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EDUCATING THE UNDERGROUND: THE CONSTITUTIONALITY OF NON-RESIDENCE BASED IMMIGRANT IN-STATE TUITION LAWS

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Woven into the fabric of the American secondary education system are students a casual observer might dismiss as simply part of the mass of students that occupy classroom seats and roam school hallways everyday. College should be just over the horizon for these students, but a closer look reveals an unfortunate tension, a legal status that belies preconceived notions of the everyday student. These students are undocumented, many brought into the United States unlawfully by their parents as young children. Unable to legally work and prohibited from receiving federal loans, grants, and work study opportunities, college tuition often presents an insurmountable obstacle to educational access for these students.

In-state tuition may relieve some of the burden of college financing for these students, but under the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),¹ states may not provide any postsecondary education benefit to an undocumented immigrant on the basis of residence, unless a citizen or national of the United States is also eligible regardless of residence.² Congress also passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”),³ which states that an undocumented immigrant is generally ineligible for any state or local public benefit, including a postsecondary education benefit.⁴ Each law generally prohibits undocumented immigrants from receiving state public benefits, but each also includes exceptions under which states may grant such benefits to undocumented immigrants.⁵ Yet, because of the general prohibitions in each law, opponents of in-state tuition for undocumented students

1. Pub. L. No. 104-208, 110 Stat. 3009-672 (codified as amended at 8 U.S.C. § 1623(2012)).

2. *Id.*

3. Pub. L. No. 104-193, 110 Stat. 2268 (codified as amended at 8 U.S.C. § 1621(2012)).

4. *Id.* at § 1621(a), 1621(c).

5. See IIRIRA, *supra* note 1 (excepting in-state tuition laws based on non-residence criteria); see, e.g., 8 U.S.C. § 1621(b)(2) (excepting “Short-term, non-cash, in-kind emergency disaster relief”).

argue that it runs afoul of federal law and rewards lawbreaking at the expense of U.S. citizens and lawful immigrants.⁶

The individual states are left to deal with the economic and social effects of the modern federal immigration scheme, the ineffectiveness of which has been blamed for the large number of undocumented immigrants in the U.S.⁷ In the area of education, state governments must decide whether to create incentives or deterrents to college access for undocumented students, the most sympathetic segment of the undocumented population. Beginning with Texas in 2001, thirteen states have passed laws that allow undocumented students to pay in-state tuition, and in twelve of those states the laws are currently in effect.⁸ Among these states, two models for the provision of in-state tuition have emerged. The California model grants in-state tuition based on non-residence criteria,⁹ while the Texas model grants in-state tuition based on residence within the state.¹⁰ Preemption-based lawsuits challenging the validity of laws granting in-state tuition rates to undocumented students were inevitable. In the first case to adjudicate the preemption issue on its merits, the California Supreme Court held in *Martinez v. Regents of the University of California*¹¹ that neither IIRIRA nor PRWORA preempted the California State Legislature from passing AB 540, a law that made undocumented students eligible for in-state tuition if they satisfied certain non-residence criteria.¹²

This note argues that federal law does not preempt states like California from granting in-state tuition to undocumented students based on criteria other than state residence. Courts should place paramount emphasis on the statutory text of IIRIRA and PRWORA, which is the

6. See, e.g., Mark Krikorian, *Opposing View: Amnesties Reward Lawbreaking*, USA TODAY (September 26, 2011), <http://www.usatoday.com/news/opinion/story/2011-09-26/Perry-illegal-immigration-tuition/50560362/1>.

7. See Michael John Garcia, Larry M. Eig, & Yule Kim, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, CONG. RES. SERVICE (2010), <http://graphics8.nytimes.com/packages/pdf/topics/science/immigcrs.pdf>.

8. Undocumented Student Tuition: State Action, National Conference of State Legislatures, NCSL, <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx> (last visited Apr. 12, 2013).

9. CAL. EDUC. CODE § 68130.5 (Deering 2012); see also N.Y. EDUC. LAW § 6206 (a-1)(McKinney 2011).

10. TEX. EDUC. CODE ANN. § 54.052(a)-(b) (West 2013). IIRIRA does not prohibit states from granting in-state tuition to undocumented students based on their residence within the state; however, out-of-state U.S. citizens must also be eligible for in-state tuition. Laws like the Texas law are more likely to be successfully challenged because of the residence-based provision of in-state tuition.

11. 241 P.3d 855 (Cal. 2010).

12. *Id.* at 859-60.

best example of Congress' intent to afford states discretion in the provision of in-state tuition. Moreover, laws like California's AB 540 are not impliedly preempted because Congress expressly grants states the discretion to extend in-state tuition to undocumented students based on non-residence criteria. And while this issue has become one of the most emotional in current political debate, courts should not consider policy arguments because their role in preemption cases is to discern congressional purpose, which is most clearly expressed through the statutory text.

Part I of this note will examine the contours of immigration federalism by describing the development of the federal exclusivity principle and its effect on the role states play in regulating matters that affect immigration. Part I also discusses *DeCanas v. Bica*,¹³ the seminal case dealing with the federal preemption doctrine in the immigration context. Part II then discusses IIRIRA and PRWORA, two important federal laws against which immigrant in-state tuition laws are analyzed under the preemption doctrine. This section will also summarize AB 540. Part III analyzes two important immigration cases that involve express preemption clauses: *Martinez*, which deals with in-state tuition for undocumented students, and *Chamber of Commerce of the United States v. Whiting*,¹⁴ a recent U.S. Supreme Court case upholding an Arizona law that imposed licensing penalties on businesses that knowingly hired undocumented workers. Finally, Part IV discusses the constitutionality of immigrant in-state tuition laws based on criteria other than residence.

I. IMMIGRATION FEDERALISM AND THE PREEMPTION DOCTRINE IN THE IMMIGRATION CONTEXT

A. *Federal Exclusivity*

Although the Constitution does not expressly grant Congress the authority to regulate immigration, the Supreme Court has consistently held for well over a century that Congress indeed has exclusive authority over immigration.¹⁵ Throughout the years the Court has articulated several sources of an exclusive federal immigration power, including

13. 424 U.S. 351 (1976).

14. 131 S. Ct. 1968 (2011).

15. *DeCanas*, 424 U.S. at 354 ("Power to regulate is unquestionably exclusively a federal power."); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

the Naturalization Clause,¹⁶ the Foreign Commerce Clause,¹⁷ and the strong national interest in regulating foreign affairs.¹⁸ Legal discourse crafted through numerous federal opinions, including several strong restatements by the Supreme Court,¹⁹ reaffirms the principle of federal exclusivity.²⁰

The doctrine of federal exclusivity began to take shape in 1875. Historically, the individual states were largely responsible for the movement of people across its borders.²¹ State legislatures also passed laws pursuant to its police powers that regulated various aspects of immigrants' lives.²² However, in 1875, Congress passed the first federal immigration law to restrict the admission of certain individuals into the U.S.²³ Building upon jurisprudence from *The Passenger Cases*, the Supreme Court then declared that Congress, and not the individual states, has the authority to regulate the "admission of citizens and subjects of foreign nations" to the U.S.²⁴ In a pair of cases from 1889 and 1893, the Supreme Court solidified the principle of federal exclusivity by casting Congress' power as plenary, a largely unfettered power based on the inherent sovereignty of the nation.²⁵

The development of the exclusivity principle has been greatly aided by the creation of the modern federal immigration scheme. Congress laid the foundation for the modern scheme in 1952 when it

16. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

17. *Henderson v. Mayor of New York*, 92 U.S. 259, 270-75 (1875).

18. See *Chy Lung*, 92 U.S. at 280; see also *United States v. Pink*, 315 U.S. 203, 242 (1942) ("In our dealings with the outside world, the United States speaks with one voice.").

19. *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Hines*, 312 U.S. at 62.

20. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575 (2008).

21. Gerald L. Neumann, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

22. Neumann identifies five major categories of immigration laws passed by state legislatures: "the regulation of the movement of criminals; public health regulation; regulation of the movement of the poor, regulation of slavery; and other policies of racial subordination." *Id.* at 1841.

23. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

24. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

25. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation."); *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

passed the Immigration and Nationality Act (“INA”).²⁶ INA created a statutory framework setting forth the different criteria and processes that enabled an alien to immigrate to the U.S. For example, INA delineated the different types of aliens that could enter and remain in the U.S.²⁷ As later amended, INA refined eligibility categories and subjected those categories to numerical limitations.²⁸ Notably, INA constitutes the “sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”²⁹ The modern federal scheme also includes important immigrant employment laws. Congress strengthened its foothold in the regulation of immigration when it enacted legislation that penalized employers who knowingly hired undocumented immigrants.³⁰

B. The Role of State and Local Governments in Regulating Immigration

Despite the development of the principle of federal exclusivity through jurisprudence and Congress’ creation of a substantial body of federal immigration law, state and local governments play a vital role in legislating areas affected by the modern scheme. Beneath the veneer of a seemingly clear and expansive federal regulatory power is a tension between the federal and sub-national governments in demarcating the boundaries of their regulatory scope. This tension results from the reality that the federal government does not, and simply cannot, regulate all aspects of immigration on its own.³¹ There is significant support for this proposition historically since immigration regulation—whether through laws explicitly marked as immigration laws or laws stemming from the state’s police powers that applied to both immigrants and citizens—primarily occurred at the state level prior to the 1870s.³² In modern jurisprudence, immigration regulation is conceptualized as those laws that regulate admission and removal from

26. 8 U.S.C. §§ 1101-1537 (1952).

27. *Id.* at § 1151.

28. *Id.*

29. *Id.* at § 1229(a)(a)(3).

30. There are two primary federal statutes dealing with immigrant employment: The Immigrant Reform and Control Act of 1986, 8 U.S.C. §§ 1324–1365 (1986), and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623 (1996).

31. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 65-66 (2007) (“Indeed, it is hard to think of a national program (other than Social Security) that is run entirely by the federal government without any state involvement”).

32. Neumann, *supra* note 21, at 1834.

the U.S.,³³ but the federal scheme constructed to meet those ends relies on state laws that touch upon many aspects of immigration. Relatively recent legislation illustrates that Congress itself will explicitly define the scope of state and local authority. For example, Congress enacted the Immigration Reform and Control Act ("IRCA") in 1986 in an effort to control unauthorized migration flows driven by economic incentives.³⁴ In order to do so, Congress created employment verification schemes for all workers.³⁵ With this framework in place, Congress generally prohibited state and local governments from enacting their own laws imposing sanctions on non-compliant employers.³⁶ However, Congress explicitly carved out an exception by allowing states and municipalities to enact "licensing and similar laws."³⁷

Scholars have emphasized both the ability of states to enact certain immigration-related laws that do not conflict with federal law and the soundness of doing so in furtherance of cooperative federalism.³⁸ States of course retain significant regulatory authority under their police powers. And even as Congress creates a larger body of federal immigration law, in certain circumstances it explicitly gives state and local governments the ability to regulate in furtherance of the modern scheme; for example, the ability to enact licensing penalties against employers who hire undocumented workers. As this note will further develop, higher education is another area in which states retain significant discretion, both because states have historically regulated this area and, more significantly for the purposes of preemption jurisprudence, because Congress has narrowly regulated the field of in-state tuition. Insofar as higher education laws affect educational access for undocumented students, Congress explicitly allowed states to make undocumented students eligible for in-state tuition based on non-residence criteria.³⁹

C. *The DeCanas Tests*

The preemption doctrine defines the relationship between the federal and sub-national governments as each enact laws that either

33. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

34. H.R. Rep. 99-682(I), 1 (1986) (Conf. Rep.).

35. 8 U.S.C. § 1324(a)(1)(b).

36. *Id.* at § 1324a(h)(2).

37. *Id.*

38. *See, e.g.*, Rodríguez, *supra* note 20.

39. 8 U.S.C. § 1623(a).

regulate immigration or regulate in areas that affect immigration. The doctrine also lies at the core of challenges to state laws that grant in-state tuition to undocumented students. While litigants have argued for relief on other grounds, such as the Equal Protection Clause⁴⁰ and the Privileges and Immunities Clause,⁴¹ the existence of federal statutes directly addressing the provision of educational benefits to undocumented immigrants makes federal preemption the most salient ground upon which to mount a challenge. The preemption doctrine is based on the Supremacy Clause, which states that the laws of the United States “shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.”⁴² The doctrine ensures fidelity to the Supremacy Clause by rendering void any state or local laws where Congress either expresses or implies its preemptive intent.

The Supreme Court announced a test for the preemption of state laws in light of the modern federal scheme in its seminal 1976 case, *DeCanas v. Bica*.⁴³ At issue in *DeCanas* was a California labor law that prohibited employers from knowingly hiring undocumented workers if it would have a negative effect on lawful workers.⁴⁴ Migrant farmworkers brought suit against labor contractors in California, alleging that the contractors refused to continue employing them because of the availability of unauthorized workers.⁴⁵ Both the California Superior Court and Court of Appeals found the statute to be unconstitutional on preemption grounds.⁴⁶ Both courts invoked the federal exclusivity principle in finding that the California law interfered with the comprehensive scheme created when Congress enacted INA.⁴⁷

The Supreme Court held that the California law was not preempted by INA.⁴⁸ The Court reasoned that despite federal exclusivity in the regulation of immigration, “[not every] state enactment which in any way deals with aliens is a regulation of immigration and thus pre-

40. Day v. Bond, 500 F.3d 1127, 1132 (10th Cir. 2007).

41. Martinez v. Regents of Univ. of Cal., 241 P.3d 855, 869-70 (Cal. 2010).

42. U.S. CONST. art. VI, cl. 2.

43. 424 U.S. 351 (1976).

44. *Id.* at 352.

45. *Id.*

46. *Id.*

47. *Id.* at 353-54.

48. *Id.* at 354, 365.

empted by this constitutional power, whether latent or exercised.”⁴⁹ With that statement, the Court laid foundations for the first element of what has been framed as a three-part test for constitutional preemption. The Court reasoned that because only the federal government may exercise authority under the Constitution to control immigration, it must first determine whether the state law is a regulation of immigration, which it defined as a “determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁵⁰ The Court reasoned that although the California law may have some indirect effect on migratory flows, it was essentially a regulation of employment, and thus not constitutionally preempted.⁵¹

The Court then addressed preemption by federal statute, articulated in the second and third elements of the *DeCanas* test. These elements are actually tests for field and conflict preemption, respectively. But when considered together, they are simply part of the statutory preemption analysis, which dictates that even where a state regulates in a way that is constitutionally permissible (i.e. does not regulate immigrant admissions and removals), it may still be preempted by a federal statute when Congress clearly expresses its preemptive intent.⁵² The Court first addressed field preemption, a type of implied preemption that occurs when a federal statute completely ousts state power from a field of regulation, even if the state law does not conflict.⁵³ The Court found that the California law was not field preempted because INA primarily regulated admissions and removals, and regulating the employment of unauthorized workers was at best a “peripheral concern” of the modern scheme.⁵⁴ The Court then addressed conflict preemption, another form of implied preemption that occurs when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁵ The Court did not

49. *DeCanas*, 424 U.S. at 355.

50. *Id.*

51. *Id.* at 355-56.

52. *Id.* at 356.

53. *Id.* at 357.

54. *Id.* at 359. After *DeCanas*, Congress enacted the IRCA, which comprehensively regulates the employment of immigrants. The enactment of this statute illustrated that Congress made regulating immigrant employment only a peripheral concern; therefore, *DeCanas* is no longer good law. See *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1974-75 (2011).

55. *DeCanas*, 424 U.S. at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

address this issue in *DeCanas* because the Court of Appeals had not reached it.⁵⁶

Although courts and commentators have framed the *DeCanas* inquiries as three tests for preemption,⁵⁷ each of which is sufficient to invalidate a state law affecting immigration, courts have not uniformly applied the *DeCanas* tests as three separate tests, particularly when express statutory provisions defining the scope of sub-national regulatory activity are involved.⁵⁸ The important takeaway from *DeCanas* is not that it creates a rigid three-part test, but rather that it defines what a regulation of immigration is⁵⁹ and that it instructs courts to consider constitutional preemption before statutory preemption. Although the *DeCanas* framework makes the determination of whether a state or local law regulates immigration the first inquiry, courts have not always made that a formal consideration at the outset.⁶⁰ This is due in large part to the fact that state and local governments rarely enact laws that govern admissions into the U.S.,⁶¹ and thus courts may see no need to formally address this inquiry.⁶² Moreover, the salience of express preemption clauses within the modern scheme leads courts to treat express preemption analysis as the first element of this test.⁶³

Congress expressly preempts state and local legislatures from regulatory action when it explicitly states such a restriction in the text of the federal statute. Express preemption was not explicitly defined as a test in *DeCanas* because there is no preemption clause in INA that would have applied to the California labor law. However, IIRIRA and

56. *Id.* at 324-25.

57. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866, 867 (N.D. Ill. 2008); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 601, 602 (E.D. Va. 2004); see also Joshua J. Herndon, *Broken Borders: DeCanas v. Bica and the Standards that Govern the Validity of State Measures Designed to Deter Undocumented Immigration*, 12 TEX. HISP. J. L. & POL'Y. 31, 50-54 (2006).

58. See *Whiting*, 131 S. Ct. at 1977.

59. *Martinez v. Bd. of Regents of Cal.*, 241 P.3d 855, 862 (Cal. 2010).

60. See *United States v. Arizona*, 641 F.3d 339, 348 (2011) ("We begin with the 'purpose of Congress' by examining the *text* . . .") (emphasis added).

61. Ryan Terrance Chin, Note, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1871 (2011).

62. The question of whether a state or local law regulates immigration also has implications for field preemption analysis. Because only Congress may constitutionally regulate immigration, Congress will always occupy that field. So that not all state or local laws will be field preempted as regulations of immigration, courts will narrow the scope of its inquiry to look at whether Congress intended to occupy the field of a specific aspect of immigration regulation. See *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (Court's field preemption examines whether Arizona alien registration law is displaced by Congress occupying the field of alien registration, not immigration in general).

63. See *Whiting*, 131 S. Ct. at 1977.

PRWORA explicitly prohibit states from granting benefits to undocumented immigrants, and both prescribe scenarios in which those general prohibitions do not apply.⁶⁴ When a federal immigration statute contains an express preemption clause, a court focuses on the “plain wording of the clause, which necessarily contains the *best evidence* of Congress’ preemptive intent.”⁶⁵ Furthermore, Congress’ “authoritative statement is the statutory text, not the legislative history.”⁶⁶ Therefore, under a modified *DeCanas* rubric, courts will analyze an express preemption clause before it analyzes whether Congress impliedly preempted state and local governments from passing certain laws.⁶⁷ As this note will later argue, the existence of the statutory exceptions in IIRIRA and PRWORA indicate that Congress clearly intended to create a limited space for states to grant in-state tuition to undocumented students.

Finally, despite inconsistent application by courts,⁶⁸ a court is likely to apply a presumption against preemption in cases in which Congress has legislated in a field that the individual states have traditionally occupied.⁶⁹ The presumption recognizes that the states’ historic police powers are not superseded by Congress, unless preemption is Congress’ “clear and manifest purpose.”⁷⁰ Because higher education is traditionally a province of the states,⁷¹ state immigrant tuition laws should be entitled to the presumption against preemption.

64. Under the IIRIRA, states may not make undocumented immigrants eligible for in-state tuition based on residence *unless* non-resident U.S. citizens are also eligible regardless of state residence. 8 U.S.C. § 1623(a). The PRWORA makes undocumented immigrants generally ineligible for state public benefits. 8 U.S.C. § 1621(a). However, states may make undocumented immigrants eligible for state public benefits as long as a state law passed after August 22, 1996 affirmatively provides for eligibility. 8 U.S.C. § 1621(d).

65. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added).

66. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

67. *Whiting*, 131 S. Ct. at 1977.

68. *See, e.g., Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 862 (Cal. 2010) (noting the lack of clarity on whether the presumption against preemption would apply in immigration-related cases).

69. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also* Mary J. Davis, *The “New” Preemption Against Preemption*, 61 HASTINGS L.J. 1217 (2010) (arguing that despite courts’ inconsistent application of the presumption, it still exists and is stronger in cases involving express preemption).

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

71. *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 265 (4th Cir. 2005).

II. THE LEGAL FRAMEWORK FOR GRANTING UNDOCUMENTED STUDENTS IN-STATE TUITION

A. *The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)*

There are two federal laws against which state efforts at granting in-state tuition to undocumented students will most likely be compared in a preemption-based challenge. While both laws prohibit undocumented immigrants from receiving benefits—one law prohibiting the receipt of a “postsecondary education benefit”⁷² and the other prohibiting the receipt of any “State or local public benefit”⁷³—each limits the scope of its prohibitions. The statutory language in each of these laws therefore carves out scenarios in which states may extend in-state tuition to undocumented students.

In 1996, Congress enacted IIRIRA, which states:

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 . . . 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.⁷⁴

Under this provision, if states offer in-state tuition to all U.S. citizens, even those residing outside the state, then undocumented students may qualify for in-state tuition based solely on their residence within the state. This provision, however, imposes no restrictions on states from granting in-state tuition based on criteria other than residency, such as graduation from a state high school. States have utilized IIRIRA’s silence on criteria other than residency to grant in-state tuition to undocumented students and any out-of-state U.S. citizens who satisfy the non-residency criteria.⁷⁵

72. 8 U.S.C. § 1623(a).

73. 8 U.S.C. § 1621(d).

74. 8 U.S.C. § 1623(a) (emphasis added).

75. See e.g., KAN. STAT. ANN. § 76-731a (2004) (undocumented students may receive in-state tuition at Kansas state universities and colleges if they have attended a Kansas high school for three or more years, graduated from a Kansas high school or received a GED within Kansas, and have filed an affidavit stating that they will file for permanent residency in the U.S. as soon as they are eligible).

Congress also passed PRWORA in 1996, which prohibits undocumented immigrants from receiving any state or local public benefit.⁷⁶ Nevertheless, PRWORA provides:

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . *only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.*⁷⁷

The statute later includes “postsecondary education” benefits as one of the benefits within its purview.⁷⁸ Therefore, any state law passed after August 22, 1996 granting undocumented immigrants in-state tuition would arguably be valid under PRWORA.⁷⁹

B. *The California Immigrant Higher Education Act (AB 540)*

With both IIRIRA and PRWORA seemingly authorizing states to make undocumented students eligible for in-state tuition, California became the second state in the country to remove legal barriers to in-state tuition for undocumented students when its legislature passed the California Immigrant Higher Education Act, more commonly known as AB 540, in 2001.⁸⁰ Under AB 540 any student other than certain visa holders—whether out-of-state U.S. citizens and permanent residents or undocumented students—will be exempt from paying nonresident tuition rates if they meet certain requirements.⁸¹ The student must have attended a California high school for three or more years, graduated from a California high school or attained an equivalency, and registered to attend a California state institution of higher learning not earlier than the 2001-02 academic year.⁸² Undocumented students must also file an affidavit with the school stating that the student has applied to legalize his or her status or will file an application as soon as he or she is eligible to do so.⁸³

By making attendance at and graduation from a California high school the touchstone for in-state tuition, and having enacted AB 540 after August 22, 1996, the California State Legislature capitalized on

76. 8 U.S.C. § 1621(a).

77. *Id.* at § 1621(d) (emphasis added).

78. *Id.* at § 1621(c)(1)(B).

79. *See id.* at 8 U.S.C. § 1621(d).

80. CAL. EDUC. CODE § 68130.5 (Deering 2012).

81. *Id.* at § 68130.5(a).

82. *Id.* at § 68130.5(a)(1-3).

83. *Id.* at § 68130.5(a)(4).

the statutory language in both IIRIRA and PRWORA. Opponents of in-state tuition charge that California passed AB 540 to purposely avoid IIRIRA's general prohibition.⁸⁴ But, as the Court in *Martinez* concluded, even if the California State Legislature passed AB 540 in order to make undocumented students eligible for in-state tuition, there is nothing legally wrong with that effort.⁸⁵ As the next section will show, recent cases involving express preemption clauses in immigration laws affirm the principle that the text reigns supreme when discerning congressional purpose.

III. EXPRESS PREEMPTION JURISPRUDENCE ON STATE LAWS AFFECTING IMMIGRATION

While *DeCanas* laid the foundation for the preemption doctrine as applied to laws affecting immigration, the Court did not have the occasion to opine on the application of the preemption doctrine to express preemption clauses. INA did not expressly preempt states from passing laws prohibiting the employment of undocumented immigrants. However, Congress has since enacted additional legislation to the modern scheme that includes express preemption clauses. In addition to IIRIRA and PRWORA, which address postsecondary educational benefits, Congress also enacted IRCA in 1986 to prevent the employment of undocumented immigrants. IRCA expressly preempts the states from imposing criminal and civil sanctions on employers, but preserved the states' authority to enact licensing and similar laws. Part A of this section will analyze *Martinez*, which dealt directly with the issue of whether Congress preempted the states from enacting laws granting undocumented students in-state tuition. Part B draws comparative insights from *Whiting*, which dealt with whether IRCA preempted states from enacting licensing sanctions against employers who knowingly hired undocumented immigrants.

A. *In-State Tuition for Undocumented Students: Martinez v. Regents of the University of California*

In 2005, a group of U.S. citizens paying nonresident tuition rates in California sued the Regents of the University of California and other state institutions of higher learning, primarily arguing that AB 540 is

84. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 866 (Cal. 2010).

85. *Id.* ("[The] mere desire to avoid the restrictions provides no basis to overturn the legislation.")

federally preempted by IIRIRA and PRWORA.⁸⁶ After the trial court dismissed their complaint, the plaintiffs appealed to the California Court of Appeals.⁸⁷ The Court of Appeals reversed the trial court's decision on the issue of preemption, holding that AB 540 was preempted because its high school attendance and graduation requirements amounted to a de facto residency requirement.⁸⁸ Moreover, the Court held that AB 540 was also expressly preempted by PRWORA because AB 540 did not affirmatively provide for undocumented student eligibility by expressly referencing the provision in PRWORA that allows states to provide benefits to otherwise ineligible individuals.⁸⁹ The Court also found that AB 540 was impliedly preempted, both through field preemption and conflict preemption.⁹⁰

The California Supreme Court reversed the decision of the Court of Appeals and ruled that AB 540 was not preempted by Congress.⁹¹ The Court reasoned that under AB 540 students qualify for the exemption if they meet requirements based on attendance in and graduation from a California high school, not residence within the state.⁹² Moreover, the requirements based on high school attendance and graduation could not be characterized as a de facto residency requirement because nonresident U.S. citizens and lawful immigrants may also qualify for California in-state tuition rates.⁹³ Although the Court considered legislative findings and opinions for "persuasive value," it bluntly stated that it owed the legislative history no deference.⁹⁴ The Court also dismissed the respondents' argument that AB 540 violated PRWORA because AB 540 did not "affirmatively provide" for the eligibility of undocumented students to receive in-state tuition because the California law did not expressly reference PRWORA or use the term "illegal alien."⁹⁵ The Court again relied on the plain meaning of statutory text and concluded that the respondents' arguments simply had no textual

86. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 523-24 (Cal. Ct. App. 2008).

87. *Id.* at 527.

88. *Id.* at 535 ("A reasonable person would assume that a person attending a California high school for three years also lives in California. Such an assumption would be reasonable, given that a school district is generally linked to attendance").

89. *Id.*

90. *Id.* at 542-43.

91. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 860 (Cal. 2010).

92. *Id.* at 863, 864.

93. *Id.* at 864.

94. *Id.* at 863.

95. *Id.* at 867, 868.

grounding in PRWORA.⁹⁶ Indeed, as the Court concluded, “[if] Congress had intended to require more, we believe it would have said so clearly and would not have set up a trap for unwary legislatures.”⁹⁷ Finally, the Court ruled that AB 540 was not impliedly preempted. The Court based its reasoning on the express preemption clauses in IIRIRA and PRWORA. While the existence of an express preemption clause does not automatically foreclose implied preemption, there is a strong inference that Congress did not intend to impliedly preempt what it expressly allows.⁹⁸ Both federal statutes explicitly allow states to provide benefits to undocumented immigrants under certain conditions. A year after the California Supreme Court issued its ruling in *Martinez*, the Supreme Court of the United States issued its ruling in *Whiting*, which involved express preemption in the context of business licensing laws as applied to undocumented immigrants. As in *Martinez*, the Supreme Court’s ruling in *Whiting* affirmed the principle that statutory text is the most important indicia of congressional intent.

B. Business Licensing Laws: Whiting v. Chamber of Commerce of the United States of America

As a border state, Arizona is especially affected by unauthorized immigration. To curb the growing number of undocumented immigrants in the state, the Arizona State Legislature in 2007 passed the Legal Arizona Workers Act (“LAWA”),⁹⁹ which subjected employers who knowingly hired undocumented workers to a series of graduated licensing penalties.¹⁰⁰ A business that violates LAWA for the first time may have its business license suspended for up to ten days.¹⁰¹ A second violation leads to the mandatory revocation of all licenses held by the business at locations where it hired undocumented workers.¹⁰² Arizona seized upon the statutory text in IRCA, which although expressly preempted states from imposing criminal or civil sanctions against non-compliant employers, expressly saved from that general prohibition “licensing and similar laws.”¹⁰³ A lawsuit challenging these laws as preempted by IRCA was unsuccessful when the Ninth Circuit in

96. *Id.* at 867.

97. *Id.* at 868.

98. *Id.* at 869 (“Congress did not impliedly prohibit what it expressly permitted.”).

99. ARIZ. REV. STAT. § 23-211 (2012).

100. *Id.* at § 23-212(A).

101. *Id.* at § 23-212(F).

102. *Id.* at § 23-212 (F)(3)(b).

103. 8 U.S.C. § 1324a(h)(2).

Chicanos Por La Causa v. Napolitano (“CPLC”) declared that LAWA fell squarely within IRCA’s savings clause.¹⁰⁴

In 2011, the Supreme Court granted certiorari in *CPLC*, with the Court’s decision effectively settling a circuit split between the Ninth and Third Circuits. The Third Circuit ruled in *Lozano v. City of Hazleton*¹⁰⁵ that a Pennsylvania licensing law similar to LAWA was preempted by federal law because it was conflict preempted; it “stands as an obstacle to the accomplishment and execution of federal law.”¹⁰⁶ However, *Lozano* was consistent with *CPLC* on the issue of express preemption. Because the Arizona and Pennsylvania laws penalized non-compliant employers by subjecting their businesses to suspension or revocation of their licenses rather than through criminal or civil sanctions, both the Third and Ninth Circuits reasoned that they fell squarely within the scope of IRCA’s savings clause. The Supreme Court agreed.

In *Whiting*, the Supreme Court reaffirmed that statutory text is the most important indicia of the scope of Congress’ preemptive reach.¹⁰⁷ Here, the Court had to essentially decide how a “licensing” law is defined, since IRCA clearly allowed states to enact such laws. The challengers of LAWA argued that it should not be considered a licensing law because it did not issue licenses, but rather simply revoked or suspended them.¹⁰⁸ The Court rebuffed this argument for not having any basis in IRCA’s text and on a more basic level, for lacking common sense: “There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses as something else altogether.”¹⁰⁹ Moreover, the Court found no merit in arguments predicated on using other congressional actions as indicia that Congress intended IRCA’s savings clause to be narrowly construed.¹¹⁰ Nor did the Court find any value in relying on legislative history when it already concluded that LAWA fell within the plain meaning of IRCA’s savings clause. As the Court reiterated, the statutory text is Congress’ definitive preemptive pronouncement.¹¹¹

104. 558 F. 3d 856 (2009).

105. 620 F. 3d 170 (2010).

106. *Id.* at 210.

107. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011).

108. *Id.* at 1979.

109. *Id.*

110. *Id.* at 1979-80.

111. *Id.* at 1980.

The Court's conclusion about express preemption influenced its reasoning regarding whether LAWA was impliedly preempted. It is quite possible that a state law that is not expressly preempted may still be conflict preempted if it creates an obstacle to the realization of a federal objective. However, that possibility is all but lost in cases where Congress explicitly grants states the authority to regulate in a certain area. Reason dictates that if Congress explicitly allows state legislative action in a given area, it does not then intend to preempt that same state act through non-explicit means.¹¹² To bolster its conclusion, the Court further reasoned that LAWA was drafted to track IRCA's provisions as closely as possible.¹¹³ LAWA adopted federal definitions and duly deferred to federal determinations of whether an individual is authorized to work in the U.S.¹¹⁴ The Court also based its holding on the fact that Congress has narrowly regulated in-state businesses through licensing laws.¹¹⁵ Moreover, the Court strongly suggested that to be impliedly preempted, a state law would need to rise to the level of constituting a direct interference in a federal program.¹¹⁶

IV. THE CONSTITUTIONALITY OF IN-STATE TUITION LAWS BASED ON NON-RESIDENCY CRITERIA

Martinez and *Whiting* offer a telling glimpse of how courts will likely approach preemption cases involving immigration-related state laws that have express preemption clauses. This section applies principles elicited from those important cases and concludes that state legislatures may grant in-state tuition to undocumented students so long as the provision is not based on state residency. While each decision's strict adherence to the statutory text may tend toward formalism, each decision also reflects an acute understanding of immigration federalism. First, non-residence based in-state tuition laws do not regulate immigration; they essentially regulate higher education, which has been a traditional province of the individual states. Next, IIRIRA and PRWORA clearly authorize state legislatures to extend in-state tuition rates to undocumented students based on non-residency criteria. Legislative history thus plays a limited, if not non-existent, role in the analysis because the statutory text is clear. Moreover, laws like AB

112. *See id.* at 1981.

113. *Id.*

114. *Id.*

115. *Id.* at 1982.

116. *Id.*

540 are not impliedly preempted because they neither encroach upon a field solely occupied by the federal government, nor conflict with federal objectives. Although a more in-depth discussion of the case is not possible here, this note will draw guidance on implied preemption from the Supreme Court's most recent immigration preemption case, *Arizona v. United States*.¹¹⁷ Finally, although there are legitimate policy arguments on both sides of the issue, a court should place little emphasis on these arguments because its task in a preemption case is to discern congressional intent and not to rewrite what Congress has already legislated.

A. *Immigrant In-State Tuition Laws Do Not Regulate Immigration*

DeCanas teaches that, as a threshold inquiry, courts must determine whether the state law in question regulates immigration, which is narrowly construed to mean only laws that regulate admissions and removals of immigrants. Even if a court may readily accept that non-residence based in-state tuition laws do not regulate immigration (i.e. determine who may enter into the U.S.), the reasoning behind that acceptance deserves mention. In-state tuition laws simply do not regulate admissions into the U.S. Even if immigrant in-state tuition laws have some indirect and speculative effect on immigration flows, those laws do not therefore become regulations of immigration.¹¹⁸ The Court in *DeCanas* found that a state employment law cannot be considered an immigration regulation, even though laws that regulate employment have a greater effect on immigration flows than education regulations.¹¹⁹ Thus, immigrant in-state tuition laws do not regulate immigration.

Rather than constituting regulations of immigration, immigrant in-state tuition laws are essentially regulations of higher education, an area which has traditionally been left to the individual states.¹²⁰ When Congress legislates within an area of the individual states' historic police powers, there is a strong presumption that the congressional statute does not supersede the state law.¹²¹ States, and not Congress, set the rate at which students will be charged for tuition at state colleges and universities. When Congress enacted IIRIRA in 1996, it was for the

117. 132 S. Ct. 2492 (2012).

118. See *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976).

119. *Id.*

120. *Md. Stadium Auth. v. Ellerbe Beckett Inc.*, 407 F.3d 255, 265 (4th Cir. 2005).

121. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

first time entering into a field that has traditionally been regulated by the states, which means that the presumption is particularly strong. Moreover, the extent to which Congress regulated in the field was relatively minor. Congress' purpose was simply to ensure that undocumented students could not avail themselves of in-state tuition based solely on state residence if out-of-state U.S. citizens and lawful residents could not also be eligible for in-state tuition.¹²² Courts should therefore apply a presumption against preemption when adjudicating immigrant in-state tuition laws.

B. Immigrant In-State Tuition Laws Are Not Expressly Preempted

1. The Statutory Text of Pertinent Federal Statutes Allows States to Grant In-State Tuition Based on Non-Residency Criteria

Martinez and *Whiting* affirm the primacy of the plain meaning of the statutory text in discerning congressional intent in preemption cases. The Supreme Court has repeatedly affirmed the same principle in other cases.¹²³ The statutory text should thus hold no less significance in cases involving in-state tuition for undocumented students. State laws like California's extend in-state tuition based on attendance at and graduation from a California high school. Moreover, an undocumented student must affirmatively indicate his or her intent to apply for lawful status when eligible. These criteria are not tantamount to residency, a factor explicitly prohibited by IIRIRA.

Opponents primarily challenge in-state tuition laws on the theory that high school attendance and graduation are merely proxies for residency, especially since school districts are generally linked to residency.¹²⁴ To be sure, many students who qualify for AB 540 will also be residents of California. However, all that suggests is that California residence and attendance at and graduation from a California high school are correlated. Allowing states to grant in-state tuition based on a factor that is merely correlated to residency does not logically lead to the conclusion that states are granting in-state tuition based on resi-

122. See 8 U.S.C. § 1623(a).

123. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text."); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (the plain meaning of the statutory text "necessarily contains the best evidence of Congress' preemptive intent."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (it is a basic rule that if the meaning of a statute is plainly evident, then a court's role is to "enforce it according to its terms.").

124. *Martinez v. Regents of Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 535 (Cal. Ct. App. 2008).

dency. This point is underscored by the different scenarios in which non-California students may nevertheless avail themselves of California in-state tuition.¹²⁵ For example, some students who live in states bordering California may be permitted to attend California high schools.¹²⁶ Additionally, the children of non-California resident parents may attend boarding schools in California for three years, yet still not be residents of California.¹²⁷ Arguments that the language in IIRIRA should be read as an absolute prohibition against in-state tuition effectively violates the canon of statutory interpretation that courts should not interpret statutory language as mere surplusage.¹²⁸ Congress could have unmistakably prohibited undocumented students from receiving in-state tuition by omitting “based on residency,” but it chose not to do so.¹²⁹

The plain meaning rule also leads to the conclusion that PROWRA allows undocumented immigrants to receive in-state tuition so long as the state legislature passes a law after August 22, 1996 making them eligible. AB 540 and other in-state tuition laws granting in-state tuition clearly do this. Congress did not, as the respondents in *Martinez* contend, impose the additional requirements on state legislatures of explicitly referencing PRWORA and using the term “illegal aliens” in its authorizing legislation.¹³⁰ Those requirements are found nowhere in the statutory text of PRWORA.¹³¹ Interpreting IIRIRA and PROWRA in a way that ignores the plain meaning of its statutory text would violate the “one, cardinal canon before all others”: Courts must presume that the legislature means what it states in a statute.¹³²

2. Legislative History Cannot Overcome Clear Statutory Text

Because the plain meaning of both IIRIRA and PRWORA is evident, legislative history should not be used to trump the statutory text.

125. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 864 (Cal. 2010) (“The [California in-state tuition] exemption cannot be deemed to be based on residence for the simple reason that many *nonresidents* may qualify for it.”).

126. CAL. EDUC. CODE § 48050 (“The governing board of any school district may, with the approval of the county superintendent of schools, admit to the elementary and high schools of the district pupils living in an adjoining state which is contiguous to the school district.”).

127. *Martinez*, 241 P.3d at 864.

128. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

129. *Martinez*, 241 P.3d at 864 (“If Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition, it could have easily done.”).

130. *Id.* at 868.

131. *Id.*

132. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Again, the Supreme Court has held that Congress' "authoritative statement is the statutory text, not the legislative history."¹³³ In both *Martinez* and *Whiting*, the challengers to the state laws argued that the Court should consider legislative history to rule that the state laws were preempted.¹³⁴ However, each court confirmed that legislative history may be used only when the statutory text is ambiguous.¹³⁵ In *Whiting*, the Court reasoned that even if the legislative history were useful, it would not be helpful to the challengers because it consisted only of a single report from "one House of a politically-divided Congress."¹³⁶ Any consideration of the legislative history was unnecessary to begin with since "[the Court] already concluded that Arizona's law falls within the plain text of IRCA's savings clause."¹³⁷ Likewise, the California Supreme Court cautioned against using legislative history because it may improperly place too much emphasis on an isolated, non-representative statement made by a lone legislator or even an unelected staffer or lobbyist.¹³⁸ In *Martinez*, the challengers cited a House conference report that stated that IIRIRA was intended to prohibit undocumented students from receiving in-state tuition. Yet, just as in *Whiting*, the court in *Martinez* concluded that even legislative history inconsistent with the statutory text, like the House conference report, cannot change the plain meaning of the statute;¹³⁹ in-state tuition laws based on non-residency criteria are valid.

C. *Immigrant In-State Tuition Laws are not Impliedly Preempted*

Because of the Supremacy Clause, states may not legislate in a way that is in fundamental tension with federal law. Thus, even though Congress does not explicitly preempt a state law, the state law may nevertheless be invalid based on implied preemption. States may be impliedly preempted through either field or conflict preemption. Field preemption occurs when a state legislates in an area that Congress has already completely occupied.¹⁴⁰ Here, courts must determine whether

133. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

134. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011); *Martinez*, 241 P.3d at 865.

135. *Martinez*, 241 P.3d at 865; *see Whiting*, 131 S. Ct. at 1980.

136. 131 S. Ct. at 1980 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-50 (2002)).

137. *Id.* at 1980.

138. *Martinez*, 241 P.3d at 865 (citing *Exxon*, 545 U.S. at 568).

139. *See id.* at 865.

140. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992) ("Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even with-

Congress through its clear and manifest purpose intended a “complete ouster of state power.”¹⁴¹ Conflict preemption occurs when a state law is an obstacle to the implementation of a congressional objective.¹⁴² While courts have greater discretion to examine congressional objectives when analyzing implied preemption, the Supreme Court has concluded that even implied preemption analysis does not justify a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.”¹⁴³

Before discussing field and conflict preemption, it is important to first discuss the impact of express preemption clauses on the implied preemption analysis. In *Martinez*, the court reasoned that express clauses defining the scope of Congress’ preemptive reach imply that matters outside the scope are not preempted.¹⁴⁴ The Supreme Court affirmed that principle in *Whiting* when it concluded that Congress did not intend to preempt licensing laws, which it expressly authorized in IRCA’s savings clause.¹⁴⁵ Congress enacted IIRIRA with statutory language that prohibits the provision of educational benefits based on residency. This strongly suggests that Congress did not intend to indirectly preempt state laws that granted in-state tuition based on criteria other than residency. The court in *Martinez* found that line of reasoning to be determinative on the issue of implied preemption, but immigrant in-state tuition laws would also pass muster under specific tests for field and conflict preemption.

Immigrant in-state tuition laws are not field preempted because Congress has not clearly manifested its intent to occupy the field of regulating tuition rates for undocumented students, let alone U.S. citizens and lawful permanent residents. The Supreme Court’s recent ruling on the landmark immigration law passed in Arizona in 2010 is particularly elucidating on this issue. In *Arizona v. United States*, the Court adjudicated whether certain measures passed by the Arizona State Legislature to address unauthorized immigration were preempted by federal law.¹⁴⁶ One provision made it a misdemeanor for immi-

out a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law.”) (Souter, J., dissenting).

141. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976).

142. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

143. *Id.*

144. 241 P.3d at 868.

145. 131 S. Ct. 1968, 1981 (2011) (“Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.”).

146. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

grants to fail to carry an alien registration document in accordance with federal law.¹⁴⁷ The Court found that provision to be preempted because Congress clearly indicated its intent to occupy the field of alien registration.¹⁴⁸ This is evident in the pervasiveness of alien registration provisions in the modern scheme, which includes the requirement that aliens carry proof of registration, a fingerprinting requirement for aliens in the U.S. for longer than 30 days, the type of information required for registration, and penalties for non-compliance.¹⁴⁹ States may not enter into a field occupied by the federal government, even when the state law attempts to mirror the substantive provisions and general aim of the federal law.¹⁵⁰

Yet unlike the comprehensive and exclusive alien registration scheme discussed in *Arizona*, the eligibility of undocumented students to receive postsecondary educational benefits is only dealt with in relatively sparse language in IIRIRA and PRWORA. IIRIRA itself deals with postsecondary educational benefits in only one provision,¹⁵¹ while postsecondary educational benefits are only one of the several benefits defined in PRWORA as generally off limits to undocumented immigrants.¹⁵² Moreover, higher education is a province of the individual states, not the federal government.¹⁵³ In-state tuition rates, in particular, are not affected by any action by the federal government to provide funding to states.¹⁵⁴ As such, the presumption against preemption should apply.¹⁵⁵ This means that Congress would need to do much more to oust states from the field of regulating in-state tuition rates than simply enact a few provisions in the modern scheme that actually allow states to grant in-state tuition.¹⁵⁶

147. *Id.* at 2501.

148. The Court relied primarily on *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Id.* at 2501-02. *Hines* dealt with a federal alien registration law enacted in 1940, which according to the Court, established a “complete system of alien registration.” 312 U.S. at 70. Although the current federal scheme is not the same as the alien registration law in *Hines*, it nevertheless remains sufficiently comprehensive to indicate Congress’ intent to occupy the field. *Arizona*, 132 S. Ct. at 2502.

149. *Id.*

150. *Id.* at 2502-03.

151. 8 U.S.C. § 1623(a).

152. 8 U.S.C. § 1621(c)(1)(B).

153. *Md. Stadium Auth. v. Ellerbe Beckett Inc.*, 407 F.3d 255, 265 (4th Cir. 2005); *see also* Michael A. Olivas, “Lawmakers Gone Wild? College Residency and the Response to Professor Kobach,” 61 SMU L. REV. 99, 122 (2008).

154. Olivas, *supra* note 153, at 122.

155. *See Arizona v. United States*, 132 S. Ct. 2492, 2530 (2012).

156. There is no doubt that Congress’ intent to occupy the field of regulation to the exclusion of state governments must be clearly conveyed, usually through a pervasive statutory framework that excludes state governments from regulating in that area. However, some formulations of this

Likewise, conflict preemption would not bar states from enacting immigrant in-state tuition laws based on non-residence criteria. As the Court reinforced in *Whiting*, conflict preemption of a state law requires a high threshold.¹⁵⁷ This is especially so when the law that may potentially be preempted is traditionally a state issue, as is higher education.¹⁵⁸ The congressional policy entrenched in the text of IIRIRA is not that undocumented students may never qualify for in-state tuition, but rather that they may not do so based on residence if non-resident U.S. citizens were simultaneously ineligible. That is the only logical conclusion that can be drawn given the inclusion of language exempting residence as a touchstone for in-state tuition.¹⁵⁹ Likewise, the policy gleaned from the text of PRWORA is that states may grant certain benefits to undocumented immigrants so long as they affirmatively do so after August 22, 1996. Laws like California's AB 540 would stand as an obstacle to the realization of federal objectives if making undocumented students eligible for in-state tuition somehow changed the immigration status of the student. Clearly, that would be in tension with the modern immigration scheme. Yet nothing in immigrant in-state tuition laws operate to change the legal status of undocumented immigrants. Those laws simply afford certain undocumented immigrants (and U.S. citizens and lawful permanent residents of all states) the opportunity to avail themselves of the in-state tuition rate. And contrary to the argument that immigrant in-state tuition laws encourage continued illegality, the state laws do not even remove the specter of deportation over the heads of undocumented students.¹⁶⁰

standard would require even more, notably express language indicating intent to occupy the field. *Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting).

157. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011).

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

159. Olivas, *supra* note 153, at 123.

160. Under an executive action issued by the Obama Administration on June 15, 2012, undocumented students who meet certain criteria, including long-time U.S. residence and graduation from a U.S. high school, are eligible for deferred action, under which they would not face deportation. Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?_r=1&pagewanted=all. While this policy may eliminate the risk of deportation for certain qualifying immigrants, it does not change the fact that in-state tuition laws provide no such protection. *See Ken Dilanian, U.S.-raised Students Face Deportation Risk*, CHI. TRIB. (June 27, 2010), http://articles.chicagotribune.com/2010-06-27/news/ct-metstudent-deportations-0627-20100626_1_illegal-immigrants-dream-act-eric-balderas.

D. *The Role of Public Policy Arguments in Preemption Analysis*

Finally, courts in preemption cases should give little consideration to arguments premised on the soundness of the policy embodied in the statutory text. To be sure, both sides of the in-state tuition debate hold impassioned views about their positions. Opponents of in-state tuition for undocumented students argue that the policy unfairly rewards unlawful behavior.¹⁶¹ Taxpayer funds should not be used to help students who do not have lawful immigration status in the U.S. Moreover, opponents argue that the policy would encourage more unauthorized immigration into the U.S.¹⁶² Conversely, advocates of in-state tuition for undocumented students argue that students who made no conscious choice to immigrate illegally into the U.S. should not be disadvantaged in accessing postsecondary education because of the actions of their parents.¹⁶³ These students have grown up in the U.S. and have been educated in American schools.¹⁶⁴ Rather than create deterrents to educational access, advocates argue, the state should create incentives to educational access so that it can receive a return on its investment.

Each side invites the judiciary to make normative judgments about a policy that Congress has already given the states discretion over, so long as in-state tuition is not given based on state residency. Tempting though it may be for litigants to make policy arguments, especially in cases involving such a highly-emotional issue, Judge Chin bluntly stated in his majority opinion in *Martinez* that “this court does not make policy.”¹⁶⁵ Rather than weighing in on the soundness of allowing states discretion over an educational policy that would benefit undocumented students, a court must start with the proposition that

161. Krikorian, *supra* note 6.

162. James R. Edwards Jr., *GOP Politics of In-State Tuition*, CENTER FOR IMMIGRATION STUDIES, <http://cis.org/edwards/GOP-politics-of-in-state-tuition>.

163. Dick Durbin, *Passing the DREAM Act*, DICK DURBIN, U.S. SENATOR FOR ILLINOIS (June 28, 2011), http://durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord_id=43eaa136-a3de-4d72-bc1b-12c3000f0ae9.

164. The DREAM Act: Securing America’s Future in Education, THE ANNIE E. CASEY FOUNDATION, available at <http://www.aecf.org/~media/Pubs/Topics/Special%20Interest%20Areas/Immigrants%20and%20Refugees/TheDREAMActSecuringAmericasFutureinEducation/The%20DREAM%20Act%20Securing%20America%27s%20Future%20in%20Education%20First%20Focus%20January%202010.pdf>.

165. *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010).

Congress has already made a policy decision.¹⁶⁶ Indeed Congress here decided that in-state tuition should not be based on state residency so as to disadvantage out-of-state U.S. citizens. What Congress did not decide was that the individual states should never allow undocumented students to pay the in-state tuition rate. Those policy decisions are clear from the statutory text of IIRIRA and PRWORA.

Congress' decision on in-state tuition can thus be conceptualized as involving two propositions: 1) undocumented students may not receive postsecondary benefits to the detriment of out-of-state U.S. citizens, and 2) states may not base the provision of in-state tuition on state residency. The first reflects the normative underpinnings of Congress' policy judgments, and the second reflects the scope of the devolution of power to the states to further that congressional policy. A court's job in a preemption case is to determine the latter and not opine on the former. The inherent problem with policy arguments, particularly in cases involving express preemption clauses, is that they conflate scope with substance. It is a well-established tenet of the preemption doctrine that it is Congress that preempts state laws, not the courts.¹⁶⁷ Judicial application of the preemption doctrine is therefore policy-neutral because it seeks merely to discern congressional purpose. The doctrine itself is not a vehicle to advance certain policy goals. As *Martinez* and *Whiting* show, application of the doctrine can yield both permissive and restrictive outcomes for undocumented immigrants. Policy arguments should not change what Congress has already explicitly set forth: states can extend in-state tuition to undocumented students based on non-residency criteria.

CONCLUSION

Efforts at passing comprehensive immigration reform in Congress have floundered in the last decade due in large part to the politically-charged nature of the immigration debate.¹⁶⁸ As Congress struggles to reach a consensus on reform, many undocumented immigrants are left

166. *See id.* ("Whether Congress's prohibition or the Legislature's exemption is good policy is not for us to say. Rather, we must decide the legal question of whether California's exemption violates Congress's prohibition or is otherwise valid."); *see also* Schuck, *supra* note 31, at 74 (noting that there is a difference between the policy wisdom of a federal immigration program and the immigration-related functions of state and local governments).

167. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992)).

168. Allison Brennan, *Immigration Reform Back to Square One*, CNN POLITICS (June 27, 2012), <http://www.cnn.com/2012/06/26/politics/immigration-square-one/index.html>.

in limbo. Among these are students who have grown up in the U.S. but who, upon high school graduation, are left to wonder if they will be able to continue in the expected arc of life for young students in America. States have traditionally regulated aspects of education, and even as Congress enacted statutes that regulate the eligibility criteria for educational benefits, states retain discretion over the provision of educational benefits, so long as state residence is not the touchstone.¹⁶⁹ States like California have complied with federal law by making U.S. citizens, lawful permanent residents, and undocumented students alike eligible to receive in-state tuition regardless of where they reside. Express preemption jurisprudence regarding immigration matters has shown that courts will rely significantly upon federal statutory text to discern congressional intent. Congress enacted IIRIRA and PRWORA with specific language, and both the California Supreme Court and the Supreme Court of the United States have affirmed the principle of using federal statutory text as the best example of congressional intent.

The Supreme Court recently denied certiorari in *Martinez*.¹⁷⁰ While that denial of certiorari does not resolve the issue of the constitutionality of non-residence based immigrant in-state tuition laws, it does keep those laws in force. In the meantime, debates over in-state tuition will likely continue because they reflect the broader debate over what to do about unauthorized immigration in the U.S. Frustration over federal inaction has led states to take a more active role in regulating areas touching upon immigration. Battles over immigration federalism have been waged in the areas of employment, education, and most visibly in the enforcement of immigration laws by state and local law enforcement officials.¹⁷¹ Yet, because the federal exclusivity principle remains in force, courts will have little opportunity to shape immigration policy. A court's role in preemption cases is simply to discern what Congress intended to legislate within its constitutional scope.

169. 8 U.S.C. § 1623(a).

170. *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011).

171. *See United States v. Arizona*, 641 F.3d 339, 343-44 (9th Cir. 2011).

