

# California Dreaming: A Case to Give States Discretion in Providing In-State Tuition to Its Undocumented Students

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## I. Introduction

Every year, millions of high-school students aspire to attend a college or university, but for some, their goal is not easily attainable. Fortunately, there are alternatives to privately funding an education, such as financial aid, federal or state grants, work study, and student loans, which ease many financial difficulties that may have contributed to the college roadblock. Such resources make attending a college or university much more accessible to those who could not have otherwise afforded it.

At the same time, thousands of *undocumented* high-school students aspire to attend a college or university, but for the vast majority, doing so is almost impossible. Federal government regulations, such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)<sup>1</sup> and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”),<sup>2</sup> preclude undocumented students from receiving any financial assistance. In effect, undocumented students do not qualify for any financial aid, grants, work study, or even student loans.<sup>3</sup> Moreover, IIRIRA prohibits states from classifying undocumented

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1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623 (2010).

2. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1621 (2010).

3. See 20 U.S.C. § 1091 (2010); CAL. EDUC. CODE §§ 69433.9, 69535 (West 2009).

students as “residents” for in-state tuition purposes.<sup>4</sup> Thus, if undocumented students wish to attend a college or university, they must not only pay their own way or rely on private scholarships, but they must also pay the much higher out-of-state tuition despite having lived in any particular state for most of their lives.

In denying in-state tuition to undocumented students, these students, and the states with a high rate of undocumented immigrants, face great obstacles and expenses. The Urban Institute has reported that 65,000 of these undocumented students are graduating from high schools each year (based on estimates of the unauthorized population from the 2000 census).<sup>5</sup> Thus, it is understandable why the federal government would preclude undocumented students from receiving government financial assistance, but it is wrong to also prevent these students from receiving what similarly situated students can attain: in-state tuition. Rather than being able to create a better life for themselves and their families, undocumented students may be forced to discontinue their education after receiving their high school diploma and remain at the bottom of the poverty chain.

Nevertheless, some states, particularly those with high rates of immigration, have passed laws that circumvent the federal government’s prohibition. In California, for example, students may qualify for in-state tuition if they graduate from a California high school that they have attended for at least three years.<sup>6</sup> Therefore, residency alone is not determinative in qualifying for in-state tuition. This statute, however, has been under scrutiny. In 2008, the California Court of Appeal held that the statute was unconstitutional because it was preempted by federal law.<sup>7</sup> The California Supreme Court has reversed the decision, but the case may be up for appeal to the United States Supreme Court.<sup>8</sup>

Opponents of in-state tuition, such as the Federation for American Immigration Reform (“FAIR”), hold the view that tax dollars should not be used to support those in the country illegally. They argue that unauthorized immigrants should not have access to

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4. 8 U.S.C. § 1623.

5. Dawn Konet, *Unauthorized Youths and Higher Education: The Ongoing Debate*, MIGRATION POL’Y INST. (2007), <http://www.migrationinformation.org/Feature/display.cfm?ID=642#top>.

6. CAL. EDUC. CODE § 68130.5 (West 2009).

7. *Martinez v. Regents of the Univ. of Cal.*, 83 Cal. Rptr. 3d 518 (2008).

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

any publicly funded benefit, including higher education.<sup>9</sup> Opponents also claim that granting in-state tuition encourages more illegal immigration, requires individual states to bear the costs, and takes enrollment slots away from citizens and legal residents.<sup>10</sup>

Proponents argue that undocumented children should not be faulted for their parents' actions that were committed when the students were children and that it is inconsistent to educate unauthorized immigrants through high school, only to deny them access to higher education later.<sup>11</sup> Proponents further believe that unauthorized students may be less inclined to complete high school if they know that post-secondary education is not a feasible option, harming themselves and the states they reside in.<sup>12</sup>

Thus, this note will focus on an undocumented student's right to attain in-state tuition by giving states the discretion to provide it. Part II of this note will discuss the legal background of undocumented students in the United States under both California and federal law, and it will introduce the *Martinez* case from the California Court of Appeal, which preempted the California statute. Part III will explain how, even in light of the federal legislation, the California Education Code is not preempted by federal law. Part IV of this note will discuss how the current federal legislation unconstitutionally overreaches state rights in that the federal government cannot—in the name of federalism—commandeer states to enforce a federal regulatory program. Part V will first discuss how the federal law potentially violates the Equal Protection rights of undocumented persons by not allowing undocumented students to qualify for in-state tuition. Part V will then explain how the California statute does not discriminate against U.S. citizens. Finally, Part VI will discuss the best solution to the controversy: the DREAM Act, which would restore a state's discretion in providing in-state tuition to its undocumented citizens and create a path to citizenship for certain students.<sup>13</sup> Overall, this note is about an undocumented student's right to qualify for in-state tuition for secondary education purposes.

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9. Konet, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

13. See Development, Relief, and Education for Alien Minors (DREAM) Act of 2009, S. 729, 111th Cong. (2009).

## II. The Legal Background of Undocumented Persons

### A. Federal Law

The United States Constitution gives the federal government ultimate authority in regulating immigration by providing Congress with the power “[t]o establish an uniform Rule of Naturalization.”<sup>14</sup> The Supremacy Clause further prevents states from burdening the federal government in carrying out its laws.<sup>15</sup> Thus, a state cannot create a law that that would be preempted by a constitutional federal law.<sup>16</sup>

#### 1. IIRIRA and PRWORA

In 2001, the federal government passed a law precluding states from offering undocumented students post-secondary education benefits on the basis of residency, presumably including in-state tuition.<sup>17</sup> Section 505 of IIRIRA reads:

[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident.<sup>18</sup>

As the federal law explains, a person who has entered the United States unlawfully cannot qualify for post-secondary education “benefits” if that benefit is determined via “residency,” unless the same benefits are also available to United States citizens who are not residents of the state granting the benefit.<sup>19</sup> In other words, if all students qualify for in-state tuition (including out-of-state students), then undocumented students may lawfully be offered the same tuition

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14. U.S. CONST. art. I, § 8, cl. 4.

15. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution of Laws of any State to the Contrary notwithstanding.”).

16. *Id.*

17. 8 U.S.C. § 1623.

18. *Id.*

19. *Id.*

rate based on residency.<sup>20</sup> Otherwise, the state statute is unconstitutional.

Section 4 of PRWORA adds that undocumented persons are ineligible for state benefits and includes “postsecondary education” as a defined benefit.<sup>21</sup> Nevertheless, under subsection (d), PRWORA further provides that “a State *may* provide that an alien who is not lawfully present in the United States [be] 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.”<sup>22</sup> Thus, if a state passes a law after August 22, 1996, subsection (a) of this provision no longer applies.<sup>23</sup>

## 2. *Plyler v. Doe and Equal Protection*

The most important case regarding an undocumented student’s right to public education is the Supreme Court’s 1982 decision *Plyler v. Doe*.<sup>24</sup> In *Plyler*, the Court held that a Texas statute prohibiting undocumented students from receiving free public primary and secondary education violated the Constitution.<sup>25</sup> *Plyler* is a groundbreaking case in that, for the first time, the Supreme Court clearly stated that undocumented persons are protected under the Equal Protection Clause of the Fourteenth Amendment.<sup>26</sup> The Court, however, chose not to apply strict scrutiny because undocumented students are not a “suspect class,” nor is education a fundamental right.<sup>27</sup> Still, after applying intermediate scrutiny, the Court could not conceive a “rational justification” for punishing children for their presence within the United States.<sup>28</sup>

The Court reasoned that it is wrong to punish children who neither had control over the conduct of their parents nor of their

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20. *Id.*

21. 8 U.S.C. § 1621.

22. *Id.* (emphasis added).

23. *Id.*

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

25. *Id.* at 202.

26. *Id.* at 213; see also Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 443 (2004) (discussing how “[p]rior to *Plyler*, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protections.”).

27. *Plyler*, 457 U.S. at 223.

28. *Id.* at 220.

undocumented status.<sup>29</sup> To hold otherwise would impose a “discriminatory burden” on these children by creating “a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”<sup>30</sup> As the Court noted, “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”<sup>31</sup>

Moreover, the Court acknowledged that denying students an education would harm society as a whole: “We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests,” and “[e]ducation has a pivotal role in maintaining the fabric of our society.”<sup>32</sup> Thus, failing to educate undocumented children is not only unfair to the child, but it is also damaging to society.

## **B. California Law**

In 2002, California became the second state to implement a law permitting nonresidents to pay in-state tuition.<sup>33</sup> In order to avoid preemption, the California statute never mentions residency nor uses residency as a requirement for in-state tuition benefits, thereby circumventing the federal law’s requirement that a state may not use residency as a basis for providing education benefits to undocumented students. Thus, the California statute does not violate the federal law. In fact, the bill directly states that it will “not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code” (“IIRIRA”).<sup>34</sup>

Specifically, California Education Code section 68130.5 provides that a student “shall be exempt” from paying out-of-state tuition upon entering a California State University or California Community

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29. *Id.*

30. *Id.* at 218–20.

31. *Id.* at 221 (citation omitted).

32. *Id.* at 203, 221.

33. CAL. EDUC. CODE § 68130.5(a). Other states with similar provisions include New York, Texas, Washington, Illinois, Kansas, Utah, Oklahoma, New Mexico, and Nebraska.

34. Assemb. B. 540, 2001–02 Cal. Sess. (Cal. 2001).

College if certain requirements are met.<sup>35</sup> These requirements include: “(1) High school attendance in California for three or more years. (2) Graduating 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.”<sup>36</sup> With regard to undocumented students, the statute requires the student to file an affidavit with the school stating that the student will file an application to become a legal resident.<sup>37</sup>

Assembly Bill 540 (“AB 540”), the bill that became California Education Code 68130.5, asserts that people who have already demonstrated their academic ability would be unfairly disadvantaged from obtaining a college education without the legislation because they would be required to pay out-of-state tuition.<sup>38</sup> The bill openly declares that “undocumented immigrant students” will also be able to qualify under the new legislation.<sup>39</sup> Thus, the bill would not only remove the education barrier, but it would also increase the state’s “productivity and economic growth.”<sup>40</sup>

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

On December 14, 2005, a group of out-of-state students enrolled at a California public university sued the Regents of the University of California, claiming that the California law discriminates against them as United States citizens and is preempted by federal law.<sup>41</sup> Although the California Court of Appeal held that the California statute did not violate the plaintiffs’ Equal Protection rights, the court agreed that federal law preempted the California law.<sup>42</sup> This case successfully invalidated California Education Code section 68130.5, but the ruling was recently reversed by the California Supreme Court.<sup>43</sup> In effect,

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35. CAL. EDUC. CODE § 68130.5(a).

36. *Id.*

37. *Id.*

38. Cal. Assemb. B. 540.

39. *Id.*

40. *Id.*

41. *Martinez*, 83 Cal. Rptr. 3d at 524.

42. *Id.* at 540, 545.

43. *Martinez*, 241 P.3d at 855.

the plaintiffs have announced their intention to appeal the decision to the United States Supreme Court.<sup>44</sup>

### 1. *Plaintiffs' Claims*

The plaintiffs first alleged that because the University denied them in-state tuition, the California law unconstitutionally discriminated against them because it provided such a “benefit” to undocumented persons, in violation of the federal and California’s Equal Protection clauses.<sup>45</sup> The plaintiffs asserted that they were similarly situated with the undocumented group in that neither class is recognized under law as “domiciled” in the state of California, yet undocumented students are allowed a benefit denied to U.S. citizens from sister states.<sup>46</sup> By allowing undocumented students to qualify for in-state tuition while denying it to lawful citizens, the plaintiffs argued that undocumented immigrants receive preferential treatment based on their national origin and that the plaintiffs are the subjects of reverse discrimination.<sup>47</sup> In fact, the plaintiffs accused the defendants of engaging in an “Illegal Alien Tuition Scheme,” whereby California colleges and universities exempted undocumented students from out-of-state tuition while, at the same time, making U.S. citizens pay for it.<sup>48</sup>

Second, the plaintiffs claimed that the California statute was a de facto residence requirement, and, thus, was preempted by IIRIRA.<sup>49</sup> According to the plaintiffs, it is residence that entitles a student to attend a California high school, and IIRIRA denies any postsecondary education benefit to undocumented students on the basis of residence.<sup>50</sup> Furthermore, the plaintiffs asserted that in denying similar benefits to United States citizens, the California law violated IIRIRA’s clause that if a benefit is given to an undocumented immigrant, that same benefit must also be provided to citizens.<sup>51</sup>

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44. See Josh Keller, *California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants*, THE CHRONICLE OF HIGHER EDUCATION, Nov. 15, 2010, available at <http://chronicle.com/article/California-Supreme-Court/125398/>.

45. *Martinez*, 83 Cal. Rptr. 3d at 524.

46. *Id.* at 525, 545.

47. *Id.* at 549.

48. *Id.* at 524.

49. *Id.*

50. *Id.* at 525.

51. *Id.* (citing 8 U.S.C. § 1623).



## 2. *Defendants' Claims*

The defendants filed a demurrer, arguing that the California law is not preempted because it is not based on residency, but on attendance.<sup>52</sup> Furthermore, according to the defendants, even if the law was designed to benefit undocumented students, California is allowed to provide undocumented students with educational benefits under section 1621(d).<sup>53</sup>

The defendants also claimed that the California statute does not violate the plaintiffs' Equal Protection rights because it does not deprive U.S. citizen students of in-state tuition on the basis of alienage, but rather on the basis of high school attendance.<sup>54</sup> Thus, any student may qualify for in-state tuition, regardless of citizenship status. To that extent, it is rationally related to a legitimate government purpose.<sup>55</sup>

## 3. *The Court's Holding and Reasoning*

First, and most significantly, the California Court of Appeal held that the California law was preempted by IIRIRA.<sup>56</sup> The court reasoned that the California law "makes illegal aliens eligible for in-state tuition without affording in-state tuition to out-of-state U.S. citizens without regard to California residence," which, in the court's view, directly conflicts with federal law.<sup>57</sup>

Moreover, the court interpreted the state law as ambiguous in regard to whether it is based on residence, particularly because residency requires "physical presence and an intention to remain."<sup>58</sup> Thus, rather than focusing, as the defendants do, on the plain meaning of the statute, the court focused on legislative intent, particularly when analyzing whether the California statute confers a benefit on the basis of residence.<sup>59</sup> The court ultimately concluded that the wording of the California statute created a de facto residency requirement, in violation of federal law, by establishing "a surrogate criterion for residence," although residence is never mentioned.<sup>60</sup>

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52. *Id.* at 533.

53. *Id.*

54. *Id.* at 527.

55. *Id.*

56. *Id.* at 530.

57. *Id.* at 531.

58. *Id.* at 533, 535 (citing *Martinez v. Bynum*, 461 U.S. 321, 330–31 (1983)).

59. *Id.* at 535.

60. *Id.* at 537.

With regard to the savings clause (PRWORA's provision that allows a state the option to enact a law allowing undocumented persons in-state tuition if it "affirmatively provides" its intention to do so after August 22, 1996), the court held that it did not apply here.<sup>61</sup> The court reasoned that, for one, the California statute is still precluded via conflict preemption.<sup>62</sup> Also, the court found that the words "affirmatively provides" in the federal law are ambiguous.<sup>63</sup> After reviewing PRWORA's legislative history, the court reasoned that "[o]nly the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section."<sup>64</sup> The court further noted that "[t]he 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>65</sup> Thus, as the conference report supports, not only must the state law specify that undocumented persons are eligible, but the state legislature must also expressly reference section 1621.<sup>66</sup> In rejecting to clearly show its intent, the court explained, the California law "does not clearly put the public on notice that tax dollars are being used to benefit illegal aliens."<sup>67</sup>

As to Equal Protection, however, the court granted the plaintiffs' leave to amend their claim.<sup>68</sup> The court held that the California statute does not on its face allow undocumented persons a benefit denied to U.S. citizens from sister states, for citizens may qualify for in-state tuition if they attend a California high school for three years and obtain a high school diploma.<sup>69</sup> Furthermore, the court held, the plaintiffs failed to show that "national origin" includes alienage or citizenship for discrimination purposes.<sup>70</sup> Thus, the California law does not violate the Equal Protection clause, although it is preempted by a conflicting federal law.

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61. *Id.* at 544–45.

62. *Id.* at 544 (citing *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 926 (2004)).

63. *Id.*

64. *Id.*

65. *Id.* (citing H.R. REP. NO. 104–725, at 1 (1996)).

66. *Id.*

67. *Id.*

68. *Id.* at 545.

69. *Id.*

70. *Id.* at 549.

### III. The California Statute Is Not Preempted by IIRIRA

As noted above, federal law is deemed “the Supreme law of the land” under the Supremacy Clause.<sup>71</sup> Thus, if a matter falls within Congress’s authority, a state law is preempted under the Supremacy Clause if it conflicts with the federal law.<sup>72</sup> In determining whether preemption has occurred, States must look to congressional intent.<sup>73</sup>

The Supreme Court has distinguished three types of preemption: (1) express preemption, when a statute contains a provision specifically referring to preemption and indicating which state laws the national statute supplants;<sup>74</sup> (2) field preemption, when the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”;<sup>75</sup> and (3) conflict preemption, when “compliance with both federal and state regulations is a physical impossibility,”<sup>76</sup> or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>77</sup> The party that claims a state law is preempted bears the burden of proof.<sup>78</sup>

#### A. No Express Preemption

“Express” preemption occurs when a federal statute includes a preemption clause explicitly withdrawing specified powers from the states.<sup>79</sup> Judges confronted with such a clause must first decide what the clause means.<sup>80</sup> The Supreme Court has indicated that judges should apply some version of a presumption against preemption and that the Court favors “a narrow reading” of express preemption clauses, at least when the states’ traditional powers to legislate for the general health, safety, and welfare are at stake.<sup>81</sup>

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

72. *Id.*

73. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992).

74. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–27 (2000).

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

76. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

77. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that the federal Alien Registration Act, which touched on the areas of immigration, naturalization, and foreign affairs, preempted a state alien registration act).

78. *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 955–56 (2004).

79. Nelson, *supra* note 74.

80. *Id.*

81. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 518 (1992) (discussing and applying “the presumption against the preemption of state police power

### *1. Presumption of Constitutionality*

California has insisted on a presumption of constitutionality of a law once it is enacted: “[O]ne of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.”<sup>82</sup> Also, the California Supreme Court has held that “[u]nless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act.”<sup>83</sup>

The legislative history of the California statute demonstrates that the law was carefully drafted to avoid any conflict with federal law. As AB 540 demonstrates, the drafters were well aware of the federal law and expressly found that it did not conflict with it.<sup>84</sup> Therefore, because the unconstitutionality of California Education Code section 68130.5 is not clearly shown, the law should be upheld.

### *2. The State Law Is Not Based on Residency*

States have the right to set residency classifications for certain state benefits. A state, however, also has the right not to set residency classifications if they want everyone to benefit equally from a certain law. To date, seven states have passed legislation eliminating “residency” as a requirement for in-state tuition.<sup>85</sup> These states recognize the damage out-of-state tuition will play on their state by preventing a whole group of people that live in their state from advancing in society.

The California legislature managed to bypass the federal legislation by shifting the focus of its statute away from “residency,” so residency is not even mentioned in the California statute.<sup>86</sup> In effect, the state law does not conflict with the federal provision in that a state law cannot give education benefits to undocumented students

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regulations”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (reaffirming this presumption and suggesting that it applies more broadly).

82. *Lockyer v. City & Cnty. of San Francisco*, 33 Cal. 4th 1055, 1086 (2004).

83. *Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 594 (1976).

84. Cal. Assemb. B. 540 (“This act, as enacted during the 2001-2002 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.”).

85. Other states with similar provisions include New York, Texas, Washington, Illinois, Kansas, Utah, Oklahoma, New Mexico, and Nebraska.

86. See CAL. EDUC. CODE § 68130.5.

“on the basis of residence.”<sup>87</sup> Instead, the California law makes the exemption available to any student who meets the criteria, regardless of residency. Thus, on its face, the California law does not conflict with the federal law. If Congress wished to eliminate any possibility of allowing undocumented immigrants from receiving in-state tuition, it would have specifically stated such an intent in the statute, and it would have at least been mentioned somewhere in the legislative history.

In reversing, the California Supreme Court has even acknowledged that the California law is not based on residency: “[S]ection 68130.5’s criteria are not the same as residence, nor are they a de facto or surrogate residency requirement.”<sup>88</sup> The court reasoned that in-state tuition is based on “other criteria,” namely obtaining a California high school degree.<sup>89</sup> Furthermore, the court noted that many undocumented students who would have otherwise been eligible for in-state tuition benefits on the basis of residency are ineligible for in-state tuition under section 68130.5.<sup>90</sup> Thus, because in-state tuition benefits are given to all students who meet the statute’s requirements, and because not all who meet the criteria are California residents, the California statute does not violate the federal law.<sup>91</sup>

To counter this argument, opponents argued that only residents can attend California high schools, so the only people benefited by this law are undocumented residents. The California Court of Appeal in *Martinez* also relied on this reasoning.<sup>92</sup> However, this is not the case. As will be explained under Part V of this note, many out-of-state U.S. citizens also qualify for in-state tuition under the California law. Also, as explained above, a presumption of constitutionality means courts must accept that a law is valid if there is no evident conflict between federal and state law.<sup>93</sup> To hold otherwise would render the phrase “on the basis of residence” mere surplusage, which violates a fundamental principle of statutory interpretation.<sup>94</sup> It is a “cardinal principle of statutory construction”

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87. *Id.*

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

89. *Id.* at 863.

90. *Id.* at 860.

91. *Id.*

92. *Martinez*, 83 Cal. Rptr. 3d at 536–38.

93. *Lockyer*, 33 Cal. 4th at 1086.

94. *See United States v. Menasche*, 348 U.S. 528 (1955).

that a court has a duty to “give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.”<sup>95</sup>

3. *Federal Law Expressly Authorizes States to Pass This Law*

Furthermore, section 1621(d) of PRWORA expressly authorizes states to enact laws that provide the same benefits it prohibits to undocumented immigrants: “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.”<sup>96</sup> Thus, the federal law explicitly allows in-state tuition benefits to undocumented students so long as the state law meets two requirements: (1) that it be enacted after August 22, 1996, and (2) that it “affirmatively provide” for such eligibility. Because IIRIRA uses the phrase “postsecondary education benefit” as a defined benefit, in-state tuition would also apply under PRWORA’s exemption.<sup>97</sup>

The California Education Code came into effect January 1, 2002, after the date required by PRWORA. Further, the law affirmatively states that undocumented students may be eligible for in-state tuition.<sup>98</sup> The language in AB 540 reaffirms this when it states, “[t]his act . . . 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.”<sup>99</sup> Such language is unambiguous and does not mandate any additional requirements for the exemption to apply.

As noted above, the California Court of Appeal held that the words “affirmatively provides” in the federal law are ambiguous.<sup>100</sup> After reviewing PRWORA’s legislative history, the court reasoned that the California law had to clearly specify that undocumented immigrants are eligible for in-state tuition and that the state legislature needed to “expressly reference section 1621.”<sup>101</sup> The

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95. *Id.* at 538–39.

96. 8 U.S.C. § 1621(d) (1998).

97. *Id.*

98. See CAL. EDUC. CODE § 68130.5(a)(4).

99. Cal. Assemb. B. 540.

100. *Martinez*, 83 Cal. Rptr. 3d at 544.

101. *Id.*

California Supreme Court, however, rejected this argument. The court held that section 1621's text "contains no requirement that a state law giving unlawful aliens a benefit must expressly reference the section."<sup>102</sup> The court went on to note that if the Congress had required such formalities, it would have made it clear "and would not have set a trap for unwary legislatures."<sup>103</sup> If Congress's intent were clear, the court continued, "[t]he [California] Legislature could easily have referenced section 1621 in section 68130.5, and no doubt it would have done so if section 1621 had so required."<sup>104</sup> Finally, the court emphasized that it would be "unreasonable" to require states to look through committee reports to find other possible requirements not visible in the plain statutory language.<sup>105</sup>

### **B. No Implied Preemption**

Even if federal law does not expressly preempt a state law, the Supremacy Clause requires states to allow the federal government to carry out its laws.<sup>106</sup> As noted above, the Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization."<sup>107</sup> Thus, the federal government has a "preemptive role" in regulating undocumented persons within the borders of the United States.<sup>108</sup> As such, when Congress passes lawful standards for admission, naturalization, and residence in the United States, states "can neither add to nor take from the conditions."<sup>109</sup> Moreover, courts give tremendous deference to Congress.

The Court has established a three-part test to determine whether a state statute constitutes a regulation of immigration, thereby conflicting with federal authority.<sup>110</sup> First, preemption occurs if a state law purports to regulate immigration.<sup>111</sup> Second, if Congress intended to "occupy the field" that the state statute attempts to regulate,

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102. *Martinez*, 241 P.3d at 867.

103. *Id.* at 868.

104. *Id.* at 867.

105. *Id.*

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

107. U.S. CONST. art. I, § 8, cl. 4.

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

109. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

110. *DeCanas*, 424 U.S. at 356; *see also* *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1253 (C.D. Cal. 1997) (applying the three-part test to California's Proposition 187).

111. *DeCanas*, 424 U.S. at 356.

federal law will preempt it.<sup>112</sup> To meet this prong, the federal law's "clear and manifest purpose" must have intended a "complete ouster of state power."<sup>113</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>114</sup> Finally, a federal law will preempt a state law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and renders compliance with both the state and federal law impossible.<sup>115</sup>

*1. The California Law Is Not a Regulation of Immigration*

The California statute does not regulate immigration nor attempts to do so. It does not determine who should be admitted into the United States or the conditions under which an immigrant may remain. Further, the California law does not create standards for determining who is and who is not in this country legally. It does not even require state officials to make independent judgments of immigration status.

The Court has held that state laws that refer to immigration are not automatically preempted by federal law.<sup>116</sup> As the Court has explained, it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power."<sup>117</sup> "[S]tanding alone, 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 the conditions under which a legal entrant may remain."<sup>118</sup> Thus, simply because the California statute may affect certain undocumented persons, it does not automatically make it a regulation of immigration.

Even *Plyler* noted that "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."<sup>119</sup> In fact, the Court of Appeal in *Martinez* conceded the fact that the California code is not a

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112. *Id.*

113. *Id.* at 357.

114. *Id.*

115. *Id.* at 363.

116. *Id.* at 355.

117. *Id.*

118. *Id.*

119. *Plyler*, 457 U.S. at 219.



regulation of immigration in stating that “[s]ection 68130.5 does not regulate immigration and therefore is not expressly preempted as a regulation of immigration.”<sup>120</sup> Thus, it appears quite clear that the California statute is not a regulation of immigration.

## 2. *No Field or Conflict Preemption*

Furthermore, Congress did not intend to occupy the field of in-state tuition for undocumented students.<sup>121</sup> As a federal court has stated, the federal law “does not govern college admissions for illegal aliens. As a result, not only has Congress failed to occupy completely the field of illegal alien eligibility for public post-secondary education, it has failed to legislate in this field at all and thus has not occupied any part of it.”<sup>122</sup> The California Supreme Court has acknowledged such an argument by noting that section 1621’s language that a state “may” provide public benefits to undocumented immigrants “shows Congress did not intend to occupy the field fully.”<sup>123</sup>

Finally, the California statute does not conflict with any federal legislation. If an undocumented student qualifies for in-state tuition, provided the student meets the requirements, section 68130.5 does not alter the definition of residency or an undocumented person’s ability to establish residency.<sup>124</sup> Even if California’s primary motivation were to permit undocumented students to qualify for in-state tuition, the California Supreme Court found that “nothing is legally wrong with the Legislature’s attempt to avoid section 1623.”<sup>125</sup> Therefore, no field or conflict preemption exists.

After considering these factors, it is fair to conclude that there is no valid basis for arguing that the California law is preempted by federal law. As noted above, there is a presumption of constitutionality, the California law is not based on residency, the federal law expressly allows states to grant in-state tuition to undocumented students, the state law is not a regulation of immigration, and no conflict between the laws exists. Thus, section 68130.5 is not preempted neither expressly nor impliedly.

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

121. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (2004).

122. *Id.*

123. *Martinez*, 241 P.3d at 868.

124. *See* CAL. EDUC. CODE § 68130.5.

125. *Martinez*, 241 P.3d at 866.

#### IV. IIRIRA Violates the Tenth Amendment

The Constitution gives Congress plenary power “to establish an uniform Rule of Naturalization.”<sup>126</sup> It does not, however, give Congress the power to dictate how states or public universities shall treat their undocumented residents, provided they do not violate any civil liberties or try to regulate immigration. Because the power to award resident tuition is neither delegated to the federal government by the Constitution nor prohibited to the states, the Tenth Amendment dictates that this power be reserved to the states.<sup>127</sup> Moreover, public education is a matter that should be and has been left to the states and local governments for years. Therefore, IIRIRA is problematic because it sets a federal mandate for state residency requirements, which is a determination not delegated to Congress and one that states typically make. Thus, IIRIRA is unconstitutional as an infringement on a state’s rights.

In a leading case, *New York v. United States*, the Court concluded that because the Tenth Amendment limits the scope of Congress’s powers under Article I, the “Federal Government may not compel the State to enact or administer a federal regulatory program.”<sup>128</sup> Although the federal government had a strong interest in controlling radioactive waste, it could not force states to implement its laws.<sup>129</sup> The Court further emphasized that although Congress has substantial power in governing the nation, even in areas of intimate concern to the states, “the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress’ instructions.”<sup>130</sup> *Printz v. United States* reaffirmed *New York v. United States* by holding that a federal law commandeering state executive officials to enforce its law is also unconstitutional.<sup>131</sup> Therefore, Congress’s powers are limited when they interfere with state sovereignty.

Similarly, although the federal government has an interest in limiting benefits to undocumented immigrants, Congress may not simply commandeer the state legislative processes by making states enact and enforce a federal law not guided by the Constitution. The

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126. U.S. CONST. art. I, § 8, cl. 4.

127. U.S. CONST. amend. X.

128. *New York v. United States*, 505 U.S. 144, 188 (1992).

129. *Id.* at 161.

130. *Id.* at 162.

131. *Printz v. United States*, 521 U.S. 898 (1997).

Court has held that if a federal law compels state legislative or regulatory activity, the statute is unconstitutional even if there is a compelling need for federal action.<sup>132</sup> Under IIRIRA, states would be required to make students who seek resident tuition to provide evidence of United States citizenship or legal immigration status, forcing school personnel into the role of “immigration police.”<sup>133</sup> Further, allowing Congress to direct state governments in such a way would undermine government accountability because Congress could make a decision and the states would suffer the consequences.<sup>134</sup> Based on its language, IIRIRA essentially commandeers states into enforcing its laws, which is a violation of the Constitution.

The Tenth Amendment should also be strictly enforced for policy reasons. PRWORA and IIRIRA function to significantly reduce the likelihood that undocumented students will ever attain legal status, and the statutes significantly increase the likelihood that these persons will be trapped at the bottom of the socioeconomic ladder.<sup>135</sup> By preventing the advancement of undocumented youths to skilled and professional careers, the statutes will increase the rate of high school drop-outs, decrease students’ ability and potential to contribute to the growth of the economy, and increase reliance on state benefits.<sup>136</sup> The long-term effect will be to keep the current class of low-skilled workers in place.<sup>137</sup> Barring qualified undocumented students from obtaining advanced degrees prevents capable immigrants from becoming professionals and significant taxpayers.<sup>138</sup> It is no coincidence that “undocumented status and poverty are mutually reinforcing obstacles to advancement.”<sup>139</sup>

Significantly, the financial burden of providing for undocumented persons falls on the states. It is unfair to force states to incur harm without allowing any viable solutions. It is no wonder that the states with the most influx of immigration have passed laws

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132. *New York v. United States*, 505 U.S. at 188.

133. *Konet*, *supra* note 5.

134. *New York v. United States*, 505 U.S. at 188.

135. Laura S. Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State Tuition Rates?*, 82 WASH. U. L. Q. 585, 604 (2004).

136. *Id.* at 605.

137. *Id.*

138. Yates, *supra* note 135, at 605.

139. Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C.J. INT’L L. & COM. REG. 393, 395 (2002).

like those in California. These states have an interest in educating the undocumented people that live in their states, but after the passage of IIRIRA, states are left in an unfortunate position of dealing with the problem of illegal immigration themselves. As one symposium pointed out, “[w]hile the vast majority of illegal immigrants reside in just seven states, the forty three other states reap the financial rewards of immigration in tax dollars contributed by the illegal immigrant population. . . . [T]he States are effectively preempted from taking immigration measures into their own hands.”<sup>140</sup>

Thus, because it is economically impossible for postsecondary institutions to offer all applicants the lower in-state tuition rates, IIRIRA effectively bars universities from extending in-state tuition rates to undocumented immigrants and forcing states to bear the costs. This is not only unfair to the states and the undocumented students, but also unconstitutional as an infringement on state and individual rights.

### **V. Denying Undocumented Students In-State Tuition May Violate the Equal Protection Clause**

Another way IIRIRA and PRWORA are unconstitutional is that they may violate the Equal Protection clause. The Fourteenth Amendment to the Constitution states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>141</sup> As discussed above, *Plyler* applied the Equal Protection clause to undocumented *children*, holding that these students have a right to a free public primary and secondary education, despite their legal status.<sup>142</sup> As the Court put it, to deny an education “to some isolated group of children poses an affront to one of the goals of the Equal Protection clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>143</sup>

Under federal law, undocumented students are not afforded the same opportunities as other similarly situated students. Instead, undocumented students are forever designated as out-of-staters

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140. Symposium, *Illegal Immigration and the State Predicament*, 8 MD. J. CONTEMP. LEGAL ISSUES 271, 292 (1997).

141. U.S. CONST. amend XIV, § 1.

142. *Plyler*, 457 U.S. at 202.

143. *Id.* at 221–22.

although they may have lived in a particular state almost their whole lives and will continue to do so for the rest of their lives.

Unfortunately, the holding in *Plyler* is limited in its application. For one, this right only extends to primary and secondary education, not college education.<sup>144</sup> Second, there is no fundamental right to education.<sup>145</sup> Third, undocumented immigrants are not a “suspect class” under the Constitution.<sup>146</sup> Most significantly, intermediate scrutiny only applies to state legislation; if the federal government is discriminatory, then rational basis review must be used.<sup>147</sup>

#### A. Extending *Plyler*

Nevertheless, considering the changed times, *Plyler* presents a good case for extending its holding to post-secondary education.<sup>148</sup> Opponents of the California law emphasize the differences between denying a basic education, as in *Plyler*, and denying a higher education, as IIRIRA and PRWORA do.<sup>149</sup> It is important to note, however, that *Plyler* was decided almost thirty years ago, when postsecondary education was less critical to an individual’s personal and professional advancement.<sup>150</sup> Society is much more technologically advanced and complex than it was thirty years ago, and primary and secondary education are no longer enough for economic success.<sup>151</sup> Today, it is more difficult to find a career that only requires a high school diploma.

Furthermore, as in *Plyler*, the students affected by IIRIRA and PRWORA are youths who are not responsible for their illegal immigration status and who have grown up in the United States with the intention to remain here.<sup>152</sup> Thus, it is unjust to punish these

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144. *Id.* at 202.

145. *Id.* at 221.

146. *Id.* at 223.

147. *Id.* at 220.

148. For an excellent report on why it is worthwhile to educate undocumented immigrants, see CTR. FOR RESEARCH AND IMMIGRATION POLICY, RAND EDUC., GOAL: THE DOUBLE RATE OF HISPANICS EARNING A BACHELOR’S DEGREE (2001), available at [http://www.rand.org/pubs/documented\\_briefings/DB350/DB350.pdf](http://www.rand.org/pubs/documented_briefings/DB350/DB350.pdf).

149. Yates, *supra* note 135, at 604.

150. See Romero, *supra* note 139, at 411 (“[T]wenty years have passed since *Plyler* and in a word in which many opportunities for economic and personal advancement require postsecondary education, the opportunity to attend college might very well be the new educational floor.”).

151. Yates, *supra* note 135, at 604.

152. *Id.*

undocumented students for their parents' actions. As Justice Brennan wrote, "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."<sup>153</sup> Moreover, by the time undocumented students graduate from high school, the government has already made a huge economic investment in their primary and secondary education, so it does not make sense to turn these students away in the name of regulating immigration.<sup>154</sup> It is important to assess the situation as a whole, rather than to simply focus on one particular issue. Opponents need to recognize the costs associated with denying in-state tuition to undocumented students (such as creating a reduction in reliance on government programs) and the benefits in allowing them to obtain in-state tuition.

Nevertheless, a common justification for denying undocumented immigrants the opportunity to continue their education is the assumption that undocumented immigrants create a net economic loss to the United States by drawing more public funds than they contribute.<sup>155</sup> There are conflicting studies indicating whether such a claim is true, but even if it were, such an argument was rejected in *Plyler* as irrelevant when constitutional rights are at issue.<sup>156</sup> Thus, the focus of in-state tuition for undocumented students should not be on finances, but rather on the Constitution and the rights it protects.

Opponents further argue that offering in-state tuition rates to undocumented aliens will promote unlawful immigration.<sup>157</sup> However, it seems extremely unlikely for a family to come to the United States for the purpose of having their child obtain in-state tuition, if the family is even aware of such a right. Data provided by immigrant advocates further shows that individuals do not immigrate to the United States in order to take advantage of public education and public services; rather, they come to seek employment and reunite with family members who are already here.<sup>158</sup>

Finally, anti-immigrant groups argue that it is illogical to spend tax dollars on higher education for those who cannot work legally in the United States and will therefore not pay United States taxes.<sup>159</sup>

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153. *Plyler*, 457 U.S. at 220.

154. *Id.*

155. Yates, *supra* note 135, at 605.

156. *Id.*

157. *Id.* at 606.

158. *Id.*

159. *Id.*

Part of the solution for this problem, however, is to prevent it before it begins. This issue is addressed by the DREAM Act (discussed in the next section), which provides a pathway to citizenship if undocumented students graduate from a college or university, amongst many other requirements.<sup>160</sup> If the DREAM Act does not pass, undocumented graduates are nevertheless more likely able to succeed in gaining a pathway to citizenship.<sup>161</sup> Thus, *Plyler* presents a good case in eliminating the relevant IIRIRA and PRWORA provisions.

### **B. United States Citizens Do Not Have an Equal Protection Claim**

The plaintiffs in *Martinez* argued that the California statute discriminates against them by precluding them from receiving in-state tuition yet allowing certain undocumented students to qualify for lower tuition rates.<sup>162</sup> This claim, however, is unfounded, and the California statute readily survives rational basis review. It is important to note that neither the plaintiffs nor other United States citizens are precluded from receiving in-state tuition, provided they meet the requirements set forth in the statute. Simply because *some* of the students that benefit from the law happen to be undocumented, it does not follow that the law gives preferential treatment to undocumented persons. As the California statute shows, even an out-of-state student may obtain in-state tuition if he or she attended and graduated from a California high school. Thus, because the exemption is available to any student who meets the criteria, the California law is not discriminatory against United States citizens.

United States citizens who would not have otherwise qualified for in-state tuition can benefit from in-state tuition under the current California law. These students include: a student who has graduated from a California high school, but then decided to work in another state or country after completing high school;<sup>163</sup> a financially dependent minor whose parents live in another state;<sup>164</sup> a lawful

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160. *Id.*

161. *Id.*

162. *Martinez*, 83 Cal. Rptr. 3d at 524.

163. CAL. EDUC. CODE §§ 68017, 68018 (2010) (such a student must have resided in California for at least a year prior to the residence determination date to be considered a California resident).

164. CAL. EDUC. CODE § 68062(f) (2010) (such a student would not be considered a California resident, since an unmarried minor's residence is derived from that of his or her parents).

immigrant dependent student whose parents have returned to another country;<sup>165</sup> and a student who attended a California high school but lived in a border area in a neighboring state.<sup>166</sup>

Thus, if any student may qualify for such an exemption, then it cannot be said that citizen students and undocumented students are not similarly situated. In fact, such a law constitutes a nondiscriminatory prerequisite because any student may qualify, regardless of citizenship, national origin, race, or ethnicity. Even the Tenth Circuit, after hearing a case involving a very similar Kansas statute, held that the statutory factors constitute “a nondiscriminatory prerequisite for benefits under [the statute], regardless of the citizenship of the students.”<sup>167</sup> Therefore, as the lower court in *Martinez* agreed, the California statute does not discriminate against U.S. citizens.

## VI. Proposed Legislation: Introducing the DREAM Act

As a proposal to resolve the in-state tuition controversy, Congress continually re-introduces the Development, Relief, and Education for Alien Minors Act (hereinafter “DREAM Act”).<sup>168</sup> The purpose of the bill is to permit states to determine residency for higher education purposes and to authorize the cancellation of removal and adjustment of illegal status of undocumented students who either graduate from college or join the military.<sup>169</sup>

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165. CAL. EDUC. CODE § 68062(i) (2010) (the residence of an unmarried minor alien shall be derived from his or her parents).

166. CAL. EDUC. CODE §§ 48050-48051 (2010).

167. *Day v. Bond*, 500 F.3d 1127, 1135 (10th Cir. 2007).

168. Development, Relief, and Education for Alien Minors (DREAM) Act of 2009, S. 729, 111th Cong. (2009)

(“A student qualifies under the DREAM Act if the student is (1) physically present in the US for at least 5 years; (2) under 16 years of age at the time of initial entry; (3) of good moral character; (4) admitted to an institution of higher education in the U.S., has earned a high school diploma, or has earned a G.E.D. in the U.S.; (5) is not yet 35 years of age; and (6) lacking final administrative or judicial order of exclusion, deportation or removal.

Afterwards, the student qualifies for conditional permanent residency for 6 years unless the student ceases to meet the requirements noted above, has become a public charge, or has received a dishonorable discharge from the uniformed services.

After the 6 years, the student can petition the government to have the conditional status removed and become a permanent resident. This petition will be granted if the student (1) has demonstrated good moral character; (2) has not abandoned his residence in the U.S.; and (3) has either acquired a degree of higher education, has completed at least 2 years in good standing, or has served in the uniformed services for at least 2 years.”).

169. *Id.*



Most importantly, the DREAM Act would repeal Section 505 of IIRIRA, which would, in turn, give PRWORA less force in invalidating a state law granting undocumented students in-state tuition. Repealing Section 505 would restore the rights of states to determine residency for public education benefits and would allow *them* to decide whether or not to offer resident tuition rates to undocumented students. As a result, the states that wish to provide their residents with in-state tuition would have the discretion to do so without fear of potential federal preemption.

The DREAM Act would also provide immigration relief to undocumented students by adjusting their lawful permanent resident (“LPR”) status if they are long-term residents who entered the United States as children (prior to the age 16), provided they meet other criteria.<sup>170</sup> Adjustment of LPR status, in addition to placing students on a pathway to citizenship, would make these students eligible for resident tuition benefits and federal financial aid.

Thus, the DREAM Act would eliminate issues of preemption and would grant children, who did not willfully violate federal immigration laws, a second chance in becoming lawful, contributing members of society.

## VII. Conclusion

In consideration of the ongoing debate, it is important to reconsider solutions to the in-state tuition problem. Although opponents of the DREAM Act would prefer to eliminate any benefit to undocumented students, it is unfair to punish those who were brought to the United States as children. Further, preserving IIRIRA is an unconstitutional abuse of federal power, a violation of the Fourteenth Amendment, and unreasonable by preventing the advancement of persons who could significantly contribute to society. Congress should instead determine once and for all that states are to have discretion in providing their residents (whether undocumented or not) with any state-approved benefit if they choose to do so, provided that the state law does not infringe upon anyone’s basic constitutional rights. An undocumented child is a person who deserves the same opportunities as others, particularly because these children did not intentionally violate the law. Unfortunately, however, many states continue to permit the federal government to turn university and state officials into immigration police.

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170. *Id.*

As the California Supreme Court noted, the California Court of Appeal in *Martinez* got it wrong. Although federal legislation prohibits states from granting postsecondary education benefits to undocumented individuals on the basis of residency, the California Education Code is not preempted by federal law. There is a strong presumption of constitutionality towards state laws, the California law does not base its requirements on residency and is not a regulation of immigration, the state and federal laws do not conflict with each other, and, most significantly, there is express evidence in the federal law that it will allow states to pass their own laws regarding state benefits. Thus, any court rulings arguing that these state laws are preempted are wrongfully decided, and the United States Supreme Court should affirm the California Supreme Court's decision in *Martinez*.

An undocumented student should have the right to qualify for in-state tuition for secondary education purposes, and the California law should be allowed to stand. It might be difficult to convince those who strongly oppose illegal immigration of the benefits of the law and the morality behind it, but thousands of undocumented students out there are still dreaming.