will file such application as soon as such person is eligible to do so.

(c) The provisions of this section shall not apply to any individual who:

(1) Has a valid student visa; or

(2) at the time of enrollment, is eligible to enroll in a public postsecondary educational institution located in another state upon payment of fees and tuition required of residents of such state.

*Id.*

101. CAL. EDUC. CODE § 68130.5 (West 2012). The California statute provides in part:

(a) A student . . . who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California . . . .

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

*Id.*

102. A.B. 130, 2011–2012 Leg., Reg. Sess. (Cal. 2011).

103. See *infra* Part II.B (discussing *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007)); Part II.C (discussing *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011)).

104. See ARIZ. REV. STAT. ANN. §§ 15-1802, 1803, 1825 (2012).

105. See GA. CODE ANN. § 20-3-66 (2012).

106. See IND. CODE. § 21-14-11-1 (2012).

students from being classified as in-state students. Colorado takes a different approach and does not include undocumented students in its regulatory scheme classifying the in-state students eligible for in-state tuition rates.<sup>107</sup> South Carolina<sup>108</sup> and Alabama<sup>109</sup> go beyond denying in-state tuition rates to undocumented students and explicitly bar them from enrolling in the state's public postsecondary institutions.

This clear divide between states' attitudes on providing undocumented students with opportunities for a postsecondary education highlights the debate over whether states are preempted from providing such benefits by federal law.

*E. Standing As an Obstacle to Challenging State Laws Providing Undocumented Students with In-State Tuition Rates*

In light of the highly politicized nature of immigration law reform and the unclear authority of states to grant postsecondary education benefits in the form of in-state tuition to undocumented residents, several courts have seen challenges based on § 1623 to such benefits. These challenges have been brought on federal law preemption grounds and claims of violations of the Fourteenth Amendment.<sup>110</sup> Federal courts, however, have dismissed such cases on standing grounds before even reaching the question of preemption.<sup>111</sup> Thus, plaintiffs seeking to enforce § 1623 against in-state tuition rates face an enormous standing hurdle to having the courts fully address issues of preemption and the enforceability of § 1623.

1. Standing Generally

Federal standing doctrine arises out of the division of powers in Article III of the Constitution, which limits the federal courts' jurisdiction to "Cases" and "Controversies."<sup>112</sup> The doctrine of standing serves to identify those justiciable disputes that can be properly resolved in the courts.<sup>113</sup>

Standing in federal court requires three elements. First, the plaintiff must have suffered a concrete injury-in-fact to a legally protected interest; second, there must be a causal link between the injury and the challenged

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107. See COLO. REV. STAT. §§ 23-7-101 to -111 (2011).

108. See S.C. CODE ANN. § 59-101-430 (2011).

109. See ALA. CODE § 31-13-8 (LexisNexis 2012).

110. See *Day v. Bond*, 500 F.3d 1127, 1130 (10th Cir. 2007); Immigration Reform Coal. of Tex. v. Texas, 706 F. Supp. 2d 760, 762 (S.D. Tex. 2010); *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 860 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011).

111. See, e.g., *Day*, 500 F.3d at 1139-40; *Immigration Reform Coal. of Tex.*, 706 F. Supp. 2d at 765; *Mannschreck v. Bd. of Regents*, No. Ci10-8 (D. Neb. filed Jan. 25, 2010), *dismissed sub nom. Mannschreck v. Clare*, No. Ci10-8 (D. Neb. Dec. 17, 2010).

112. U.S. CONST. art. III, § 2.

113. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

conduct; and third, it must be likely that a favorable decision of the court can redress the injury.<sup>114</sup>

## 2. Standing to Challenge State Legislation Granting In-State Tuition Benefits to Undocumented Students: Federal vs. State Court

The standing hurdle for plaintiffs challenging state legislation granting in-state tuition benefits to undocumented students is exemplified in *Day*, which challenged Kansas's statute granting in-state tuition to undocumented students.<sup>115</sup> On July 1, 2004, Kansas enacted Kansas Statutes Annotated section 76-731a (K.S.A. 76-731a), which classified eligible undocumented students as residents for the purposes of tuition and fees.<sup>116</sup> U.S. citizen students at Kansas public postsecondary institutions who were nonresidents of Kansas and parents of those students brought suit against the Governor of Kansas, the members of the Board of Regents, and officials of the state's universities, seeking an injunction against the enforcement of K.S.A. 76-731a and a declaration that it is preempted by federal law and unconstitutional.<sup>117</sup>

Arguing for standing in district court, the plaintiffs asserted that K.S.A. 76-731a caused a number of potential "injuries in fact": injury to their property rights as a result of paying out-of-state tuition while undocumented students were allowed to pay in-state tuition; the resulting scarcity of college education and increased competition for that resource; and the increased likelihood that they would bear the burden of higher tuitions in order to help Kansas state universities subsidize undocumented students' tuitions.<sup>118</sup> The court, however, held that these arguments were unfounded and unsupported by any evidence.<sup>119</sup> Moreover, the plaintiffs' unsupported allegations of injury were not "concrete and imminent" enough to constitute the injury-in-fact required for standing.<sup>120</sup> K.S.A. 76-731a simply did not apply to the plaintiffs, as they would be paying out-of-state tuition regardless of whether K.S.A. 76-731a had been passed or not.<sup>121</sup> The plaintiffs thus stood "in the same shoes as any citizen," unable to assert any particularized injury.<sup>122</sup> In addition, the court found that striking down

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114. *See id.* at 560–61. *See generally* ERWIN CHERMERISNKY, FEDERAL JURISDICTION § 2.3 (5th ed. 2007); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3531–3531.6 (3d ed. 2008).

115. *See id.* at 1130.

116. *See* H.B. 2145, 2003–2004 Leg., Reg. Sess. (Kan. 2004); *see also* KAN. STAT. ANN. § 76-731a (2011).

117. *See* *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1025–26 (D. Kan. 2005).

118. *See id.* at 1033.

119. *See id.*

120. *Id.* ("Hypothetical or conjectural harm is not sufficient.").

121. *See id.*

122. *Id.* at 1033–34 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) (reaffirming that "a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy"))).

K.S.A. 76-731a as preempted by federal law or in violation of federal law would not redress any alleged injury in a manner that would provide the plaintiffs with any personal benefit.<sup>123</sup>

The court also addressed the plaintiffs' alleged equal protection injury, based on the argument that K.S.A. 76-731a's structure discriminatorily allowed undocumented aliens to receive in-state tuition benefits, while denying those benefits to out-of-state U.S. citizens.<sup>124</sup> The court dismissed this claim because K.S.A. 76-731a did not deny the plaintiffs in-state tuition, as it was another unchallenged statute that required out-of-state citizens to pay out-of-state tuition.<sup>125</sup> Because K.S.A. 76-731a did not apply to the plaintiffs, they could not demonstrate sufficient injury to establish standing on an equal protection claim.<sup>126</sup> The Tenth Circuit affirmed the district court's holdings on appeal and, by dismissing on standing grounds, the circuit court never reached the issue of whether *Day* demonstrates that federal courts are unwilling to find that private individuals have standing to challenge state legislation granting in-state tuition benefits to undocumented students.<sup>127</sup> As a result, plaintiffs challenging state laws offering in-state tuition rates to undocumented students appear to prefer to keep their challenges in state courts. In *Immigration Reform Coalition of Texas v. Texas*, which challenged a Texas law granting undocumented students in-state tuition benefits, the defendants had removed the case to federal court.<sup>128</sup> The plaintiff, Immigration Reform Coalition of Texas (IRCOT), a nonprofit organization comprised of Texas taxpayers, sought to remand the case to state court based on its lack of standing in federal court, as federal law does not give plaintiffs standing to bring cases based solely on their status as taxpayers.<sup>129</sup> IRCOT alleged that it had proper standing in state court, where standing is more permissive.<sup>130</sup> The district court agreed that it had no power to grant injunctive relief prohibiting state use of tax money to make educational grants to undocumented students pursuant to state statutes.<sup>131</sup> The court also held that IRCOT lacked constitutional standing to bring preemption claims against Texas laws defining residency for the purposes of in-state tuition rates.<sup>132</sup> Similar to the Tenth Circuit's holding in *Day*, the Southern

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123. *See id.* at 1034.

124. *See id.* at 1037–38, 1038 n.8.

125. *See id.* at 1039.

126. *See id.*

127. *See id.*; *see also* Denise Oas, *Immigration and Higher Education: The Debate Over In-State Tuition*, 79 UMKC L. REV. 877, 890–92 (2011) (discussing *Mannschreck v. Bd. of Regents*, No. C110-8 (D. Neb. filed Jan. 25, 2010), *dismissed sub nom.* *Mannschreck v. Clare*, No. C110-8 (D. Neb. Dec. 17, 2010), where the district court held that resident property owners lacked standing to bring preemption claims against the state statute granting in-state tuition rates to undocumented students).

128. 706 F. Supp. 2d 760, 762 (S.D. Tex. 2010).

129. *See id.* at 762–63.

130. *See id.* at 763.

131. *See id.* at 764–65.

132. *See id.* at 765.

District of Texas held that IRCOT alleged no concrete injury-in-fact resulting from the Texas residency statutes granting undocumented students in-state tuition rates.<sup>133</sup> Thus, because the court found that IRCOT lacked standing in federal court, the case was remanded to the state court where it originated.<sup>134</sup>

Indeed, standing is more permissive in state court, as demonstrated in *Martinez*.<sup>135</sup> The *Martinez* plaintiffs brought a preemption claim in state court against section 68130.5 of the California Education Code,<sup>136</sup> which was enacted in 2001.<sup>137</sup> The plaintiffs, who were U.S. citizens paying nonresident tuition rates at California public colleges and universities, filed a class action lawsuit against the various governing bodies and officials of California's public postsecondary institutions.<sup>138</sup> From the start of the litigation, the California Superior Court held that the plaintiffs' allegation that section 68130.5 infringed on their constitutional and statutory rights was sufficient to establish standing to bring a challenge in state court.<sup>139</sup> Moreover, the court held that a private right of action did not need to exist in § 1621 and § 1623 for the plaintiffs to have standing to bring a preemption challenge.<sup>140</sup> Thus, as § 1621 and § 1623 were intended to cover the treatment of undocumented immigrants, U.S. citizen plaintiffs had standing in state court to bring a preemption challenge because section 68130.5 gave undocumented immigrants the right to postsecondary education benefits.<sup>141</sup> The defendants did not challenge the Superior Court's holding on the plaintiffs' standing on appeal.<sup>142</sup>

Thus, from the limited case law that exists, it appears that plaintiffs challenging state laws granting in-state tuition rates to undocumented students must bring their cases in state court, as they will not have standing to bring their challenges in federal court.

#### *F. Federal Preemption of Laws Relating to Undocumented Immigrants*

With standing issues allowing the federal courts to avoid deciding issues of preemption concerning § 1623, the conflict over whether state laws granting in-state tuition benefits to undocumented students are preempted by federal law remains an undecided issue. In order to lay a basis for understanding how preemption doctrine should apply to state laws granting in-state tuition benefits to undocumented students, this section discusses

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133. *See id.*

134. *See id.*

135. 241 P.3d 855 (Cal. 2010).

136. *See id.* at 859–60.

137. A.B. 540, 2001–2002 Leg., Reg. Sess. (Cal. 2001).

138. *See* 241 P.3d at 860.

139. *See* *Martinez v. Regents of the Univ. of Cal.*, No. CV 05-2064, 2006 WL 2974303, at \*5 (Cal. Super. Ct. Oct. 4, 2006).

140. *See id.*

141. *See id.*

142. *See* *Martinez v. Regents of the Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 527 (Cal. Ct. App. 2008).

preemption doctrine generally, and explores two cases of the Supreme Court's application of preemption to state laws affecting aliens in the United States.

### 1. Preemption Doctrine Generally

The doctrine of preemption is based in Article VI of the Constitution, which states that the laws and treaties of the United States “shall be the supreme law of the land . . . anything in the Constitution or Laws of any State to the contrary notwithstanding.”<sup>143</sup> Pure immigration law, defined as that which relates to “the entry and expulsion of noncitizens and the conditions under which they may remain,”<sup>144</sup> is the exclusive domain of the federal government.<sup>145</sup> Thus, state laws that relate to noncitizens may face preemption challenges, since “[d]omesticating immigration law . . . alienates . . . the notion that the Constitution imbues only Congress with power to conduct foreign affairs.”<sup>146</sup> The preemption of state laws turns on the question of congressional intent, for while “Congress clearly can preempt state law, federal law can also be ‘supreme’ without state law being contrary to it, *if* the federal authority decides that it wants to permit state laws to continue to operate notwithstanding the federal law.”<sup>147</sup> Where there are state laws concerning noncitizens and the regulation of domestic issues, the three possible bases for preemption are: express preemption, implied preemption in the form of field preemption, or conflict preemption.<sup>148</sup>

Express preemption applies where a statute clearly indicates what state laws it intends to preempt in an express preemption provision.<sup>149</sup> Congress can also clarify the issue of whether there is express preemption by including a savings clause that indicates what state laws it does not intend to preempt.<sup>150</sup> It is challenging, however, for Congress to craft a savings clause that anticipates the full impact a statute will have on state laws, thus making it difficult to ascertain Congress's full intent with certain statutes.<sup>151</sup> In such cases, the Supreme Court applies a canon of statutory interpretation that recognizes a presumption against preemption to preserve the values of federalism and respect for state laws.<sup>152</sup> This presumption

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143. U.S. CONST. art. VI; Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 119, 119 (William W. Buzbee ed., 2009).

144. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1600–01 (2008).

145. *See supra* Part I.A.

146. Stumpf, *supra* note 144, at 1601.

147. Schroeder, *supra* note 143, at 120.

148. *See* Stumpf, *supra* note 144, at 1601–02.

149. *See* Schroeder, *supra* note 143, at 121.

150. *Id.*

151. *See id.* at 122.

152. *See id.* at 122–23 (citing *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)).

remains particularly strong when the state law in question is one that is in the realm of the states' traditional powers to protect public health, safety, and morals.<sup>153</sup> Courts therefore tend to read federal statutes narrowly and look for a clear statement that Congress intended to override state law.<sup>154</sup>

In cases in which the statute contains no express preemption or savings clause, the question becomes whether Congress has preempted state law by implication.<sup>155</sup> In an analysis for implied preemption, the touchstone question is one of congressional intent.<sup>156</sup> While it may be difficult to keep the two categories of implied preemption distinct, implied preemption can take the form of field preemption or conflict preemption.<sup>157</sup>

Field preemption applies where the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."<sup>158</sup> Within these exclusively federal fields of regulation, state laws would be preempted even if they are not in conflict with federal laws.<sup>159</sup> Defining the "field" that is to be preempted can depend on the pervasiveness of a federal statute in its regulation of an area, as a more comprehensive regulatory scheme indicates that Congress likely did not intend "to leave holes in its regulations to be filled in by the states."<sup>160</sup> Courts have also found field preemption where there are federal statutes regulating an area with such a dominating federal interest that the preclusion of state laws is assumed.<sup>161</sup>

Conflict preemption applies "when 'compliance with both federal and state regulation is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"<sup>162</sup> Physical impossibility cases demonstrate clear implied preemption of state laws, as Congress would not enact a law with the intent that states could prohibit what federal law requires.<sup>163</sup> The analysis for conflict preemption becomes more challenging, however, when determining whether a state law "stands as an obstacle" to the objectives of

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153. See Schroeder, *supra* note 143, at 123 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

154. See *id.*

155. See *id.* at 124.

156. See *id.*

157. See *id.* at 125.

158. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citations omitted).

159. See Schroeder, *supra* note 143, at 125–26.

160. *Id.* at 127.

161. See *id.* at 128 (citing *Pennsylvania v. Nelson*, 350 U.S. 497, 503 (1956)). As an example, the Supreme Court struck down a state statute imposing sanctions that supplemented those implemented by the federal government against a foreign nation, as the federal government occupies the field of foreign affairs. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

162. *Pac. Gas*, 461 U.S. at 204 (citations omitted) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

163. See Schroeder, *supra* note 143, at 131.

a federal law.<sup>164</sup> This obstacle test for preemption appears to rest on whether the state law would impede the *full* achievement of Congress's purposes and objectives in enacting its statute.<sup>165</sup>

## 2. Preemption As Applied in the Immigration Context: *De Canas v. Bica*

As immigration regulation is understood to be a federal power, the Supreme Court has faced challenges in applying preemption doctrine to various state laws affecting aliens.<sup>166</sup> In 1976, the Court clarified the extent to which states have the right to regulate matters concerning unauthorized immigrants in *De Canas v. Bica*.<sup>167</sup> Lawfully admitted migrant farmworkers challenged a provision of the California Labor Code that prohibited an employer from knowingly employing an alien without lawful residence status if such employment would have an adverse effect on lawful resident workers.<sup>168</sup> The Court held that this provision was not unconstitutional as a regulation of immigration or preempted by federal immigration law, and the sole fact that aliens were the subject of the state statute did not render it a regulation of immigration.<sup>169</sup>

The challenged provision did not touch issues involving determinations of who should or should not be admitted into the country, nor did it address the conditions under which an immigrant may remain.<sup>170</sup> Rather, it reflected California's use of its state powers to protect workers within the state.<sup>171</sup> The Court held that federal regulation should not be considered preemptive of state regulatory power unless the nature of the regulated subject matter so clearly indicates that its regulatory authority rests within the federal government, or that Congress has unmistakably legislated the power to the federal government.<sup>172</sup>

## 3. Preemption Regarding Higher Education for Nonimmigrant Aliens

Six years later, in *Toll v. Moreno*,<sup>173</sup> the Supreme Court considered the constitutionality of a state's denial of in-state tuition to nonimmigrants,

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164. *Id.* at 132–33 (quoting *Hines*, 312 U.S. at 67).

165. *See id.* at 133.

166. *See* Schroeder, *supra* note 143, at 129–30 (describing the Supreme Court's holdings that federal law preempted a state law interfering with federal alien registration requirements, *Hines*, 312 U.S. 52, as well as a state law denying commercial fishing licenses to aliens ineligible for citizenship, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), but did not preempt a state law prohibiting undocumented aliens from employment that would affect resident workers, *De Canas v. Bica*, 424 U.S. 351 (1976)).

167. 424 U.S. 351 (1976)

168. *See id.* at 353; *see also* CAL. LAB. CODE § 2805, *repealed by* 1988 Cal. Stat. ch. 946, § 1.

169. *See De Canas*, 424 U.S. at 355. Legislation with a “purely speculative and indirect impact on immigration” does not render it an unconstitutional regulation of immigration. *Id.* at 355–56.

170. *See id.* at 355.

171. *See id.* at 356–57.

172. *See id.* at 356.

173. 458 U.S. 1 (1982).

though not in the context of undocumented immigrants. The plaintiffs in *Toll* challenged a University of Maryland policy that denied treaty organization (G-4) aliens in-state tuition pursuant to the University's policy of excluding all nonimmigrant aliens from obtaining in-state status even upon a showing of domicile within the state.<sup>174</sup> The plaintiffs contended that the University's policy violated various federal laws, as well as constitutional provisions, including the Supremacy Clause.<sup>175</sup> Under a Supremacy Clause analysis, the Court reiterated that states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."<sup>176</sup> This echoed the Court's reasoning in *De Canas*,<sup>177</sup> and the Court held that because Congress made the explicit decision to not bar G-4 aliens from acquiring domicile, the University's policy of denying in-state status to G-4 aliens solely on the basis of their nonimmigrant status violated the Supremacy Clause by imposing an "ancillary burden not contemplated by Congress in admitting these aliens" to reside in the United States.<sup>178</sup>

## II. ARE STATE LAWS PROVIDING POSTSECONDARY EDUCATION BENEFITS TO UNDOCUMENTED STUDENTS IN THE FORM OF IN-STATE TUITION RATES PREEMPTED BY FEDERAL LAW?

As the issue of whether federal law preempts state legislation granting in-state tuition benefits to undocumented students has not yet been decided by a federal court, the arguments for and against preemption have been voiced strongly throughout the several cases challenging such state legislation and in the ongoing debates over immigration reform. Part II.A explores the arguments for and against preemption presented in legal scholarship over state laws providing in-state tuition benefits to undocumented students. Part II.B examines those arguments made specifically in *Day*, and Part II.C looks at those presented in *Martinez*.

### A. Preemption Arguments Made In Legal Scholarship

The arguments made by the leading legal scholars on postsecondary education benefits for undocumented students are discussed below. This section first presents the arguments against the preemption of state laws providing in-state tuition benefits for undocumented students. It then presents the arguments in favor of preemption.

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174. *See id.* at 3–4.

175. *See id.* at 4.

176. *Id.* at 11 (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)).

177. *See id.* at 12–13 (“[S]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.” (quoting *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976))).

178. *Id.* at 14 (internal quotation marks omitted).

### 1. Arguments Against Preemption

Supporters of state statutes providing in-state tuition rate benefits to undocumented students interpret § 1621 and § 1623 to allow states to provide undocumented residents with a residency benefit in their public postsecondary institutions.<sup>179</sup> Regarding § 1623, Professor Michael Olivas argues that state residency is a status to be determined by the states, and that Congress has no authority to regulate the benefits that states give to their residents.<sup>180</sup>

Olivas also argues that states have the right to provide such immigrants with education benefits because Congress used the word “unless” in § 1623.<sup>181</sup> The “unless” establishes a condition precedent that a state cannot give any more consideration to an undocumented student than it can to a nonresident student from another state.<sup>182</sup> A state is therefore allowed to provide postsecondary education benefits as long as it treats in-state undocumented immigrants in the same way it treats out-of-state U.S. citizens. The presence of this condition precedent serves to establish that states are allowed to enact measures that provide undocumented students with postsecondary education benefits, because “[a] flat bar [against such provisions] would not include such a modifier.”<sup>183</sup>

Lastly, Professor Olivas argues that § 1623 only prohibits providing monetary benefits, as is indicated by the statute’s use of the words “amount, duration, and scope” to describe the benefits prohibited.<sup>184</sup> As the direct benefit conferred by state legislation providing undocumented students with access to in-state tuition rates is not a direct monetary benefit, but the right to be considered for in-state residency status for the purposes of tuition and fees, it does not fall under the scope of § 1623’s prohibited benefits.<sup>185</sup> This interpretation is further supported by the fact that Congress has enacted a separate program to limit the availability of monetary postsecondary education benefits in the form of federal financial aid.<sup>186</sup>

An additional argument offered by in-state tuition proponents is that because most state legislation granting in-state tuition to undocumented

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179. See Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 453–54 (2004).

180. See *id.* at 453.

181. See *id.*; cf. 8 U.S.C. § 1623 (2006) (“[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit *unless* a citizen or national of the United States is eligible for such a benefit . . .” (emphasis added)).

182. See Olivas, *supra* note 179, at 453 (“The only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than it can give to a nonresident student from State B. For example, California could not enact a plan to extend resident status to undocumented students after they had resided in the state for twelve months, and then accord that same status to U.S. citizens or permanent residents from Nevada or Oregon after eighteen months.”).

183. *Id.*

184. *Id.* at 454.

185. See *id.*

186. See *id.*

students does not hinge eligibility upon residence, but upon other criteria—such as graduation from a high school in the state—such legislation is not in violation of § 1623.<sup>187</sup>

## 2. Arguments for Preemption

Those who find state provision of in-state tuition rates to undocumented students to be unconstitutional maintain that the states who do so “flagrantly violate federal immigration laws,”<sup>188</sup> namely § 1623.<sup>189</sup> In addition to making public policy arguments against allowing in-state tuition rates for undocumented students,<sup>190</sup> Professor Kris Kobach argues that such state legislation is expressly and impliedly preempted by federal law.<sup>191</sup> Professor Kobach argues that § 1623 expressly prohibits offering in-state tuition rates to undocumented students unless all U.S. citizens receive such rates, thus reflecting Congress’s intent to prohibit states from offering in-state tuition rates to undocumented students “by making it impossibly expensive to do so.”<sup>192</sup> Supported by the principle that “the purpose of Congress is the ultimate touchstone” of preemption analysis,<sup>193</sup> Professor Kobach referred to the Committee Reports on IIRIRA section 505 to demonstrate Congress’s intent to enact the law to prevent undocumented students from receiving in-state tuition rates.<sup>194</sup> In addition, a holistic view of IIRIRA and Congress’s manifest intent in enacting the law to discourage illegal immigration requires interpreting § 1623 as prohibiting in-state tuition rates for undocumented students in order to be consistent with IIRIRA’s purpose.<sup>195</sup>

Professor Kobach also finds state legislation providing in-state tuition rates to undocumented students impliedly preempted under a *De Canas* analysis.<sup>196</sup> Pursuant to *De Canas*, any state law conflicting with congressional objectives is impliedly preempted by federal law.<sup>197</sup> Following this analysis, Professor Kobach proffers three reasons why federal laws preempt state legislation providing in-state tuition rates to

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187. LEGOMSKY & RODRÍGUEZ, *supra* note 15, at 1211.

188. Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 473, 475 (2007). Professor Kobach served as Plaintiffs’ counsel in both *Day v. Bond*, 511 F.3d 1030 (10th Cir. 2007), and *Martinez v. Regents of the University of California*, 241 P.3d 855 (Cal. 2010).

189. *See* Kobach, *supra* note 188, at 477.

190. *See id.* at 498–503 (arguing that laws granting in-state tuition rates for undocumented students are poor public policy because, inter alia, they give a significant financial benefit to aliens who are in violation of federal law while denying the same benefits to U.S. citizens who are from out of state, and allowing such rates rewards illegal behavior).

191. *See id.* at 475.

192. *Id.* at 507–08.

193. *Id.* at 508 (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

194. *See* Kobach, *supra* note 188, at 508–09.

195. *See id.* at 511.

196. *See id.* at 514.

197. *See supra* notes 167–72 and accompanying text.

undocumented students.<sup>198</sup> First, such legislation conflicts with the government's interest in removing the availability of public benefits as an incentive for illegal immigration.<sup>199</sup> Second, such legislation acts as an obstacle to the enforcement of the Immigration and Nationality Act (INA) by encouraging students to remain in their undocumented status, as many state statutes are constructed so as to take away the benefit of in-state tuition rates if undocumented students were to obtain student visas to be in compliance with the federal law.<sup>200</sup> Lastly, the state statutes unconstitutionally use terms to describe students' immigration statuses that are inconsistent with the terminology of federal immigration law.<sup>201</sup> State officials go beyond their powers in using such terms by unconstitutionally making determinations that are inconsistent with federal law about who is entitled to be considered lawfully present in the United States.<sup>202</sup>

Those opposed to providing undocumented students with in-state tuition benefits therefore find that state legislation doing so is inconsistent with congressional intent to exclude unlawfully present aliens from postsecondary education benefits.<sup>203</sup> In addition, they argue that § 1621 prohibits residency reclassification for the purposes of providing undocumented students with in-state tuition rates.<sup>204</sup> In response, Professor Olivas points out that residency reclassification is not listed within the state or local public benefits enumerated in § 1621(c).<sup>205</sup>

#### B. Kansas: *Day v. Bond*

The arguments of Professors Olivas and Kobach have been made by parties in cases such as *Day*.<sup>206</sup> As discussed above, the case was ultimately decided on standing grounds, and neither the district court nor the Tenth Circuit ever fully addressed the preemption issue.<sup>207</sup> In addition,

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198. *See id.*

199. *See id.* at 515.

200. *See id.* (explaining that California law is constructed so as to “exclude[] any alien holding a nonimmigrant visa. . . . Moreover, [an undocumented student] must continue to remain in the United States and attend university in violation of federal law in order to receive [in-state tuition rates]. If such an alien leaves the United States, as required by federal law, he loses eligibility for the benefit. On the other hand, if he obtains a student visa to attend college in compliance with federal law, he loses eligibility for the benefit.”).

201. *See id.* at 516.

202. *See id.*

203. *See* Memorandum from Alison P. Landry, Assistant Att’y Gen., Va., to INS Designated Sch. Officials & the Exec. Dir. of the State Council for Higher Educ. in Va. 6–7 (Sept. 5, 2002), available at <http://www.schev.edu/AdminFaculty/ImmigrationMemo9-5-02APL.pdf> (providing immigration law compliance update).

204. *See* Olivas, *supra* note 179, at 454.

205. *See id.*

206. 500 F.3d 1127 (10th Cir. 2007).

207. *See* *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1039 (D. Kan. 2005) (dismissing Plaintiffs’ equal protection claims for lack of standing, as Plaintiffs were unable to establish any injury caused by K.S.A. 76-731a since they would have to pay out-of-state tuition regardless of whether K.S.A. 76-731a was in effect); *see also* *Day v. Bond*, 511 F.3d 1030, 1032 (10th Cir. 2007) (affirming the district court’s decision, holding that “[t]he only form

the Supreme Court denied the petition for writ of certiorari in June 2008.<sup>208</sup> However, throughout the course of the litigation, the parties raised the basic preemption arguments concerning § 1623.

1. Arguments That K.S.A. 76-731a Is Preempted by 8 U.S.C. § 1623

The plaintiffs first argued that § 1623 expressly preempts K.S.A. 76-731a, as § 1623's plain language requires in-state tuition rates to be offered to U.S. citizens without regard to their residence if such rates are offered to undocumented students.<sup>209</sup> This argument rested upon an interpretation of § 1623 that requires *all* nonresident U.S. citizens to be entitled to the same benefits as undocumented residents.<sup>210</sup> Such an interpretation would be consistent with Congress's efforts to deter illegal immigration by enacting § 1623,<sup>211</sup> and to prevent the states from undermining the enforcement of federal immigration laws by providing benefits to undocumented immigrants unlawfully present in the United States.<sup>212</sup> The plaintiffs argued that the title itself of K.S.A. 76-731a—"Certain persons without lawful immigration status deemed residents for the purpose of tuition and fees"<sup>213</sup>—facially violates § 1623 because it extends the in-state tuition benefit to only undocumented immigrants and excludes U.S. citizens.<sup>214</sup> In addition, the plaintiffs emphasized that because residency laws of the states operate so that every U.S. citizen is a resident of some state,<sup>215</sup> every out-of-state U.S. citizen is disqualified for the in-state tuition benefit based on K.S.A. 76-731a(c)(2)'s requirement that a person not be eligible for in-state tuition in another state.<sup>216</sup> By interpreting § 1623 as an "equal protection" statute for U.S. citizens seeking favorable tuition rates at public universities located outside their state of residence, the plaintiffs maintained that § 1623 requires U.S. citizens to be placed on "equal footing" with undocumented students.<sup>217</sup> Following such reasoning, K.S.A. 76-731a unlawfully treats undocumented immigrants more favorably than citizens in violation of

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of injury that the Plaintiffs assert in support of their standing to make this preemption claim is the invasion of a putative statutory right conferred on them by . . . § 1623." (quoting *Day*, 500 F.3d at 1136) (internal quotation marks omitted)).

208. See *Day v. Bond*, 554 U.S. 918, 918 (2008).

209. See Petition for Writ of Certiorari at 6–7, *Day*, 554 U.S. 918 (No. 07-1193) [hereinafter *Day Cert. Petition*].

210. See *id.* at 7.

211. Amici Curiae Brief of the Honorable Alan K. Simpson et al. in Support of Petitioners at 7, *Day*, 554 U.S. 918 (No. 07-1193) [hereinafter Judge Simpson Brief].

212. See *Day Cert. Petition*, *supra* note 209, at 7.

213. KAN. STAT. ANN. § 76-731a (2011).

214. See *Day Cert. Petition*, *supra* note 209, at 8.

215. See Reply Brief of Petitioners at 11, *Day*, 554 U.S. 918 (No. 07-1193) [hereinafter *Day Petitioners' Reply Brief*].

216. See KAN. STAT. ANN. § 76-731a(c)(2) ("The provisions of this section shall not apply to any individual who . . . at the time of enrollment, is eligible to enroll in a public postsecondary educational institution located in another state upon payment of fees and tuition required of residents of such state.").

217. Brief of Washington Legal Foundation et al. As Amici Curiae in Support of Petitioners at 21, *Day*, 554 U.S. 918 (No. 07-1193).

§ 1623, as an undocumented immigrant cannot be disqualified by the requirement of ineligibility for resident tuition in another state because he is ineligible to acquire legal residence in *any* state.<sup>218</sup>

The plaintiffs also argued for the implied preemption of K.S.A. 76-731a, as upholding the state statute would render § 1623 “a dead letter” and defeat the intent of Congress.<sup>219</sup> The plaintiffs maintained that Congress’s intent in enacting § 1623 was to allow U.S. citizen students to have the same rights to any educational benefits offered to undocumented students.<sup>220</sup> In support of this proposition was the argument that Congress’s multiple failed attempts to pass the DREAM Act, which would have repealed § 1623 and granted undocumented students with postsecondary education benefits, reflected Congress’s recognition of its intent behind § 1623 to ban state legislation that granted such benefits.<sup>221</sup> However, contrary to this intent, K.S.A. 76-731a unlawfully allows undocumented students to receive reduced in-state tuition at taxpayer-funded state colleges.<sup>222</sup>

## 2. Arguments That K.S.A. 76-731a Is Not Preempted by 8 U.S.C. § 1623

The defendants argued that K.S.A. 76-731a is not preempted, because pursuant to § 1621 and § 1623, the in-state tuition benefits are available to any individual who meets the conditions of K.S.A. 76-731.<sup>223</sup> The district court’s finding that most of those students who have been able to take advantage of K.S.A. 76-731a are not undocumented immigrant students, but U.S. citizens who were not residents of Kansas,<sup>224</sup> supported the defendants’ argument that K.S.A. 76-731a does not violate § 1623 because its in-state tuition benefit is not limited to undocumented immigrants. Moreover, the defendants argued that K.S.A. 76-731a also adheres to § 1621(d) by affirmatively stating Kansas’s intent to make undocumented students among its beneficiaries.<sup>225</sup>

### C. California: Martinez v. Regents of the University of California

While K.S.A. 76-731a explicitly states that undocumented students are eligible for in-state tuition rates as residents of Kansas for the purposes of tuition and fees, section 68130.5 of the California Education Code does not

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218. See Day Petitioners’ Reply Brief, *supra* note 215, at 11.

219. Day Cert. Petition, *supra* note 209, at 34–36.

220. See *id.* at 35.

221. See Judge Simpson Brief, *supra* note 211, at 7.

222. See Day Cert. Petition, *supra* note 209, at 35.

223. See Brief in Opposition 4–5, Day, 554 U.S. 918 (No. 07-1193) [hereinafter Day Respondents’ Brief]. The conditions as set forth in K.S.A. 76-731 are: attending Kansas high school for at least three years; graduating from a Kansas high school or obtaining a Kansas GED; signing an affidavit regarding the legalization of the student’s immigration status; not holding a valid student visa; and ineligibility for resident tuition at any other state’s postsecondary schools. KAN. STAT. ANN. § 76-731a (2011).

224. See Day v. Sebelius, 376 F. Supp. 2d 1022, 1033 (D. Kan. 2005).

225. See Day Respondents’ Brief, *supra* note 223, at 5; see also *supra* note 87 and accompanying text.

make such express statements about being considered a resident for tuition purposes.<sup>226</sup> It simply bases an undocumented student's eligibility on meeting the requirements of attending a California high school for three or more years; graduating from a California high school; enrolling at a California public college or university; and, in the case of a student without lawful immigration status, filing an affidavit with the institution of higher education stating that the student has filed or will file an application to legalize his or her immigration status.<sup>227</sup>

The central issue in the *Martinez* revolved around whether § 1623 should be interpreted as barring state laws that grant in-state tuition *literally* "on the basis of residence," or whether "on the basis of residence" is merely a term used to describe the *kinds* of benefits typically given on the basis of residence, which Congress sought to bar.<sup>228</sup> In the latter case, section 68130.5 would be preempted by federal law from granting in-state tuition benefits to undocumented students, even if eligibility is based on factors not explicitly residence-based, such as an undocumented student's attendance at and graduation from a California high school.

1. Arguments That Section 68130.5 of the California Education Code Is Preempted by 8 U.S.C. § 1623

The *Martinez* plaintiffs argued that section 68130.5 is expressly preempted by § 1623, as Congress intended § 1623 to prevent states from providing in-state tuition rates as a resident benefit to undocumented immigrants.<sup>229</sup> The plaintiffs argued that section 68130.5 violates § 1623 by conferring a benefit on the basis of "de facto residence requirement[s]"<sup>230</sup> without giving the same benefit to every U.S. citizen.<sup>231</sup> The plaintiffs maintained that the graduation requirement is a de facto residence requirement, because "[a] reasonable person would assume that a person attending a California high school for three years also lives in California. Such an assumption would be reasonable, given that a school district is generally linked to residence."<sup>232</sup> In addition, the three-year California high school attendance requirement similarly created a "surrogate criterion for residence."<sup>233</sup>

The plaintiffs relied heavily on the legislative history behind § 1623 to argue for express preemption, as legislative intent can inform statutory

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226. See *supra* note 101 and accompanying text.

227. See *id.*

228. See Petition for Writ of Certiorari at 10, *Martinez v. Regents of the Univ. of Cal.*, 131 S. Ct. 2961 (2011) (No. 10-1029) [hereinafter *Martinez Cert. Petition*].

229. See *id.* at 17.

230. *Martinez v. Regents of the Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 537 (Cal. Ct. App. 2008).

231. See *Martinez Cert. Petition*, *supra* note 228, at 11.

232. *Martinez*, 83 Cal. Rptr. 3d at 535.

233. *Id.* at 537.

interpretation where a statute is unclear.<sup>234</sup> Because § 1623 was enacted as a part of IIRIRA, the plaintiffs emphasized that IIRIRA was enacted to preclude undocumented immigrants from public benefits, including postsecondary education benefits.<sup>235</sup> Moreover, this legislation came six weeks after PRWORA was enacted for the purpose of removing the incentive for illegal immigration provided by the availability of public benefits.<sup>236</sup> Congress's intent behind PRWORA and IIRIRA support the idea that it sought to make it practically impossible for states to grant in-state tuition to undocumented students.<sup>237</sup> In fact, the Congressional Committee Report describes IIRIRA section 505 as "provid[ing] that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education."<sup>238</sup> Statements from members of Congress reflect their support for IIRIRA section 505 as a measure to deny undocumented immigrants in-state tuition.<sup>239</sup>

The preemption of section 68130.5 is further supported by the argument that the California state legislature cannot evade or circumvent § 1623 preemption by making the in-state tuition benefit available to only some and not all U.S. citizens without regard to their state of residence.<sup>240</sup> According to the *Martinez* plaintiffs, section 68130.5 unlawfully excludes the "vast majority" of nonresident U.S. citizens who do not attend or graduate from a California high school, and thus do not qualify for reduced tuition.<sup>241</sup> The plaintiffs also argued that Congress did not intend to create a "loophole" that would allow states to play "semantic games" and avoid granting undocumented students residence-based benefits by using "surrogate criterion," such as graduation from a state high school.<sup>242</sup> The plaintiffs additionally argued that section 68130.5 is preempted by § 1621, which expressly prohibits public benefits for illegal aliens unless a state enacts a statute affirmatively providing eligibility for undocumented immigrants.<sup>243</sup>

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234. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09 (1989) ("Concluding that the text is ambiguous . . . , we then seek guidance from legislative history . . .").

235. See *Martinez* Cert. Petition, *supra* note 228, at 19–20.

236. See *id.* at 18–19; see also 8 U.S.C. § 1601(6) (2006) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.").

237. See *Martinez* Cert. Petition, *supra* note 228, at 20.

238. *Id.*; see also H.R. REP. NO. 104-828, at 240 (1996).

239. See *Martinez* Cert. Petition, *supra* note 228, at 20–22; see also 142 CONG. REC. 26438 (1996) (statement of Sen. Alan Simpson) (recording Simpson, the principal sponsor of the Senate bill, as stating, "Illegal aliens will no longer be eligible for reduced in-State college tuition."); 142 CONG. REC. 25264 (1996) (statement of Rep. Christopher Cox) ("[I]llegal aliens, unless we pass this bill, are going to get in-State tuition.").

240. See *Martinez v. Regents of the Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 540–41 (Cal. Ct. App. 2008).

241. Brief of U.S. Reps. Lamar Smith et al. As Amici Curiae in Support of Petitioners at 16, *Martinez v. Regents of the Univ. of Cal.*, 131 S. Ct. 2961 (2011) (No. 10-1029) [hereinafter Rep. Smith Brief].

242. *Martinez* Cert. Petition, *supra* note 228, at 22–24.

243. See *Martinez*, 83 Cal. Rptr. 3d at 543–44.

As the plaintiffs' express preemption argument was based primarily upon congressional intent, rather than any express provisions of federal law, they also argued that the lack of express preemption does not mean that implied preemption does not exist.<sup>244</sup> In arguing for field preemption, the plaintiffs asserted that Congress manifested its clear purpose to oust state power in the field of regulating postsecondary education benefits available to undocumented students.<sup>245</sup> The plaintiffs' field preemption argument rested upon the idea that by enacting § 1623, "Congress . . . expressly limited the state's power to give in-state tuition to illegal aliens, and in that sense Congress manifested a clear purpose to oust state power with respect to the subject matter which the state statute attempts to regulate."<sup>246</sup> Therefore, while § 1623 does not contain express preemption language, it impliedly bars section 68130.5 because among its objectives is prohibiting undocumented immigrants from receiving postsecondary education benefits.<sup>247</sup>

The plaintiffs also made a conflict preemption argument, stating that section 68130.5 stands as an obstacle to Congress's goal of removing the incentives for illegal immigration.<sup>248</sup> It would be impossible for undocumented immigrants to take advantage of section 68130.5 and be in compliance with federal law, as resident tuition rates for undocumented students would encourage them to remain unlawfully in the United States, thus conflicting with the anti-illegal immigration objective of § 1623.<sup>249</sup> In addition, it would be impossible for the defendant state university officials to comply with both section 68130.5 and § 1623, because section 68130.5 grants the in-state tuition benefit to nonresident U.S. citizens only if they attended a California high school for three years, and thus does not afford the same benefit to all citizens without regard to residence as required by § 1623.<sup>250</sup>

## 2. Arguments That Section 68130.5 of the California Education Code Is Not Preempted by 8 U.S.C. § 1623

While the California Superior Court initially ruled for the defendants on the preemption issue, holding that neither § 1621 nor § 1623 preempted section 68130.5,<sup>251</sup> on appeal in 2008, the California Court of Appeal reversed, holding that § 1621 and § 1623 preempted section 68130.5.<sup>252</sup> However, the Supreme Court of California reversed the Court of Appeal's

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244. See Petitioners' Reply Brief at 10–11, *Martinez*, 131 S. Ct. 2961 (No. 10-1029).

245. See *Martinez*, 83 Cal. Rptr. 3d at 541.

246. *Id.* (citing *De Canas v. Bica*, 424 U.S. 351, 357 (1976)).

247. See Rep. Smith Brief, *supra* note 241, at 22.

248. See *Martinez* Cert. Petition, *supra* note 228, at 32–33; see also *Martinez*, 83 Cal. Rptr. 3d at 542 (citing *De Canas v. Bica*, 424 U.S. 351, 357 (1976)).

249. See *Martinez*, 83 Cal. Rptr. 3d at 541.

250. See *id.*

251. *Martinez v. Regents of the Univ. of Cal.*, No. CV 05-2064, 2006 WL 2974303, at \*3 (Cal. Super. Ct. Oct. 4, 2006).

252. See *Martinez*, 83 Cal. Rptr. 3d at 540–44.

decision in 2010, holding that section 68130.5 is not preempted by § 1621 and § 1623.<sup>253</sup> The arguments that exist against section 68130.5 preemption were strongly voiced in the California Supreme Court's decision.

Addressing the plaintiffs' express preemption arguments, which had emphasized Congress's legislative intent behind § 1623, the court emphasized that the plain statutory language of § 1623 is controlling in its interpretation.<sup>254</sup> Such unambiguous language cannot be negated by legislative history.<sup>255</sup> Thus, the legislative history behind § 1623, which contains only remarks by a few members of Congress, cannot negate the plain language of the statute, particularly where the remarks portray § 1623 as something other than that which is conveyed in its plain and unambiguous text.<sup>256</sup>

Following such a principle of statutory interpretation, the California Supreme Court held that section 68130.5 is not expressly preempted by § 1623.<sup>257</sup> The plain text of § 1623 shows that Congress did not enact an absolute bar against providing undocumented immigrants with in-state tuition rates; rather, § 1623 was drafted as a conditional and qualified prohibition.<sup>258</sup> Congress's inclusion of the phrase "on the basis of residence" serves as a limit on the reach of § 1623's prohibition on providing benefits to undocumented immigrants.<sup>259</sup> Had Congress intended to create an absolute ban on postsecondary education benefits for undocumented immigrants, it could have easily crafted § 1623 to be one.<sup>260</sup> Thus, to read the statute as an absolute bar would render "on the basis of residence" superfluous.<sup>261</sup>

The court held that section 68130.5 does not confer eligibility on the basis of residence, but bases eligibility on other criteria,<sup>262</sup> such as having attended high school in California for at least three years and having graduated from a California high school.<sup>263</sup> Such criteria cannot be

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253. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

254. *Id.* at 863–64.

255. *Id.* at 865–66 (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent that they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.")).

256. See Brief in Opposition at 34, *Martinez v. Regents of the Univ. of Cal.*, 131 S. Ct. 2961 (2011) (No. 10-1029) [hereinafter *Martinez* Respondents' Brief]; *id.* at 35 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.")).

257. See *Martinez*, 241 P.3d at 863.

258. See *Martinez* Respondents' Brief, *supra* note 256, at 31.

259. See *Martinez*, 241 P.3d at 864.

260. See *id.*

261. See *Martinez* Respondents' Brief, *supra* note 256, at 33.

262. See *Martinez*, 241 P.3d at 860.

263. See *supra* note 101 and accompanying text.

considered “de facto” residence criteria due to the fact that there are several categories of nonresident students who are not undocumented immigrants also qualifying for in-state tuition rates.<sup>264</sup> For example, students living in an adjoining state or country who are permitted to attend high school in California; the children of parents living outside California, who attend boarding schools or high schools in California; and those who attended high school in California for three years, but moved out of the state and lost residency status, but decide to attend a California public college or university are all eligible for in-state tuition rates under section 68130.5.<sup>265</sup>

The court also held that there was no implied preemption of section 68130.5.<sup>266</sup> In rejecting the plaintiffs’ field preemption argument, the court recognized that immigration power is within the exclusive realm of the federal government, but that not all state legislation affecting noncitizens is preempted by federal law.<sup>267</sup>

In deciding *Martinez*, the court determined that, through § 1621 and § 1623, Congress defined the reach of federal preemption of state legislation.<sup>268</sup> Those arguing against the preemption of section 68130.5 maintain that § 1623 does not require all U.S. citizens to receive the same benefits as those granted to undocumented immigrants; it only requires that citizens also be given the opportunity to be considered for such a benefit.<sup>269</sup> The court found that requiring the benefits to extend to *all* U.S. citizens would be an oversimplification of the statutory language of § 1623.<sup>270</sup>

Moreover, the defendants asserted that section 68130.5 is not preempted because § 1621(d) expressly authorizes states to provide public benefits for undocumented immigrants if it does so in compliance with § 1621(d)’s requirements,<sup>271</sup> which include affirmatively providing undocumented immigrants with eligibility for in-state tuition benefits.<sup>272</sup> The fact that such express authorization exists in the federal law therefore shows that Congress did not intend to fully occupy the field regulating benefits to undocumented immigrants.<sup>273</sup> In compliance with § 1621(d), the California state legislature enacted section 68130.5 by affirmatively stating that “[t]his act . . . allows all persons, including undocumented immigrant students who meet the requirements . . . to be exempt from non-resident tuition in California’s colleges and universities.”<sup>274</sup> Therefore, section 68130.5 does

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264. *See Martinez*, 241 P.3d at 864.

265. *See id.*

266. *See id.* at 868.

267. *See id.* at 861 (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

268. *See id.* at 868.

269. *See* Brief of Respondents the Board of Governors of the California Community Colleges and Marshall Drummond in Opposition at 19, *Martinez v. Regents of the Univ. of Cal.*, 131 S. Ct. 2961 (2011) (No. 10-1029).

270. *See Martinez*, 241 P.3d at 865.

271. *See Martinez* Respondents’ Brief, *supra* note 256, at 23.

272. *See supra* note 87 and accompanying text.

273. *See Martinez* Respondents’ Brief, *supra* note 256, at 23.

274. *Martinez*, 241 P.3d at 866–67 (quoting A.B. 540, 2001–2002 Leg., Reg. Sess. (Cal. 2001)).

not fall within the scope of preemption by federal law because it complies with the conditions set forth in both § 1621 and § 1623.<sup>275</sup>

In accordance with these arguments, the California Supreme Court held there was no preemption of section 68130.5.<sup>276</sup> However, because the U.S. Supreme Court denied the petition for writ of certiorari for *Martinez* in June 2011,<sup>277</sup> the issue of whether state legislation providing in-state tuition benefits to undocumented students is preempted by federal immigration law remains an undecided question.

### III. STATES CAN PROPERLY CRAFT LEGISLATION GRANTING UNDOCUMENTED STUDENTS IN-STATE TUITION RATES IN COMPLIANCE WITH FEDERAL LAW

Strong arguments exist on both sides of the debate over whether federal law preempts states from passing legislation that provides postsecondary education benefits in the form of in-state tuition rates to undocumented students. Part III of this Note argues, however, that proper statutory interpretation of § 1621 and § 1623 and standard preemption analysis indicate that states can provide in-state tuition rates to undocumented students. Properly crafted legislation does not face express preemption, field preemption, or conflict preemption by § 1623, as discussed in Parts III.A, III.B, and III.C, respectively. Nonetheless, while the states are able to provide in-state tuition rates to undocumented students, Part III.D argues that the best solution to resolving the conflicting views on in-state tuition rates for undocumented students would be through federal legislation repealing § 1623 and granting deserving undocumented students a pathway to lawful immigration status and higher education.

#### A. *In-State Tuition Rates for Undocumented Students Are Not Expressly Preempted by § 1623*

Section 1623 states that “an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence within a State . . .* for any postsecondary education benefit *unless* a citizen or national of the United States is eligible for such a benefit . . . .”<sup>278</sup> Thus, the statute sets forth two conditions to be met by states legislating to provide in-state tuition rates for undocumented students: first, the benefit cannot be based on residence within a state;<sup>279</sup> and second, nonresident citizens must not be any less entitled to the benefit than undocumented students.<sup>280</sup> State legislation that meets these two requirements is therefore not expressly preempted by § 1623.<sup>281</sup>

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275. *See id.* at 868.

276. *See id.* at 869.

277. *See* *Martinez v. Regents of the Univ. of Cal.*, 131 S. Ct. 2961 (2011).

278. 8 U.S.C. § 1623 (2006) (emphasis added).

279. *See supra* notes 258–59 and accompanying text.

280. *See supra* notes 181–82 and accompanying text.

281. *See supra* notes 149–54 and accompanying text.

Moreover, § 1623 cannot be viewed as an absolute bar against providing undocumented students with postsecondary education benefits. The legislative history behind § 1623, which contains only a few congressional remarks to indicate an intent to create a blanket prohibition against postsecondary education benefits, cannot negate the plain and unambiguous language of the statute.<sup>282</sup> Section 1623 was drafted as a conditional and qualified prohibition, not an absolute one.<sup>283</sup> Congress's use of the phrase "on the basis of residence" serves as a limit on the reach of § 1623's prohibition on providing benefits to undocumented immigrants,<sup>284</sup> and to read the statute as an absolute bar would render "on the basis of residence" meaningless surplus language in the statute.<sup>285</sup> Had Congress intended to create an absolute ban on postsecondary education benefits for undocumented immigrants, it could have easily crafted § 1623 to be one.<sup>286</sup>

Furthermore, the condition established by the "unless" in the statutory language further supports a conclusion that states can offer in-state tuition benefits to undocumented students.<sup>287</sup> The "unless" establishes the condition that a state cannot give any more consideration to an undocumented student than it can to a nonresident student from another state.<sup>288</sup> This condition further proves that states are allowed to enact measures that provide undocumented students with postsecondary education benefits, as such a modifier would not be necessary had Congress intended to enact a flat bar against providing postsecondary education benefits.<sup>289</sup>

As most state legislation granting in-state tuition to undocumented students does not rest eligibility upon residence within a state, but upon other criteria, such as graduation from a high school within the state, such legislation is not in violation of § 1623.<sup>290</sup> For example, K.S.A. 76-731a is not preempted by § 1623 because the in-state tuition benefits are available to *any* individuals—not just undocumented students—who meet the conditions of the statute, which are not expressly based upon residence.<sup>291</sup> Section 68130.5 of the California Education Code also does not confer eligibility on the basis of residence, but bases eligibility on other criteria, including graduation from a California high school, which apply to all individuals seeking the benefit.<sup>292</sup> Both the Kansas and California statutes are therefore in compliance with the two conditions set forth in § 1623 and lawfully provide undocumented students with in-state tuition rate benefits.

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282. *See supra* notes 255–56 and accompanying text.

283. *See supra* note 258 and accompanying text.

284. *See supra* note 259 and accompanying text.

285. *See supra* note 261 and accompanying text.

286. *See supra* note 260 and accompanying text.

287. *See supra* note 181 and accompanying text.

288. *See supra* note 182 and accompanying text.

289. *See supra* note 183 and accompanying text.

290. *See supra* note 187 and accompanying text.

291. *See supra* notes 223–24 and accompanying text.

292. *See supra* notes 262–65 and accompanying text.

*B. The Ability of States to Provide In-State Tuition Rates to Undocumented Students Is Not Field Preempted*

States are not field preempted from providing postsecondary education benefits to undocumented students simply because the undocumented are noncitizens.<sup>293</sup> While power to regulate immigration is within the exclusive realm of the federal government,<sup>294</sup> not all state regulations affecting noncitizens are regulations of immigration.<sup>295</sup> Federal law does not state law unless either the nature of the regulated subject matter so clearly indicates that authority over it rests with the federal government, or Congress has unmistakably given the power to the federal government.<sup>296</sup> As held in both *De Canas* and *Toll*, state regulations affecting noncitizens will be upheld as within the realm of state regulatory authority, so long as they do not add to or take away from the conditions Congress has decided to place upon the admission, naturalization, and residence of noncitizens in the United States.<sup>297</sup> Thus, to enact valid legislation, states must simply comply with the plain and unambiguous language of § 1623, which set forth the conditions that define the reach of the preempted field of state legislation providing postsecondary education benefits to undocumented students.<sup>298</sup> Those conditions do not require all U.S. citizens to receive the same benefits as those granted to undocumented immigrants, but only that citizens be given the same opportunity to be considered for such a benefit.<sup>299</sup> Therefore, state statutes that are in compliance with § 1623, such as those in Kansas and California, are not field preempted by federal law because they do not add to or take away from the conditions imposed by Congress.<sup>300</sup>

*C. The Ability of States to Provide In-State Tuition Rates to Undocumented Students Is Not Conflict Preempted*

Opponents of in-state tuition for undocumented students argue that states providing the benefit face conflict preemption.<sup>301</sup> However, the argument that providing in-state tuition to undocumented students would stand as an obstacle to Congress fulfilling the objectives of PRWORA and IIRIRA to disincentivize illegal immigration is weak.<sup>302</sup> The undocumented children who would gain from postsecondary education benefits form only a small percentage of the undocumented immigrant population in the United States.<sup>303</sup> In addition, state provision of in-state tuition rates to the

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293. *See supra* notes 158–65 and accompanying text.

294. *See supra* notes 16–17 and accompanying text.

295. *See supra* notes 169–70 and accompanying text.

296. *See supra* note 172 and accompanying text.

297. *See supra* notes 167–78 and accompanying text.

298. *See supra* note 258 and accompanying text.

299. *See supra* note 269 and accompanying text.

300. *See supra* note 275 and accompanying text.

301. *See supra* notes 162–65 and accompanying text.

302. *See supra* notes 31–33, 36, 235–39 and accompanying text.

303. *See supra* notes 38, 42–43 and accompanying text.

relatively small population of undocumented students cannot be considered an obstacle to Congress's objectives in PRWORA and IIRIRA, as they were overall unsuccessful pieces of legislation that were not able to deter illegal immigration.<sup>304</sup> Moreover, § 1623, which was enacted as a part of IIRIRA, indicates that in-state tuition is a permitted benefit so long as it is not based on residence.<sup>305</sup> Therefore, conflict preemption cannot exist where state legislation granting in-state tuition to undocumented students is in compliance with the measures set forth by Congress through IIRIRA in § 1623.

*D. Judicial Deference and the Need for a Legislative Solution*

Because the California Supreme Court is the only court to have thus far decided the § 1623 preemption issue,<sup>306</sup> the lawfulness of state statutes offering in-state tuition rates to undocumented students remains unclear. Further delaying resolution of the issue is the fact that federal courts have held that plaintiffs have no standing to bring preemption claims, effectively destroyed the ability of private individuals to bring enforcement actions under § 1623 in federal court.<sup>307</sup> The apparent reluctance of federal courts to address the issue likely reflects the judiciary's traditional deference to the other branches of government in immigration regulation.<sup>308</sup>

The difficulty of resolving the § 1623 preemption issue is also compounded by the fact that, in addition to the courts' deferential avoidance of the issue, the federal government has not taken any action to enforce § 1623 against state laws granting in-state tuition benefits.<sup>309</sup> The U.S. Department of Homeland Security is responsible for enforcing federal immigration laws, yet has failed even to respond to complaints alleging that state laws violated IIRIRA's provisions against postsecondary education benefits.<sup>310</sup> Due to the federal government's inaction in enforcing § 1623 and the federal courts' reluctance to decide the issue of whether states can lawfully provide in-state tuition benefits to undocumented students, the justiciability of the issue remains at a standstill and the best hope for a resolution rests with Congress.

Legislative responses to the issue include Congress's attempts to pass the DREAM Act, which would repeal § 1623.<sup>311</sup> Part of the difficulty in passing the DREAM Act lies in the fact that immigration law reform today is no longer approached through piecemeal efforts in Congress, but through

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304. See *supra* note 36 and accompanying text.

305. See *supra* note 84 and accompanying text.

306. See *supra* note 253 and accompanying text.

307. See *supra* notes 131–34 and accompanying text.

308. See *supra* notes 266–67 and accompanying text.

309. See *Martinez Respondents' Brief*, *supra* note 256, at 27–28.

310. See *Oas*, *supra* note 127, at 892 (noting that the DHS has not responded to the complaint filed in 2005 by the legal advocacy group, the Washington Legal Foundation, arguing that New York's and Texas's statutes granting in-state tuition benefits to undocumented students violated IIRIRA).

311. See *supra* notes 68–79 and accompanying text.

an omnibus strategy due to the “transcendent complexity [of immigration reform], with so many interrelated moving parts, that [immigration law] cannot be incrementally reformed.”<sup>312</sup> Thus, the hopes for reforming policies regarding postsecondary education opportunities for undocumented students are inextricably tied to other immigration reform issues, such as employment and border security.<sup>313</sup>

As a matter of fairness and good policy, Congress should continue to place full efforts behind passing legislation that recognizes the value of providing postsecondary education opportunities for those long-term undocumented students who received much of their basic education in the United States, as they are entitled to under *Plyler v. Doe*.<sup>314</sup> Though *Plyler* does not give undocumented students the right to a postsecondary education, there is an inherent unfairness in denying undocumented students the opportunity to pursue those dreams of higher education that were nurtured through the basic education they received in the United States. The feelings of disenfranchisement and helplessness that develop in undocumented children as a result of the insurmountable barriers to higher education surely resonate with the feelings of inferiority that the Court sought to prevent in *Brown v. Board of Education*.<sup>315</sup>

Restricting the postsecondary education opportunities of undocumented students also prevents the federal and state governments from reaping economic benefits that were cultivated in these young adults.<sup>316</sup> The states have already invested in undocumented children by providing them with a basic education. Allowing these children to earn their postsecondary degrees, and thus secure better job opportunities, would mean that they could earn higher salaries and make higher tax contributions as adults.<sup>317</sup> For the benefit of undocumented children, the states, and the nation as a whole, Congress needs to pass legislation that supports deserving undocumented students seeking a higher education. Until Congress offers these students a pathway to lawful immigration status and gives the states back their authority to regulate their postsecondary education benefits by repealing § 1623, countless undocumented students will remain prisoners of an immigration status that they acquired by no fault of their own.

#### CONCLUSION

Many undocumented young adults who have grown up as productive members of American society discover only at the footsteps of receiving a higher education that their dreams are barred by an unlawful immigration

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312. Olivas, *supra* note 10, at 1800–02, 1804.

313. *See id.* at 1800–02.

314. *See supra* notes 57–67 and accompanying text.

315. *See supra* notes 50–53 and accompanying text.

316. Youngro Lee, Note, *To Dream or Not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 CORNELL J.L. & PUB. POL’Y 231, 247–48 (2006).

317. *Id.* at 248.

status due to no fault of their own. The ultimate solution to this injustice is federal legislation opening up a path for deserving undocumented students to obtain lawful immigration status and the opportunity for higher education. Unfortunately, it is unclear whether Congress will pass such legislation.

Though an incomplete solution, state legislation granting undocumented students in-state tuition rates can help alleviate these students' fears of being unable to pursue their goals and help them to remain productive members of society. Having already invested in these young adults with primary and secondary education, states should recognize the potential for these undocumented students to contribute to society. Thus, out of both pragmatism and compassion, states should offer their undocumented students in-state tuition rates according to terms that are carefully crafted to comply with § 1621 and § 1623.