Martinez v. Regents: 
Mis-Step or Wave of the Future 

IHELG Monograph 
08-07

Kristen Miller 
Juris Doctorate Candidate (Dec. 2009) 
University of Houston Law Center 
kmmiller@central.uh.edu 
(713) 301-6152 
and 
Celina Moreno 
Juris Doctorate Candidate (2010) 
University of Houston Law Center 
cymoreno@central.uh.edu 
(617)388-3551

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ABSTRACT

The article suggests that, contrary to the 2008 California appellate court holding in *Martinez v. Regents of the University of California*, federal law does not preempt a California statute allowing certain undocumented students in-state tuition at California public colleges and universities. The plaintiffs, non-resident students attending California public universities, alleged that they were illegally denied exemption from non-resident tuition under California Education Code section 68130.5. The court incorrectly held that section 681305 was preempted by federal immigration and benefits legislation, specifically 8 U.S.C. §§ 1621 and 1623. The article notes that these federal laws may impermissibly delve into the state’s province of higher education. Further, the article argues that even if states’ rights regarding higher education legislation were not preeminent, §§ 1621 and 1623 do not prohibit state statutes, such as section 68130.5, that allow undocumented students eligibility for in-state tuition rates. The article also addresses the importance of standing in determining the proper outcome for these cases and the inappropriateness of using state law standing requirements when interpreting federal law. Next, the article contends that section 68130.5 survives a facial Equal Protection attack and argues that the appellate court correctly concluded that only a “rational relationship” is required, because no fundamental right or suspect class based on alienage or national origin is implicated by the statute. The authors also provide the federal and state statutory and judicial framework implicated in *Martinez* and forecast the ramifications of that case if upheld.
Martinez v. Regents: Mis-Step or Wave of the Future
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Table of Contents

PART I: Introduction ................................................................. 2

PART II: Statutory and Judicial Framework ........................................ 5
   A. Judicial Review of Seminal Cases Relevant to Martinez ..................... 5
      1. Plyler v. Doe: Public K-12 Education of Undocumented Students ........ 5
      2. Toll v. Moreno: Domicile and the Higher Education of Certain Non-Immigrant Aliens ......................................................... 6
   B. Federal Statutory Framework for Martinez .................................. 9
      1. IIRAIRA .................................................................................. 10
      2. PRWORA ............................................................................... 10
   C. State Statutory Framework for Martinez ........................................ 10

PART III: Statement of the Case .................................................. 11
   A. Facts and Proceedings: The Lower Court Decision ......................... 12
   B. Facts and Proceedings: The Appellate Court Decision ..................... 14

PART IV: Analysis of Martinez ..................................................... 20
   A. Standing: A Procedural Problem with Substantive Consequences ........ 20
      1. The California Standing Rule .................................................. 21
         a. Standing in Martinez: The Lower Court Decision .................... 21
         b. Standing in Martinez: The Appellate Court Decision ............... 22
      2. The Federal Standing Rule ..................................................... 22
      3. Is it good public policy to apply looser state standing requirements when interpreting federal immigration laws? .............................................. 24
   B. An Analysis of 8 U.S.C. 1621 ..................................................... 26
      1. Meaning of Benefit .................................................................. 26
      2. Meaning of “Affirmatively Provide” ......................................... 28
      3. The Martinez Treatment of § 1621 and How the Court Erred ........... 29
   C. An Analysis of 8 U.S.C. 1623 ..................................................... 31
      1. Is in-state tuition a benefit under §1623? .................................. 31
         a. The Martinez Treatment of “Benefit” under § 1623 .................. 33
      2. Is section 68130.5’s granting of in-state tuition “on the basis of residence”? .... 33
         a. Meaning of “Residence” under California Law ....................... 34
         b. The Martinez Treatment of “On the Basis of Residence” ............ 35
      3. If undocumented students are eligible for in-state tuition status under section 68130.5, are non-resident U.S. citizens or nationals who meet the same section 68130.5 criteria being denied eligibility for in-state tuition status in contravention of federal law? .................................................. 36
         a. The Martinez Treatment of § 1623’s “Unless Clause” ............... 36
   D. Equal Protection and Other Remaining Claims .............................. 37
      1. The Martinez Treatment of the Facial Equal Protection Claim ........... 38
      2. The Martinez Treatment of the As-Applied Equal Protection Claim .... 40
PART I: INTRODUCTION

"The illegal alien of today may well be the legal alien of tomorrow."1
- Plyler v. Doe

The U.S. Supreme Court employed such logic, arguing that unless undocumented immigrant2 children have access to public education, they "will become permanently locked into the lowest socioeconomic class."3 In 1982’s Plyler v. Doe, the Court struck down a Texas law that allowed school districts to deny enrollment to undocumented immigrant children, many of whom had been brought to the United States illegally by their parents and could not affect their own immigration status.4 At the time of Plyler, estimates indicated that fifty to sixty percent of then-current legal alien workers were formerly illegal aliens.5

Over twenty-five years later, while the notion that public schools cannot refuse undocumented children is a well-settled one, the same is far from true for physical and financial access to public higher education. Many so-called "Plyler students," those who

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1 457 U.S. 202, 207 (1982). This adjustment of immigration status from an undocumented to a documented person can occur through myriad hardship exceptions and other provisions under the federal immigration scheme, including legalization through marriage, family petition, employment, as well as through Congressional bills granting forms of amnesty. See generally the Immigration and Nationality Act of 1952 (INA). However, since the Plyler decision in 1982, Congressional immigration legislation – notably, the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA) of 1996 and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act) – has restricted the ability of certain aliens to adjust status.

2 The term "undocumented immigrant" denotes the same meaning as "illegal alien" for the purposes of this paper.

3 Id. at 208.

4 Id. at 202.

5 Id. at 208.
have benefited from its decision, are the undocumented university applicants of today. Their advocates argue that the reasoning behind *Pyler* continues to apply to these youth in a higher education setting; that is, it is unjust to present “unreasonable obstacles to advancement on the basis of individual merit” because of a variable not within those students’ control. For many undocumented students, educational attainment ends abruptly upon graduating from high school, often due to financial barriers. To counteract that reality, many states have passed legislation that allows for in-state tuition status to qualifying undocumented students. That status lets them escape the out-of-state tuition rates that can more than double the cost of attending college. A court decision overturning one such statute – California Assembly Bill 540 (AB 540), codified as California Education Code section 68130.5 – will be the subject of this paper.

Supporters of state legislation like section 68130.5 argue that those who will pay state taxes as future workers, or whose parents already do, should be eligible for in-state tuition rates. On the other hand, opponents contend that undocumented students will graduate from college only to become legally unemployable workers, thereby rendering the state subsidies for those students futile. Opponents also argue that granting in-state tuition status to undocumented students encourages and condones illegal immigration and subtracts resources from U.S. citizens who are already struggling to pay increasingly high tuition bills.

The debate over whether to grant certain undocumented students in-state tuition status will likely continue to take a front seat in the national spotlight for four reasons. First, we are in a time where states are growing more frustrated with a perceived lack of federal enforcement of immigration laws. Second, federal legislative proposals exist that, if passed, would likely spread the passage of laws like California’s section 68130.5.

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6 *Id.* at 222.
8 For example, at University of California-Berkeley, average in-state registration and fees for an undergraduate to take a full course load for the 2008-09 school year cost about $8,932, while an out-of-state student would pay approximately $29,539.50. University of California Berkeley -- Average Student Budget 2008-09, [http://students.berkeley.edu/admissions/general.asp?id=26](http://students.berkeley.edu/admissions/general.asp?id=26)
9 [CAL. EDUC. CODE § 68130.5 (West 2003)].
11 Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U.J. LEGIS. & PUB. POL’Y 473, 502-03 (2006-07); *but see contra* Ruge and Iza, *Higher Education* at 275 (contending that students may obtain legal status through a change in the federal immigration law, by a future amnesty, or through a family or employment-based petition).
12 Dan Stein, *Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies*, UNIV. BUS., Apr. 2002, at 64, 64 (arguing that “the cost of higher education is soaring out of reach of many middle-class families” and that parents who did not break any laws will be forced to subsidize the children of those who did not “play by the rules”).
13 The Development, Relief, and Education for Alien Minors Act (DREAM Act) is currently pending legislation proposed as S. 2205 in the Senate and H.R. 1275 in the House. The DREAM
Third, our increasingly global economy makes higher learning critical to a competitive workforce. Lastly, during fragile economic times, constituents more closely monitor how their tax dollars are spent.

This paper will discuss the 2008 California appellate court decision, *Martinez v. Regents of University of California*, which overturned section 68130.5. The California statute offers in-state tuition rates to California public colleges for any student who attended three years at a California high school and received a high school diploma or equivalent. Most notably, the appellate court held that: (1) section 68130.5 was preempted by federal law excluding undocumented immigrants from preferential treatment on the basis of residence for postsecondary benefits; and (2) section 68130.5 was preempted by federal law precluding undocumented immigrants from eligibility for state benefits unless state law “affirmatively provides” for such eligibility.

*Martinez* was wrongly decided because it misapplies relevant law, specifically federal immigration standards, preemption principles, state domicile law, and canons of statutory construction. While the opinion does not have precedential value at this time, it is influential to lawmakers and university officials considering policies that allow for or deny in-state tuition for undocumented students. For example, within days of *Martinez*, a Texas legislator submitted a request to that state’s attorney general to issue an opinion as to whether a Texas statute similar to section 68130.5 violates federal law.

The following is a brief roadmap of the remainder of this paper: Part Two provides the federal and state statutory and judicial framework implicated in this issue; Part Three summarizes the *Martinez* case at the trial and appellate levels; Part Four provides an analysis of the *Martinez* decision; Part Five forecasts the implications of that case being upheld; and Part Six offers a conclusion.

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Act would explicitly allow states to determine state residency for higher education purposes. It would also authorize the federal government to cancel the removal of, and adjust to conditional permanent resident status, an undocumented immigrant who: (1) entered the United States before his or her sixteenth birthday, and has been present in the United States for at least five years immediately preceding enactment of the DREAM Act; (2) is a person of good moral character; (3) is not inadmissible or deportable under specified grounds of the Immigration and Nationality Act; (4) at the time of application, has been admitted to an institution of higher education, or has earned a high school or equivalent diploma; and (5) from the age of 16 and older, has never been under a final order of exclusion, deportation, or removal. DREAM Act, S. 1291, 107th Cong. (2001).

14 83 Cal. Rptr.3d 518 (Cal. Ct. App. 3d), rev. granted by 198 P.3d 1 (Cal. 2008).

15 CAL. EDUC. CODE § 68130.5 (West 2008). See also *Martinez*, 83 Cal. Rptr. 3d 518.


PART II: STATUTORY AND JUDICIAL FRAMEWORK

Understanding the debate over whether or not states may grant in-state tuition status requires consideration of many facets of the law: higher education law, immigration law, civil procedure, constitutional law, statutory interpretation, and federal preemption, among others. Each area of law contains its own complexities, which are amplified when those areas intersect as they do with the issues of physical and financial college access for the undocumented. Thus, to appreciate those issues, more than a cursory background of the statutory and judicial framework is necessary.

A. Judicial Review of Seminal Cases Relevant to Martinez

1. Plyler v. Doe: Public K-12 Education of Undocumented Students

Without Plyler, there would be no Martinez. Plyler’s holding that states cannot deny undocumented children free public education has protected against state attempts to exclude those children from K-12 schooling, completion of which is generally necessary to attend college.18

Plyler was the first Supreme Court case to recognize the undocumented as “persons” under the 14th Amendment.19 Plyler held that K-12 education is not a fundamental right but neither is it merely some governmental benefit, indistinguishable from other forms of social welfare.20 The opinion also said the undocumented are not a suspect class, since entry into that class is voluntary, but acknowledged that denying children free education would hold them accountable for their parents’ mistakes.21 Thus, in its 14th Amendment equal protection analysis, the narrow Plyler majority chose not to apply a strict scrutiny test to the Texas statute, but instead applied intermediate scrutiny, requiring Texas to have a “substantial” goal in denying undocumented children K-12 education.22

The Supreme Court rejected Texas’ stated goals -- to protect itself from an influx of undocumented families, to prevent its school systems from being rendered less

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18 In California, the most recent such attempt was the passage of Proposition 187. See LULAC v. Wilson, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997) (describing Proposition 187 as an initiative passed by California voters in 1994, requiring “law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (i) notify certain defined categories of persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care and education”).
19 Plyer, 457 U.S. at 212.
20 Id. at 221.
21 Id. at 219-20.
22 Id. at 224. By determining that the Texas statute cannot be rational unless it furthers some substantial goal of the state, the Supreme Court in Plyler heightened the scrutiny required from the rational basis test that generally requires only a legitimate state goal. See Heller v. Doe, 509 U.S. 312 (1993) (describing the “rational basis test,” holding that classifications neither involving fundamental rights nor proceeding along suspect lines do not run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and a legitimate governmental purpose (emphasis added)).
effective, and to save state resources from consumption by a population that would eventually leave the state. The Court addressed each of those arguments in turn, reasoning that denying education was ineffective in stemming illegal immigration, that there was no constitutional basis to deny those rights, and that there was no evidence that undocumented children would consume the educational benefits and thereafter leave the state.

While Plyler defends rights for undocumented students to public K-12 education, it cannot shield the same children once they complete high school. In fact, some undocumented students may be unaware of, or at least, have previously had no reason to confront their immigration status until they begin a college application process requiring extensive personal documentation. Also important to the forthcoming analysis of the Martinez case is Plyler’s footnote 22, which says, “... illegal entry into the country, would not, under traditional criteria, bar a person from obtaining domicile within a State...”

2. Toll v. Moreno: Domicile and the Higher Education of Certain Non-Immigrant Aliens

The concept of domicile was central to Toll v. Moreno, a U.S. Supreme Court case concerning aliens decided the same year as Plyler. Domicile is "a person's true, fixed principle and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Domicile is distinguishable from "residence;" one can have many residences but only one domicile. Residence "usually just means bodily presence as an inhabitant in a given place."

The Toll decision tackled whether or not certain non-immigrant alien students could receive in-state tuition benefits. The Court held that a state university denying in-state tuition status to G-4 non-immigrant aliens violated the U.S. Constitution’s Supremacy Clause. In doing so, the Court built on the earlier case, Elkins v. Moreno, where a threshold issue was whether the G-4 visa holders could establish domicile for in-state tuition purposes. Rather than deciding that issue itself, the Supreme Court certified the question to the Maryland courts and adopted the state courts’ ruling into Toll that such aliens were not precluded from establishing domicile because Congress, in the Immigration and Nationality Act, specifically allowed those aliens to establish

23 *Plyler*, 457 U.S. at 228-30.
24 *Id.*
26 *Plyler*, 457 U.S. at 227.
29 *Black's Law Dictionary* (8th ed. 2004). These definitions seem basic but are often confused by legislators, attorneys, and courts.
30 *Elkins v. Moreno*, 435 U.S. 647, 647 (1978) (defining a G-4 visa as one granted to non-immigrants who are employees of international treaty organizations, as well as to their immediate relatives). *See also INA.*
31 *See generally Id.*
32 *Id.*
domicile.\textsuperscript{33} The Court did so, because in-state domicile is a wholly state-determined status, as no federal funds are tied to it.\textsuperscript{34}

\textit{Toll} illustrates a critical constitutional metaphor: for states, a federal constitutional restraint is a ceiling, but a constitutional benefit is a floor.\textsuperscript{35} Because of the constitutional constraint posed by the Supremacy Clause, federal law preempted Maryland's exclusion of G-4s from in-state tuition status, even though domiciliary classification is a state-determined status.\textsuperscript{36} But where no such constraints exist, federal constitutional benefits serve as a floor. That is, states cannot go below the "floor" to restrict benefits, but can provide additional ones. While \textit{Toll} concerned non-immigrants rather than undocumented immigrants, the case is helpful in understanding the jurisdictional role of the states versus the federal government in determining questions of federal preemption and domicile that will be key to a thorough analysis of \textit{Martinez}.\textsuperscript{37}


When states (or their agents, including public colleges) adopt policies impacting aliens, they confront the possibility of preemption when that law conflicts with federal goals.\textsuperscript{38} The leading Supreme Court case on federal preemption in the context of laws impacting immigrants is \textit{DeCanas v. Bica}.\textsuperscript{39} In that case, the Court notes that "[p]ower to regulate immigration is unquestionably exclusively a federal power...[b]ut the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration."\textsuperscript{40} The Court defines regulation of immigration as "essentially a


\textsuperscript{34} Id. at 122.

\textsuperscript{35} \textit{LeCroy v. Hanlon}, 713 S.W.2d 335, 338 (Tex. 1986) (explaining that "[t]he federal constitution sets the floor for individual rights; state constitutions establish the ceiling.").

\textsuperscript{36} \textit{Toll}, 458 U.S. at 17.

\textsuperscript{37} A nonimmigrant is "an alien who seeks temporary entry to the United States for a specific purpose," whereas an immigrant is defined as "any alien in the United States, except one legally admitted under specific nonimmigrant categories." U.S. Citizenship and Immigration Services Glossary, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD. As provided in section 68130.5, non-immigrants (such as those on student visas) are not eligible for exemption from non-resident tuition status, because they do not meet the requirements necessary to establish domicile. The rationale behind domicile in the higher education context is that states are more willing to subsidize the education of those who are more likely to remain in the state and contribute to its economy. \textit{Toll}, 458 U.S. at 7. States granting the undocumented in-state tuition status argue that those students are more likely to meet that description than those non-immigrants who cannot establish domicile.


\textsuperscript{40} Id. at 354-55.
illegally to seek its benefits. In relevant part, Section 401 of PRWORA, codified as 8 U.S.C. § 1621, provides:

(a) An undocumented immigrant is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

(c) "State or local public benefit" means...any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payment or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government (emphasis added).

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

The hotly debated interpretations of §§ 1621 and 1623 are outlined in Part Four of this paper.

C. State Statutory Framework for Martinez

Since 2001, when Texas and California passed legislation granting in-state tuition status to undocumented students, eight other states have enacted similar laws: Illinois, Kansas, Oklahoma, Nebraska, New Mexico, New York, Utah, and Washington. Some of those states do not seem to view IIRAIRA as a major threat to their legislation, but others appear to draft their legislation quite carefully to avoid potential conflict with IIRAIRA, especially when drafting around residency restrictions, specifically the "on the basis of residence" and the "unless a citizen...is eligible...without regard to whether the citizen...is such a resident" provisions.

The ten state laws granting in-state tuition to undocumented students fall into two categories: (1) the Texas law and laws modeled after it that classify qualified

55 The Oklahoma Taxpayer and Citizen Protection Act of 2007 (HB 1804) repealed the 2003 law affording grants and in-state tuition to certain undocumented students (amending 21 O.S. 2001, § 1550.42, etc.); even though the law was repealed, the undocumented students that qualified under the 2003 law and were attending college at the time of the repeal were allowed to continue paying the in-state tuition rate.
56 NEB. REV. STAT. § 85-502 (West 2009).
57 N.M. STAT. § 21-1-4.6 (2009).
58 N.Y. EDUC. LAW § 6206 (McKinney 2009).
59 UTAH CODE ANN. § 53B-8-106 (West 2009).
60 Kobach, Immigration Nullification at 478.
61 Salsbury, Evading Residence at 473.
undocumented students as residents for tuition purposes and (2) the California law and laws modeled after it that create exemptions from non-resident tuition for qualified undocumented students.

The Texas-style statutes mention the word "residence" but have additional criteria that must be met, including high school graduation or the equivalent from a state high school. The California-style laws, including section 68130.5, do not mention "residence" but rather exempt people from paying out-of-state tuition if they can establish certain background criteria. For example, the California statute reads:

(a) high school attendance in California for three or more years,
(b) graduation from a California high school or attainment of the equivalent thereof,
(c) registration as an entering student, or current enrollment, at an accredited institution of higher education in California, not earlier than the fall semester or quarter of the 2001-2002 academic year; and
(d) in the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

It is not always clear whether states like California are cautious in their drafting because they believe IIRIRA does, in fact, prohibit providing in-state tuition to the undocumented on the basis of residence, or whether they do so simply to safeguard their law from the possibility of a § 1623 preemption. Martinez, which held that California's section 68130.5 violated IIRIRA's "on the basis of residence" provision and thus was preempted, proved that even the more conservatively crafted state laws are susceptible to judicial abolition. The state appellate court held that the state's criteria for exemption from non-resident tuition status, including high school attendance, were a de facto residency requirement. The following section will present a more thorough summary of Martinez.

PART III: STATEMENT OF THE CASE

This section presents the facts of Martinez and tracks the parties' journey to the California appellate court. We will also briefly present other cases that are instructive in understanding Martinez. In short, Martinez teaches us that the debate over the meaning of § 1623 still rages on and the question over whether states may grant in-state tuition to undocumented immigrant students is still ultimately unanswered.

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62 The states in the Texas category are Texas, Illinois, New Mexico, Kansas, Nebraska, and Washington. See Salsbury, Evading Residence at 476.
63 The states in the California category are California, Utah, New York, and Oklahoma. See Salsbury, Evading Residence at 478.
64 TEX. EDUC. CODE ANN. § 54.052(j) (Vernon 2003).
65 CAL. EDUC. CODE § 68130.5 (West 2003).
66 See Martinez, 83 Cal. Rptr. 3d 518. See also Salsbury, Evading Residence at 476-480.
67 Martinez, 83 Cal. Rptr. 3d at 537-38.
B. Facts and Proceedings: The Appellate Court Decision

In brief, the California’s Third District Court of Appeals focuses chiefly on determining whether section 68130.5 violates § 1623. The court finds that in-state tuition is a benefit within the meaning of §§ 1621 and 1623 and that section 68130.5 is a de facto residency statute. The court reverses the judgment of dismissal and remands the case to the trial court for further proceedings. The court tackles the issue of federal preemption, which comprises about half of the opinion; much of this is repetitive of the earlier discussion of DeCanas. The court ultimately holds that §1623 preempts section 68130.5 as it passes the first prong of the DeCanas test but fails the second and third prongs.

The court first attacks the defendants’ argument that section 68130.5 does not confer a benefit with the meaning of § 1623. According to the court, defendants argue that “benefit” refers to an amount or type of monetary payment. The court refers to this as an illogical assumption and appears to agree with the plaintiffs that the benefit in question is a calculable amount. To bolster its position, the court cites a line in the conference committee report, which says that “illegal aliens” are not qualified for in-state tuition.

93 Martinez, 83 Cal. Rptr. 3d at 522.
94 Id. at 531, 537, & 543.
95 Id. at 523. Before reaching the crux of the opinion, the appellate court rules on several threshold matters. The court denies plaintiffs the opportunity to present new legal theories on appeal because they were improperly addressed in their trial brief. It affirms the denials of judicial notice by the trial court. Finally, the court dismisses the plaintiffs motion to amend the complaint to include a claim that section 68130.5 constitutes discrimination in violation of another part of the California Education Code, section 68062. Martinez v. Regents of the Univ. of Cal., No. C054124, slip op. at 17-33 (Cal. Crt. App. 3d Sep. 15, 2008); Martinez, 83 Cal. Rptr. 3d at 528-29.
96 Martinez, 83 Cal. Rptr. 3d at 529-30. Outlining the basics, the court explains that preemption may occur in one of three ways. First, Congress can define explicitly the extent to which its enactments preempt state law. Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Third, state law is preempted to the extent that it actually conflicts with federal law. The court then reviews the three DeCanas tests, which are used to determine whether a state statute related to immigration is preempted. First, the court must determine whether the state statute is a “regulation of immigration.” Second, even if the state statute does not regulate immigration, it is preempted if Congress manifested a clear purpose to effect a complete ouster of state power, including state power to promulgate laws not in conflict with federal laws, with respect to the subject matter that the statute attempts to regulate. Third, a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”
97 Id. at 530.
98 Id. at 531-32.
99 Id. at 531.
100 Id.
Next, the court rejects defendants’ argument that “benefit” in § 1623 should be given the same meaning as “benefit” in § 1621, i.e. “money paid to students.” Defendants argue that “postsecondary education benefit” is modified by the language “for which payments or assistance are provided.” The court finds that the location of “or” in the provision makes this modification theory implausible. The court also attacks defendants’ assertion that assistance refers to direct financial assistance, insisting that this is already dealt with elsewhere in the U.S. Code. Finally the court distinguishes the defendants’ cited cases, *California Rural Legal Assistance v. Legal Services Corp.*, *Equal Access Education v. Merten*, and *Doe v. Wilson*, finding them either detrimental to defendants’ position or simply unhelpful.

The court then disagrees with defendants’ argument that section 68130.5 is not based on residence. The court explains that the meaning of “residence” varies according to the context, but it generally requires both physical presence and an intention to remain. It also notes that state domicile is a matter of state law.

The court introduces California’s Education Code section 68062, the California residency statute that bars undocumented immigrants from establishing California residency for higher education in-state tuition purposes if they are precluded by federal law from establishing domicile in the United States. The court finds that there are legitimate state interests in denying resident tuition to “illegal” aliens. The court then explains California’s residency requirements. Although somewhat tedious, the court’s explanations are instructive in later discussion.

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102 *Id.* at 531.
103 *Id.*
104 *Id.* at 531-32.
105 917 F.2d 1171 (9th Cir. 1990) (held that Congress did not intend the term “financial assistance” to include legal service programs.).
106 305 F.Supp. 2d 585 (ED Va. 2004) (held that Supremacy Clause did not bar states from adopting and enforcing admissions policies that denied admissions to undocumented students, provided that federal immigration status standards were used to identify which applicants were undocumented immigrants). The court’s finding that denying resident tuition is at odds with what the legislature identified as a legitimate state interest, namely the state’s interest in offering in-state tuition to California-educated undocumented students.
107 67 Cal. Rptr. 2d 187 (Cal. Superior 1997) (held that state properly acted when promulgating medical funding regulations concerning undocumented immigrants to conform state regulations to PRWORA).
108 *Martinez*, 83 Cal. Rptr. 3d at 532.
109 *Id.* at 533-40.
110 *Id.* at 533-34.
112 *Martinez*, 83 Cal. Rptr. 3d at 533. *But see Plyler*, 457 U.S. at 227 n.22; *see also supra* Part II.A.1.
113 *Martinez*, 83 Cal. Rptr. 3d at 533.
114 *Id.* at 534 (internal cites omitted).
115 The court does not explain how California residency law concerning *unmarried minor aliens* is relevant to an analysis of a law that allows undocumented student *adults* to receive in-state tuition.
“Residence” within the meaning of the California tuition statutes means, the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose. The student must couple physical presence in California with objective evidence of intent to make California the home for other than a temporary purpose. The residence of an unmarried minor child is generally the residence of the parent with whom the child maintains his or her place of abode. This includes an unmarried minor alien, unless the child or parent is precluded by the Immigration and Nationality Act from establishing United States domicile.

A “resident” is a student who has residence, pursuant to § 68062 in the state for more than one year immediately preceding the residence determination date. A “nonresident” is a student who does not have residence in the state for more than one year preceding the determination date.

A student classified as a nonresident shall be required, except as otherwise provided in this part, to pay, in addition to other fees required by the institution, nonresident tuition. The governing board shall adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, unless otherwise provided by law. Section 68052 (which does not apply to community colleges) states that, under no circumstance shall the level of nonresident tuition plus required fees fall below the marginal cost of instruction, unless state revenues and expenditures are substantially imbalanced due to unforeseen factors.116

The court subsequently addresses the defendants’ argument that the plain language of section 68130.5 does not condition the exemption from non-resident tuition on the basis of residence.117 To do so, the court flips the question and asks whether the statute confers a benefit on the basis of residence, instead of whether the statute admits such a benefit is being conferred.118

In response, the court focuses on two requirements of section 68130.5: (1) that the student attend a California high school for three years and (2) that the student graduate or attain the equivalent.119 The court supposes that a reasonable person would assume that that if a person went to a California high school for three years that they indeed lived in California; the assumption, the court says, is reasonable because attendance of a school in a particular school district is generally linked to residence.120 Ultimately, the court decides that the language of section 68130.5 is ambiguous as to whether it affords a benefit to undocumented immigrants based on residence.121

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116 Id. at 534.
117 Id. at 535.
118 Id.
119 Id.
120 Id.
121 Id.
The court then refutes the defendants’ argument that section 68130.5 is similar to those statutes that allow non-California residents (children from adjoining states or an adjoining country) to attend K-12 schools in California.\textsuperscript{122} The court notes that those statutes require parents or the other state or country to reimburse the California schools educating the non-resident and are thus distinguishable.\textsuperscript{123} Additionally, the court notes that these statutes require the child to return to his or her home country at the end of the day.\textsuperscript{124}

Finally, the court attacks defendants’ argument that section 68130.5 is beneficial to more than just undocumented students.\textsuperscript{125} That section 68130.5 may benefit some who are not undocumented students, the court says, does not save the statute from plaintiffs’ preemption claims, if the statute benefits undocumented students in contravention of federal law.\textsuperscript{126} Also, the court suspects that the majority of students who attended a California high school for three years live in California.\textsuperscript{127} Further undermining defendants’ arguments, the court says the vast numbers of undocumented students eligible for the benefit indicate that the statute was designed to benefit “illegal aliens.”\textsuperscript{128}

For the above reasons, the courts describes the California statute as creating a “de facto residence requirement” or, as plaintiffs articulate it, a “surrogate criterion for residence.”\textsuperscript{129} The court states that “§ 68130.5 manifestly thwarts the will of Congress...that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States.”\textsuperscript{130} The court thus rejects the defendants’ reliance on the presumption of legislation’s constitutionality.\textsuperscript{131}

The court also rejects the defendants’ proffered uncodified section of the original bill that includes a legislative statement that section 68130.5 does not confer postsecondary education benefits on the basis of residence within the meaning of § 1623.\textsuperscript{132} Finding that this statement is a legal conclusion, the court notes that statutory interpretation is ultimately a judicial function.\textsuperscript{133} The court also contends that the remainder of the uncodified section reflects an intent to benefit resident “illegal” aliens.\textsuperscript{134} Ultimately, based on proffered evidence, the court concludes that section 68130.5 does and was intended to benefit undocumented immigrants on the basis of residency in California.\textsuperscript{135}

The court decides that section 68130.5 is preempted by § 1623, because of its conclusion that section 68130.5 confers a benefit to California’s undocumented students

\textsuperscript{122} Id.
\textsuperscript{123} Id. at 536 referring to CAL. EDUC. CODE § 48051 (West 2009). The statute only applies to non-immigrants, those “whose actual and legal residence is in a foreign country adjacent to this state.”
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 536.
\textsuperscript{126} Id. at 536-37.
\textsuperscript{127} Id. at 537.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 537-38.
\textsuperscript{132} Id. at 538.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 539.
\textsuperscript{135} Id. at 540.
based on (de facto) residence and does not afford the same benefit to non-resident U.S.
citizens "without regard to' California residence." 136 The state law is preempted, the
court says, because § 1623 expressly limits state power to offer in-state tuition to illegal
aliens and thus manifested clear intent to "oust state power" with respect to that subject
matter. 137 Acknowledging that LULAC v. Wilson is not binding, the court nonetheless
cites that decision as persuasive authority for the proposition that § 1623 preempts
section 68130.5, because "Congress has occupied the field of regulation of postsecondary
education benefits to the undocumented." 138 Finally, the court holds that it is impossible
to simultaneously comply with section 68130.5's three year high school attendance
requirement and § 1623's "without regard to [California's] residence" clause. 139

The court contends that section 68130.5 is also impliedly preempted as it stands in
the way of Congress' goal to remove incentives for illegal immigration provided by the
availability of public benefits. 140 Defendants cite cases holding that federal law does not
preempt state statutes making immigration status irrelevant to liability under labor,
housing, and civil rights law. But the Martinez court argues that, unlike section 68130.5,
the statutes referenced by defendants are consistent with the ultimate aim of federal
immigration law to control illegal immigration. The court says the defendants' policy
arguments should be directed to Congress. 141

In the opinion's discussion of preemption by § 1621, the court reiterates its
holding that postsecondary "benefit" under § 1621 includes exemption from non-resident
tuition. Again, the court cites LULAC v. Wilson in support of its finding that PRWORA
preempts section 68130.5 just as it did portions of Proposition 187 that related to public
postsecondary benefits. 142 The court says § 1621 requires state statutes to "affirmatively
provide" for undocumented students' eligibility for postsecondary benefits if they are to
be provided, referring to that part of the statute as the "savings clause." 143 "Defendants
argue that 'affirmatively' merely means explicitly rather than implicitly," that "no 'magic
words' are required," and that "§ 68130.5 affirmatively provides for eligibility by
referring to 'person[s] without lawful immigration status.'" 144 Plaintiffs, on the other
hand, construe the savings clause as requiring specific mention of § 1621 and use of the
words "illegal aliens." 145

The court ultimately finds the savings clause to be ambiguous and thus refers to a
Congressional conference report on PRWORA that says the state statute must reference
§ 1621 and specify that "illegal aliens" are eligible for the benefits. 146 Because that
measure was not taken in section 68130.5, the court holds that Californians were not

136 Id.
137 Id. at 541.
138 Id.
139 Id.
140 Id. at 542.
141 Id. at 543.
142 Id.
143 Id. at 543-544.
144 Id. at 544.
145 Id.
146 Id.
sufficiently placed on notice as Congress intended. The court does not hold that § 1621 requires a state statute to use the words “illegal aliens.” However, it does conclude that since the California statute failed to reference § 1621, the latter preempted the former.

The court next addresses whether section 68130.5 violated the equal protection clauses of the U.S. and California constitutions by denying U.S. citizen plaintiffs the non-resident tuition exemption granted to undocumented students in California. Plaintiffs contend that both groups are similarly situated in that neither can be domiciliaries of California. However, the court rules that U.S. citizens and undocumented immigrants alike can benefit from section 68130.5 if they attend a California high school for three years and receive a diploma or its equivalent from there. It opines that section 68130.5’s so-called residency requirement, if uniformly applied, “furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents.”

Plaintiffs not only attack section 68130.5 facially, they also argue that state public colleges and universities are applying the law in violation of the Equal Protection clauses of the United States and California Constitutions. They claim that some California colleges have refused in-state tuition to qualifying U.S. citizens under section 68130.5. The court grants plaintiffs’ leave for amend on this claim since, at the demurrer stage, plaintiffs are not required to prove their allegations.

The *Martinez* plaintiffs allege that “making illegal aliens who possess no lawful domicile in the state of California eligible for exemption from out-of-state tuition rates, while denying the same to U.S. citizens whose lawful domicile is outside California, the state of California has denigrated U.S. citizenship and placed U.S. citizen plaintiffs in a legally disfavored position compared to that of illegal aliens” in violation of the Constitution’s privileges and immunities clause. In view of its preemption discussion, the appellate court rejects defendants’ point that section 68130.5 applies equally to U.S. citizens and the undocumented and consequently overrules the trial court’s dismissal of plaintiff’s privileges and immunities clause claim.

Plaintiffs argue that defendants’ conduct was an “illegal extraction of excessive tuition” from them, representing a taking of property without due process of law under the U.S. and California constitutions. The court finds the argument unpersuasive. Plaintiffs also advance a reverse discrimination claim under the Unruh Civil Rights Act, arguing that they were discriminated against on the basis of national origin. But the court asserts that plaintiffs were denied exemption from out-of-state tuition not because

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147 *Id.*
148 *Id.*
149 *Id.* at 545
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.* at 546.
154 *Id.*
155 *Id.*
156 *Id.* at 546-47.
157 *Id.* at 547.
158 *Id.*
159 *Id.*
of their U.S. origin but because they did not attend high school in California.\(^{160}\) The
Unruh Act prohibits only arbitrary discrimination, the court said, and the defendants’
action in applying a state statute (section 68130.5) cannot be considered arbitrary.\(^{161}\)
Plaintiffs argue that defendants discriminated against them based on national origin in
violation of the California Constitution,\(^{162}\) but the court contends that plaintiffs failed to
persuade them that "national origin" included alienage or citizenship.\(^{163}\)

Given its aforementioned conclusions, the court rules that plaintiffs have
adequately pleaded claims for injunctive and declaratory relief, reverses the lower court's
grant of defendants' demurrer as to the preemption claims, and grants plaintiffs' leave to
amend for their equal protection and privileges and immunities claims.\(^ {164}\)

PART IV: ANALYSIS OF M Artinez

A. Standing: A Procedural Problem with Substantive Consequences

Standing was the decisive issue that determined the fate of Day v. Sebelius,\(^ {165}\) a
case factually similar to Martinez but brought in federal court.\(^ {166}\) Once the Day court
determined that the petitioners did not have standing, the case was quickly dismissed.
Only briefly mentioning standing in the Martinez opinion, the appellate court merely
notes that the lower court found standing and the defendants failed to challenge that
ruling.\(^ {167}\) A discussion of standing is relevant because decisions in courts that use federal
standards of standing or have stricter standing requirements will have outcomes similar to
that of Day v. Bond. The inconsistencies in standing laws limit the relevance of Martinez
in other states. First, we will confront the California's standing rule and the Martinez
treatment of standing. Second, we will review the standards for standing in federal court
and review why the Day v. Bond court held that the plaintiffs lacked standing. Finally, we
will briefly confront whether or not application of the reverse-Erie doctrine might have
resulted in a better decision.\(^ {168}\)

\(^ {160}\) Id. at 548.
\(^ {161}\) Id.
\(^ {162}\) The relevant part of the California Constitution is Article I, section 31, which was adopted by
Proposition 209 in 1996, providing in part that the state shall not discriminate against, or grant
preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or
national origin in the operation of public employment, public education, or public contracting.
(CAL. CONST., art. I, § 31, subds. (g)-(h)).
\(^ {163}\) Martinez, 83 Cal. Rptr. 3d at 549. For support of this contention, the court cited U.S. Supreme
\(^ {164}\) Martinez, 83 Cal. Rptr. 3d at 550.
\(^ {166}\) The Day v. Sebelius case was brought and argued by Kris Kobach, the same attorney for
plaintiffs in Martinez. Day v. Sebelius was upheld by Day v. Bond. 500 F.3d 1127, 1135 (10th
Cir. 2007). See discussion infra Part IV.A.2.a.
\(^ {167}\) Martinez, 83 Cal. Rptr. 3d at 527.
\(^ {168}\) Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (landmark case standing for the proposition that a
federal court exercising diversity jurisdiction over a case that does not involve a federal question
must apply the substantive law of the state where the court sits).
1. The California Standing Rule

In California, the standing requirements are statutory. Standing is given to “real parties in interest.” A “real party in interest” is defined as a person who possesses the right sued upon by reason of the substantive law. In other words, a party with a real interest in dispute has standing to seek its adjudication. Plaintiffs will have standing if they have suffered or are threatened with an injury of sufficient magnitude to reasonably assure the relevant facts will be adequately represented.

Although the California Supreme Court has stated that its view of whether or not someone is a beneficially interested person under state law is consistent with federal law, that statement was written in an opinion concerning writs of mandate and apparently does not apply to California’s standing requirements. Indeed, California’s Constitution does not have a cases and controversies limitation on the judiciary. Only one California appellate court has held that federal limits on standing may apply in California.

The majority of the California courts of appeal have found that Article III standing does not apply in California, including the Third District Court of Appeals. In fact, the Third District Court’s rulings seem to be quite plaintiff-friendly when it comes to standing. The court has held that to have standing, a party must be at least beneficially interested in the controversy; that is, the party must only have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. The Third District has also held that the question of when a party lacks standing is if the party lacks a real interest in the ultimate adjudication because it has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably large enough to assure that all of the relevant facts and issues will be adequately presented. With the expansiveness of these requirements, it is no surprise that standing was granted in Martinez.

a. Standing in Martinez: The Lower Court Decision

The lower court found that Article III standing requirements do not apply to state courts. Further, the court found that the plaintiffs’ allegation that the California Education Code infringes on their constitutional and statutory rights was enough to establish standing to challenge section 68130.5.

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170 Id.
172 Id.
173 Id.
175 See generally Cal. Const.; see also National Paint & Coatings Assn. v. State of Cal., 68 Cal. Rptr. 2d 360 (Cal. Ct. App. 2d 1997). A cases and controversies limitation restricts a court from issuing advisory opinions and limits them to adjudication of actual cases and controversies.
178 Calvert v. County of Yuba, 51 Cal. Rptr. 3d 797 (Cal. Ct. App. 3d Dist. 2006).
179 Martinez, 2006 WL 2974303 at *5.
180 Id.
b. Standing in Martinez: The Appellate Court Decision

The only time the appellate court mentions standing is in the following context:

As to other grounds for demurrer asserted by the Trustees/Board, the trial court rejected defendants' argument that plaintiffs lacked standing (a ruling not challenged by defendants in their response to this appeal), sustained the demurrer without leave to amend as to the first three counts, and concluded it was unnecessary to rule on other grounds given the Court's sustaining of the Regents' demurrer without leave to amend.181

The brief treatment of standing in the court’s opinion belies the importance of standing.182 The reason why the court in Martinez reached the merits in California but did not in Kansas revolves around standing. Although this area deserves a richer treatment than this paper is able to provide, a basic overview of the controversy is needed.183

2. The Federal Standing Rule

To establish Article III standing, a plaintiff invoking the jurisdiction of a federal court must show: (1) injury in fact which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, i.e., the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.184

When discussing standing for Equal Protection claims, there are additional standing considerations. For one, injury in fact that supports standing to bring a claim under the Equal Protection Clause need not be economic in nature. Often, the right asserted...is the right to receive ‘benefits distributed according to classifications which do not without sufficient justification differentiate among covered applicants solely on the basis of [impermissible criteria],’ and not a substantive right to any particular amount

181 Martinez, 83 Cal. Rptr. 3d at 526.
182 Plaintiffs argue that because defendants did not cross-appeal the standing issue, they are bound by it. This is incorrect. Standing may be brought at any time; as the California Supreme Court phrased it: “[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.” Californians For Disability Rights v. Mervyn's, LLC, 138 P.3d 207, 213 (Cal. 2006) (quoting Common Cause v. Board of Supervisors, 777 P.2d 610 (Cal. 1989)). Under this rule, the defendants may bring a standing challenge at any point and need not be restrained by failing to appeal this particular decision.
of benefits.\textsuperscript{185} In such a case, injury in fact is simply "the existence of a government-erected barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group."\textsuperscript{186} A plaintiff need not show that he or she would necessarily have received the benefit but for the operation of the policy; rather, "the injury is the imposition of the barrier itself."\textsuperscript{187} But, the plaintiff still must show that the challenged discriminatory criterion was, in fact, the barrier that disadvantaged his or her ability to obtain benefits.\textsuperscript{188}

\textbf{a. Standing in Day v. Sebelius and Day v. Bond}

In \textit{Day v. Sebelius}, out-of-state student plaintiffs in Kansas brought suit against state officials and universities in federal court. The statute at issue was Kan. Stat. Ann. § 85-502 which allowed undocumented immigrants the opportunity to meet residency requirements and qualify for in-state tuition. Plaintiffs, again represented by Kris Kobach, brought seven claims, including: § 1621 violation, § 1623 violation, preemption, and violation of Equal Protection. The defendants argued successfully that the plaintiffs did not have standing to bring these claims. The lower court found that there was no standing to claim a § 1621 violation as there was no injury-in-fact and the claim was merely a generalized grievance.\textsuperscript{189} The plaintiffs did not have standing to raise the § 1623 claim either as § 1623 does not create a private right action.\textsuperscript{190} As to the Equal Protection claim, the court held that the Kansas statute did not establish any barriers precluding the plaintiffs from admission and that there was no denied benefit because the plaintiffs did not fulfill the lawful requirements.\textsuperscript{191}

In \textit{Day v. Bond}, the appellate decision that affirmed \textit{Day v. Sebelius}, the court addressed standing in two contexts. The first regarded the equal protection claims of the plaintiffs. The second concerned the preemption claim of the plaintiffs. The court found that the four proffered equal protection injuries fail under the standing requirements. The first injury claimed by the plaintiffs is a denial of equal treatment under the state statute in that the statute made it impossible for non-resident U.S. citizens to obtain the benefits extended by the statute.\textsuperscript{192} The second injury was the increased tuition to be paid by plaintiffs, as the burden of subsidizing undocumented immigrant beneficiaries of the state statute was passed along to other students through tuition hikes.\textsuperscript{193} The third injury claimed was that the injury that resulted from competition for scarce tuition resources.\textsuperscript{194} The fourth injury claimed was the extra tuition paid by non-resident plaintiffs during the prior academic year over the in-state tuition paid by undocumented immigrant students,


\textsuperscript{186} \textit{Buchwald v. Univ. of N.M. Sch. of Med.}, 159 F.3d 487, 493 (10th Cir.1998) as quoted in \textit{Day}, 500 F.3d at 1133.

\textsuperscript{187} Id.

\textsuperscript{188} Id.

\textsuperscript{189} 376 F. Supp. 2d at 1033.

\textsuperscript{190} Id. at 1035.

\textsuperscript{191} Id. at 1037.

\textsuperscript{192} 500 F.3d at 1132.

\textsuperscript{193} Id.

\textsuperscript{194} Id.
as a consequence of the discriminatory operation of the state statute. The court ultimately found that the first and fourth injuries do show concrete and particularized injury but do not satisfy the causation or redressability prongs. The court also found the second and third claimed injuries lack concreteness. In discussing causation and redressability, the court noted that "a person who fails to satisfy lawful, non-discriminatory requirements or qualifications for the benefit lacks standing to raise claims of discrimination in denial of the benefit...A favorable decision on the discrimination claim could not redress the injury because the person would still be disqualified from competing."

The second context in which the court addressed standing is that of federal preemption:

The only form of injury that the plaintiffs assert in support of their standing to make this preemption claim is the invasion of a putative statutory right conferred on them by § 1623. However, we conclude that § 1623 does not vest any federal right in non-resident citizen students like the plaintiffs to assert preemption. We therefore conclude that the plaintiffs cannot claim such a right as the basis of an injury supporting standing. Thus, they lack standing to pursue their preemption claim, and we affirm its dismissal.

The court also noted that absent a statutory right vested in these particular plaintiffs by virtue of § 1623, the plaintiffs would retain only a generalized interest in the defendants' compliance with the law.

The persuasiveness of the Day court's arguments raises the question as to why the California courts did not agree that standing failed under the California standards as well. Even a careful reading of the briefs and both appellate and trial opinions sheds little light on that issue. The resulting dilemma—that a state law is permissible under a federal scheme in one state but not in another—is a symptom of a greater problem.

3. Is it good public policy to apply looser state standing requirements when interpreting federal immigration laws?

Most simply, the issue is that, under the line of cases following Erie, standing is a procedural matter and determined by the jurisdiction of the court. Thus, the federal district court in Kansas that decided Day v. Sebelius was required to use the federal standing requirements developed by the U.S. Supreme Court while the California court could apply the less-rigid California statutory standard. Because of the different standing requirements, the merits of the case were reached in California but not in Kansas.

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195 Id. at 1133.
196 Id. at 1134.
197 Id. at 1133.
199 Day, 500 F.3d at 1136.
200 Id. See also Lujan v. Defenders of Wildlife, 504 U.S. 555 at 573-74 (1992).
The judge in Martinez should have applied a reverse-Erie inquiry to determine whether this case required federal standing to continue. The reverse-Erie inquiry asks whether a state procedural rule conflicts, or undermines, the federal substantive right at issue. In other words, where federal law neither authorizes nor forecloses a particular right in state action, the state action may be enforced so long as it does not conflict with substantive law or any remedy peculiar to the federal jurisdiction. Generally used in maritime cases, the need for this line of inquiry is similar in immigration law as both maritime and immigration are both exclusively within the power of Congress but both may be enforced in state courts. In Martinez, because California standing requirements are more lax, plaintiffs in an action in California have the potential for an incredible remedy not available in federal courts: the judicial repeal of a law.

Several problems arise when state courts use looser standing requirements to allow cases arising under federal statutes. The first is that it hinders Congress’s ability to plan for a uniform application of its statutes. When creating policy, Congress must consider the benefits of strict adherence to its acts against the costs of heavy enforcement and litigation. Since standing limits the type of litigant, litigants other than the type foreseen by Congress may be able to succeed in a claim that Congress had no intent to allow. The Martinez ruling is a good example of this. It is hard to imagine that Congress wanted out-of-state citizens to be able to force the repeal of state law in the area of in-state tuition policy by using federal law to give them standing to sue. Considering Congress has only given the states limited abilities to help enforce immigration policy, it is even harder to imagine that Congress wanted U.S. citizen individuals to be able to enforce those federal immigration statutes in the state courts, where standing to sue has not been otherwise been specifically granted by Congress. Foreign nationals, not U.S. citizens, are the focus of these statutes. Enforcement of immigration policy is the prerogative of the Department of Homeland Security (DHS) and where standing interferes with that basic rule, standing should be deemed substantive and the federal standing requirements should apply.

A second reason why using the state’s standing rules to interpret §§ 1621 and 1623 is bad policy is that any potential defendants’ liabilities will unnecessarily chill and constrain their lawful activities. In Martinez, this means that other states, wary of a repeat of the California ruling, may feel compelled to repeal their similarly written statutes or may decide not to pass lawful statutes for fear of expensive litigation and a future negative ruling.

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201 Katz, *Standing in Good Stead* at 1327.
202 See *State Trading Corp. of India, Ltd. v. Assurancetforeningen Skuld*, 921 F.2d 409 (2d Cir. 1990).
203 This argument in no way displaces our prior argument that Congress is here attempting to regulate in an exclusively state area. The statute’s placement in the INA indicates that Congress intended that these statutes were meant to be regulations of immigration. We assume that Congress meant to legislate only what it was allowed under federalist principles.
204 Katz, *Standing in Good Stead* at 1341
205 Id. at 1341-42.
207 Id. at 1341.
The third reason is that forum shopping by the potential plaintiffs undermines Congressional goals in uniformity and enforcement. If plaintiffs’ attorneys obtain a favorable decision in California and nowhere else, then Congress’s federal legislation is applied inconsistently across the country. This may be moot in this particular case, because the debate revolves around states’ rights to grant or deny in-state tuition (a state status) to certain aliens and states may lawfully have different statutes on their books.

Taking advantage of California’s less-rigid standing requirement allowed plaintiffs a win that would have been prevented elsewhere. But this win is a hollow victory for the plaintiffs. If affirmed, the plaintiffs’ only comfort is repealing a law that had no direct effect on them. They will still not be eligible for in-state tuition, nor was it their tax dollars that were subsidizing the tuition of undocumented immigrants.

B. An Analysis of 8 U.S.C. 1621

Title 8 U.S.C. § 1621, in pertinent part, provides that an alien who is not a qualified alien, a nonimmigrant under the INA or an alien paroled into the United States for less than one year, is not eligible for any state or local public benefit. A “State or local public benefit” means, in relevant part, any postsecondary education...or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.208 The statute includes a savings clause as well: 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.209

In the area of in-state tuition for immigrants, the debate has focused on two questions about the correct interpretation of this statute. The first question is whether or not eligibility for classification as a resident for in-state tuition purposes is within the meaning of “State or local public benefit.” Put differently by plaintiffs, the questions is whether or not in-state tuition is a benefit included within the meaning of “State or local public benefit.” The second question revolves around the definition of “affirmatively provides.” In practical terms, what does a state need to do to have its state law “affirmatively provide” for eligibility?

1. Meaning of Benefit

Professor Olivas of the Expansionist camp interprets this section as saying that public benefits referred to are limited to those involving direct payments or assistance.210 He argues that the benefit that the states, including California, are attempting to confer is a reclassification and that being eligible for a reclassification does not involve payment or assistance.211 Olivas suggests a careful reading of subsection (c) confirms his

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209 Id.
210 Olivas, Lawmakers at 124.
211 Id.
interpretation, by referencing payments. Olivas also points out that the benefit of being reclassified as a resident student in a state is not listed as a prohibition in the federal statute. He argues that subsection (1)(B)'s reference to "postsecondary education" is modified by "or any other similar benefit for which payments or assistance are provided...by an agency of a State or local government or by appropriated funds of a State or local government." For Olivas, this indicates that what is potentially proscribed is money or appropriated funds, but not the 'status benefits' confirmed by the right to declare state residency. In classic residency determinations, such as these, no money or proscribed appropriated funds are in play.

In other words, Congress has proscribed spending public funds for an undocumented immigrant's postsecondary education but has not proscribed eligibility for an exemption from non-resident tuition, which involves no payment or direct financial assistance. Bolstering this view is a letter from U.S. Immigration and Customs Enforcement (ICE) dated July 9, 2008, directed to the North Carolina Department of Justice that says, "Section 411(c)(1)(B) of PRWORA, codified at 8 U.S.C. § 1621(c)(1)(B), addresses benefits "for which payments or assistance are provided..." (underlining in original) such as monetary assistance for postsecondary education.

The Restrictionists read "State or local public benefit" as specifically including in-state tuition benefits. Plaintiffs conclude that in-state tuition rates constitute a prohibited "public benefit" under 8 U.S.C. § 1621(a). Presumably, the logic is that because the state subsidizes the education of its resident students, this subsidy is a form of monetary benefit or assistance to an individual. Eligibility for this subsidy is, in itself, a postsecondary education benefit within the meaning of "State or local public benefit."

A flaw in the Restrictionist logic appears upon close reading of the statute. All of the expressly proscribed benefits refer to benefits that involve a cash transfer. Retirement, welfare, health, disability, public or assisted housing, food assistance, and unemployment benefits all refer to either state-funded services provided directly to needy individuals and households or monetary benefits that are paid directly to persons and households. In-state college tuition rates are not a state-funded service provided on an individualized basis nor is the in-state cost based on any sort of need-based assessment of the individual student. The subsidy is not paid directly to the student or to the university on behalf of the individual attending the school. At no point does the "individual, household, or family

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212 Id.
213 Id. at 125.
214 Id.
215 Id.
216 Id.
eligibility unit" ever receive direct payments or assistance. Finally, none of these examples refer to discounts given to all residents of a state. If the statute is read in the way that the Restrictionists suggest, the term “postsecondary education” is out of place. If Congress had wanted to prevent undocumented immigrants from eligibility for in-state tuition, it would have done so expressly.

Further support for this argument can be found in PRWORA itself. Although limited to a different subsection, “Postsecondary educational expenses” are defined elsewhere in PRWORA as “(i) tuition and fees required for the enrollment or attendance of a student at an eligible educational institution, and (ii) fees, books, supplies, and equipment required for courses of instruction at an eligible educational institution.”

This definition specifically refers to “tuition and fees...of a student.” This is consistent with the direct payments or assistance interpretation of the term “postsecondary education” within the proscribed benefits section. The Temporary Aid to Needy Families (TANF) section of PRWORA uses the term “postsecondary educational expenses” in the following manner to describe a qualified purpose: “Postsecondary educational expenses paid from an individual development account directly to an eligible educational institution.” Again, PRWORA is referring to payments made directly to an educational institution. Although these sections do not apply directly to § 1621, a basic rule of statutory interpretation is to look at the legislation as a whole to determine the intent of the legislators before looking to the legislative history.

A review of the usage of “postsecondary education” in PRWORA indicates generally that the statute is referring to expenses involving an individualized monetary transfer, not an aggregate subsidization of college tuition for residents by a state.

2. Meaning of “Affirmatively Provide”

Despite the differences in these interpretations, a state may provide any of the proscribed benefits if it does so “affirmatively.” That leads us to the next debate regarding § 1621: the meaning of the word “affirmatively.”

The Expansionists rely on the plain meaning interpretation. They say that...subsection (d) must allow states to enact statutes giving exemptions from out-of-state tuition to undocumented immigrants. They point out that any fair reading of this statute refutes the Restrictionist position on this matter, because the plain language of (d) is dispositive, there is no need to consider the legislative history.

The Restrictionists’ view is that “affirmatively provides” requires something above and beyond merely stating that undocumented immigrants qualify for benefits. The Martinez plaintiffs note the following legislative history as support for their proposition:

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221 42 U.S.C.A § 604 (West 2008).
222 Id.
223 See In re Dannenberg, 104 P.3d 783 (Cal. 2005).
225 Olivas, Lawmakers at 125.
Only 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. The phrase "affirmatively provides for such eligibility" means that the State law enacted must specify that illegal aliens are eligible for State or local benefits. Persons residing under color of law shall be considered to be aliens unlawfully present in the United States and are prohibited from receiving State or local benefits, as defined, regardless of the enactment of any State law. 227

Plaintiffs contend that, because of that legislative history, federal law requires a state statute to include the phrase “illegal aliens” and specific reference to 8 U.S.C. § 1621 in order to qualify under subsection (d).

A third interpretation of § 1621(d) that harmonizes the Expansionist and Restrictionist approaches is that the section was intended by Congress to be a re-enactment statute. In other words, in order to continue giving benefits previously given to undocumented immigrants, the state must “re-enact” those statutes that did so. Re-enactment of prior statutes is how to “affirmatively provide” as opposed to merely letting the statutes remain as they are but continuing to provide benefits to undocumented immigrants. However, merely re-enacting the statute is not enough. There must be some notice that the intended beneficiaries are undocumented immigrants. This approach has been taken in Doe v. Wilson, a 1997 California Superior Court case,228 and a 2001 Texas Attorney General opinion,229 both of which were concerned with providing health care to undocumented immigrants under PRWORA. Although not supported by any authority binding on the Martinez court, that analysis is persuasive.

3. The Martinez Treatment of § 1621 and How the Court Erred

Plaintiffs point out in their brief that the lower court found that benefits under § 1621 included in-state tuition, and the defendants did not appeal that holding. Thus, the appellate court was under no duty to revisit the lower court’s holding on this particular issue.230

As noted above, the appellate court agrees with the plaintiffs that section 68130.5 is preempted by § 1621. The court uses LULAC v. Wilson’s holding that IIRAIRA occupied the field of regulation of public postsecondary education benefits to aliens as support for its finding that compliance with both § 1621 and section 68130.5 is an impossibility. Additionally, the court finds that the phrase “affirmatively provides” is ambiguous and that § 1621(d) requires “something more” than a statement that undocumented immigrants are eligible under the California statute.231 The court finds support for this theory in the federal legislative history.232 Specifically, the conference

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228 Doe v. Wilson, 1997 WL 811788.
231 Martinez, 83 Cal. Rptr. 3d at 544.
232 Id.
report says, "The phrase ‘affirmatively provides for such eligibility’ means that the State
law enacted must specify that illegal aliens are eligible for State or local benefits." The
court finds that section 68130.5 fails because it does not expressly reference § 1621. In
rejecting the defendant’s claim that section 68130.5 “affirmatively provides” for in-state
tuition for undocumented students, the court notes that the language of section 68130.5
does its best to conceal that the benefit is for “illegal aliens.” The court decides that it
does not need to address whether the statute must use the words “illegal alien” or “alien
who is not lawfully present in the United States.”

The Court misreads the LULAC cases by taking them out of context. Before
attempting to use the LULAC opinions for their precedential value, one must read them in
the context of Proposition 187. The decisions, as a whole, attempted to protect the rights
of California’s immigrants, not attenuate them. In LULAC II, the judge states, “Congress
has occupied the field of regulation of public postsecondary education benefits to aliens
without explaining the range of state functions that actually fall into this category.” The
holding cited by the Martinez appellate court, specifically that the portions of Proposition
187 that regulated undocumented students’ access to public university were preempted by
federal law, does not necessitate a Martinez holding that undocumented students’ right to
be classified as residents for purposes of determining tuition rates is a postsecondary
education benefit exclusively within the realm of Congress under PRWORA. Though
LULAC was proper in the context of Proposition 187, the applicability of its holding, that
Congress alone occupies the field of postsecondary education for undocumented
immigrants, is questionable.

The court avoids the plain meaning of “affirmatively provides.” This phrase is not
used anywhere else in the U.S. Code nor is it defined. Although Black’s Law Dictionary
does not have a definition for “provide,” it does give one for “affirmative”—involving or
requiring effort. Webster’s Dictionary defines “affirm” as “to declare positively” or “to
confirm.” “Provide” is defined in Webster’s as “to supply or furnish” or “to have or
offer for use.” Two Supreme Court rulings use the phrase “affirmatively provide”
without finding need to define it; ironically, both are opinions interpreting statutes and
the phrase is used in the court’s attempt to clarify ambiguous language. All that
indicates the phrase’s ambiguity is § 1621’s legislative history. However, to insist that
one visit the legislative history before determining whether a phrase’s meaning is obvious
or not is absurd and leads to problems like the one before us.

The court affords too much weight to the legislative history and not enough to the
plain meaning. To read eligibility for in-state tuition rates as a proscribed “State or local
public benefit” into § 1621 is incorrect. Although some of the bill’s authors may have
supported that view, that is not how it is written. To impose a meaning onto a statute that

234 Martinez, 83 Cal. Rptr. 3d at 544.
235 Id. at 545.
236 LULAC II, 997 F. Supp. at 1256.
238 Webster’s II New Riverside Dictionary at 13.
239 Id. at 552.
at 302 n.2 (2003).
was not explicitly stated in the statute is unnecessary judicial activism. The court compounds its first mistake by treating a conference report as federal law. Conference reports are persuasive, secondary sources looked to by courts as interpretive aids.\textsuperscript{241} Grafting requirements laid out into a conference report onto § 1621 creates a new law.

Another consideration when a court interprets a statute is that of public policy.\textsuperscript{242} The legislature has spoken. DHS has been entrusted with enforcement of immigration statutes but has declined to take action. Federal courts have refrained from invalidating similar statutes. The interpretation of this court is not in harmony with the public policy concerns of the California legislature, the federal government, or other states. Simply put, it is not the role of a court to overturn a state’s lawful legislation in the area when it does not clearly conflict with federal law on the matter.

\textbf{C. An Analysis of 8 U.S.C. 1623}

Section 1623 provides that an alien shall not be eligible for a postsecondary education benefit on the basis of residence within a state unless a U.S. citizen or national is eligible for such a benefit, without regard to whether the citizen or national is such a resident. To conclude that this provision is violated by section 68130.5, three questions must be answered affirmatively:

1) Is in-state tuition a benefit under § 1623?
2) Is section 68130.5’s granting of in-state tuition done on the basis of residence?
3) If undocumented students are eligible for in-state tuition status under section 68130.5, are non-resident U.S. citizens or nationals who meet the same section 68130.5 criteria being denied eligibility for in-state tuition status in contravention of federal law?

This section will address each question sequentially.

\textbf{1. Is in-state tuition a benefit under § 1623?}

Section 1623’s restriction only concerns a postsecondary education benefit. If one concludes that in-state tuition is not a benefit under § 1623, then the § 1623 analysis ends there. While a “postsecondary education benefit” certainly may be characterized as a “benefit” in the generic sense of the word, we argue that this is not the kind of construction of “benefit” intended by § 1623. In fact, both the Martinez plaintiffs and defendants treat the word “benefit” as a legal term of art, i.e. a word whose meaning in a legal sense does not undertake the everyday usage of that word.\textsuperscript{243}

In an analysis of this threshold question, it is useful to examine how § 1621 and § 1623 should and do interrelate with one another. Both defendants and plaintiffs argue that

\textsuperscript{241} City of Sacramento v. Public Employees’ Retirement System, 27 Cal.Rptr.2d 545 (Cal. App. 3d Dist. 1994).

\textsuperscript{242} In re Damienburg, 104 P.3d at 1082.

\textsuperscript{243} A “term of art” is defined as “[a] word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts.” It is also termed “word of art.” Black’s Law Dictionary (8th ed. 2004).
their respective interpretations of "benefit" under § 1621 also apply to § 1623. However, the principal similarities in their positions seem to end there.

The *Martinez* plaintiffs argue that "postsecondary education benefit" in both § 1621 and the later-enacted § 1623 has the same meaning. They argue that in both statutes, the "benefit" language incorporates in-state tuition. For support, the plaintiffs draw attention to the legislative history of § 1623. Specifically, they point to a line in the House Conference Report that reads Section 505 of HIRAR as "provid[ing] that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education."

The *Martinez* defendant also seem to favor the idea of reading "postsecondary education benefit" as having the same meaning in § 1621 and § 1623. Their interpretation, however, varies sharply from that of the plaintiffs. They cite Professor Olivas' interpretation of § 1621 and § 1623, which is that the term "benefit" refers to dollars ("amount, duration and scope"), as if prohibiting states from giving undocumented students state scholarships or fellowships. Olivas makes the case that "the word 'benefit' is defined in a way that makes it clear that Congress intended it as a monetary benefit, whereas the determination of [in-state] residency for tuition purposes is a status benefit." He thus concludes that the benefit actually conferred by state laws allowing undocumented students to pay in-state tuition is the "right to be considered for in-state resident status, a non-monetary benefit." While section 68130.5 does not literally classify those eligible under its criteria as California residents, it does seem to confer exemption from non-California resident tuition status.

Unlike plaintiffs, who look first to legislative history to determine legislative intent, the defendants urge the state appellate court to look first at the plain meaning of § 1623's language. Then, if the court finds ambiguity, they said the court should look to other congressionally enacted statutes to determine Congressional intent, before reviewing documents of legislative history such as the conference committee report.

Defendants argue that "[w]here Congress uses the same language in two statutes in the same substantive area, courts will assume that terms of art are intended to mean the same thing in both statutes." A U.S. Supreme Court case, *Sullivan v. Stroop*, is helpful in addressing that issue. The *Sullivan* case involved two statutes that operated closely together, such that the court applied the "normal rule of statutory construction [for a single statute] that 'identical words used in different parts of the same act are intended to have the same meaning.'" Put another way, the defendants urged the appellate court to

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244 Many in the legal profession are not comfortable with legislative history; "[i]n part this relates to the confusing nature of the conference reports, which explain modifications to the House and Senate bills rather than explaining the provisions from scratch. This means that the reader must examine two, and often three, committee reports together in order to determine the effect of a provision." *3B Sutherland Statutory Construction § 77A:1* (6th ed. 2008).


246 *Id.* at 124.


248 *Sullivan*, 496 U.S. at 484. (citing *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986)).
give the identical words — “postsecondary education benefit” — in § 1623 the identical meaning they have in § 1621.

a. The Martinez Treatment of “Benefit” under § 1623

The appellate court in Martinez sided with the plaintiffs, arguing that in-state tuition is a calculable amount and rejecting defendants’ notion that § 1623 means only the payment of money to the person being benefited. But, we find the defendants’ statutory construction argument the more persuasive one. The argument to assign the same meaning to the same words in two related statutes is particularly strong in the instant case, since Congress enacted PRWORA and IRRAIRA within weeks of each other. Congress also placed the two acts in the same title, chapter, and subchapter within the U.S. Code – Title 8: Aliens and Nationality, Chapter 14: Restricting Welfare and Public Benefits for Aliens, Subchapter II: Eligibility for State and Local Public Benefits Programs. It seems nonsensical for Congress to write one meaning of the exact same phrase, “postsecondary education benefit,” into § 1621, and then only a few weeks later write a conflicting meaning of that phrase into a second act placed in the same title, chapter and subchapter of the code. Reading the phrase in the two acts to have the same meaning gives both laws practical effect, whereas reading them as different seems to pit two versions of the same phrase against each other.

As discussed earlier in Part Four of this paper, we do not find “postsecondary education benefit” to be ambiguous in § 1621. A court should look at the plain meaning of a statute. Since the defendant’s construal of § 1623’s “postsecondary education benefit” incorporates § 1621’s definition of the same, the court’s task should thus end on the face of the statute. Delving into the shallow waters of § 1623’s legislative history is unnecessary and, given the discussion in the preceding few paragraphs, doing so can lead to further confusion of legislative intent. Both plaintiffs and the appellate court in Martinez placed undue importance on a conference report “one-liner” that appears as an overreaching, yet at the same time incomplete, step in their analyses. Such analysis, we contend, led them to get it wrong on this threshold question. Under the assumption that the meaning of the term “benefit” under § 1621 also applies to § 1623, the exemption from out-of-state tuition afforded by section 68130.5 is not a “benefit” under either federal law. However, for the sake of argument, this paper will continue to analyze the following two threshold questions, as though the first were answered in the affirmative, to determine whether section 68130.5 violates § 1623.

2. Is section 68130.5’s granting of in-state tuition “on the basis of residence”?

Unlike with the first § 1623 threshold question, there is no need to seek guidance from § 1621 in examining the second question. With the second inquiry, the primary point of contention between the Martinez parties is whether or not section 68130.5’s grant of eligibility for in-state tuition requires California residency. If the answer to that question is “no,” then, for that reason alone, section 68130.5 does not violate § 1623,

249 Martinez, 83 Cal. Rptr. 3d at 531.
250 8 U.S.C.A §§ 1621, 1623
because that statute only mandates that “an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State…”

Courts have long acknowledged that charging different college tuition rates is within the states’ power. State power to set residency policies is also well established. Court cases dating back to 1882 have clearly held not only that states can charge these differentials, but that they may decide which students are entitled to be classified as residents and which are not. Like setting tuition rates, the development of residency classifications for tuition purposes likewise does not follow a set formula. Rather, policymakers take into account a number of considerations, such as whether a student lives, works, pays taxes, owns property, is registered to vote, or is licensed to drive in that state.

Critical to a thorough analysis of the second threshold question is an understanding that states can, and often do, exempt certain students, who do not meet a set of traditional criteria, from paying out-of-state tuition. Perhaps among the most well known examples are athletes or others with exceptional talent from other states whose physical or academic talents seduce universities into waiving out-of-state tuition.

a. Meaning of "Residence" under California Law

In California, a “resident” is a student who has residence, pursuant to section 68062 in the state for more than one year immediately preceding the residence determination date.” A “nonresident” is one who does not have residence in the state for more than one year preceding the determination date.” “Residence” within the meaning of section 68062 of the California Code is “the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.” The terms "residence" and "domicile" often provoke confusion, because they are frequently used interchangeably, or "’residence’ is measured with language denoting intentionality, which is generally not required for mere residence.”

To add to this confusing area of the law, California courts in the 1980s and 1990s wrestled with a question relevant to our discussion here: can an undocumented student establish the necessary intent to remain in California required to receive in-state

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252 Vlandis v. Kline, 412 U.S. 441, 453 (1973) (holding that a state “has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its…resident to attend such institutions on a preferential tuition basis”). See also Toll, 458 U.S. 1; Nyquist v. Mauclet, 432 U.S. 1 (1977).
253 Michael A. Olivas, Storytelling Out of School: Undocumented College Residency, Race, and Reaction, 22 HASTINGS CONST. L. Q. 1019, 1027 (1995) (“The most striking feature among [residency laws] is how few exemptions or special treatment have anything to do with the fundamental concepts of duration or intention.”)
254 Id. at 1037 tbl 2 (1995).
255 Martinez, 83 Cal. Rptr. 3d at 534.
256 Id.
257 Id. at 526.
258 Olivas, Storytelling, 22 HASTINGS CONST. L. Q. at 1030 (stating that as a point of law, ‘domicile’ includes ‘residence,’ but has a more specific meaning than does ‘residence.’).
Plaintiffs argued in *Martinez* that the California Legislature, in an attempt to avoid that controversy, drafted section 68130.5 in a manner that deliberately avoids the use of the word “residency” only to include a so-called *de facto* residency requirement. On the other hand, the defendants directed the court to look at the plain language of the state statute for insight on legislative intent. They also argue that plaintiffs fail to give effect to every word, and in this case, an entire phrase in § 1623: “on the basis of residence.”

**b. The Martinez Treatment of “On the Basis of Residence”**

The appellate court ultimately adopts the plaintiffs’ legal arguments, ruling that the state statute’s criteria for in-state tuition eligibility — namely attendance and graduation from a California high school — are *de facto* residency requirements. In other words, the court holds that such requirements carry the weight of a bonafide residency requirement. For support, the court looks to the holding in *Martinez v. Bynum*, which said attendance of a high school in a particular school district is linked to residence. Finally, the court concludes that section 68130.5 does, and was intended to, benefit “illegal aliens” on the basis of California in violation of federal law.

The court’s argument is more persuasive on this issue than on previous topics. However, the trial court decision does a better job of interpreting section 68130.5, which says that “any person” who meets the statute’s criteria is eligible for in-state tuition, not simply those individuals who are California residents. The trial court cites § 48050 of the state’s code, which says that state law provides that “pupils living in an adjoining state which is contiguous to the school district” may be admitted to elementary and high schools in California. Also, a person whose actual and legal residence is in a foreign country adjacent to this state and who regularly returns within a 24-hour period to said foreign country may be admitted to such schools, whether or not the students’ parents are U.S. citizens. Private high schools are not subject to restrictions regarding residency of their students, so a student from Montana could attend boarding school in California and fall under section 68130.5 exemption from residence. Thus, simply because section 68130.5 benefits undocumented students, or even that it intends to do so, does not signify that the statute is on the basis of residence and in violation of § 1623.

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259 Salsbury, *Evading Residence* at 474 fn.72 (citing Ass’n of Am. Women v. Bd. of Trs., 38 Cal. Rptr. 2d 15, 706-07 (Cal. App. 2d Dist. 1995), “resolving the discrepancy between the University of California and California State University policies [after two conflicting state court decisions] by holding that undocumented alien students did not qualify as California residents for tuition purposes”).


263 CAL. EDUC. CODE § 48050 (West 2009).

264 CAL. EDUC. CODE § 48051 (West 2009).
3. If undocumented students are eligible for in-state tuition status under section 68130.5, are non-resident U.S. citizens or nationals who meet the same section 68130.5 criteria being denied eligibility for in-state tuition status in contravention of federal law?

Even if, *arguendo*, in-state tuition were a “benefit” based on residency under the meaning of § 1623, such conclusions do not automatically indicate that undocumented students will always have to pay out-of-state tuition rates. A court would still have to answer the third threshold question in the affirmative for a statute like section 68130.5 to be held in violation of the § 1623. Otherwise, § 1623 could not prohibit a state from enacting a law allowing certain undocumented students to pay in-state rates, if they met the requirement stated in the statute. This is a result of the word “unless” in § 1623.

Professor Olivas says “the word ‘unless’ can only mean that Congress enacted a condition precedent for states enacting rules in this area.” He advances the following argument of how to interpret the “unless clause.”

A flat bar would not include such a modifier [i.e. the word “unless]. The only way to read this convoluted language is: State A cannot give any more consideration to an undocumented student than to a nonresident student from state B.

On the other hand, instead of framing the question as we have in our third threshold question, Professor Kobach reconstructs the issue to ask the following question: If California, under section 68130.5, exempts *any* undocumented student from paying out-of-state tuition, does it then provide the same exemption to *all* U.S. citizens and nationals?

*a. The Martinez Treatment of § 1623’s “Unless Clause”*

The appellate court in *Martinez* seems to pose the same question as the plaintiffs, because it rules that section 68130 conflicts with § 1623, “in that the state statute allows the benefit to United States citizens from other states only if they attend a California high school for three years. Thus, the state statute does not afford the same benefit to United States citizens without regard to California residence, as required by [§ 1623].” Therefore, the appellate court seems to object to the fact that not *all* U.S. citizens are eligible.

Under its interpretation, the appellate court effectively ignores the plain language of the statute and judicially strikes the entire “unless clause” from § 1623, as though that clause was not written into the law by Congress. In other words, the court reads § 1623 as requiring public universities to adopt an all-or-nothing approach, whose form appears more like a threat than a statute: “If you, public university, allow even one undocumented

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266 Hereafter, the “unless clause” refers to the § 1623 text, beginning with word “unless” through the rest of that sentence.
268 *Martinez*, 83 Cal. Rptr. 3d at 541.
person to pay an in-state tuition rate, you forfeit your right to collect any out-of-state tuition fees from all U.S. citizens and nationals.” Thus, this reading would exempt any out-of-state U.S. citizen who has not met the one-year residency requirement or the criteria set forth under section 68130.5 from paying out-of-state tuition. This is prohibitive, since many universities rely heavily on out-of-state tuition payments for revenue and thus would face strong disincentives to exempt any undocumented students for fear of repercussions.

Due to what they claim is ambiguous statutory language, the plaintiffs directed the court to legislative history – the same conference committee report sentence that said § 1623 provides that “illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.” But even in reading the statute in its most restrictive form (i.e., the way plaintiffs and the appellate court suggest), the plain language still does not constitute a total prohibition on the states from enacting laws granting certain undocumented students exemption from paying out-of-state tuition. No plausible reading of the statute completely takes away state power in this traditionally state domain. The conference committee line on Section 505 is nonsensical. It adds a substantive restriction and renders moot an entire phrase of its own statute. When legislative history contradicts the words of the statute itself, the plain language must prevail. As previously stated, courts cannot cross out entire phrases of a statute at their pleasure.

D. Equal Protection and Other Remaining Claims

This section will discuss the merits of the facial attack launched by the plaintiffs based on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Under the equal protection clause, a state must treat similarly situated individuals similarly, in the absence of a rational basis for distinguishing between them. For a heightened level of scrutiny, at least one of the following two criteria must be satisfied: (1) The law must involve a fundamental right; or (2) the law must discriminate against a suspect class. If neither criterion is met, then the equal protection claim fails unless the plaintiffs proved that the state had no rational basis for enacting section 68130.5.

Regardless of the way the statutory language in section 68130.5 is interpreted, only a cursory analysis is necessary to determine whether a fundamental right was involved in Martinez. There is no fundamental right to pay in-state as opposed to out-of-state tuition, to be exempt from paying out-of-state tuition, or to be considered a resident for in-state tuition purposes. The analysis can then quickly move forward to the next question: do plaintiffs fall within a suspect class? The famous “Footnote Four” in the U.S. Supreme Court case, United States v. Carolene Products Company, outlines common characteristics of a “suspect class.” That case held that a heightened judicial scrutiny of a law is meant to protect “discrete and insular minorities, who lack the normal

270 The Equal Protection Clause provides that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.
271 Id.
272 Heller, 509 U.S. 312
 protections of the political process. \textsuperscript{274} U.S. citizens, who possess the right to vote, among other key rights, do not seem to fit the typical description for individuals in a suspect class.

Nonetheless, the plaintiffs argue that there is a "suspect class" based on national origin, because section 68130.5 favors foreign-born persons over U.S. citizens. In this regard, the plaintiffs' equal protection claim and their argument that section 68130.5 violates § 1623 are closely related, essentially relying on the same premise. Namely, they read § 1623 as prohibiting discrimination against any U.S. citizen, regardless of whether he or she meets section 68130.5's statutory requirements, who cannot benefit from that law. Plaintiffs argue that strict scrutiny is warranted. Alternatively, the plaintiffs contend that a stricter scrutiny is justified, arguing that section 68130.5 discriminates based on alienage, instead of national origin. Further, even if a lower level of scrutiny – the "rational relationship test" – is employed by the court, the plaintiffs nevertheless contend that section 68130.5 fails that test as well. Plaintiffs and Professor Kobach suggest there is nothing rational about state subsidization that encourages law breaking and that drains money from U.S. citizens for those who cannot legally work in the United States. \textsuperscript{275}

Defendants counter the facial challenge, arguing that section 68130.5 is neither a citizenship-based classification based on alienage nor one based on a person's country of origin. They argue that all that is required is a rational relationship of the law to a legitimate aim of the state. They say the California Legislature had a rational basis for passing a law seeking to increase the state's collective productivity and economic growth. \textsuperscript{276} For support, the defendants quote Plyler: "An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen." \textsuperscript{277} In their appellate brief, the defendants also claim that many of the "AB 540" undocumented students are already on a path to citizenship as children of parents granted amnesty and are waiting for their applications for citizenship to be accepted. \textsuperscript{278}

1. The Martinez Treatment of the Facial Equal Protection Claim

In its equal protection analysis, the Martinez court again framed the issue around whether the so-called "de facto residency requirement" was uniformly applied to undocumented students and U.S. citizens. This reasoning is flawed because the classifications imposed by section 68130.5 are not based on citizenship: section 68130.5 does not exclude all U.S. citizens and nationals from eligibility. In Day v. Bond, the federal court ruled that the statutory factors (high school attendance and graduation) of the state law constituted "a nondiscriminatory prerequisite for benefits under [the Kansas statute], regardless of the citizenship of the students." \textsuperscript{279}

\textsuperscript{274} Id.
\textsuperscript{275} See generally Kobach, Immigration Nullification.
\textsuperscript{276} Joint Brief of Respondents at 49, Martinez v. Regents of the Univ. of Cal., No. C054124 (Cal. Ct. App. 3d Nov. 8, 2007).
\textsuperscript{277} Plyler, 457 U.S. at 226.
\textsuperscript{278} Joint Brief of Respondents at 50, Martinez v. Regents of the Univ. of Cal., No. C054124 (Cal. Ct. App. 3d Nov. 8, 2007).
\textsuperscript{279} Day v. Bond, 500 F.3d at 1135.
Plaintiffs were misleading and inaccurate in arguing that the undocumented are the only persons eligible to take advantage of section 68130.5. In fact, according to a UC System Report on the statute, “70 percent of AB 540 students attending the University of California are U.S. citizens who do not meet the state residency requirements for in-state tuition purposes.”

In addition, the undocumented population must actually meet more requirements than their out-of-state counterparts. In California, to establish residency one must reside in the state for more than one year; however, undocumented students face a higher standard: they must attend a California high school for three years to qualify for resident tuition rates. Therefore, since the undocumented have to be physically present in the state for longer than U.S. citizens and nationals of other states for treatment as residents, states that consider undocumented residents for tuition purposes can argue that their laws do not violate Section 505. Moreover, undocumented students must sign an affidavit indicating their intent to legalize their immigration status.

The appellate court in *Martinez* ultimately arrived at the more solid conclusion in its ruling on the (facial) equal protection claim: only a “rational relationship” is required because there is no fundamental right (or anything even resembling one) nor a suspect class based on national origin. The court, rightly so, declined to break with California and federal court precedent by refusing to recognize classifications based on alienage as a suspect class. Even *Plyler*, recognized by some to be the “highwater mark for immigrant rights,” explicitly said that the undocumented are not a suspect class for purposes of equal protection analysis. If undocumented persons, a group much more vulnerable to the whim of the majority, are not a suspect class, then the reverse seems obvious: U.S. citizens do not constitute a suspect class. As a result, the rational relationship test is the appropriate scrutiny for section 68130.5. As the lower court had stated, “the statute’s goal of helping high school students likely to remain in California and presumably contribute to the State’s economy is a legitimate governmental purpose.” The appellate court seems to uphold the lower court’s decision on the facial equal protection claim without explicitly doing so.

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281 Compare CAL. EDUC. CODE § 68017 (West 2003) (classifying students as “residents” after one year of residence in California) with CAL. EDUC. CODE § 68130.5(d) (West 2003).

282 Salsbury, *Evading ResidenceResidence at 480.*

283 CAL. EDUC. CODE § 68130.5(d) (West 2003).

284 The same appellate court that ruled on *Martinez* has held that the undocumented are not a suspect class for purposes of equal protection scrutiny. *Am. GI Forum v. Miller*, 218 Cal. App.3d 859, 868 (1990).


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


288 *Martinez*, 83 Cal. Rptr. 3d at 545-46.
2. The *Martinez* Treatment of the As-Applied Equal Protection Claim

Plaintiffs also launched an “as-applied” equal protection attack, alleging that some California colleges and universities have implemented section 68130.5 to deny eligibility to all U.S. citizens, even those who meet the statute’s criteria. The court states that while the evidence thus far does not support plaintiffs’ allegation, they are not required to prove their allegations at the demurrer stage. Thus, the appellate court granted plaintiffs leave to amend on their as-applied equal protection claim.

3. The *Martinez* Treatment of the Remaining Claims

The plaintiffs’ argument for the remainder of their claims also lacks merit, as they rely on the same flawed premise of their federal equal protection claim. The additional claims charge violations of the following: the California equal protection clause, the federal privileges and immunities clause, the right to due process for a taking of property, the Unruh Civil Rights Act, and the California Constitution anti-discrimination statute. As discussed earlier, because section 68130.5 does not discriminate on the basis of U.S. citizenship, there can be no discrimination based on national origin.

E. Supremacy Clause and Preemption Analysis

An overarching question in the debate over in-state tuition for undocumented immigrants concerns federal preemption: Did Congress surpass its authority under the Supremacy Clause by regulating in the area of state determinations of tuition rates? Conversely, another important question that *Martinez* addresses is whether or not California’s section 68130.5 is preempted by §§ 1621 and 1623. This is a very broad topic, much of which is outside the scope of this paper. But before we can fully address these questions and discuss the preemption problems in the *Martinez* opinion, we will review the principles of preemption set forth in footnotes in Part Two.

The primary source of authority for the preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution. Federal law can preempt a state statute through various means. First, Congress can preempt a state law by using express statutory language to do so. However, even absent explicit language, courts can imply Congressional preemption via legislative intent.

Implied preemption occurs (1) if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it; (2) if the Acts of Congress touch a field in which the federal interest is so dominant

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289 Id. at 546.
290 Id.
291 Id.
292 U.S. CONST. art. VI, cl. 2
that the federal system will be assumed to preclude enforcement of state laws on the same subject; or (3) if the goals sought to be obtained and the obligation imposed reveal a purpose to preclude state authority. 295

Even if Congress has not "occupied the field," a state statute is preempted to the degree that it conflicts with a federal law. 296 A conflict usually arises in one of two ways: (1) where compliance with both state and federal laws is a legal impossibility; or (2) where the state law stands as an obstacle to the Congress’ execution of its purpose and aims. 297

Only federal laws that pass constitutional muster can preempt state law. 298 There is a strong presumption against preemption, such that a federal law will preempt a state law only where it clearly manifests a legislative intent to do so, or where a direct conflict exists such that the two laws are irreconcilable. 299

1. Federalism Analysis

A discussion of the Supremacy Clause would be incomplete without a discussion of the states’ police powers. Federalist principles embodied in the Tenth Amendment of the U.S. Constitution dictate that power not specifically given to Congress falls to the states. As Congress’s legislative reach has increased over the past 200 years, the states’ areas of legislation have become increasingly defined. 300 One area in which states have had exclusive power is in determining who may receive in-state tuition benefits. 301 Although state regulatory power over in-state tuition benefits is secure under the Supreme Court’s jurisprudence, adding the word “immigrant” to the statute potentially presents a conflict with a Congressional prerogative: immigration law.

Federal power over immigration derives from Congress’s constitutional power “[t]o establish a uniform Rule of Naturalization.” 302 It also comes from the federal government’s power to regulate commerce with foreign countries and its broad authority over foreign affairs. 303 Based on the U.S. Constitution, federal statutes, and judicial

295 Id.
296 Massachusetts Ass’n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176 (1st Cir. 1999); Envtl. Encapsulating Corp. v. City of New York, 855 F.2d 48 (2d Cir. 1988).
298 Qwest Commc’ns Inc. v. City of Berkeley, 433 F.3d 1253 (9th Cir. 2006) (overruled on other grounds by Sprint Telephony PCS, L.P. v. County of San Diego, 45 Commc’ns Reg. (P & F) 1317, 2008 WL 4166657 (9th Cir. 2008)).
300 Saenz v. Roe, 526 US 489 (1999); Sosna v. Iowa, 419 U.S. 393 (1975); Vlandis v. Kline, 412 US 441 (1973) (recognizing a state’s power to determine who can receive in-state tuition benefits); Gonzales v. Oregon, 546 U.S. 243, 126 (2006) (acknowledging that regulating the practice of medicine is a state power); Kelo v. City of New London, Conn. 545 U.S. 469 (U.S. Conn. 2005) (holding that the regulation of property is a state power); and Hill v. Colorado, 530 U.S. 703, 120 (2000) (recognizing that the protection of health and safety of its citizens is a state power).
301 See Toll, 458 U.S. 1; see also Merten, 305 F.Supp. 2d 585.
303 U.S. CONST. art. I, § 8, cls. 3, 4.
opinions expanding these powers, the federal government has a “preeminent role” in regulating aliens within the borders of the United States. Because of Congress's power over immigration, federal immigration laws or policies often will preempt state laws pertaining to immigrants. Because immigrants are such a large percentage of the general population and because federal immigration law is so extensive, it can be difficult to determine when a state law “regulates” immigration.

2. An Application of DeCanas to Martinez

As discussed in Part Two of this paper, DeCanas was an example of when federal immigration law did not preempt a state statute, but instead deferred to the state’s police power. Nonetheless, that opinion gave rise to the abovementioned three-part analysis still used today to analyze state statutes impacting immigrants. Although the Martinez court begins its analysis with the DeCanas test, it never thoroughly applies it. Had the court done so, it may have yielded a different outcome. The following subsection applies the DeCanas test to section 68130.5.

a. Does section 68130.5 regulate immigration?

Even if courts do not find that laws similar to section 68130.5 are in violation of §§ 1621 or 1623 because of de facto residency requirements or other statutory components, further analysis is required. The state may still have to protect against a claim of preemption. Laws like section 68130.5 seem to be in no danger of violating the first DeCanas prong, for they do not regulate who is or is not admitted into the country or under what conditions they may remain. The federal government does not prohibit states from setting residency policies for tuition purposes. For example, defining residence for state purposes is quite different from defining residence within the federal immigration scheme, which uses classifications like “legal permanent resident.”

State laws such as section 68130.5 do not hamper the federal government’s power to regulate the immigration of undocumented students. Nor do such laws control intrastate migration; rather, they concentrate on their educational access once present in

304 See Toll, 458 U.S. at 10.
305 Id. The author provides the following examples: Hines, 312 U.S. 52 (invalidating the Pennsylvania Alien Registration Act, perceiving it as an obstacle to the fulfillment of Congressional goals in the passage of a federal Alien Registration Act); Elkins, 435 U.S. 647 (certifying the question of whether the children of G-4 aliens could constitute domiciliaries of Maryland, as a matter of state law, for tuition purposes; however, because Maryland's subsequent determination, that G-4 aliens could not fulfill residency requirements, frustrated federal policy, the Court found that the Maryland policy violated the Supremacy Clause.)
306 See generally DeCanas, 424 U.S. 351. The three-part analysis in DeCanas remains useful in determining whether federal law preempts a state statute in the immigration context. However, since the 1996 passage of IIRIRA and PRWORA enhanced the federal legislation in the higher education of immigrants, that case’s precedential value is limited. The preemption analysis does not end with DeCanas.
307 See, e.g., Lozano, 496 F. Supp. 2d 477.
308 See generally Martinez, 83 Cal. Rptr. 3d 518.
309 See Vlandis, 412 US 441.
that state.\textsuperscript{310} Thus, states assume the risk that after they subsidize tuition for certain undocumented students, the federal government can remove them for unlawful presence.\textsuperscript{311}

In addition, section 68130.5 does not add or take away any immigration requirements or seek to impose additional restrictions that often trigger the preemption doctrine. For example, whereas federal law may require certain proof of lawful immigrant status, section 68130.5 does not ask for such proof before applying section 68130.5 to an undocumented student. The state statute imposes no restrictions that require verifying federal immigration classifications. With no state-imposed scheme, section 68130.5 does not amount to a regulation of immigration under the first \textit{DeCanas} prong.\textsuperscript{312}

\textbf{b. Is Congress’ interest in postsecondary education of undocumented students not so dominant as to bar section 68130.5?}

The holding of \textit{LULAC v. Wilson} notwithstanding, the federal government has not occupied the field of undocumented students’ state tuition rates such to ouster state power in the area.\textsuperscript{313} The \textit{LULAC v. Wilson} decision, which overturned part of Proposition 187 on the grounds that it was preempted by §§ 1621 and 1623, held that Congress has manifested an intent to occupy the field of postsecondary education of non-citizens and thus precluded states from legislating in the area.\textsuperscript{314} The court cites a series of federal laws that together “demarcate a field of comprehensive federal regulation within which states may not legislate.”\textsuperscript{315}

However, postsecondary education of non-citizens is an overly broad category, and the \textit{LULAC} decision must be read in the more limited context of its facts. The decision banned a state law denying undocumented students’ access to higher education. An undocumented student’s physical access to college is only one of many potential components of the court-created field in \textit{LULAC} – postsecondary education of non-citizens.\textsuperscript{316} The court fails to describe or explain the range of state functions that fall within this field, including exemption from non-resident tuition status.\textsuperscript{317} Section 68130.5 should not have been swept up into that very broad category. A more reasonable reading of federal law would suggest that Congress intended to supplement, not supplant, state action in the area of postsecondary education for undocumented students.

\textsuperscript{310} Salsbury, \textit{Evading Residence} at 484.
\textsuperscript{311} \textit{Id.} at 486.
\textsuperscript{312} \textit{See Merten}, 305 F. Supp.2d at 603.
\textsuperscript{313} \textit{LULAC}, 997 F. Supp. at 1254.
\textsuperscript{314} \textit{Id.}
\textsuperscript{315} \textit{Id.}
\textsuperscript{316} For example, the category "non-citizens" includes immigrants and non-immigrants.
\textsuperscript{317} Salsbury, \textit{Evading Residence} at 487.
c. Is compliance with section 68130.5 and federal law a legal impossibility, and does section 68130.5 conflict with Congressional aims?

Congress has not articulated, either expressly in the law or in its legislative history, its rationale behind passing § 1623, which specifically addresses postsecondary education. Thus, analysis of the third prong of the DeCanas test is not an easy task. IIRA as a whole seeks to deter illegal immigration, but Congress discussed no evidence suggesting that postsecondary education benefits or in-state tuition status would prove an effective deterrent. In fact, family reunification and economic motivations are among the most significant reasons for unauthorized migration.\(^{318}\) As previously discussed, § 1621 addresses only postsecondary monetary assistance paid to students and their families. Thus, compliance with § 1621 and with a state law providing for exemption from paying non-resident tuition is certainly not a legal impossibility. And even if a court interprets section 68130.5 to offer an undocumented student “a state benefit based on residence,” the law should not be read as standing as an obstacle to § 1623, but rather as a strictly-construed exception to that law within its “unless clause.”

In Merten, the court held that Virginia’s policy to deny undocumented students access to college would not face conflict preemption unless the colleges were using state-created immigration standards or misapplying federal standards when reviewing admissions applications.\(^{319}\) Generally, the denial of in-state tuition status requires determination of a classification that is controlled by state, not federal law, so the same conflict does not arise.

Under section 68130.5 specifically, whether an undocumented student is exempt from paying non-resident tuition dictates neither an application of federal standards nor a creation of state standards in determining a person’s unlawful status. Rather, under section 68130.5, state public universities must determine whether a person attended high school in California for three or more years, graduated from that high school or attained the equivalent thereof, and is registered at or attends an accredited institution in California. None of those requirements relates to determination of unlawful immigration status.\(^{320}\) The only line in section 68130.5 even mentioning unlawful immigration status is the following: “In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do.”\(^{321}\) The affidavit requirement does not seem to ask states to create standards of immigration status.

The LULAC decision, on the other hand, found that Proposition 187 failed not only the first DeCanas prong, but also the third conflict preemption prong. The court said Proposition 187 established “a new, wholly independent procedure, pursuant to which state law enforcement, welfare, health care, and educational officials – rather than federal officials and immigration judges – are required to determine the deportability of aliens

\(^{318}\) Jorge Durand, et al., Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration (2003).

\(^{319}\) Merten, 305 F. Supp.2d at 608, 673.

\(^{320}\) CAL. EDUC. CODE § 68130.5 (West 2003).

\(^{321}\) Id.
and effect their deportation.”322 The opinion stated that Proposition 187 delegated duties to state officials that federal law exclusively assigns to federal officials.323 However, as student information obtained in the implementation of section 68130.5 is confidential, there does not seem to be the same dilemma as in LULAC of delegating authority to state officials to report immigration violations that could effect the students’ deportation.324 The presumption that if two statutes can be read together, they should be—coupled with section 68130.5’s satisfaction of all three DeCenas prongs—suggests that section 68130.5 meets the test of constitutionality and is not impliedly preempted by federal law.

PART V: POSSIBLE IMPLICATIONS IF MARTINEZ IS UPHOLD

One possible result of an upheld Martinez decision is that Congress could decide to directly confront the issue of federal preemption by passing the proposed federal DREAM Act, which, in its most recent version, would render the Martinez ruling moot by repealing § 1623.325 The DREAM Act would settle the issue for the dozens of other states across the country grappling with whether to extend in-state tuition status to their undocumented populations.326 Some advocates for undocumented students hope the changed presidential-Congressional dynamic could push the DREAM Act onto the House and Senate floor for a vote. In addition to potential federal legislation on this issue, such as the DREAM Act, Martinez may trigger other widespread implications if it is upheld.

Currently, the ruling in Martinez on in-state tuition for undocumented students is far from settled law in California. The public university systems in California are directing their component universities to continue to implement section 68130.5 as a mandatory state law.327 The State Supreme Court of California has not yet decided the case.328 In short, Martinez’s lack of legal finality limits the strength of its implications at this time.

Despite any persuasive authority the opinion may generate, federal courts and state courts sitting outside the jurisdiction of the California’s Third District Court of Appeals are not bound by Martinez.329 But, due to California’s relatively large

322 LULAC, 908 F. Supp. at 777.
323 Id.
324 CAL. EDUC. CODE § 68130.5(d) (West 2009).
325 See supra note 13.
327 “While the case is pending, districts must continue to implement Education Code section 68130.5. The AB 540 exemption from nonresident tuition is mandatory.” Memorandum from the General Counsel to the California Community College System (Sept. 19, 2008) (on file with authors).
328 Even if the Supreme Court of California upholds the appellate court’s ruling, the latter decision remained several issues to the trial court, including the equal protection cause of action. See supra Part III.B.
329 Professor Olivas was quoted after the appellate court rendered its decision in Martinez: “No other state is bound by what one state does, and they’re particularly not bound by it when the state got it wrong. They weren’t bound by it when the trial court in effect got it right.” Article from Insidehighered.com. In California, Uncertainty on Immigrant Student Tuition. (Sept. 17, 2008), http://www.insidehighered.com/news/2008/09/17/tuition. Furthermore, the state statutes are not identical. See discussion supra Part II.C.
undocumented student population, the size of its higher education system generally, and
the state’s location on the U.S.-Mexico border, Californian legislative and judicial law
have a disproportionately heavy impact on the nation in the immigration arena.  

Examining the beneficiaries of section 68130.5 is useful in predicting the
typical consequences if Martinez’s holding spreads. An estimated 40 percent of the
50,000 to 70,000 undocumented students that graduate from U.S. high schools each year
do so in California.  

That high percentage notwithstanding, section 68130.5 affects only
a relatively small number of the more than two million students that comprise the total
public university enrollment in California.  

Despite possible misconceptions, undocumented students are a small percentage of the section 68130 beneficiaries at the
highest ranked of the three university tiers in California: the University of California
System. The UC System recently reported that in the 2006-07 school year, it offered
1,639 exemptions under section 68130.5. In 2006-07, the average value of an exemption
in the UC System was $16,828 per student and the total value was $21 million. But
students classified as “potential undocumented” immigrants comprised only 271 of those
exemptions that year. Most of the remaining exemptions were granted to students whose
families had recently moved to the state.  

Others have estimated that the number of undocumented students who benefit at the top-tier level is even lower.  

At the other end of the spectrum, in the California Community College (CCC)
System, with its open admission policy and lower tuition, the number and percentage of
undocumented section 68130.5 beneficiaries are higher.  

The majority of undocumented students have taken advantage of section 68130.5, not at the four-year
level but within CCC institutions. The CCC System estimated that, in the 2006-07

330 Olivas, Storytelling, 22 Hastings Const. L. Q. at 1024.
331 Gale Holland, Undocumented Students Have a Degree of Anxiety, Los Angeles Times, July
8, 2008, http://www.latimes.com/news/nationworld/world/la-me-ucla-2008jul08,0,6725156,
full.story.
332 California total public postsecondary enrollment reached 2,207,473 in 2005. Department of
Finance, State of California, California Public Postsecondary Enrollment Projections,
2006 Series, Sacramento, California (December 2006).
333 The statistics collected by the state of California do not differentiate between documented and
undocumented students.
334 Office of the President (UCOP), University of California, Annual Report on AB 540 Tuition
Exemptions 2006-07 Academic Year, pg. 10 Display 1C (March 5, 2008), http://209.85.173.132/
search?q=cachе:RB7rBfMdxYJ:www.ucop.edu/sas/sfs/docs/ab540_annualrpt_2008.pdf+universi
ty+of+california+and+271+exemptions+and+potential+undocumented&hl=en&ct=clnk&cd=6&g
l=us&client=safari.
335 Id. at 5.
336 In every year since the induction of the program, at least 70 percent of students benefiting
from section 68130.5 and attending the University of California are documented students who did
not meet the state residency requirements for in-state tuition purposes. Id. at 3.
337 Such trend, in part, reflects the reality of demographics among the undocumented population.
See, e.g., Salsbury, Evading Residence at 468-69 (stating that undocumented students usually
come from poorer families than their documented counterparts).
academic year, it granted almost 20,000 exceptions, about 90 percent to students believed to be undocumented.\textsuperscript{338}

Many opponents of section 68130.5 predict that the appellate court decision will deter undocumented immigrants from moving to California, and some even believe that it will cause undocumented students and families already in California to leave. Conversely, others argue that Martinez will not deter most potential beneficiaries of section 68130.5 (i.e. immigrants already living in California) from staying in the state and continuing in their undocumented status. Because so many identify themselves as “Americans,” not as foreigners, rendering them ineligible for exemption of non-resident tuition status would not likely compel them to voluntarily depart the country or surrender themselves to the federal government for deportation.\textsuperscript{339}

\textit{A. Implications for Undocumented Youth}

Undocumented students, who are not already potential beneficiaries of a pending family immigration petition, will see their chances for legalization weakened if Martinez becomes the law of the land. Someone with an education is more likely to be eligible for an employment-based immigrant petition under federal immigration law. Preference is given to high-skilled workers, including immigrants who excel in the sciences, arts, education, business or athletics; renowned professors and researchers; certain multinational executives and managers; and professionals who hold advanced or bachelor’s degrees.\textsuperscript{340} In addition, the more limited prospects for attending and affording college in California may contribute to an increase in high school dropout rates among undocumented youth. Even if they receive a high school diploma or its equivalent, however, those who only graduate from high school are likelier to consume more in public services than they pay in taxes. The same is not true for college graduates.\textsuperscript{341}

\textit{B. Implications for California and Similar States}

During hard economic times and state budget deficits, the issue of in-state tuition for undocumented students is especially controversial. Nonetheless, states with among the largest (undocumented) immigrant populations have chosen to implement the in-state tuition laws after weighing the costs and benefits.\textsuperscript{342} Critics of these states say laws like section 68130.5 are a waste of taxpayer money because they fund students who will not be able to work legally in the United States upon graduation. Advocates of such laws say

\textsuperscript{338} Memorandum from the General Counsel to the California Community College System. (Sept. 19, 2008) (on file with authors).
\textsuperscript{339} Romero, Promises and Pitfalls, 27 N.C. J. INT’L L. & COM. REG. at 403
\textsuperscript{340} INA § 203(b)(1)
\textsuperscript{342} In fact, some states argue that the undocumented population produces a net economic gain for their state. For example, in Texas, the comptroller release a report stating that the \textit{absence} of Texas’ 1.4 million undocumented in 2005 would have equaled a $17.7 billion loss to Texas’ gross state product. Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy, Texas Comptroller Report (2006).
not instituting laws such as section 68130.5 would fail to maximize state resources invested in the undocumented youth as K-12 public school students, per Plyler v. Doe.

C. Implications for State Colleges and Universities

In addition to consequences for California and its current and future undocumented student population, Martinez will also have implications for public colleges and universities in that state. The decision will likely affect the pool of applicants that universities will enroll: fewer applicants means less competitiveness. Forced to pay out-of-state costs, qualified students who were exempted from higher tuition rates under section 68130.5 may now decide to enroll elsewhere or not at all. That will not only affect human capital at universities but may also represent a loss of overall revenue resulting from a potential decline in enrollment and, therefore, tuition monies. Community colleges will be particularly susceptible due to their higher undocumented enrollment.

D. Implications for Immigrant-Related Policy

Lastly, the appellate court decision, if upheld by the California Supreme Court, will probably have repercussions in the political arena. For example, the Martinez decision may lead states with laws similar to section 68130.5 to repeal or reword their laws for fear of lawsuits or out of concern that their laws will attract undocumented families to their state. Also, a Restrictionist victory in Martinez may embolden those who have pushed for stricter immigration enforcement and tighter restrictions on undocumented immigrants. Alternatively, or perhaps simultaneously, a possible backlash will transpire, garnering a better-armed lobbying effort to pass the DREAM Act and to render the Martinez decision lifeless.

PART VI: CONCLUSION

Some characterize the debate over statutes like section 68130.5 as between people who embody either lawlessness or heartlessness. Who is who usually depends on one’s personal lens. However, that is an overly simplistic perspective on the issue. At the core of the controversy is a tension between principles. Such principles include compassion, justice, practicality, national interest, human interest, and self interest. These values conflict and converge within and across viewpoints.

Proponents of section 68130.5 point to many of the conceptions of justice raised in Plyler. For example, they lament about the injustice of erecting barriers to success simply because of students’ immigration status—one inherited from their parents, not self-imposed. Charging a higher college tuition rate to in-state undocumented students serves as a disincentive for them to excel in their elementary and secondary schooling and may lead to an increase in already grim high school dropout rates. Years of inconsistent immigration enforcement and an entrenched black market economy of cheap undocumented labor have resulted in millions of “mixed families;” part documented, part undocumented. To have a situation in which a sibling, only slightly younger, can attend college while her older undocumented sibling cannot afford to is nonsensical. Attempting
to correct the enforcement errors of the past and present by stifling the futures of a guiltless generation contributes to the “permanent underclass” about which Plyler warned. That generation aspires to pursue a higher education, needed more everyday to remain competitive in the U.S. workforce. Supporters of section 68130.5 point to other economic considerations, such as the fact that non-California U.S. citizens and nationals, unlike the in-state undocumented population, are probably not paying state taxes that help to subsidize the state’s higher education system.

On other hand, section 68130.5’s critics question why U.S. citizens and nationals should have to pay higher public university rates than a person who is not legally living in this country. They suggest that most citizens in California would rather subsidize out-of-state citizens before the undocumented and argue undocumented youth should return to their countries and received subsidized education there. Opponents of section 68130.5 also raise the issue that such state statutes undermine federal efforts to combat illegal immigration. Instead, they argue, states are actually encouraging illegal behavior and providing disincentives to “play by the rules.” They say it is unjust to favor those illegally present at the expense of law-abiding citizens, immigrants and non-immigrants, who are themselves struggling to pay for college and who will be legally employable, unlike their undocumented counterparts.

Given strong emotions on all sides of this issue, a blend of evasiveness and pragmatism often sets the tone. With no sign of mass deportation in sight and with what continues as half-hearted immigration enforcement, the adage of Plyler still rings true: “The illegal alien of today may well be the legal alien of tomorrow.” As was true then, undocumented students are here to stay, and many have realistic hopes of legalizing their status in the future through new laws or via current paths to legalization. In that light, then, the Martinez decision seems shortsighted from a public policy standpoint and misguided from a legal one.

343 See generally Kobach, Immigration Nullification 473.
344 “The cost of higher education is soaring out of reach of many middle-class families.” Dan Stein, Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies, UNIV. BUS., Apr. 2002, at 64, 64.
345 Plyler, 457 U.S. at 207.