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## Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens Are Preempted by Federal Law

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AFFIRMATIVE ACTION GONE HAYWIRE: WHY STATE  
LAW GRANTING COLLEGE TUITION PREFERENCES  
TO ILLEGAL ALIENS ARE PREEMPTED BY FEDERAL  
LAW

*Ralph W. Kasarda\**

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## I. INTRODUCTION<sup>1</sup>

In a case with far reaching implications, a California Court of Appeal recently issued a decision that will affect an estimated 5-6,000 illegal aliens<sup>2</sup> attending college in California and most likely thousands more in nine other states. In *Martinez v. Regents of University of California*<sup>3</sup> (hereinafter “*Martinez*”), the court analyzed California Education Code Section 68130.5 (hereinafter “Section 68130.5”), a state law similar to the laws in nine other states that grant eligibility for in-state tuition to illegal aliens. The first time an appellate court ever seriously analyzed a law of this kind, the court found that Section 68130.5 was preempted by federal immigration laws.

Every college student in America expects to pay non-resident tuition when attending college out-of-state.<sup>4</sup> But most

1. Readers should be advised that at the time of publication the California Supreme Court had granted review of the California Appellate decision which constitutes the keystone of this article—*Martinez v. Regents of University of California*, 198 P.3d 1 (Cal. 2008). Before citing or referencing this article readers should first refer to the subsequent outcome of the California Supreme Court decision. For this reason, every citation to *Martinez* will be followed by reference to the forthcoming California Supreme Court decision.

2. The term “illegal alien” is used in this Article not to disparage those immigrants who are without documentation, but because that is the term used by Congress in the Immigration and Naturalization Act to denote those in this country who are neither United States citizens nor documented foreigners. See 8 U.S.C. § 1101(a)(3) (2004).

3. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008), *reh’g granted*, 198 P.3d 1 (Cal. 2008).

4. See *Vlandis v. Kline*, 412 U.S. 441, 452-453 (1973) (recognizing that “a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.”).

out-of-state students may be surprised and possibly outraged to discover that in ten states, illegal aliens are granted preferences over U.S. citizen students through eligibility for the lower in-state college tuition rate. The difference between in-state and out-of-state tuition can range from a few thousand dollars, to over ten thousand dollars per year, depending on the state and postsecondary institution.<sup>5</sup> These states intentionally grant eligibility for college in-state tuition to illegal aliens through laws written in convoluted language that disguises the fact that taxpayer funds are being diverted to specifically benefit illegal aliens. The states following this practice are California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington.

Even to Americans who are aware of these misleading state provisions, the state funding of college for illegal aliens' may seem troubling. After all, undocumented adult students remain in this country illegally, and face deportation at anytime. Federal law prohibits the hiring of illegal aliens regardless of whether or not they have graduated from college. Moreover, federal immigration laws passed in 1996 specify that postsecondary education benefits shall not be awarded to illegal aliens unless the same benefit is given to U.S. citizens without regard to residence.<sup>6</sup> In outright defiance of federal laws, politicians from states that do offer in-state tuition to illegal aliens argue with a straight face that granting eligibility for in-state tuition is not a postsecondary education benefit as contemplated by the federal statutes.

With the federal government lacking the will and wherewithal to firmly enforce immigration laws, a sometimes angry public has taken the matter into its own hands through civil litigation aimed at ending the subsidization of college education for illegal aliens. But until very recently, the challenges failed. A lawsuit targeting a Kansas law was thrown out of federal court for lack of standing, and the Tenth Circuit Court of Appeals affirmed the dismissal without even probing into the merits of the case.<sup>7</sup> A class action lawsuit brought by

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5. See e.g. MIDWESTERN HIGHER EDUC. COMPACT, AVERAGE TUITION AND REQUIRED FEES: A COMPARISON OF PUBLIC COLLEGES AND UNIVERSITIES BY MIDWESTERN STATES, 10–11 (2005), <http://www.mhec.org/documents/tuit-reqfees05.pdf>.

6. 8 U.S.C. § 1623 (2000).

7. *Day v. Bond*, 500 F.3d 1127, 1130 (10th Cir. 2007) (holding that there was a lack of standing because their theory of injury was too speculative under the 14<sup>th</sup> amendment).

out-of-state students challenging a very similar California law saw the complaint dismissed by the state trial court without leave to amend.<sup>8</sup> However, in this case, the students successfully appealed.<sup>9</sup>

This article explores the decision in *Martinez*, which holds that in-state tuition is indeed a postsecondary education benefit as those terms are defined by the federal immigration laws. This decision is important for several reasons. First, this marks a turning point in litigation challenging state laws that subsidize the college education of illegal aliens. The Kansas action, filed in federal court, resulted in failure and was never heard on the merits. In *Martinez*, the state trial court dismissed the out-of-state students' complaint on defendants' demurrer, without leave to amend.<sup>10</sup> Thus, the decision by the appellate court in *Martinez* is the first time that a court has applied federal preemption analysis on a state law granting in-state tuition to illegal aliens. Second, in many cases the nation looks to California for legal precedence. Legal challenges are likely to follow in nine other states, and courts in those jurisdictions may view the *Martinez* decision as persuasive authority. Therefore, because *Martinez* held that a California law granting in-state tuition to illegal aliens is preempted by federal law, the nearly identical laws in nine other states are also likely to be declared null and void under a similar analysis and stricken by their state legislatures.

Part II of this article provides a summary of the events that culminated in the California court challenge. Part III is an analysis of the *Martinez* decision, and in Part IV the *Martinez* analysis is extended to the laws of the nine other states that offer in-state tuition to illegal aliens to show why those laws are without effect. Part V discusses important policy considerations against laws offering in-state tuition to illegal aliens.

## II. BACKGROUND OF IN-STATE TUITION FOR IMMIGRANTS

Of the approximately 35.2 million people immigrating to

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8. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 522 (Cal. Ct. App. 2008), *reh'g granted*, 198 P.3d 1 (Cal. 2008).

9. *Id.* at 523 (reversing the judgment of dismissal and allowing the case to proceed to trial).

10. *Id.* at 522.

the United States in 2005, it is estimated that between 9.6 and 9.8 million were illegal aliens.<sup>11</sup> It has been estimated that illegal aliens comprise approximately one-fourth of the total U.S. foreign-born population, and that they make up approximately half of the recent overall growth in the immigrant population.<sup>12</sup> In a 2004 study, the net fiscal cost imposed on all levels of government because of illegal immigration is a staggering \$89.1 billion a year.<sup>13</sup> But the federal government pays only about \$10 billion per year,<sup>14</sup> leaving state and local governments to bear the brunt of the costs associated with illegal immigration.

An expensive burden borne by states is the cost of providing K-12 education to illegal alien children.<sup>15</sup> As a result of a 1982 Supreme Court decision, states must provide K-12 education to all children, whether they are legal or illegal immigrants.<sup>16</sup> With a 5-4 decision in *Plyler v. Doe*, a divided Supreme Court narrowly struck down a Texas statute that withheld state funding to education for illegal alien children in grades K-12.<sup>17</sup> In its decision, the Court noted that those who elect to enter our Country “in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation.”<sup>18</sup> But in the case of minors who accompany their parents across U.S. borders illegally, the children “can affect neither their

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11. STEVEN A. CAMAROTA, IMMIGRANTS AT MID-DECADE: A SNAPSHOT OF AMERICA'S FOREIGN-BORN POPULATION IN 2005, at 23 (2005), <http://www.cis.org/articles/2005/back1405.html>.

12. *Id.* at 4.

13. Kris W. Kobach, *Reinforcing The Rule of Law: What States Can And Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 460 (citing ROBERT RECTOR, THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO STATE AND LOCAL TAXPAYERS: TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION COMMITTEE ON THE JUDICIARY UNITED STATES HOUSE OF REPRESENTATIVES 10 (2007), available at <http://www.heritage.org/research/immigration/tst052107a.cfm>).

14. *Id.* at 460–61 (citing STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET 5 (2004)).

15. See JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, BREAKING THE PIGGY BANK: HOW ILLEGAL IMMIGRATION IS SENDING SCHOOLS INTO THE RED 1 (2005) (states spend nearly \$12 billion annually on K-12 education for illegal aliens, which increases to \$28.6 billion when the cost of educating the children born here to illegal immigrants is added), available at <http://www.fairus.org/site/DocServer/piggybank05.pdf?docID=2301>.

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

17. *Id.* at 230.

18. *Id.* at 220.

parents' conduct, nor their own status."<sup>19</sup> Therefore, five justices found that legislation targeting children in an attempt to control the conduct of their parents "does not comport with fundamental conceptions of justice."<sup>20</sup>

*Plyler* and the rationale behind the Court's decision does not apply to adult illegal aliens in college. First, the Court specifically stated that "public education is not a 'right' granted to individuals by the Constitution."<sup>21</sup> Second, the Court noted there were persuasive arguments supporting the view that a State may withhold its benefits from those whose very presence within the United States is the product of their own unlawful conduct.<sup>22</sup> Finally, the Court would not presumptively object to holding parents accountable for their illegal status, because "parents have the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction . . ."<sup>23</sup> Therefore, once minor illegal aliens attain adulthood, they are responsible for their own actions, and they acquire the ability to conform their conduct to societal norms even if this means removing themselves from the State's jurisdiction.<sup>24</sup> An adult illegal alien's status is the "product of conscious, indeed unlawful, action."<sup>25</sup>

Since *Plyler* does not require states to provide a college education to adult illegal aliens, state taxpayers should mercifully be spared this unnecessary expense. But driven by political ideology rather than concern for their state's fiscal well-being, some state politicians have enacted legislation that forces their constituents to subsidize the post-secondary education of adult illegal aliens. It is beyond the scope of this article to discuss the history of all state efforts to either withhold or grant benefits to illegal aliens.<sup>26</sup> Instead the focus

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19. *Id.*

20. *Id.*

21. *Id.* at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

22. *See id.* at 220.

23. *Id.* at 220 (internal quotations and citations omitted).

24. *See id.* at 220 (suggesting that adult illegal immigrants are able to remove themselves from the United States); *see also* Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263, 281 (discussing why *Plyler* did not hold that illegal aliens have a right to higher education, including that college age students are "young adults with agency" and no longer "young and 'innocent.'").

25. *See id.* ("Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.").

26. For a thorough exploration of state efforts to limit spending on illegal

here is on efforts pertaining to the fight against bestowing the benefit of in-state tuition to illegal aliens, particularly in light of *Martinez*. This discussion appropriately begins with California's struggles to battle the cost of illegal immigration.

### A. California's Proposition 187 Is Struck Down

In 1994, California voters "in overwhelming approval"<sup>27</sup> passed Proposition 187,<sup>28</sup> a voter initiative that, among other things, would have prohibited illegal aliens from receiving all but the most essential health and medical services.<sup>29</sup> The passage of Proposition 187 reflected the California voters' "justifiable frustration with the federal government's inability to enforce the immigration laws effectively."<sup>30</sup> Despite its popularity, Proposition 187 was attacked immediately in both state and federal courts.<sup>31</sup> Although the District Court ultimately held that many of Proposition 187's provisions were unconstitutional, its prohibition on granting postsecondary education benefits to

immigration see generally Kobach, *supra* note 13.

27. League of United Latin Am. Citizens v. Wilson (*Wilson I*), 908 F.Supp. 755, 786 (C.D. Cal 1995). Proposition 187 passed by a vote of 59% to 41%. *Id.* at 763.

28. *Id.* at 764-65. Proposition 187 consisted of ten sections: a preamble (section 1), a section pertaining to the amendment and severability of the initiative (section 10) and eight substantive sections (sections 2-9). Within the eight substantive sections of the initiative, there were the following five types of provisions:

(1) provisions which required state officials to verify or determine the immigration status of arrestees, applicants for social services and health care, and public school students and their parents, by either classifying persons based on state-created categories of immigration status (the "classification" provisions) or verifying immigration status by reference to federal immigration laws (the "remaining verification" provisions) (Prop. 187 §§ 4(b), 5(b), (c); 6(b), (c); 7(a)-(e); 8(a)-(c))

(2) provisions which required state officials to notify individuals that they were apparently present in the United States unlawfully and that they must "either obtain legal status or leave the United States" (the "notification" provisions) (Prop. 187 §§ 4(b)(2); 5(c)(2); 6(c)(2));

(3) provisions which required state agencies to report immigration status information to state and federal authorities, and to cooperate with the INS regarding persons whose immigration status was suspect (contained in Sections 4-9) (the "cooperation/reporting" provisions) (Prop. 187 §§ 4(b)(3); 5(c)(3); 6(c)(3); 7(e); 8(c); 9);

(4) provisions which required facilities to deny social services, health care services and public education to individuals based on immigration status (the "benefit denial" provisions) (Prop. 187 §§ 5(b), (c)(1); 6(b), (c)(1); 7(a)-(c); 8(a)-(b)); and

(5) criminal penalties for falsifying immigration documents (Prop. 187 §§ 2, 3).

29. See *id.* at 755, 763.

30. *Id.* at 786.

31. See League of United Latin Am. Citizens v. Wilson (*Wilson II*), 997 F.Supp. 1244, 1249 n.1 (C.D. Cal. 1997) (listing five actions filed in federal courts in California).



illegal aliens survived the initial legal skirmishes.<sup>32</sup>

Contrary to the will of California voters, the remainder of Proposition 187 was negotiated away by a new state administration that was openly hostile to the initiative.<sup>33</sup> In 1998, Gray Davis was elected as Governor of California.<sup>34</sup> Governor Davis personally opposed Proposition 187, and his representatives mediated an end to Proposition 187 in which only the opponents of the initiative were allowed to participate.<sup>35</sup> Although a Los Angeles Times poll at the time showed that 60 percent of California voters still favored a law to bar illegal aliens from public services, Governor Davis agreed to drop the state's appeal of the district court's ruling that Proposition 187 was unconstitutional.<sup>36</sup> Additionally, opponents of 187 agreed to permit its provisions which make it a state crime to manufacture and distribute false documents to go into effect.<sup>37</sup> In July 1999, the settlement was approved by the Ninth Circuit Court of Appeals, which was the first time that a legal challenge to a California voter initiative was ever settled through mediation.<sup>38</sup> Not surprisingly, Governor Davis was dishonorably removed from office in 2003 through a recall election in which one third of those voting for his ouster admitted to being motivated by his pro-illegal immigration policies.<sup>39</sup>

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32. *Wilson I*, 908 F.Supp. at 764.

33. See Howard Leichter, *Ethnic Politics, Policy Fragmentation, and Dependent Health Care Access in California*, 29 J. HEALTH POL. POL'Y & L. 177, 195 (2004) (describing how Governor Davis brokered a settlement overturning Proposition 187 despite contrary voter sentiment); see also Evelyn Nieves, *California Calls Off Effort to Carry Out Immigrant Measure*, N.Y. TIMES, July 30, 1999, at A1 (quoting Sharon Browne of Pacific Legal Foundation).

34. See e.g. John M. Broder & Mireya Navarro, *The California Recall: The Governor: Davis Struggling To Hold His Base*, N.Y. TIMES, October 5, 2003, at (discussing the diminishing support for Davis since his 1998 election).

35. See David Leshner & Henry Weinstein, *Prop. 187 Backers Accuse Davis of Ignoring Voters Court: They Vow to Mount a New Legal Challenge to Accord that Kills the Anti-Illegal Immigrant Measure*, L.A. TIMES, July 30, 1999, at A1; see also Terry McDermott, *Some are Embittered by Fate of Prop. 187 Politics: Fervent Backers of Anti-Immigration Measure Express Rage at its Demise and Want to Recall Gov. Davis*, L.A. TIMES, Aug. 2, 1999, at A1; Yeh Ling-Ling, *Amnesty's Impact On Future of U.S.*, WORLDNET DAILY.COM, May 4, 2006, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=50050](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=50050) (discussing mediation of Proposition 187).

36. Leshner & Weinstein, *supra* note 35.

37. *Id.*

38. U.C. Davis, *California: 187, Los Angeles Booms*, 5 MIGRATION NEWS no. 4 (August 1999), available at [http://migration.ucdavis.edu/mn/more.php?id=1873\\_0\\_2\\_0](http://migration.ucdavis.edu/mn/more.php?id=1873_0_2_0).

39. See FED'N FOR AM. IMMIGRATION REFORM, *GRANTING DRIVER'S LICENSES TO*

Interestingly, in the process of crippling Proposition 187, the district court recognized that the authority to regulate immigration belongs exclusively to the federal government. Specifically, the district court held that the “State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws.”<sup>40</sup> In *Martinez*, the court recognized that the most significant issue of the case was whether state law authorizing in-state tuition to illegal aliens violates federal immigration laws.<sup>41</sup> That issue was addressed by the district court deciding the fate of Proposition 187. Federal statutes governing educational benefits preempt any inconsistent state laws: “Congress has ousted state power in the field of regulation of public benefits to immigrants by enacting legislation that denies federal, state and local . . . postsecondary education benefits to aliens who are not ‘qualified.’”<sup>42</sup> This holding does not bode well for state laws granting in-state tuition to illegal aliens.

### *B. Federal Laws Prohibit In-State Tuition Benefits to Illegal Aliens*

In August 1995, Representative Lamar S. Smith introduced into the United States House of Representatives a bill to amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States.<sup>43</sup> The new bill, known as H.R. 2202, prohibited illegal aliens from receiving any benefits under any state assistance program.<sup>44</sup> On March 21, 1996, the House passed the amendment by a

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*ILLEGAL ALIENS BACKFIRES ON DAVIS*, October 8, 2003, [http://www.fairus.org/site/PageServer?pagename=media\\_mediadeaf](http://www.fairus.org/site/PageServer?pagename=media_mediadeaf) (stating that 1/3 of those voting for the Governor’s removal admitted being motivated by his decision to grant drivers licenses to illegal aliens); *see also* Patrick Mallon, *How Liberal Fascism Destroyed Gray Davis*, NEWSMAX.COM, June 6, 2003, <http://archive.newsmax.com/archives/articles/2003/6/5/173326.shtml>.

40. League of United Latin American Citizens v. Wilson (*Wilson I*), 908 F.Supp. 755, 786 (C.D. Cal. 1995).

41. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 530, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

42. League of United Latin Am. Citizens v. Wilson (*Wilson II*), 997 F.Supp. 1244, 1254 (C.D. Cal. 1997) (*citing* 8 U.S.C. § 1621).

43. Act of June 27, 1952, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 *et seq.* (2008)).

44. Immigration in the National Interest Act of 1995, H.R. 2202, 104th Cong. § 601(b)(1) (1995).

vote of 333 to 87.<sup>45</sup> On May 2, 1996, the Senate passed H.R. 2202 by a vote of 97 to 3.<sup>46</sup> On September 30, 1996, H.R. 2202 was enacted as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA").<sup>47</sup>

Section 505 of the IIRIRA, provides:

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 amount, duration, and scope) without regard to whether the citizen or national is such a resident.<sup>48</sup>

Section 505 of the IIRIRA has been the supreme law of the land since 1996, though Congress considered amending the section in 2001 and again in 2003.<sup>49</sup> Both proposed bills would have replaced Section 505 with a program granting postsecondary education benefits to illegal aliens.<sup>50</sup> Both proposals failed. In 1997, during the litigation over California's Proposition 187, the United States District Court for the Central District of California held that Section 505, codified as 8 U.S.C. § 1623, demonstrated Congress's intent to preempt state law.<sup>51</sup>

On August 22, 1996, one month before the IIRIRA was enacted, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (hereinafter "PRWORA").<sup>52</sup> In the PRWORA, Congress established a national policy of restricting availability of public benefits, including benefits for postsecondary education, to

45. Govtrack.us, H.R. 2202 [104<sup>th</sup>]: Immigration Control and Financial Responsibility Act of 1996, <http://www.govtrack.us/congress/bill.xpd?bill=h104-2202> (last visited Jan. 22, 2009).

46. *Id.*

47. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of Titles 8 and 18 U.S.C. (2008)).

48. 8 U.S.C. § 1623(a).

49. The Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001); The Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1545, 108th Cong. (2003).

50. (DREAM) Act, S. 1291, 107th Cong. (2001); (DREAM) Act, S. 1545, 108th Cong. (2003).

51. *League of United Latin Am. Citizens v. Wilson (Wilson II)*, 997 F.Supp. 1244, 1256 (C.D. Cal. 1997) (holding Proposition 187's provision regarding postsecondary education benefits was preempted by federal law).

52. *Id.* at 1251-52.

undocumented aliens.<sup>53</sup> The PRWORA “creates a comprehensive statutory scheme for determining aliens’ eligibility for federal, state, and local benefits and services.”<sup>54</sup> Congress enacted the PRWORA in response to complaints by angry taxpayers burdened with the escalating costs of providing benefits to immigrants.<sup>55</sup>

In enacting the PRWORA, Congress clearly announced that it is the immigration policy of the United States to deny public benefits to all but a narrowly defined class of immigrants, not including illegal aliens.<sup>56</sup> Congress also declared that there is a “compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”<sup>57</sup> This policy statement “leaves no doubt” that the federal government has taken full control of the field of regulation of public benefits to aliens.<sup>58</sup> Specifically, PRWORA denies state and local postsecondary education benefits to any alien who is not a “qualified” alien.<sup>59</sup>

### C. *The Initial Challenge in Kansas Fails on Standing*

Notwithstanding seemingly clear Congressional intent that federal laws preempt local laws that grant postsecondary education benefits to illegal aliens, several rogue states enacted laws to the contrary. Ten states currently grant in-state college tuition to illegal immigrants: California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah and Washington.<sup>60</sup> On the other end of the spectrum, Arizona, Mississippi, and Virginia have laws prohibiting undocumented students from receiving in-state tuition at public colleges and universities.<sup>61</sup> To understand the importance of the *Martinez*

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53. 8 U.S.C. §1611 (2000).

54. *Wilson II*, 997 F.Supp. at 1251–52.

55. See 142 Cong. Rec. H2380 (March 19, 1996) (statement of Rep. Smith) (observing the burden on U.S. taxpayers as a result of paying the cost of benefits to immigrants).

56. *Wilson II*, 997 F.Supp. at 1254.

57. 8 U.S.C. § 1601 (2)(B)(6).

58. *Wilson II*, 997 F. Supp. at 1254.

59. 8 U.S.C. § 1611; *Id.* at 1256.

60. ASHLEY ZALESKI, EDUC. COMM'N OF THE STATES, IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANTS (Updated March 2008), <http://www.ecs.org/clearinghouse/75/53/7553.pdf>.

61. Elizabeth Redden, *An In-State Tuition Debate*, INSIDE HIGHER EDUC., Feb. 28, 2007, <http://insidehighered.com/news/2007/02/28/immigration>.

decision, it is necessary to review the first challenge by nonresident citizen university students and their families in Kansas.<sup>62</sup>

In 2004, the Governor of Kansas signed into law House Bill 2145, which provides that certain nonresidents, including unlawful immigrants may be considered state residents for tuition purposes under certain conditions.<sup>63</sup> Generally, illegal aliens are eligible for in-state tuition under House Bill 2145, codified as K.S.A. Section 76-731a, if they attended high school in Kansas for at least three years and graduated or earned an equivalent certificate, and if they sign an affidavit promising to become a citizen when the opportunity arises.<sup>64</sup> In *Day v. Bond*, nonresident students in Kansas, who were U.S. citizens, filed suit in federal court to stop the implementation of K.S.A. Section 76-731a.<sup>65</sup> The students filed a seven-count complaint which included the allegation that § 76-731a violates § 1623.<sup>66</sup>

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62. See *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

63. KAN. STAT. ANN § 76-731a (2004).

64. KAN. STAT. ANN § 76-731a (2004). Section 76-731a, captioned "certain persons without lawful immigration status deemed residents for purpose of tuition and fees," provides, in relevant part:

(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: . . .

(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.

65. *Day*, 500 F.3d at 1130-1131.

66. *Id.* at 1131. The students' complaint "alleged that § 76-731a violates various provisions of federal immigration law and the "comprehensive regulatory scheme governing immigration; that it is preempted by Congress's occupation of the immigration field; that it impermissibly infringes upon powers reserved to the federal

The district court dismissed all counts on the parties' motions for summary judgment holding that the students lacked standing to assert their preemption claim, and also that they could not enforce § 1623 against the state defendants because that statute did not confer a private right of action.<sup>67</sup>

On appeal, the Tenth Circuit Court of Appeals affirmed on the issue of standing and never reached the merits of the students' preemption claims.<sup>68</sup> In regard to the preemption claim, the court held that the only form of injury asserted by plaintiffs was an invasion of a putative statutory right conferred on them by § 1623.<sup>69</sup> But the court held that § 1623 does not vest in nonresident citizen students the federal right to assert a preemption claim, and therefore the students lacked standing.<sup>70</sup> Instead, the court suggested that § 1623 could only be enforced by the Department of Homeland Security.<sup>71</sup> The court similarly dismissed plaintiffs' equal protection claims.<sup>72</sup>

Undeterred by the results in *Day*, new out-of state citizen students brought a class-action law suit in California state

government; and that it violates the Equal Protection Clause by discriminating in favor of illegal aliens, as against nonresident U.S. citizens, in the provision of educational benefits." *Id.*

67. *Id.* at 1130-31. The Defendants to the suit included Governor Sebelius, the members of the Board of Regents, and the registrars of Kansas University, Kansas State University, and Emporia State University; the Hispanic American Leadership Organization, Kansas State Chapter, and the Kansas League of United Latin American Citizens were allowed to intervene as defendants. *Id.* Governor Sebelius was later dismissed as an improper party. *Id.*

68. *See id.* at 1138 ("Here, the issue of standing is not necessarily determined by the merits determination. The merits issue is whether K.S.A. § 76-731a is preempted by 8 U.S.C. § 1623. The standing question is whether § 1623 creates a private cause of action. Each of these issues is separate and independent, and we may determine whether the Plaintiffs here have standing to assert a private cause of action under § 1623 without reaching the merits of whether § 1623 preempts § 76-731a.").

69. *Id.* at 1136 ("The only form 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.").

70. *Id.* ("[W]e conclude that § 1623 does not vest any federal right in nonresident citizen students like the Plaintiffs to assert preemption. We therefore conclude that the Plaintiffs cannot claim such a right as the basis of an injury supporting standing. Thus, they lack standing to pursue their preemption claim, and we affirm its dismissal.").

71. *See id.* at 1139 ("[W]e observe that 8 U.S.C. § 1103(a)(1) provides in relevant part that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.").

72. *See id.* at 1133 (showing that plaintiff could not demonstrate a concrete and non-speculative injury based on discriminatory treatment, or that any injury was proximately caused by the state statute or could be redressed by a favorable court outcome).

court to challenge a California law that also made in-state tuition available to illegal aliens. Before discussing the California suit in detail, it is first worth reviewing the interesting history of the California law.

*D. History of California Law Granting In-State Tuition to Illegal Aliens*

In 2000, the California legislature passed Assembly Bill No. 1197 (AB 1197). AB 1197 proposed granting eligibility for in-state tuition to illegal aliens if they (1) attended a California high school for at least three years; (2) graduated from a California high school; (3) enrolled in college within one year of high school graduation on or before January 1, 2001; and (4) initiated an application to legalize their immigration status.<sup>73</sup> However, then Governor Gray Davis vetoed the bill out of concern that the state statute conflicted with federal law.<sup>74</sup> “In response to the veto message, the [California’s] Chief Legislative Counsel issued an opinion that AB 1197 did not violate federal law since it did not tamper with a student’s residency status under federal law and because it excluded from out-of-state tuition exemptions foreign students as specified in the United States Code.”<sup>75</sup>

California Assembly Bill 540, the bill which became California Education Code Section 68130.5, was the California Legislature’s second attempt to overcome a conflict with federal law.<sup>76</sup> “Yet the content of Section 68130.5 is not significantly different from the content of Assembly Bill No. 1197” in regards to the conditions under which the state may grant in-state tuition to adult illegal aliens.<sup>77</sup> Education Code Section 68130.5 states:

Notwithstanding any other provision of law:

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73. Sen. Rules Com., 3d Reading of Assem. Bill No. 1197, 1999–2000 Reg. Sess., at 2 (Cal. 2000), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_1151-1200/ab\\_1197\\_cfa\\_20000827\\_121645\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_cfa_20000827_121645_sen_floor.html).

74. See *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 539–540, *reh’g granted*, 198 P.3d 1 (Cal. 2008) (“In his veto message, Governor Davis cited the [IRIRA], by which undocumented aliens are ineligible to receive postsecondary education benefits based on state residence unless a citizen or national of the U.S. would be eligible for the same benefits without regard to their residence.”).

75. *Id.* at 540.

76. 2001 Cal. Legis. Serv. 5174–75 (West).

77. *Martinez*, 83 Cal. Rptr. 3d at 540.

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, 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 not earlier than the fall semester or quarter of the 2001-02 academic year.

(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.

(b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes.<sup>78</sup>

The first clause of Section 68130.5 excludes from the benefits of the law any “nonimmigrant alien within the meaning of paragraph (15)” of 8 U.S.C. § 1101(a).<sup>79</sup> Paragraph 15 defines every class of temporary visa holder that can be lawfully present in the United States.<sup>80</sup> Thus, even temporary visa holders are ineligible for in-state tuition under California law while the same benefit is available to illegal aliens.

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78. CAL. EDUC. CODE § 68130.5 (West 2008), *invalidated by* *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, *reh'g granted*, 198 P.3d 1 (Cal. 2008).

79. *Id.*

80. *See* 8 U.S.C. § 1101(a) (2008).



*E. Martinez v. Regents of University of California*

In *Martinez*, U.S. citizen-students and parents who pay nonresident tuition for enrollment at California's public universities and colleges brought a class-action lawsuit attacking Education Code Section 68130.5.<sup>81</sup> Plaintiffs' complaint for damages included causes of action for injunctive relief; declaratory relief; federal preemption; and violation of the U.S. Constitution (14th Amend.), California Constitution (art. I, § 7)<sup>82</sup>, federal statutes (8 U.S.C. §§ 1621, 1623; 42 U.S.C. § 1983), and the California Unruh Civil Rights Act (Cal. Civ. Code, § 51).<sup>83</sup> The trial court sustained the demurrers of state defendants,<sup>84</sup> and dismissed the complaint without leave to amend.<sup>85</sup> The U.S. citizen-students and their parents appealed.

The California Court of Appeals for the Third Appellate District held that allowing illegal aliens to attend public colleges by paying the in-state tuition rate is a postsecondary education "benefit" conferred on illegal aliens within the meaning of the federal law.<sup>86</sup> The California Court of Appeals not only held that plaintiffs did in fact state a cause of action for preemption, but that the state education code conferring in-state tuition to illegal aliens *was* preempted by 8 U.S.C §§ 1623 and 1621.<sup>87</sup> The court accordingly reversed the judgment of

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81. *See Martinez*, 83 Cal. Rptr. 3d at 521 ("Plaintiffs are U.S. citizens from states other than California and are students, or tuition-paying parents of students, enrolled after January 1, 2002, in a course of study for an undergraduate or graduate degree at a California public university or college.").

82. *Id.* at 522. The California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . ." CAL.CONST. art. I, § 7(a); and "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." *Id.* at § 7(b).

83. CAL. CIV. CODE § 51(b) (West 2008) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."); *Martinez*, 83 Cal. Rptr. 3d at 522.

84. The State defendants in *Martinez* were Regents of the University of California, Trustees of the California State University System, Board of Governors of the California Community Colleges, UC President Robert C. Dynes, CSU Chancellor Charles B. Reed, and CCC Chancellor Marshall Drummond. *Id.* at 522.

85. *Id.*

86. *Id.*

87. *See id.* at 540 ("Since California does not afford the same benefit [in-state tuition] to U.S. citizens from other states 'without regard to' California residence, Section 68130.5 conflicts with title 8 U.S.C. § 1623 . . ."); *Id.* at 545 ("We conclude the

dismissal and ordered the case to proceed in the trial court consistent with these findings.<sup>88</sup>

### III. CALIFORNIA LAW GRANTING IN-STATE TUITION BENEFITS TO ILLEGAL ALIENS IS PREEMPTED BY FEDERAL LAW

California Education Code Section 68130.5 is similar or identical to the laws in the nine other states that also reward adult illegal aliens with in-state tuition if they attended state high schools for one to three years, graduated, and sign an affidavit promising to seek legal immigration status.<sup>89</sup> The unsound wisdom of such a policy is discussed in Part IV, but the primary legal objection to state laws that grant in-state tuition to illegal aliens is that these laws are expressly preempted by Section 505 of the IIRAIRA,<sup>90</sup> and the PRWORA.<sup>91</sup>

#### A. Federal Preemption Principles

The Supremacy Clause provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land.<sup>92</sup> Under this clause, “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to a federal law, must yield.”<sup>93</sup>

State law is preempted under the Supremacy Clause in three circumstances. First, Congress can explicitly define the

California Legislature has not met the requirements of title 8 U.S.C. § 1621’s ‘safe harbor’ or ‘savings clause.’”)

88. *Id.*

89. See CAL. EDUC. CODE § 68130.5(a) (West 2008), *invalidated by* *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, *reh’g granted*, 198 P.3d 1 (Cal. 2008); 110 ILL. COMP. STAT. ANN. 305/7e-5 (2009); N.Y. EDUC. LAW § 6206 (McKinney 2008); OKLA. STAT. ANN. tit. 70, § 3242 (West 2008); TEX. EDUC. CODE ANN. § 54.052(j) (Vernon 2007); UTAH CODE ANN. § 53B-8-106 (2008); WASH. REV. CODE ANN. § 28B.15.012 (West 2008); 2004 KAN. SESS. LAWS 172.

90. Pub.L. No. 104-208, 110 Stat 3009 (1996) (codified as amended at 8 U.S.C. § 1623 (2008)).

91. Pub.L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 8 U.S.C. § 1601 (2008) *et seq.*).

92. The Supremacy Clause provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const., art. VI, cl. 2.

93. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted).

extent to which its enactments preempt state law.<sup>94</sup> Preemption fundamentally is a question of congressional intent,<sup>95</sup> and “when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.”<sup>96</sup>

Second, “in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”<sup>97</sup> Such an intent may be inferred from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>98</sup> Although the Supreme Court does not hesitate to draw an inference of field preemption where it is supported by the federal statutory and regulatory schemes, the Court has emphasized that “[w]here . . . the field which Congress is said to have pre-empted” includes areas that have “been traditionally occupied by the States,” congressional intent to supersede state laws must be “clear and manifest.”<sup>99</sup>

Finally, “state law is preempted to the extent that it actually conflicts with federal law.”<sup>100</sup> For instance, the “[Supreme] Court has found preemption where it is impossible for a private party to comply with both state and federal requirements” at the same time,<sup>101</sup> or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>102</sup>

By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field preemption may be understood as a species of conflict pre-

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94. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95–98 (1983).

95. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (citing *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152 (1982)).

96. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

97. *Id.*

98. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

99. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

100. *English*, 496 U.S. at 79.

101. *Id.*; see, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

102. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.<sup>103</sup>

Federal authority to regulate immigration "derives from various sources, including the federal government's power '[t]o establish [a] uniform Rule of Naturalization,' its power '[t]o regulate commerce with foreign Nations,' and its broad authority over foreign affairs."<sup>104</sup> Thus, there is no doubt that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."<sup>105</sup>

The Supreme Court has already applied preemption analysis in reference to federal and state immigration laws.<sup>106</sup> In *De Canas v. Bica*, the Court held that a California statute prohibiting an employer from knowingly employing illegal aliens at the expense of lawful resident workers was not unconstitutional as a regulation of immigration and was not preempted by the Immigration and Nationality Act.<sup>107</sup> In *De Canas*, the Court articulated three tests to be used when determining whether a state statute related to immigration is preempted by federal law. First, the court must determine whether the state statute is a "regulation of immigration."<sup>108</sup> In other words, does the state statute determine who should or should not be admitted into the country and the conditions under which a legal entrant may remain? If the state statute has the effect of regulating immigration, it is preempted because the power to regulate immigration is exclusively a federal power.<sup>109</sup> But just because aliens are subjects of a state statute does not mean that the statute is a "regulation of immigration."<sup>110</sup> In *De Canas*, the Court reasoned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and

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103. *English*, 496 U.S. at 79 n.5.

104. *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

105. *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

106. *Id.*

107. *Id.* at 351.

108. *Id.* at 356.

109. *Id.*

110. *People v. Salazar-Merino*, 107 Cal.Rptr.2d 313, 319 (2001) (showing that a California Court of Appeal held that a state statute imposing criminal penalties for using a false document to conceal true citizenship or resident alien status was not preempted by federal immigration law).

the conditions under which a legal entrant may remain.”<sup>111</sup>

Second, a state statute that does not regulate immigration is still preempted if Congress manifested a clear purpose to affect a complete ouster of state power, “including state power to promulgate laws not in conflict with federal laws,” with respect to the subject matter which the statute attempts to regulate.<sup>112</sup> An intent to preclude state action may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains.<sup>113</sup> Third, a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>114</sup> A state statute is preempted under this test if compliance with both state and federal law is impossible.<sup>115</sup>

### *B. Preemption by Title 8 U.S.C. § 1623*

In *Martinez*, the court began its preemption analysis by focusing on 8 U.S.C. § 1623.<sup>116</sup> That analysis required the court to determine whether in-state tuition is an education “benefit,” whether the California law based this “benefit” on state residence, and whether the California law could withstand the *De Canas* tests.<sup>117</sup>

#### *1. Nonresident Tuition Is a “Benefit”*

In *Martinez*, the key issue was whether 8 U.S.C. § 1623 preempts a state law conferring resident tuition to illegal aliens.<sup>118</sup> § 1623 provides that an illegal alien is not eligible on

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111. *De Canas*, 424 U.S. at 355.

112. *Id.* at 357.

113. *Id.*

114. *Id.* at 363.

115. *Toll v. Moreno*, 458 U.S. 1 (1982) (holding that a state university’s policy of denying in-state status to domiciled nonimmigrant aliens holding G-4 visas violated the supremacy clause); *League of United Latin Am. Citizens v. Wilson (Wilson II)*, 997 F. Supp. 1244, 1253, 1256 (holding that, through legislation enacted in 1996, Congress occupied the field of regulation of public postsecondary education benefits to aliens, thereby preempting portions of California initiative measure Proposition 187, including a provision denying public postsecondary education to illegal aliens); *League of United Latin Am. Citizens v. Wilson (Wilson I)*, 908 F. Supp. 755 (C.D. Cal. 1995) (Other provisions of Proposition 187 preempted by Federal immigration law).

116. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 531, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

117. *Id.* at 533, 540.

118. *See id.* (“Numerous legal issues are addressed in this case. However, the most significant issue is whether California’s authorization of in-state tuition to illegal aliens violates a federal law, title 8 of the United States Code (U.S.C.) Section 1623 . . .

the basis of residence within a State for any “postsecondary education benefit” unless a U.S. citizen is eligible for the same benefit without regard to residence.<sup>119</sup> Section 68130.5 of the California Education Code provides eligibility for in-state tuition to illegal aliens if certain conditions are met, but does not provide in-state tuition to out-of-state U.S. citizens unless they also satisfy the same conditions.<sup>120</sup> The central issue to the preemption claim, then, is whether in-state tuition is a “postsecondary education benefit” prohibited in 8 U.S.C. § 1623.

The *Martinez* court carefully considered and then rejected the defendants’ arguments. The defendants first claimed that the term “benefit” in § 1623 does not include an offer of in-state tuition because the federal statute refers to “amount,” which signifies actual monetary payments, while in-state tuition does not involve the payment of money to students.<sup>121</sup> The court was unimpressed and found this assertion to be unsupported.<sup>122</sup> But to remove all doubt that a postsecondary benefit does not have to involve an actual payment, the court reviewed the legislative history of § 1623. The court noted that the conference committee report unambiguously stated that “this Section provides that *illegal aliens are not eligible for in-state tuition rates* at public institutions of higher education.”<sup>123</sup>

Next, the court determined that “benefit” in § 1623 should not be given the same meaning as “benefit” in 8 U.S.C. § 1621, which defendants interpreted as also being limited to money actually paid to students.<sup>124</sup> Generally, § 1621 provides that an illegal alien is not eligible for any state or local public

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119. 8 U.S.C. § 1623(a) (2008) (“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.”).

120. CAL. EDUC. CODE § 68130.5(a) (West 2008), *invalidated by* *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

121. *Martinez*, 83 Cal. Rptr. 3d at 531.

122. *Id.* (“[D]efendants cite no authority supporting their illogical assumption that ‘amount’ must mean monetary payment to the beneficiary.”).

123. H.R. Rep. No. 104-828, at 240 (1996) (Conf. Rep.) (emphasis added). A conference committee report is an authoritative source of Congressional intent. *Eldred v. Ashcroft*, 537 U.S. 186, 210 n 16 (2003).

124. *Martinez*, 83 Cal. Rptr. 3d at 531.

benefit.<sup>125</sup> The term “state or local public benefit” is defined in § 1621 as, among other things, “postsecondary education . . . assistance, or any other similar benefit for which payments or assistance are provided to an individual, household, or family . . . by an agency of a state or local government or by appropriated funds of a state or local government.”<sup>126</sup> A state may provide that an illegal alien is eligible for state or local benefits but only if a state law “affirmatively provides for such eligibility.”<sup>127</sup>

The Regents of University of California argued that allowing illegal aliens to attend college by paying only in-state tuition is not a “benefit” for which “*payments* or assistance are provided” under § 1621.<sup>128</sup> In other words, since eligibility for in-state tuition does not involve the actual payment of money from the state to the illegal alien, it cannot be a benefit as that term is used in §§ 1621 or 1623. The court dismissed this assertion as “implausible,” since the terms in § 1621 are separated by the word “or” (“State or local public benefit’ means . . . postsecondary education . . . or any other similar benefit for which payments or assistance are provided . . .”).<sup>129</sup> It should also be noted that the United States Supreme Court has referred to in-state tuition rates as being a “cash” subsidy, which further weakens the argument that nonresident tuition is not a benefit for which payment is provided.<sup>130</sup>

Even if a “public benefit” is a postsecondary education benefit for which “payments or assistance are provided,” the court concluded that granting eligibility for in-state tuition to illegal aliens is still unquestionably “assistance.”<sup>131</sup> Nor could

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125. 8 U.S.C. § 1621(a) (2008).

126. 8 U.S.C. § 1621(c)(1) (a “state or local public benefit” means “(1) 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 (2) 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.*”) (emphasis added).

127. 8 U.S.C. § 1621(d).

128. *Martinez*, 83 Cal. Rptr. 3d at 531 (emphasis added).

129. *Id.*

130. *Saenz v. Roe*, 526 U.S. 489, 518 (1999) (“The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people, and California’s standard of living and higher education system make both subsidies quite attractive.”).

131. *Id.*

use of the word “assistance” in § 1621 be limited to a direct form of financial assistance or aid, since 20 U.S.C. § 1091 already excludes illegal aliens from receiving student financial aid.<sup>132</sup>

## 2. *The De-Facto Residence Requirement*

Having concluded that in-state tuition is a postsecondary education benefit, the *Martinez* court next considered the language in § 1623 which provides that illegal aliens “shall not be eligible *on the basis of residence* within a State . . . for any postsecondary education benefit . . . .”<sup>133</sup> California law forbids illegal aliens from establishing residency in California for tuition purposes.<sup>134</sup> But in contrast, California Education Code Section 68130.5 allows illegal aliens to pay resident tuition if they attended a California high school for three years and either graduated from a California high school or earned an equivalent certificate.<sup>135</sup> The defendants in *Martinez* argued that Section 68130.5 is not based on residence because other California statutes allow children from adjoining states or an adjoining country—non-California residents—to attend elementary and high schools in California.<sup>136</sup> But the court keenly observed that those other California statutes require the parents or the other state to reimburse the California

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132. See 20 U.S.C. § 1091(1)(5) (“In order to receive any grant, loan, or work assistance under [provisions concerning student financial aid], a student must . . . be a citizen or national of the United States, a permanent resident of the United States, able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident, [or] a citizen of any one of the Freely Associated States.”) In California, illegal aliens are prohibited from receiving financial assistance. CAL. EDUC. CODE §§ 69433.9, 69535 (West 2008).

133. 8 U.S.C. § 1623(a).

134. CAL. EDUC. CODE § 68062 (“In determining the place of residence the following rules are to be observed: (a) There can only be one residence. (b) A residence is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose. . . . (f) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of the unmarried minor child. . . . (h) An alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. § 1101, et seq.) from establishing domicile in the United States.”); see *Regents of Univ. of Cal. v. Superior Court*, 276 Cal. Rptr. 197, 200 (1990) (“[S]ection 68062, subdivision (h), precludes undocumented alien students from qualifying as residents of California for tuition purposes.”).

135. CAL. EDUC. CODE § 68130.5, *invalidated* by *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

136. CAL. EDUC. CODE §§ 48050-48051.



school district for the total cost of educating the non-resident student.<sup>137</sup>

Section 68130.5 is intended to benefit illegal aliens *residing* in California by making in-state tuition available to illegal aliens on the basis of attendance at a California high school for three years.<sup>138</sup> The defendants in *Martinez* argued that Section 68130.5 was a permissible statute because it could apply to legal non-resident students.<sup>139</sup> But even if Section 68130.5 did cover legal aliens, the court noted that it would still be preempted if it benefited illegal aliens in “contravention of federal law.”<sup>140</sup> And that is exactly what Section 68130.5 does.

California’s Office of the Secretary of Education estimated that 5,000 to 6,000 illegal aliens would benefit from Section 68130.5, while only 500 legal nonresident students could take advantage of the law’s provisions.<sup>141</sup> Section 68130.5’s requirement that illegal aliens attend a California high school for at least three years “creates a *de facto* residence requirement.”<sup>142</sup> Furthermore, the court added that Section 68130.5 “manifestly thwarts the will of Congress,” expressed in § 1623, “that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States.”<sup>143</sup>

When the California legislature enacted Section 68130.5, it added a section stating its intent not to confer postsecondary education benefits on the basis of residence within the meaning of 8 U.S.C. § 1623.<sup>144</sup> However, the *Martinez* court found the

137. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 535–36, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

138. *Id.* at 539.

139. *Id.* at 535–37 (examples include (1) a U.S. citizen who attended high school in California but lived in another state after high school before enrolling in a California college/university; (2) a student who attended boarding school in California while maintaining a residence in another state; (3) a minor financially dependent on parents who reside in another state (since a minor’s residence is derived from that of his or her parents); (4) a lawful immigrant dependent student whose parents have returned to another country; and (5) an “undocumented” student whose parents were granted permanent residency through an amnesty program and who is awaiting acceptance of his or her own application for permanent residency.).

140. *Id.*

141. Off. of the Sec. for Educ., Enrolled Bill Report on Assem. Bill No. 540, 2001–2002 Reg. Sess., at 5 (Oct. 3, 2001); *but see Martinez*, 83 Cal. Rptr. 3d at 537 n.19, *reh’g granted*, 198 P.3d 1 (Cal. 2008) (“Plaintiffs assert the total number of illegal aliens paying in-state tuition [in California] . . . is over 25,000.”).

142. *Martinez*, 83 Cal. Rptr. 3d at 537.

143. *Id.*

144. 2001 Cal. Legis. Serv. 5174–75 (West) (“This act, as enacted during the 2001–

“Legislature’s statement . . . was not a finding of fact, but a legal conclusion” worthy of little weight.<sup>145</sup> The court was also troubled by another uncodified section of the original California statute that clearly described intent to benefit illegal aliens.<sup>146</sup> The legislative history of Education Code Section 68130.5 also reveals an unmistakable intent to benefit illegal aliens.<sup>147</sup>

California Education Code Section 68130.5 bestows upon illegal aliens a postsecondary education benefit—eligibility for in-state tuition—based upon residence.<sup>148</sup> California does not provide this same benefit to U.S. citizens without regard to residence.<sup>149</sup> Thus, Section 68130.5 conflicts with 8 U.S.C. § 1623. The next question is whether the state law is preempted by federal law and thus null and void.

### 3. *Application of De Canas*

The first test from *De Canas* is whether the state statute is a “regulation of immigration,” which asks if the state statute determines who should or should not be admitted into the country and the conditions under which a legal entrant may

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02 Regular Session, does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code.”).

145. *Martinez*, 83 Cal. Rptr. 3d at 538.

146. 2001 Cal. Legis. Serv. 5174–75 (West) provides:

(a) The Legislature hereby finds and declares all of the following:

(1) There are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain, but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates.

(2) These pupils have already proven their academic eligibility and merit by being accepted into our state's colleges and universities.

(3) A fair tuition policy for all high school pupils in California ensures access to our state's colleges and universities, and thereby increases the state's collective productivity and economic growth.

(4) This act, as enacted during the 2001-02 Regular Session, allows all persons, including undocumented immigrant students who meet the requirements set forth in Section 68130.5 of the Education Code, to be exempt from nonresident tuition in California's colleges and universities.

(5) This act, as enacted during the 2001-02 Regular Session, does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code.

147. *See e.g.*, Concurrence in Sen. Amends., Assem. Bill No. 540, 2001–2002 Reg. Sess., at 1 (as amended Sept. 7, 2001), *available at* [http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_0501-0550/ab\\_540\\_cfa\\_20010918\\_163923\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_cfa_20010918_163923_asm_floor.html) (“Qualifies long-term California residents, as specified, regardless of citizenship status, for lower ‘resident’ fee payments at the [community colleges] and the [state universities].”).

148. *See Martinez*, 83 Cal. Rptr. 3d at 540 (“We conclude Section 68130.5 does, and was intended to, benefit illegal aliens on the basis of residence in California.”).

149. *Id.* (“Since California does not afford the same benefit to U.S. citizens from other states “without regard to” California residence . . .”).

remain.<sup>150</sup> Since Section 68130.5 does not determine who should or should not be admitted into the United States, it can be argued that the section “does not regulate immigration and is therefore not expressly preempted as a regulation of immigration.”<sup>151</sup>

Even if a state statute does not regulate immigration, it is preempted under *De Canas* if Congress manifested a clear purpose to affect a complete ouster of state power with respect to the subject matter which the statute attempts to regulate.<sup>152</sup> Here Section 68130.5 runs afoul of federal law. The federal statutory language specifically states that an illegal alien is ineligible to receive the benefit of in-state tuition, unless any other U.S. citizen is also eligible for the same financial benefit, without regard to residence.<sup>153</sup> Thus, Congress expressly limited the state’s power to give in-state tuition to illegal aliens. In doing so, “Congress manifested a clear purpose to effect a complete ouster of state power” with respect to in-state tuition for illegal aliens, which Section 68130.5 attempts to regulate.<sup>154</sup>

Under the third preemption test from *De Canas*, a state statute is preempted if it conflicts with federal law, making compliance with both state and federal law impossible.<sup>155</sup> This becomes problematic for state laws, such as California’s Education Code Section 68130.5, which provide a perverse form of affirmative action to illegal aliens in the form of in-state tuition. Federal law prohibits a state from providing in-state tuition to illegal aliens on the basis of residence, unless a U.S. citizen is also eligible without regard to residence.<sup>156</sup> But under Section 68130.5, citizens and nationals of the United States are only eligible for in-state tuition if they attend a California high school for three years. Citizens of the United States are thus not afforded the same benefit as illegal aliens “without regard to residence” as mandated by federal law.<sup>157</sup> Moreover, providing in-state tuition to illegal aliens if they attended a

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150. *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

151. *Martinez*, 83 Cal. Rptr. 3d at 541 (citing *De Canas*, 424 U.S. at 356).

152. *De Canas*, 424 U.S. at 357.

153. 8 U.S.C. § 1623(a) (2008).

154. *Martinez*, 83 Cal. Rptr. 3d at 541.

155. *De Canas*, 424 U.S. at 357; see e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

156. 8 U.S.C. § 1623.

157. *Martinez*, 83 Cal. Rptr. 3d at 540, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

high school in California for three years provides encouragement for illegal aliens to reside in California. But it is a federal crime to encourage an illegal alien to reside in the United States.<sup>158</sup> In the case of Section 68130.5, it is thus impossible for California colleges to comply with both state and federal requirements.<sup>159</sup>

Illegal aliens also cannot lawfully comply with both California Education Code Section 68130.5 and 8 U.S.C. § 1623. Illegal aliens might attend a California public university or college pursuant to Section 68130.5 under the false belief that college attendance provides a safe haven. But they still remain unlawfully present in the United States in violation of federal immigration law because federal law forbids aliens to enter the United States without applying for admission.<sup>160</sup> Illegal aliens caught in this country are subject to arrest and deportation.<sup>161</sup>

State laws like California Education Code Section 68130.5 that provide in-state tuition benefits to illegal aliens fall within the principle of implied preemption. A state law may be preempted by federal law if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>162</sup> Self-sufficiency has been a basic principle of federal immigration law since this country's earliest immigration statutes.<sup>163</sup> The Congressional intent behind current immigration policy is that immigrants should "not depend on public resources to meet their needs" and that "public benefits must not constitute an incentive for immigration."<sup>164</sup> It is also the policy of Congress that aliens should not burden the "public benefits system."<sup>165</sup> States that subsidize the college education of illegal aliens are thwarting Congressional intent, and the immigration policy of the United

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158. 8 U.S.C. § 1324(a)(1)(A)(iv) (any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law" . . . shall be punished as provided in subparagraph (B)).

159. *Martinez*, 83 Cal. Rptr. 3d at 541.

160. 8 U.S.C. §§ 1101(a)(4), 1181(a), 1201.

161. 8 U.S.C. §§ 1251, 1252, 1357.

162. *De Canas v. Bica*, 424 U.S. 351, 357 (1976).

163. 8 U.S.C. § 1601(1).

164. 8 U.S.C. § 1601(2)(A)-(B).

165. 8 U.S.C. § 1601(4) ("Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.").

States.

In the only other reported decision addressing in-state tuition payments, other than *Martinez* a federal court recognized that allowing illegal aliens to attend postsecondary institutions by paying only in-state tuition confers a “benefit” as defined by the IIRIRA.<sup>166</sup>

### *C. Preemption by 8 U.S.C. § 1621*

Title 8 U.S.C. § 1621 expressly preempts states from giving postsecondary education benefits to illegal aliens unless the state enacts a statute which “affirmatively provides” for such eligibility.<sup>167</sup>

The preemption doctrine requires courts to examine congressional intent.<sup>168</sup> According to the House Conference Report on 8 U.S.C. § 1621, the intent and effect of that section is to make illegal aliens “ineligible for all State and local public benefits, with limited exceptions for emergency medical services, emergency disaster relief, immunizations and testing and treatment for symptoms of communicable diseases, and programs necessary for the protection of life or safety.”<sup>169</sup>

While § 1621 allows states to make illegal aliens eligible for state and local benefits, this can only be accomplished through the enactment of a state law, “which *affirmatively provides for such eligibility*.”<sup>170</sup> Congressional intent regarding the phrase “affirmatively provides” is unmistakable because the House Conference Report states that only the affirmative enactment

166. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 606 (E.D. Va. 2004) (“The more persuasive inference to draw from § 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit.”).

167. 8 U.S.C. § 1621 provides in part: “(a) In general. Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an [illegal alien] is not eligible for any State or local public benefit (as defined in subsection (c) of this section) . . . (c) . . . ‘State or local public benefit’ means . . . (B) any . . . postsecondary education . . . 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. . . . (d) . . . 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 under subsection (a) of this section only through the enactment of a State law after [August 22, 1996], which affirmatively provides for such eligibility.”

168. *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152 (1982).

169. H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.).

170. 8 U.S.C. 1621(d).

of a state law “that references this provision” will meet the requirements of § 1621.<sup>171</sup> The phrase “affirmatively provides for such eligibility” means that the State law enacted must specify that illegal aliens are eligible for State or local benefits.<sup>172</sup>

The California law, Section 68130.5, does not affirmatively provide that illegal aliens are eligible for exemption or nonresident tuition, or that the majority of the cost of their postsecondary education will be paid out of the appropriated state or local funds.<sup>173</sup> Nor does Section 68130.5 expressly reference § 1621 as federal law mandates.<sup>174</sup> The *Martinez* court explained the policy behind this requirement:

The federal law [8 U.S.C. § 1621] forces any state that is contemplating the provision of benefits to illegal aliens to spell out that intent publicly and explicitly. Doing so places the public on notice that their tax dollars are being used to support illegal aliens. It is a matter of democratic accountability, forcing state legislators to take public responsibility for their actions.<sup>175</sup>

Because Section 68130.5 does not expressly reference 8 U.S.C. § 1621, the *Martinez* court scolded the California legislature for trying to “conceal” from the public the benefit being bestowed upon illegal aliens.<sup>176</sup> Section 68130.5 may even be misleading. The statute states that a student “other than a nonimmigrant alien” is exempt from nonresident tuition. This seems to imply that the California statute does not benefit illegal aliens, even though it does.<sup>177</sup> Section 68130.5 states that a person “without lawful immigration status” must swear he or she has filed an application to legalize his or her immigration status or will file “as soon as he or she is eligible to do so.” This phrasing implies to the public that the student can and will become legalized, but the reality is that it

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171. H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.).

172. *Id.*

173. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 544, *reh'g granted*, 198 P.3d 1 (Cal. 2008).

174. *Id.*

175. *Id.*

176. *Id.* (“Moreover, even accepting defendants’ view that ‘affirmatively’ merely means explicitly rather than implicitly and does not require the statute to use the words ‘illegal aliens,’ Section 68130.5 does its best to conceal the benefit to illegal aliens.”)

177. *Id.*

“could very well be that these students will never be eligible for legal status.”<sup>178</sup>

In conclusion, the “convoluted” language of Section 68130.5 does not clearly put the public on notice that tax dollars are being used to benefit illegal aliens.<sup>179</sup> Therefore, Section 68130.5 does not satisfy the federal requirement set forth in 8 U.S.C. § 1621(d) as explained by the House Conference Report No. 104-725, and is thus null and void.

#### IV. THE LAWS OF OTHER STATES ARE PREEMPTED UNDER A *MARTINEZ ANALYSIS*

The other states that grant in-state tuition benefits to illegal aliens generally pattern their laws after either the California or Texas Education Code.<sup>180</sup>

##### *A. State Laws Patterned After California’s Education Code Section 68130.5*

Laws from Utah, New York, Oklahoma, and New Mexico that grant in-state tuition benefits to illegal aliens practically parallel title 3, section 68130.5 of the California Education Code.<sup>181</sup> These laws provide the benefit of in-state tuition to illegal aliens based primarily on attendance at a high school in the state, but do not explicitly mention “residence.” The Utah Code grants in-state tuition benefits to anyone who (1) attended high school in Utah for three years, (2) graduated or attained an equivalent diploma, and (3) signs an affidavit promising to legalize his or her immigration status when the opportunity arises.<sup>182</sup> New York Education Law grants illegal

178. *Id.*

179. *Id.*

180. Jessica Salsbury, *Evading “Residence”: Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 476 (2003).

181. Compare CAL. EDUC. CODE § 68130.5 (West 2008), with UTAH CODE ANN. § 53B-8-106 (2008); N.Y. EDUC. LAW § 6206(7)(A) (Consol. 2008); OKLA. STAT. tit. 70, § 3242 (2008); and N.M. STAT. § 21-1-4.6 (LexisNexis 2008).

182. UTAH CODE ANN. § 53B-8-106. (2008). Resident tuition—Requirements—Rules

(1) If allowed under federal law, a student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, shall be exempt from paying the nonresident portion of total tuition if the student:

(a) attended high school in this state for three or more years;

(b) graduated from a high school in this state or received the equivalent of a high school diploma in this state; and

aliens in-state tuition if (1) they attended a New York high school for two years, (2) graduated or have an equivalent certificate, and (3) sign an affidavit promising to legalize their citizenship status if possible.<sup>183</sup> Under the Oklahoma Statute, a student may receive in-state tuition if they (1) resided in the state for two years while attending an Oklahoma high school, (2) graduate from an Oklahoma high school, and (3) provide an affidavit promising to become a legal citizen when possible.<sup>184</sup>

(c) registers as an entering student at an institution of higher education not earlier than the fall of the 2002-03 academic year.

(2) In addition to the requirements under Subsection (1), a student without lawful immigration status shall file an affidavit with the institution of higher education stating that the student has filed an application to legalize his immigration status, or will file an application as soon as he is eligible to do so.

(3) The State Board of Regents shall make rules for the implementation of this section.

(4) Nothing in this section limits the ability of institutions of higher education to assess nonresident tuition on students who do not meet the requirements under this section.

183. N.Y. EDUC. LAW § 6206(7)(A) (Consol. 2008). In relevant part, this section states:

The trustees shall further provide that the payment of tuition and fees by any student who is not a resident of New York state, other than a non-immigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of title 8 of the United States Code, shall be paid at a rate or charge no greater than that imposed for students who are residents of the state if such student:

(i) attended an approved New York high school for two or more years, graduated from an approved New York high school and applied for attendance at an institution or educational unit of the city university within five years of receiving a New York state high school diploma; or

(ii) attended an approved New York state program for general equivalency diploma exam preparation, received a general equivalency diploma issued within New York state and applied for attendance at an institution or educational unit of the city university within five years of receiving a general equivalency diploma issued within New York state; or

(iii) was enrolled in an institution or educational unit of the city university in the fall semester or quarter of the two thousand one-two thousand two academic year and was authorized by such institution or educational unit to pay tuition at the rate or charge imposed for students who are residents of the state.

A student without lawful immigration status shall also be required to file an affidavit with such institution or educational unit stating that the student has filed an application to legalize his or her immigration status, or will file such an application as soon as he or she is eligible to do so.

184. OKLA. STAT. tit. 70, § 3242 (2008). This statute states in relevant part:

A. The Oklahoma State Regents for Higher Education may adopt a policy which allows a student to enroll in an institution within The Oklahoma State System of Higher Education and allows a student to be eligible for resident tuition if the student:

1. Graduated from a public or private high school in this state; and
2. Resided in this state with a parent or legal guardian while attending classes at a public or private high school in this state for at least two (2) years prior to graduation.

B. To be eligible for the provisions of subsection A of this section, an eligible student shall:

1. Satisfy admission standards as determined by the Oklahoma State



The New Mexico Statute simply grants in-state tuition, regardless of immigration status, to those who have graduated from a New Mexico high school after having attended for at least a year, or who have received an equivalent certificate.<sup>185</sup>

*B. State Laws Patterned After Texas Education Code Section 54.052*

In contrast to laws modeled after California's Education Code which do not mention "residence," Texas law explicitly grants in-state tuition to illegal aliens based upon state residence. According to the Texas Education Code, illegal aliens are considered "residents of the state" for tuition purposes if they have (1) graduated from a Texas high school, and (2) maintained a residence continuously in the state for

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Regents for Higher Education for the appropriate type of institution and have secured admission to, and enrolled in, an institution within The Oklahoma State System of Higher Education; and

2. If the student cannot present to the institution valid documentation of United States nationality or an immigration status permitting study at a postsecondary institution:

a. provide to the institution a copy of a true and correct application or petition filed with the United States Citizenship and Immigration Services to legalize the student's immigration status, or

b. file an affidavit with the institution stating that the student will file an application to legalize his or her immigration status at the earliest opportunity the student is eligible to do so, but in no case later than:

(1) one (1) year after the date on which the student enrolls for study at the institution, or

(2) if there is no formal process to permit children of parents without lawful immigration status to apply for lawful status without risk of deportation, one (1) year after the date the United States Citizenship and Immigration Services provide such a formal process, and

c. if the student files an affidavit pursuant to subparagraph b of this paragraph, present to the institution a copy of a true and correct application or petition filed with the United States Citizenship and Immigration Services no later than:

(1) one (1) year after the date on which the student enrolls for study at the institution, or

(2) if there is no formal process to permit children of parents without lawful immigration status to apply for lawful status without risk of deportation, one (1) year after the date the United States Citizenship and Immigration Services provide such a formal process, which copy shall be maintained in the institution's records for that student.

185. N.M. STAT. § 21-1-4.6 (A) (LexisNexis 2008) (prohibiting a post-secondary educational institution from denying admission to anyone on account of immigration status). Subsection (B) states:

Any tuition rate or state-funded financial aid that is granted to residents of New Mexico shall also be granted on the same terms to all persons, regardless of immigration status, who have attended a secondary educational institution in New Mexico for at least one year and who have either graduated from a New Mexico high school or received a general educational development certificate in New Mexico.

three years.<sup>186</sup> Similarly, an illegal alien in Illinois is treated as “an Illinois resident” for tuition purposes if that person has (1) resided in the state for three years, (2) attended high school in the state for three years, (3) graduated from a high school in the state (or earned the equivalent of a high school diploma in the state) and (4) provided an affidavit promising to become a legal citizen as soon as that becomes possible.<sup>187</sup> In Kansas, an individual enrolled at a postsecondary education institution is “deemed to be a resident of Kansas” for tuition purposes if that

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186. TEX. EDUC. CODE ANN. § 54.052 (Vernon 2007). This statute provides in relevant part:

(a) Subject to the other applicable provisions of this subchapter governing the determination of resident status, the following persons are considered residents of this state for purposes of this title:

(1) a person who:

(A) established a domicile in this state not later than one year before the census date of the academic term in which the person is enrolled in an institution of higher education; and

(B) maintained that domicile continuously for the year preceding that census date;

(2) a dependent whose parent:

(A) established a domicile in this state not later than one year before the census date of the academic term in which the dependent is enrolled in an institution of higher education; and

(B) maintained that domicile continuously for the year preceding that census date; and

(3) a person who:

(A) graduated from a public or private high school in this state or received the equivalent of a high school diploma in this state; and

(B) maintained a residence continuously in this state for:

(i) the three years preceding the date of graduation or receipt of the diploma equivalent, as applicable; and

(ii) the year preceding the census date of the academic term in which the person is enrolled in an institution of higher education.

187. 110 ILL. COMP. STAT. 305/7e-5(a) (2009) The requirements to qualify as a resident “for tuition purposes” parallel those of the California statutes. *Id.* This statute states in relevant part:

(a) Notwithstanding any other provision of law to the contrary, for tuition purposes, the Board of Trustees shall deem an individual an Illinois resident, until the individual establishes a residence outside of this State, if all of the following conditions are met:

(1) The individual resided with his or her parent or guardian while attending a public or private high school in this State.

(2) The individual graduated from a public or private high school or received the equivalent of a high school diploma in this State.

(3) The individual attended school in this State for at least 3 years as of the date the individual graduated from high school or received the equivalent of a high school diploma.

(4) The individual registers as an entering student in the University not earlier than the 2003 fall semester.

(5) In the case of an individual who is not a citizen or a permanent resident of the United States, the individual provides the University with an affidavit stating that the individual will file an application to become a permanent resident of the United States at the earliest opportunity the individual is eligible to do so.

person (1) attended a high school in Kansas for three years, (2) graduated from an accredited Kansas high school or earned a general educational development certificate, and (3) files an affidavit promising to become a citizen as soon as that person becomes eligible.<sup>188</sup> The Nebraska Revised Statutes provides that a student has “established residence for tuition purposes” if such student (1) resides in Nebraska for three years, (2) attends a Nebraska high school, and (3) graduates from high school or receives the equivalent of a high school diploma, and (4) provides an affidavit stating that he or she will file an application to become a permanent resident when possible.<sup>189</sup> The Revised Code of Washington provides that any person who (1) completes high school and obtains a diploma in Washington or the equivalent, (2) who has lived in Washington for three years, and (3) who signs an affidavit demonstrating the willingness to become a permanent resident is a resident for tuition purposes.<sup>190</sup>

### *C. Martinez Analysis Applied To Nine Other States*

Congress has statutorily established a compelling government interest in removing the public benefit incentive

188. See KAN. STAT. ANN. § 76-731(a) (2004).

189. NEB. REV. STAT. § 85-502(8)(A) (2008). This section provides, in relevant part, that a person is not deemed to have established a residence for tuition purposes unless:

(8)(a) Such student resided with his or her parent, guardian, or conservator while attending a public or private high school in this state and:

(i) Graduated from a public or private high school in this state or received the equivalent of a high school diploma in this state;

(ii) Resided in this state for at least three years before the date the student graduated from the high school or received the equivalent of a high school diploma;

(iii) Registered as an entering student in a state postsecondary educational institution not earlier than the 2006 fall semester; and

(iv) Provided to the state postsecondary educational institution an affidavit stating that he or she will file an application to become a permanent resident at the earliest opportunity he or she is eligible to do so.

190. WASH. REV. CODE § 28B.15.012 (2008) This section provides in relevant part:

(2) The term “resident student” shall mean:

(e) Any person who has completed the full senior year of high school and obtained a high school diploma, both at a Washington public high school or private high school approved under chapter 28A.195 RCW, or a person who has received the equivalent of a diploma; who has lived in Washington for at least three years immediately prior to receiving the diploma or its equivalent; who has continuously lived in the state of Washington after receiving the diploma or its equivalent and until such time as the individual is admitted to an institution of higher education under subsection (1) of this section; and who provides to the institution an affidavit indicating that the individual will file an application to become a permanent resident at the earliest opportunity the individual is eligible to do so . . . .

for illegal immigration.<sup>191</sup> The nine other states besides California that grant the benefit of in-state tuition to adult illegal aliens are defying the Congressional objective that immigrants be self-sufficient and not depend on public resources to meet their needs.<sup>192</sup>

Under a *Martinez* analysis, 8 U.S.C. §§ 1621 and 1623 preempt the in-state tuition for illegal alien laws of not only California, but also of the states with practically identical statutes: Utah, New York, Oklahoma, and New Mexico. First, as *Martinez* explained, in-state tuition is a postsecondary education benefit.<sup>193</sup> The language of § 1623 refers to “postsecondary benefit,” but the congressional conference committee report specifically states § 1623 disqualifies illegal aliens for in-state tuition.<sup>194</sup> Second, the high school attendance requirement “creates a *de facto* residence requirement” which runs afoul of the specific prohibition of eligibility “on the basis of residence within a state.”<sup>195</sup> “Residence” generally requires physical presence and an intention to remain.<sup>196</sup> If a state “requires an illegal alien to attend a state’s high school for three years in order to qualify [for in-state tuition], then the state has effectively established a surrogate criterion for residence.”<sup>197</sup> A state law that provides in-state tuition to illegal aliens based on *de facto* or surrogate criterion for residence “manifestly thwarts the will of Congress” as expressed in § 1623 and is accordingly preempted.<sup>198</sup>

Like California’s Education Code Section 68130.5, the laws of New Mexico, New York, Oklahoma, and Utah also fail to comply with the § 1621 requirement to affirmatively “put the public on notice that their tax dollars are being used to support

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191. 8 U.S.C. § 1601 (6) (2008).

192. *See generally id.* at § 1601.

193. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 540, *reh’g granted*, 198 P.3d 1 (Cal. 2008).

194. H.R. REP. NO. 104-828, at 240 (1996) (Conf. Rep.).

195. *Martinez*, 83 Cal. Rptr. 3d at 540–41.

196. *Martinez v. Bynum*, 461 U.S. 321, 330 (1983) (stating that a state residency requirement for admission to tuition-free public schools does not violate the federal equal protection clause).

197. *See Martinez*, 83 Cal. Rptr. 3d at 537 (agreeing with plaintiffs that California Education Code Section 68130.5’s requirement that illegal aliens attend state high school for three years in order to qualify for in-state tuition is a “surrogate criterion” for residence.).

198. *Id.* at 537–38.

illegal aliens.”<sup>199</sup> None of these laws specifically mentions § 1621, nor expressly alerts state residents that their tax money will be used to subsidize the education of adult illegal aliens. Finally, even though New York, Oklahoma, and Utah require that illegal aliens sign an affidavit promising to become a U.S. citizen as soon as the opportunity becomes available, the sad truth is that these statements are meaningless.<sup>200</sup> These illegal aliens may never have the opportunity to legalize their status.<sup>201</sup> The requirement thus tends to mislead the public into believing these adult illegal alien students *can* legalize their status, or that such a possibility is very likely to occur.<sup>202</sup>

Directly contrary to the specific language of §1623, state laws patterned after the Texas law, which include the laws from Illinois, Kansas, Nebraska and Washington, explicitly base an illegal alien’s eligibility for in-state tuition on residence. § 1623 states that an illegal alien is not eligible for postsecondary benefits “on the basis of residence within a state.”<sup>203</sup> The Texas model also fails to unequivocally spell out for the general public that the intention of the law is to use taxpayer money to subsidize the college education of illegal aliens.<sup>204</sup>

Under a reasoned *Martinez* analysis, the laws of the nine states offering in-state tuition to illegal aliens on the basis of residence, without offering the same benefit to U.S. citizens and without regard to residence, are preempted by federal law and are null and void. The Supreme Court has interpreted the Supremacy Clause to require that “any state law, however clearly within a State’s acknowledged power, which interferes

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199. See N.M. STAT. § 21-1-4.6 (2008); N.Y. EDUC LAW § 6301.5 (Consol. 2008); OKLA. STAT. tit. 70, § 3242 (2008); UTAH CODE ANN. § 53B-8-106 (2008); 8 U.S.C. § 1621(d) (2008) (allowing states to make illegal aliens eligible for benefits only through an enactment which “affirmatively provides for such eligibility.”); *Martinez*, 83 Cal. Rptr. 3d at 544 (“[t]he federal law forces any state that is contemplating the provision of benefits to illegal aliens to spell out that intent publicly and explicitly.”).

200. See *Martinez*, 83 Cal. Rptr. 3d at 535 (calling affidavits required by California Education Code Section 68130.5 an “empty, unenforceable promise contingent upon some future eligibility that may or may not ever occur.”).

201. *Id.*

202. *Id.* Here the court stated that “the reality, in contrast, is that it could very well be that these students will never be eligible for legal status.” *Id.*

203. Compare 8 U.S.C. § 1623, with TEX. EDUC CODE ANN. §§ 54.051-54.060 (Vernon 2007), and 110 ILL. COMP. STAT. § 305/7e-5 (2008); and KAN. STAT. ANN. § 76-731(a) (2008); and NEB. REV. STAT. § 85-502 (2008); and WASH. REV. CODE § 28B.15.012 (2008).

204. See 8 U.S.C. § 1621(d); *Martinez*, 83 Cal. Rptr. 3d at 544.

with or is contrary to federal law, must yield.”<sup>205</sup> “[S]tate law that conflicts with federal law is “without effect.”<sup>206</sup> In § 1623, Congress expressly limited the states’ power to grant eligibility for in-state tuition to illegal aliens, and has therefore “manifested a clear purpose to oust state power” in the field of postsecondary education benefits for illegal aliens.<sup>207</sup>

## V. GRANTING IN-STATE TUITION BENEFITS TO ADULT ILLEGAL ALIENS PLACES AN UNFAIR BURDEN ON TAXPAYERS AND IS BAD PUBLIC POLICY

### A. *The High Cost of In-State Tuition Benefits*

When eligibility for in-state tuition is granted to an illegal alien, state funds must be appropriated to finance the majority of that student’s education.<sup>208</sup> Taxpayers generally subsidize the postsecondary education of the state’s resident college students.<sup>209</sup> The California 2006–2007 budget provided nearly \$11 billion from the state general fund to support higher education, an increase of \$931 million (9.4%) above revised 2005–2006.<sup>210</sup> Including the \$1.9 billion in local revenues that are a major component of community college funding, total State funding of postsecondary education in 2006–2007 for California reached nearly \$13 billion, an increase of 8.2% over

205. *Free v. Bland*, 369 U.S. 663, 666 (1962) (citing *Gibbons v. Ogden*, 22 U.S. 1, 210–11 (1824)).

206. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

207. *Martinez*, 83 Cal. Rptr. 3d at 541.

208. See Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard The Law*, 10 N.Y.U. J. LEGIS & PUB. POLY 473, 499 (“On average, taxpayers cover approximately two-thirds of the cost of the college education of students who pay in-state tuition . . . .”) (citing Sandra Block, *Rising Costs Make Climb to Higher Education Steeper: Parents Students Wonder Why Tuition, Fees Increase so Rapidly*, USA TODAY, Jan. 12, 2007 at B1).

209. Cf. *Toll v. Moreno*, 458 U.S. 1, 38 (1982). In *Toll*, the Court examined the policy of the University of Maryland regarding in-state tuition, which can be generalized to most states. The tuition and fees students pay to attend state colleges and universities often do not pay the full cost of a university education. State postsecondary institutions usually receive large appropriations from a state’s general fund, which is derived in most part from state income tax. The state thus subsidizes the cost of college education. The amount of the subsidy is normally considerably greater for state residents, since they pay income tax, and thereby indirectly contribute to the subsidy. By charging non-residents out-of-state tuition, the states are asking non-residents to pay their fair share of the cost of state-supported education.

210. CAL. POSTSECONDARY EDUC. COMM’N, FISCAL PROFILES 1 (2006).

the previous year.<sup>211</sup> Sales and use taxes and personal income taxes generated approximately 78% of state funds.<sup>212</sup>

The in-state tuition paid by resident students does not equal the true *cost of education*. “Cost of education” is a term used to describe the cost of providing direct education services.<sup>213</sup> Both tax and student fee revenue finance State higher education. When an adult illegal alien pays only “in-state tuition” to attend a public college, the state taxpayers must fund the remaining cost of education.<sup>214</sup> Analysis of funding for public higher education in California demonstrates the exuberant amount taxpayers must spend to finance an illegal alien’s college education. For 2006–2007, the estimated per-student revenue funding (money a California public higher education institution receives from both taxpayers and student fees)<sup>215</sup> for full time equivalent students (FTES) at the University of California was \$21,365 per year.<sup>216</sup> Estimated per-student revenue funding in the California State University system was \$11,004<sup>217</sup> and \$5,501 for California Community Colleges.<sup>218</sup>

The amount paid from the California general fund per student in the 2006–2007 school year was as follows: \$14,562 for each University of California FTES, \$7,968 for each California State University FTES, and up to \$5,234 for each California Community College FTES (community colleges also receive local government funds).<sup>219</sup> Therefore, these figures are the amount of subsidies Californians pay for each and every illegal alien enrolled full time in a public college or university in California.

Allowing an illegal alien to attend a two year community college program without paying nonresident tuition is worth \$10,468 in financial assistance—the amount that must be paid

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211. *Id.*

212. *Id.* at 11.

213. CAL. POSTSECONDARY EDUC. COMM’N, KEEPING COLLEGE AFFORDABLE IN CALIFORNIA: RECOMMENDED POLICY OPTIONS AND A PANEL REPORT ON COLLEGE AFFORDABILITY 7 (2006).

214. *Toll*, 458 U.S. at 46

215. CAL. POSTSECONDARY EDUC. COMM’N, FISCAL PROFILES 14 (2006).

216. *Id.*

217. *Id.* at Display 14.

218. *Id.* at Display 15.

219. *Id.* at Displays 13–15.

from the state general fund for each resident FTEs.<sup>220</sup> In the case of full time attendance at a four year institution, the payment by the state for one adult illegal alien student would in effect be the equivalent of a scholarship worth from \$31,872 to \$58,248, depending on whether the enrollment is in the California State University system or the University of California system.<sup>221</sup> Thus, the implementation of state laws granting in-state tuition to illegal aliens, such as California Education Code Section 68130.5, results in substantial financial assistance to each illegal alien enrolled in public higher education institutions.

### *B. The Burden on Taxpayers*

States' already spend vast sums of money to defray the cost of illegal immigration even before the cost of subsidizing postsecondary education for illegal aliens is taken into consideration. Analysis of 2002 Census data indicates that the education, medical care and incarceration of illegal aliens costs California taxpayers approximately \$10.5 billion per year.<sup>222</sup> While this figure does not include the cost of providing postsecondary education, it demonstrates the huge financial strain illegal aliens force upon state taxpayers. Table 1 below shows the estimated cost to taxpayers in the ten states that offer in-state tuition to illegal aliens. This represents the costs of services provided to illegal aliens but does not include the cost of college education subsidies. Table 2 shows the available estimated costs incurred by five states granting in-state tuition to illegal aliens.

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220. *See id.* (\$5,234 per year for two years).

221. *See id.* (\$7,968 or \$14,562 for four years).

222. FED'N FOR AM. IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO CALIFORNIANS 2, 6 (2004), available at [http://www.fairus.org/site/DocServer/ca\\_costs.pdf?docID=141](http://www.fairus.org/site/DocServer/ca_costs.pdf?docID=141). The illegal alien population in California is the largest of any state. Jennifer L. Maki, Note, *The Three R's: Reading, 'Riting, and Rewarding Illegal Immigrants: How Higher Education has acquiesced in the Illegal Presence of Undocumented Aliens In the United States*, 13 WM. & MARY BILL RTS. J. 1341, 1344 (2005) (citing Office of Policy & Planning, U.S. Immigration & Naturalization Serv., *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* (Jan. 2003), available at [http://uscis.gov/graphics/shared/aboutus/statistics/ill\\_report\\_1211.pdf](http://uscis.gov/graphics/shared/aboutus/statistics/ill_report_1211.pdf)).

The number of illegal aliens in California is estimated to be between 2.8 and 3 million persons, which is 23–30% of the national total. FED'N FOR AM. IMMIGRATION REFORM, *supra* note 223, at 6.



**Table 1. Cost of Illegal Immigration in States Granting In-State Tuition to Illegal Aliens<sup>223</sup>**

States Granting In-State Tuition To Illegal Aliens	Illegal Alien Population	Cost of All Services to Taxpayers
California	2,209,000	\$10.5 billion
Illinois	620,000	\$3.5 billion
Kansas	40,000-70,000	\$192.5 million
Nebraska	39,000	\$104.1 million
New Mexico	73,000	\$153.1 million
New York	646,000	\$5.1 billion
Oklahoma	83,000	\$207 million
Texas	1,400,000 1,600,000	\$4.7 billion
Utah	108,000	\$184.4 million
Washington	207,000	\$549.4 million

**Table 2. Cost Estimates For Five States That Provide In-State Tuition To Illegal Aliens.<sup>224</sup>**

States Providing In-State Tuition	Costs of Providing In-State Tuition to Illegal Aliens
California	\$222.6-289.3 million
Illinois	\$23.3-30.5 million
New York	\$28.8-37.5 million
Texas	\$80.2-104.4 million
Washington	\$13.2-17.2 million

Some U.S. parents see their tax dollars being taken away to

223. FED'N FOR AM. IMMIGRATION REFORM, IMMIGRATION IN YOUR BACKYARD, [http://www.fairus.org/site/PageServer?pagename=research\\_researchlistda29](http://www.fairus.org/site/PageServer?pagename=research_researchlistda29) (select appropriate state link).

224. JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, BREAKING THE PIGGY BANK: HOW ILLEGAL IMMIGRATION IS SENDING SCHOOLS INTO THE RED 5 (2005), available at [http://www.fairus.org/site/PageServer?pagename=research\\_researchf6ad](http://www.fairus.org/site/PageServer?pagename=research_researchf6ad).

fund the postsecondary education of illegal aliens even though they cannot afford to send their own children to college.<sup>225</sup> Increases in college fees and the cost of living, combined with income stagnation among the middle and lower-income workers, have made paying for a college education impossible for many families.<sup>226</sup> Legal resident students and their families even find it increasingly difficult to pay for a two-year community college. Generally, students must depend on their families for support, seek financial aid, and carefully weigh the costs of loans against the future value of a college education.<sup>227</sup> The particularly acute impact of indebtedness for middle-income families without access to need-based grant aid affects both access and choice in higher education. Students in some public universities incur an average indebtedness of \$18,000 to finance their education.<sup>228</sup> Because of higher education costs and decreased state support, the aggregate average debt level for California families borrowing from Federal Stafford Programs from 1995–1996 to 2003–2004 increased by over 60%.<sup>229</sup>

Other disturbing trends signal the growing financial drain on California families: the number of parent loans increased by 260% from 1994–1995 to 2003–2004, the use of unsubsidized borrowing with high repayment obligations continues to grow, and the wave of student loan consolidations has resulted in a significantly greater debt due to extended repayment schedules.<sup>230</sup> In 2003–2004, 56% of dependent undergraduates

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225. For instance, in 2001, the California Postsecondary Education Commission studied data from six counties comprising the northernmost inland region of California and found that participation in postsecondary education lags behind statewide levels. The reason for this disparity was the distance from public four-year institutions. In other words, families in those counties cannot afford to send their children to college. CAL. POSTSECONDARY EDUC. COMM'N, RECOMMENDATIONS TO INCREASE THE POSTSECONDARY EDUCATION OPPORTUNITIES FOR RESIDENTS OF SUPERIOR CALIFORNIA 2, 8–9 (2002).

226. CAL. POSTSECONDARY EDUC. COMM'N, WHO CAN AFFORD IT? HOW RISING COSTS ARE MAKING COLLEGE UNAFFORDABLE FOR WORKING FAMILIES 1 (2008), available at <http://www.cpec.ca.gov/completereports/2008reports/08-10.pdf>.

227. CAL. POSTSECONDARY EDUC. COMM'N, COMMUNITY COLLEGES: STILL AN AFFORDABLE ROUTE TO A DEGREE? 4 (2008), available at <http://www.cpec.ca.gov/completereports/2008reports/08-14.pdf>.

228. CAL. POSTSECONDARY EDUC. COMM'N, RESIDENT UNDERGRADUATE STUDENT FEES – ISSUES AND OPTIONS 8 (2006).

229. CAL. POSTSECONDARY EDUC. COMM'N, KEEPING COLLEGE AFFORDABLE IN CALIFORNIA: RECOMMENDED POLICY OPTIONS AND A PANEL REPORT ON COLLEGE AFFORDABILITY 13 (2006).

230. *Id.* at 13.

owned at least one credit card, and 25% carried a balance.<sup>231</sup> In fact, credit cards accounted for 18% of tuition payments.<sup>232</sup> A large number of undergraduate students must enroll on a part-time basis and work while enrolled to help cover the increasing costs.<sup>233</sup> The increasing reliance on loans by students and families to finance college tuition already poses a threat to career aspirations and may substantially weaken a state's economy.<sup>234</sup> Requiring working families to fund the college education of illegal aliens while struggling to finance the college education of their children can only exacerbate an already growing financial strain on the state and on families.

One argument used to justify the award of resident tuition rates to adult illegal aliens is that they do pay taxes in various ways, and thus deserve a taxpayer-subsidized postsecondary education as much as legal residents.<sup>235</sup> However, that argument is not helpful if the payment of taxes by illegal aliens does not offset the costs illegal aliens impose on government through the utilization of government services.<sup>236</sup> Unfortunately, government expenditures caused by illegal aliens exceed the taxes that are paid.<sup>237</sup> As previously indicated, the net fiscal cost due to illegal immigration on all levels of government is estimated at \$89.1 billion a year.<sup>238</sup> Since the federal government pays only about \$10 billion per year, state and local governments must pay the difference.<sup>239</sup>

### *C. The Policy of Providing In-State Tuition to Illegal Aliens Is*

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231. *Id.* at 15.

232. *Id.*

233. *Id.*

234. CAL. POSTSECONDARY EDUC. COMM'N, KEEPING COLLEGE AFFORDABLE IN CALIFORNIA: RECOMMENDED POLICY OPTIONS AND A PANEL REPORT ON COLLEGE AFFORDABILITY 2 (2006).

235. See Aimee Deverall, *Make the Dream a Reality: Why Passing the DREAM Act is the Logical First Step in Achieving Comprehensive Immigration Reform*, 41 J. MARSHALL L. REV. 1251, 1270 (2008) (discussing how illegal aliens pay taxes "just like everyone else," including payroll taxes, but omitting mention of identify theft issues).

236. See Tammi D. Jackson, *Free Social Service: Where Do I Enroll? – The True Cost Welfare Recipients and Undocumented Immigrants Have on the U.S. Economy*, 13 PUBL. INT. L. REP. 271, 279 ("[T]he fact that undocumented immigrants pay taxes does not necessarily mean that they are a fiscal benefit.").

237. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 460-463 (2008) (discussing the fiscal burdens imposed by illegal immigration).

238. Kobach, *supra* note 13.

239. *Id.*

*Unsound*

At least one state court previously articulated important public policy arguments against subsidizing the postsecondary education of illegal aliens.<sup>240</sup> The court identified no less than nine important considerations: the state's interest (1) in not subsidizing violations of law; (2) in preferring to educate its own lawful residents; (3) in avoiding enhancing the employment prospects of those to whom employment is forbidden by law; (4) in conserving its fiscal resources for the benefit of its lawful residents; (5) in avoiding accusations that it unlawfully harbors illegal aliens in its classrooms and dormitories; (6) in not subsidizing the university education of those who may be deported; (7) in avoiding discrimination against citizens of sister states and aliens lawfully present; (8) in maintaining respect for government by not subsidizing those who break the law; and (9) in not subsidizing the university education of students whose parents, because of the risk of deportation if detected, are less likely to pay taxes.<sup>241</sup> These policy reasons are just as valid today as they were in 1990, and there are many others.

The growing number of illegal aliens in the United States contributes to increased cases of identity theft.<sup>242</sup> As previously noted, it is against the law to hire illegal aliens.<sup>243</sup> This means that illegal aliens must commit two crimes in order to secure employment, aside from the crime of their unlawful entry and stay. First they must acquire personal information such as stolen social security cards or numbers, a violation of federal law.<sup>244</sup> Next, they must provide false documentation to potential employers, which is another violation of federal law.<sup>245</sup> The Federal Trade Commission estimated that identity theft affected approximately 8.3 million American adults in

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240. *Regents of Univ. of Cal. v. Super.Ct.*, 276 Cal. Rptr. 197, 201 (Cal. Ct. App. 1990).

241. *Id.*

242. Identity theft and identity fraud are terms used to refer to all types of crime in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for economic gain. United States Department of Justice, <http://www.usdoj.gov/criminal/fraud/websites/idtheft.html#whatis> (last visited March 3, 2009).

243. 8 U.S.C. § 1324 (2008).

244. 18 U.S.C. § 1028A.

245. 8 U.S.C. § 1324c(a).

2005.<sup>246</sup> It should come as no surprise that the states along the southern border have among the highest incidents of identity theft.<sup>247</sup> But identify theft perpetuated by illegal aliens is not limited to just a few states.<sup>248</sup>

In 2005, an assistant attorney general from Utah estimated that 90 percent of the identity theft cases he investigated involved illegal aliens.<sup>249</sup> Identity theft destroys people's credit and interferes with Social Security benefits.<sup>250</sup> Because a social security card number stolen by illegal aliens usually gets passed around to families and friends, identity theft victims typically see their social security number "shared" about 30 times.<sup>251</sup> Victims may spend years trying to reclaim their lives, but some are never successful.<sup>252</sup> States that offer in-state tuition benefits to illegal aliens do so with the unrealistic expectation that these aliens will go on to secure better employment in their state.<sup>253</sup> However, because illegal aliens must use stolen identities in order to be hired, state politicians who advocate for in-state tuition for illegal aliens are in effect sacrificing, or at least putting at risk, the personal identifying information of their own constituents.

The Federal Immigration Reform and Control Act ("IRCA") prohibits the employment of unauthorized workers in the United States.<sup>254</sup> "IRCA 'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'"<sup>255</sup> Under IRCA, once an employer realizes

246. SYNOVATE, FEDERAL TRADE COMMISSION – 2006 IDENTITY THEFT SURVEY REPORT 11 (2007), available at <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>.

247. FED. TRADE COMM'N, IDENTITY THEFT VICTIMS COMPLAINT DATA: TEXAS JANUARY 1 - DECEMBER 2006, 4-5(2007), available at <http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2006/Texas%CY-2006.pdf>.

248. *Id.*

249. Bob Sullivan, *The Secret List of ID Theft Victims*, MSNBC, Jan. 29, 2005, <http://www.msnbc.msn.com/id/6814673>.

250. *Id.*

251. *Id.*

252. David Lazarus, *Revenge Can Be Sweet*, S. F. CHRON., April 18, 2003, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/04/18/BU293901.DTL>. (Lazarus had his own identity stolen by an illegal alien.)

253. See Maki, *supra* note 223, at 1372 (countering the argument that because states invest money in the education of illegal alien children, more money must be spent for their postsecondary education).

254. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002).

255. *Id.* (citing *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, 194 n. 8 (1991)).

that an unauthorized alien has been unknowingly hired, or if an employee becomes unauthorized, the employer must discharge that employee.<sup>256</sup> Employers who violate IRCA can be punished by civil fines and criminal prosecution.<sup>257</sup> Prospective employees are also subject to criminal prosecutions and fines for providing fraudulent documents.<sup>258</sup> As a result, employers seeking to hire college educated employees are generally reluctant to violate federal immigration laws by hiring undocumented workers.<sup>259</sup>

In December 2006, federal immigration authorities raided installations owned by Swift & Company.<sup>260</sup> Authorities apprehended 1,282 illegal workers, and afterwards, eighteen of Swift's former employees filed a lawsuit in the U.S. District Court for the Northern District of Texas alleging violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), subjecting Swift to \$23 million in potential liability.<sup>261</sup> An obscure amendment to RICO allows private citizens to sue employers for hiring illegal immigrants.<sup>262</sup> This means that citizens who are angry at the federal government for a perceived dereliction in enforcing the immigration code may be able to bypass the sometimes shoddy federal enforcement efforts and initiate their own citizen lawsuits against employers.<sup>263</sup> The privatization of immigration enforcement in the United States will make it more difficult for illegal aliens to secure employment.<sup>264</sup>

Laws against illegal immigration and the hiring of illegal

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256. 8 U.S.C. § 1324a(a)(2) (2008).

257. 8 U.S.C. § 1342a(e)(4)(A); *Id.* at § 1324a(f)(1).

258. 8 U.S.C. § 1324c(a).

259. Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 503 (2006–2007) (citing 8 U.S.C. § 1324a (2000) and Miriam Jordan, *Illegals' New Lament: Have Degree, No Job*, WALL ST. J., April 26, 2005, at B1).

260. Stephen A. Brown, Comment, *Illegal Immigrants In The Workplace: Why Electronic Verification Benefits Employers*, 8 N.C. J. L. & TECH. 349, 349 (2007).

261. *Id.*

262. Adam J. Homicz, Note, *Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act*, 38 SUFFOLK U.L. REV. 621, 622 (2005) (citing 18 U.S.C. §§ 1961–1968 (1971) (amended 1996)).

263. *Id.* (citing James Fulford, *Illegals' Employers Meet RICO Doomsday Machine*, Apr. 10, 2002, <http://www.vdare.com/fulford/lawsuit.htm>).

264. *Id.* (citing Micah King, CTR. FOR IMMIGRATION STUDIES, RICO: A NEW TOOL FOR IMMIGRATION LAW ENFORCEMENT, Aug. 2003, <http://www.eis.org/articles/2003/back1103.html> (detailing new RICO immigration developments and implications for businesses and tax payers)).

immigrants are unlikely to be eased because the American public is opposed to such changes. Nearly two-thirds of Americans oppose making it easier for illegal immigrants to become United States citizens.<sup>265</sup> Continuous and unchecked illegal immigration across our borders “breeds anger and resentment among citizens who can[not] understand why illegal aliens often receive government-funded health care, education benefits, and subsidized housing.”<sup>266</sup> Allowing undocumented aliens to receive public benefits “perpetuates their unlawful activities and thus weakens the public outlook of the law.”<sup>267</sup>

*Martinez* is not the only court decision restoring the rule of law and calming public discontent. The Ninth Circuit Court of Appeals recently upheld a 2007 Arizona law that targeted employers who hire illegal aliens.<sup>268</sup> The law reflected “rising frustration with Congress’s failure to enact comprehensive immigration reform,” and called for the revocation of state licenses to do business in Arizona in the case of offending businesses.<sup>269</sup> Thus, it will become increasingly difficult for illegal immigrants to find jobs.

A state offering in-state tuition benefits to illegal aliens in the hopes that they will remain in the state, find better under-the-table jobs, and re-pay the state in the form of higher taxes has no assurance that the aliens will in fact remain in the state after college.<sup>270</sup> Even assuming that an illegal alien stays and finds employment in the state where the subsidy arose, it will

265. Rebecca Ness Ryhmer, *Taking Back The Power: Federal vs. State Regulation on Postsecondary Education Benefits for Illegal Immigrants*, 44 WASHBURN L.J. 603, 625 (2005) (citing Lou Dobbs, *Campaign Cowardice*, U.S. NEWS & WORLD REP., Sept. 27, 2004 at 58).

266. Megan L. Capasso, Comment, *An Attempt at a “12 Step Program”: President Bush’s Comprehensive Strategy To Rehabilitate California and Mexico’s Addiction to Illegal Immigration: Does It Strike the Correct Societal Balance?*, 34 W. ST. U. L. REV. 87, 99 (2006) (citing Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004 at 51).

267. Maki, *supra* note 223, at 1366.

268. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 980 (9th Cir. 2008).

269. *Id.* at 979.

270. See John Leland, *Some ID Theft Is Not for Profit, but to Get a Job*, N.Y. TIMES, Sept. 4, 2006, at A1 (in many cases, taxes are paid through stolen social security numbers); see also Plyler v. Doe, 457 U.S.202, 230 (1982) (“The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders.”); *Court Eyes Illegal Aliens and ID Theft*, CBS NEWS, Oct. 20, 2008, <http://www.cbsnews.com/stories/2008/10/20/supremecourt/main4532240.shtml>.

most likely be a position that would have been filled by a citizen or legal nonresident.<sup>271</sup> The argument historically relied upon to justify the non-enforcement of U.S. immigration and labor laws, is that illegal aliens simply fill unskilled positions that Americans refuse to perform.<sup>272</sup> However in actuality, jobs are being taken away from citizens and lawful residents by companies that chose to replace them with foreign workers and exploit the cheaper illegal labor to maximize profits.<sup>273</sup> It follows to reason that just as unskilled illegal aliens take away blue-collar jobs from legal workers, college educated illegal aliens take away white-collar jobs from professionals.<sup>274</sup>

Ultimately, the offer of in-state tuition to illegal aliens attracts even more illegal immigration.<sup>275</sup> Granting adult illegal alien students the benefit of in-state college tuition rates then results in more illegal alien students applying for and attending college.<sup>276</sup> These illegal aliens, whose education would be subsidized by state taxpayers, would be competing for college seats and taking the place of U.S. citizens.

## VI. CONCLUSION

*Martinez v. Regents of University of California* held that a California law granting in-state tuition to illegal aliens is preempted by federal law.<sup>277</sup> Therefore, the nearly identical laws in nine other states are also likely null and void. Illegal immigration is a federal matter and Congress has set forth through 8 U.S.C. §§ 1621 and 1623 the circumstances under which illegal aliens may receive postsecondary education

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271. See *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976) (“Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs. . . .”); Michael J. Almonte, Note, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make the Rules, Too?*, 72 BROOK. L. REV. 655, 659 (2007) (discussing studies supporting claims that undocumented workers take jobs away from American citizens).

272. Tom Tancredo, *Cui Bono? The Case for an Honest Guest Worker Program*, 10 TEX. REV. L. & POL. 63, 80 (2005).

273. *Id.* at 73.

274. See *id.* at 73 (The displacement of citizens and legal residents by illegal labor is expanding into the service sector).

275. See Maki, *supra* note 223, at 1363–64.

276. FED’N FOR AM. IMMIGRATION REFORM, TAXPAYERS SHOULD NOT SUBSIDIZE COLLEGE FOR ILLEGAL ALIENS, , May 2003, available at [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters6be3](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters6be3).

277. *Martinez v. Regents of Univ. of Cal.* 83 Cal. Rptr. 3d 518, 540, 543 (Cal. Ct. App. 2008), *reh’g granted*, 198 P.3d 1 (Cal. 2008).



benefits.<sup>278</sup> Nevertheless, ten states have laws making in-state tuition available to adult illegal aliens under circumstances forbidden by federal immigration laws. These state laws are preempted because in-state tuition is a postsecondary education benefit that can only be made available to illegal aliens if the same benefit is made available to U.S. citizens without regard to state residence.<sup>279</sup> Even if in-state tuition is available, the state must affirmatively put its state residents on notice that a postsecondary education benefit is being offered to illegal aliens to alert taxpayers to this added drain on their state budgets.<sup>280</sup>

Numerous policy reasons forcefully argue against offering in-state tuition to adult illegal aliens in order to subsidize their college education, including the added burden that must be borne by taxpayers and the likelihood that offering this benefit to illegal aliens will encourage more illegal immigration. State action to encourage and condone illegal immigration is contrary to federal laws that make it a crime to immigrate to the United States illegally, stay in the country illegally, and to hire illegal aliens.<sup>281</sup> The end result is the weakening of the rule of law, particularly since illegal aliens must resort to the violation of other laws to secure employment such as identity theft, and offering false documents to their employers.<sup>282</sup>

State laws that grant in-state tuition to adult illegal aliens circumvent federal law and are completely contrary to sound public policy. The legislatures of ten states that grant the benefit of in-state tuition to adult illegal aliens should take notice of *Martinez*, and initiate immediate action to strike their offensive and preempted laws from the books. If not, these states will likely be on the losing end of costly and unpopular court battles that will increase the burden on angry taxpayers who will remember the unwise decisions of their politicians the next time they are up for reelection.

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278. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (the power to regulate immigration is exclusively a federal power).

279. See *Martinez*, 83 Cal. Rptr. 3d at 533 (holding that California Education Code Section 68130.5, which provides in-state tuition to illegal aliens, confers a "benefit" within the meaning of 8 U.S.C §§ 1621 and 1623).

280. *Id.* at 543–44.

281. 8 U.S.C. § 1101(a)(4) (2008); *id.* at § 1181(a); *id.* at § 1201; *id.* at §§ 1251, 1252; *id.* at § 1324; *id.* at § 1357.

282. *Id.* at §§ 1028A, 1324c(a).