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IN-STATE TUITION AND ILLEGAL IMMIGRANTS: AN ANALYSIS OF *MARTINEZ V. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

This paper analyzes whether state statutes that allow illegal immigrants to receive in-state tuition violate federal law. *Martinez v. Regents of the University of California*, which is currently pending before the California Supreme Court, provides the first opportunity for a state supreme court to decide whether a state law that makes in-state tuition available to illegal immigrants violates federal law. Despite legitimate policy reasons for allowing illegal immigrants to pay in-state tuition, the California Supreme Court should hold that the California statute offering in-state tuition to illegal immigrants violates federal law.

On November 4, 2008, Barack Obama made history becoming the first African-American elected President of the United States of America. The victory marked a watershed event, a “symbolic moment in the evolution of the nation’s fraught racial history.”¹ President Obama’s personal biography resonated not only with African-Americans, but it also struck a cord with individuals whose own histories include stories of personal or family immigration to the United States. Born to a white American mother and a black Kenyan father, President Obama’s success provides hope to the millions of individuals who come to the United States based on optimism for a better life. Perhaps nothing is more important in achieving that better life than attaining a quality education. For talented young Americans whose families enter the United States illegally, however, the path to higher education is lined with barriers.

Each year millions of young Americans graduate from high school with hopes of attending an institution of higher education. At the same time, however, 65,000 illegal immigrants graduate from high school with only a small

1. Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2008, at A1.

likelihood of pursuing higher education because they cannot afford the costs of college.² “Currently, only about 5 to 10 percent of undocumented young people who graduate from high school go on to college, compared with about 75 percent of their classmates.”³ These young men and women are generally not eligible for federal financial aid⁴ and are normally required to pay out-of-state tuition, which is, on average, between two and three times the cost of in-state tuition.⁵

Although ten states have passed laws that allow illegal immigrants to avoid out-of-state tuition costs, federal law arguably forbids such action.⁶ A case pending before the California Supreme Court, *Martinez v. Regents of the University of California*,⁷ provides the first opportunity for a state supreme court to examine whether these types of state laws violate federal law. Despite legitimate policy reasons for allowing illegal immigrants to pay in-state tuition, the California Supreme Court should hold that the California statute offering in-state tuition to illegal immigrants violates federal law.

This article proceeds as follows. Part I provides policy reasons for granting in-state tuition to illegal immigrants and introduces federal law that prohibits states from granting any benefit to illegal immigrants that is not also offered to US citizens who are residents of a different state. Part II offers an overview of state legislation regarding in-state tuition for illegal immigrants. Part III introduces the facts and procedural history of *Martinez*. Part IV presents arguments that the California Supreme Court should hold that the state statute violates federal law because it grants illegal immigrants a benefit based on residency. Part V offers conclusions about the

2. JEFFREY S. PASSEL, FURTHER DEMOGRAPHIC INFORMATION RELATING TO THE DREAM ACT 1 (2003), http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

3. NATIONAL IMMIGRATION LAW CENTER, BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS (2009), <http://www.nilc.org/immlawpolicy/DREAM/instate-tuition-basicfacts-2009-02-23.pdf>.

4. See Federal Student Aid: Glossary, Eligible Noncitizen, <http://studentaid.ed.gov/PORTALSWebApp/students/english/Glossary.jsp> (last visited Mar. 23, 2010).

5. See THE COLLEGE BOARD, TRENDS IN COLLEGE PRICING 2009 (2009), http://www.trendscollegeboard.com/college_pricing/pdf/2009_Trends_College_Pricing.pdf.

6. 8 U.S.C. § 1623 (2006).

7. 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008).

future of state statutes that grant in-state tuition to illegal immigrants and suggests another way help these individuals attain higher education, namely the adoption of federal legislation based on the DREAM Act.

I. STATE POLICY AND FEDERAL LAW

Although private institutions of higher education do not typically distinguish between residents and non-residents for tuition purposes, state-sponsored schools have traditionally offered a reduced rate for tuition and fees to state residents. Several policy reasons exist for offering state residents a reduced cost of attendance. First, state schools are public institutions that are supported in part by taxing state residents.⁸ Taxpayers and their families should therefore receive a benefit for supporting these public institutions.⁹ Because non-residents do not pay taxes that go toward these schools, they should not receive the same discount.¹⁰ Second, providing in-state tuition to residents also provides an incentive for each state to provide strong public universities and colleges to its residents.¹¹ Without strong postsecondary schools, state residents would otherwise move out of state to pursue higher education. Therefore, in-state tuition prevents a brain drain of talented young individuals migrating in mass to other states.¹²

The aforementioned policy considerations underlying the reasons states offer in-state tuition to its residents do not necessarily support denying illegal immigrants this same benefit. Regarding tax purposes, illegal immigrants often pay taxes in the states in which they reside despite their legal status.¹³ They also do not receive benefits such as social security, although they pay into this fund. Experts actually disagree whether illegal immigrants provide a net benefit or detriment to state economies. One can easily find studies

8. MICHAEL A. OLIVAS, *THE LAW OF HIGHER EDUCATION* 878 (3d ed. 2006).

9. *Id.*

10. *Id.*

11. *Id.* at 879.

12. *Id.*

13. *E.g.*, Travis Loller, *Many Illegal Immigrants Pay Up at Tax Time*, USA TODAY, April 10, 2008.

supporting either view.¹⁴ Thus, the idea that illegal immigrants should not receive in-state tuition based on financial considerations alone is debatable.

On the other hand, there are legitimate policy reasons for allowing illegal immigrants the opportunity to receive in-state tuition. These individuals may be committed long term to living and working in the state, and therefore offering a discounted higher education to illegal immigrants can have a positive effect on that state's economy. Moreover, these individuals may have lived in the state for nearly their entire lives and are only illegal because their parents brought them to the United States when they were very young. Thus, they may appear to be American in every way except in name or legal status. Furthermore, because illegal immigrants are not eligible for federal financial aid, the only way these young men and women may be able to attend institutions of higher education is through receiving in-state tuition.

Although these explanations are persuasive, many Americans are opposed to granting illegal immigrants in-state tuition based on moral grounds. Allowing illegal immigrants to pay reduced tuition while US citizens from other states are simultaneously forced to pay higher rates seems discriminatory to US citizens who are residents of a different state.¹⁵ Additionally, granting this benefit to illegal immigrants "condones and perhaps encourages 'illegal' immigration."¹⁶ Although illegal immigrants may not come to the United States based solely on the fact that their children can attend better schools, granting additional benefits to these individuals, such as in-state tuition, is an additional incentive to immigrate illegally.

Presumably basing its legislation on moral rather than financial concerns, the United States Congress decided that illegal immigrants should not receive benefits that are withheld from US citizens based solely on residency status. In 1996, Congress passed the Illegal Immigration Reform and

14. For a detailed analysis of these studies and arguments relating to how illegal immigration affects the U.S. economy, see GORDON H. HANSON, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* (2007), available at <http://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf>.

15. Victor Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L. & COM. REG. 393, 396 (2002).

16. *Id.*

Immigrant Responsibility Act (IIRIRA). Section 505 of the bill, later codified as 8 U.S.C. § 1623, states:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.¹⁷

The purpose of section 505 is to restrict states from offering benefits to illegal immigrants that are not also offered to US citizens who are residents of other states. The statute itself specifically states that residency cannot be the basis for conferring this benefit.¹⁸ States have since attempted to find a loophole in section 505 by using criteria other than residency as the basis for giving illegal immigrants the benefit of in-state tuition.

II. STATE LEGISLATION

After Congress passed IIRIRA in 1996, several states passed legislation that attempts to provide in-state tuition for illegal immigrants while avoiding a direct violation of federal law. Although section 505 restricts states from offering in-state tuition for illegal immigrants based on residency, it does not explicitly prohibit states from providing this benefit based on criteria unrelated to an individual's residency. To date, ten states have passed laws allowing illegal immigrants to pay only in-state tuition despite IIRIRA.¹⁹ In addition to the ten states that have passed these types of laws, twenty-two other states have unsuccessfully attempted to pass similar legislation.²⁰

17. 8 U.S.C § 1623 (2006).

18. *Id.*

19. The states are California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington. CAL. EDUC. CODE § 68130.5 (West 2001); H.B. 60, 93d Gen. Assem., (Ill. 2003); KAN. STAT. ANN. § 76-729 (2004); L.B. 239, 99th Leg., 2d Reg. Sess. (Neb. 2006); S.B. 582, 45th Leg., 1st Reg. Sess. (New Mex. 2005); N.Y. EDUC. CODE § 6206 (McKinney 2003); S.B. 596, 49th Leg., 1st Sess. (Okla. 2003); TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003); UTAH CODE ANN. § 53B-8-106 (2003); H.B. 1079, 58th Leg., 1st Reg. Sess. (Wash. 2003).

20. These states are Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New Hampshire, North Carolina, Oregon, Rhode Island, Virginia, and Wisconsin. EDUCATION COMMISSION OF THE STATES, IN-STATE TUITION

Although the language in these statutes varies slightly from state to state, the statutes generally include similar provisions. For individuals to qualify under these laws, students must normally satisfy the following criteria. First, the individual must have attended a school in the state for a certain number of years.²¹ Second, the student must have graduated from high school in the state or must have received the equivalent of a high school degree.²² Third, individuals who desire to pay in-state tuition are usually required to sign an affidavit stating they have applied to legalize their immigration status.²³ In essence, these states have attempted to avoid federal legislation by granting illegal immigrants in-state tuition conditioned on requirements that are not explicitly based on residency. Proponents of these state laws argue that US citizens who are not residents of the state in which in-state tuition is sought can also meet these requirements. Thus, because non-residents can also qualify, these laws do not violate federal law.²⁴

The ten state statutes can be divided into two different categories.²⁵ The first category actually qualifies illegal immigrants as residents for tuition purposes if they meet the criteria of the law.²⁶ The Texas statute exemplifies this first category.²⁷ It requires students to specify where they have lived and with whom they have lived to qualify for in-state tuition. Moreover, states in this first category base eligibility for residency on high school attendance and require individuals to maintain “a residence continuously in [the] state.”²⁸ A court would be hard pressed to hold that a state statute that uses the words resident, residence, or residency does not violate the

FOR UNDOCUMENTED IMMIGRANTS 1 (2008),
<http://www.ecs.org/clearinghouse/75/53/7553.pdf>. It is also worth noting that ten states have introduced legislation that restricts illegal immigrants from receiving in-state tuition. *Id.* at 1–2.

21. See, e.g. KAN. STAT. ANN. § 76-729 (2004).

22. *Id.*

23. *Id.*

24. Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. REV. 257, 267 (2005).

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

26. *Id.*

27. TEX. EDUC. CODE ANN. § 54.052 (Vernon 2003).

28. *Id.*

federal restriction set forth in section 505 of the IIRIRA.

The second category of statutes steers clear of federal law even further by avoiding the words resident, residence, or residency. Rather than attaching eligibility to residency, this group of states provides an exemption from paying non-resident tuition based on other factors.²⁹ The California statute exemplifies this category. Unlike the first category, California and other states in this second group do not require students to have lived in the state, and the word residency is never mentioned in these statutes. Instead, students are only required to attend and graduate from an in-state high school. Thus, instead of a residency requirement, these states have imposed a high school attendance requirement.³⁰ These states argue that non-residents of other states could satisfy these requirements and therefore become eligible for in-state tuition.³¹ Although the first category of statutes seems to clearly contradict federal law, whether the second category also violates section 505 of the IIRIRA is a more difficult question. This question is currently pending before the California Supreme Court.

III. MARTINEZ V. REGENTS OF THE UNIVERSITY OF CALIFORNIA

A. The California Superior Court

In 2006, a group of US citizens who were not residents of the state of California filed suit against the Regents of the University of California.³² These citizens argued that California Education Code section 68130.5, which was enacted in 2001, violates federal law.³³ Among other claims, they asserted the California statute stands in direct contradiction to section 505 of the IIRIRA.³⁴ According to section 68130.5, illegal immigrants in California can pay in-state tuition if they meet certain criteria. First, the individual must have attended

29. Salsbury, *supra* note 25, at 477.

30. *See, e.g.*, CAL. EDUC. CODE § 68130.5 (West 2001).

31. Ruge & Iza, *supra* note 24, at 270.

32. *Martinez v. Regents of Univ. of Cal.*, 2006 WL 2974303 (Cal. App. Dep't Super. Ct. Oct. 4, 2006), *rev'd*, 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008), *review granted and opinion superseded by* 198 P.3d 1 (Cal. 2008).

33. *Id.* at 1.

34. *Id.*

high school in California for three or more years.³⁵ Second, he or she must graduate from a California high school or attain the equivalent of a high school education.³⁶ Third, the individual must register at an accredited institution of higher education in California not earlier than the 2001–2002 academic year.³⁷ Finally, if the individual is an illegal immigrant, he or she must file an affidavit stating that he or she has filed an application pursuing legal immigration status.³⁸

On October 4, 2006, the state trial court ruled in favor of the defendants. Specifically, the trial court held that section 68130.5 does not conflict with section 505 of the IIRIRA.³⁹ The court's opinion was concise. Simply put, it stated that the state law "does not confer a benefit based on residency within California. The requirement of high school attendance . . . does not require residency in California because non-California residents may attend high school in this State."⁴⁰ Plaintiffs appealed the trial court's decision.

B. The Court of Appeals for the Third District

The Court of Appeals for the Third District delivered its opinion in *Martinez* on September 15, 2008.⁴¹ The court acknowledged the case involved several legal issues, but it stated "the most significant issue is whether California's authorization of in-state tuition to illegal aliens violates a federal law, title 8 of the United States Code (U.S.C.) section 1623."⁴² The court held that the California law did in fact violate federal law for two reasons. First, offering in-state tuition "is a 'benefit' conferred on illegal aliens within the meaning of the federal law."⁴³ Second, the statute's use of a high school attendance requirement to gain residency status is a "surrogate residence requirement" and therefore "thwarts the

35. *Id.*

36. *Id.*

37. *Id.*

38. CAL. EDUC. CODE § 68130.5 (West 2001).

39. *Martinez*, 2006 WL 2974303, at 1.

40. *Id.* at 3.

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

42. *Id.* at 522.

43. *Id.* at 523.

will of Congress manifest in title 8 section 1623.”⁴⁴ These two factors combine for an “Illegal Alien Tuition Scheme” that grants in-state tuition for illegal immigrants while simultaneously denying the same benefit to US citizens who are non-residents of California.⁴⁵

The court first addressed whether in-state tuition constituted a benefit under section 505. To help decide this point, the court considered the Conference Committee Report that accompanied the IIRIRA, which states, “This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education.”⁴⁶ Based on this report, the court held that in-state tuition constitutes a benefit under section 505.⁴⁷ In coming to this conclusion, the court rejected the defendant’s argument that “benefit” must be narrowly defined as a monetary payment to students.⁴⁸ Instead, it concluded that a tuition discount in the form of in-state tuition constitutes assistance, and this assistance is a benefit under federal law.⁴⁹ After determining that in-state tuition is indeed a benefit, the court next turned to whether the California law granted this benefit based on residency.⁵⁰

Although the California statute does not include the words resident, residence, or residency, the court nonetheless held that the statute violated federal law because it confers in-state tuition on the basis of residence.⁵¹ The court went to great lengths to define residency. It stated that residency usually requires physical location and intent to remain in the state.⁵² The defendants in the case, however, argued that the California statute itself does not use the word resident or residency and therefore does not violate federal law.⁵³

The court, however, rejected this argument. “A reasonable person would assume that a person attending a California high school for three years also lives in California. Such an

44. *Id.*

45. *Id.* at 524.

46. *Id.* at 531 (quoting H.R. REP. No. 104-828, at 184 (1996) (Conf. Rep.)).

47. *Id.* at 533.

48. *Id.* at 531.

49. *Id.*

50. *Id.* at 533.

51. CAL. EDUC. CODE § 68130.5 (West 2001).

52. *Martinez*, 83 Cal. Rptr. 3d at 533.

53. *Id.* at 535.

assumption would be reasonable, given that a school district is generally linked to residence.”⁵⁴ The court found that despite the absence of the word resident in the California statute, the requirement of high school attendance created a “de facto residence requirement.”⁵⁵ In other words, the state had attempted to employ a surrogate measure for residency itself. For these reasons, the appellate court reversed the trial court’s decision and held that the California statute violates federal law.⁵⁶ The Regents of the University of California appealed, and the case is currently pending before the California Supreme Court.

IV. CALIFORNIA EDUCATION CODE SECTION 68130.5 VIOLATES FEDERAL LAW

Despite legitimate policy reasons that exist for allowing illegal immigrants to pay in-state tuition, the California Supreme Court should hold that California Education Code section 68130.5, which grants the ability to qualify for in-state tuition to illegal immigrants, violates federal law. In deciding *Martinez*, the California Supreme Court must answer two questions regarding California Education Code section 68130.5. First, does offering in-state tuition constitute a benefit? Second, does the statute’s use of high school attendance as a condition for in-state tuition represent a requirement that is based on residency within the state? Similar to the Court of Appeals for the Third District, the California Supreme Court should answer both questions in the affirmative. Based on the text of both the California statute and federal law, the California Supreme Court should affirm the decision of the appellate court and hold that section 68130.5 violates federal law.

A. *In-State Tuition Constitutes a Benefit*

The first question the California Supreme Court must answer is whether offering in-state tuition qualifies as a benefit. As previously mentioned, federal law restricts states from offering illegal immigrants any “postsecondary education benefit” unless the same benefit is offered to US citizens who

54. *Id.*

55. *Id.* at 537.

56. *Id.* at 550.

are residents of other states.⁵⁷ The phrase “postsecondary education benefit” is not defined in federal law. The word “benefit,” however, is explained in 8 U.S.C. § 1621. This portion of the IIRIRA provides an illustrative rather than exhaustive list of what constitutes a benefit. According to section 1621, a benefit is “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual”⁵⁸

Proponents of state laws such as section 68130.5 in California interpret this language as only a restriction on offering monetary benefits to illegal immigrants.⁵⁹ These individuals argue that “payments or assistance” should be narrowly defined as monetary payments given directly by the state.⁶⁰ The types of benefits listed in 8 U.S.C. § 1621, according to these proponents, are all monetary in nature.⁶¹ If one were to apply 8 U.S.C. § 1621 to the postsecondary benefit restriction set forth in section 1623, only scholarships or fellowships should qualify.⁶² State statutes, such as California on the other hand, do not provide a monetary benefit but rather a *status* benefit based on resident status, according to this reasoning.⁶³

This argument is flawed because it ignores the actual monetary gain that accompanies residency status for tuition purposes. For example, an individual who attains residency status in California paid approximately \$8,373 in tuition and fees for the 2009–2010 academic year.⁶⁴ On the other hand,

57. 8 U.S.C. § 1623 (2006).

58. *Id.* at § 1621.

59. Michael Olivas is perhaps the most widely known academic who is an advocate of state laws that offer in-state tuition to illegal immigrants. He is the William B. Bates Distinguished Chair in Law at the University of Houston Law Center and Director of the Institute for Higher Education Law and Governance at UH. He has written extensively on the issue of illegal immigrants and in-state tuition. *See, e.g.,* Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004). Professor Olivas also helped draft the Texas statute on this issue and served as the state’s expert witness in litigation involving the Kansas statute.

60. Ruge & Iza, *supra* note 24.

61. Olivas, *supra* note 59, at 450.

62. Olivas, *supra* note 59, at 450.

63. Olivas, *supra* note 59, at 450.

64. UNIVERSITY OF CALIFORNIA, 2009–10 MANDATORY SYSTEMWIDE FEES, NONRESIDENT TUITION, AND FEES FOR SELECTED PROFESSIONAL SCHOOL STUDENTS, <http://budget.ucop.edu/fees/200910/0910genfees.html>.

non-residents paid a total of approximately \$31,090.⁶⁵ This difference of over \$20,000 in tuition rates and fees for residents versus non-residents is clearly a monetary benefit.⁶⁶ It is difficult to see exactly how saving over \$20,000 per year in the California higher education system is not a benefit. The amount saved may not equate to the institution providing a monetary payment to the resident student directly in the form of a fellowship, but the effect is clearly the same.⁶⁷ An individual is obviously better off financially if he or she is eligible to pay in-state rather than out-of-state tuition.

This difference in tuition rates for out-of-state versus in-state residents represents “assistance . . . provided to an individual” and therefore constitutes a benefit.⁶⁸ Thus, allowing illegal immigrants to pay in-state tuition under California Education Code section 68130.5 is a benefit under federal law. For these reasons, the California Supreme Court should find that offering in-state tuition constitutes a benefit. The court must then turn to whether residency is the basis used for conferring this benefit.

B. High School Attendance is a Surrogate Measure of Residency

In addition to finding that in-state tuition is a benefit under federal law, the California Supreme Court should determine that the state law confers this benefit based on a residency requirement. Although section 68130.5 does not explicitly use residency as a basis for offering in-state tuition, the law uses other requirements that constitute surrogate measures of residency. Instead of directly violating section 505 of IIRIRA by explicitly stating that in-state residency is required, the statute uses high school attendance as a measurement of residency.

Proponents of the California law state that section 68130.5 never mentions the word resident or residency. Therefore, residency is not the deciding factor in determining who does and does not receive in-state tuition, according to this argument. Instead, high school attendance is the separating

65. *Id.*

66. See Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 515 (2007).

67. *Id.*

68. 8 U.S.C. § 1621 (2006).

factor.⁶⁹ These proponents also point out that it is possible for residents of other states to attend California high schools.⁷⁰ In other words, California residency is not a prerequisite for high school attendance in the state. Therefore, even if in-state tuition is a benefit, California law does not violate federal law because this benefit is not offered “on the basis of residence within a State.”⁷¹

The California Supreme Court could accept this argument and hold that section 68130.5 does not grant in-state tuition based on residency. It is theoretically possible that a US citizen who is a non-resident may qualify under the California law for in-state tuition. Common sense, however, points to the opposite conclusion. Conventional wisdom suggests the vast majority of individuals who qualify for in-state tuition under the state law live in California while attending high school in the state. The number of individuals who attend high school in California while living in another state is likely to be extremely small or nonexistent. As the appellate court accurately noted, these assumptions are reasonable because attendance in “a school district is generally linked to residence.”⁷² In essence, allowing states to use high school attendance as a basis for offering in-state tuition “creates a semantic loophole so large that it swallows the rest of the statute.”⁷³ This interpretation of federal law means that states only violate section 505 of the IIRIRA by using the magic words resident, residence, or residency. All other criteria, regardless of their relation to residency, are therefore permissible as long as they do not use these magic words. According to this interpretation, state legislatures that are “willing to play semantic games” may avoid IIRIRA.⁷⁴

If common sense is not persuasive, perhaps the legislative history of the California statute is convincing. Although the California legislature passed section 68130.5 in 2001, the legislation was actually introduced in the state legislature two

69. Ruge & Iza, *supra* note 24, at 268.

70. Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 122 (2008).

71. 8 U.S.C. § 1623 (2006).

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

73. Kobach, *supra* note 67, at 510.

74. *Id.*

years earlier as AB 1197.⁷⁵ Both houses of the legislature eventually passed the bill, yet Governor Gray Davis vetoed the legislation.⁷⁶ The governor cited federal law as the reason for the veto.⁷⁷ The difference between AB 1197 and the bill as it was eventually signed into law (section 68130.5) is that the former included provisions making illegal immigrants who could not establish California residency eligible for in-state tuition.⁷⁸ To avoid another veto, lawmakers took out this provision mentioning residency and ultimately passed section 68130.5.⁷⁹ Thus, it appears that the California statute attempted to circumvent the residency language set forth in the IIRIRA. For these reasons, the law's high school attendance requirement is a de facto residency requirement.

In sum, California Education Code section 68130.5 provides a benefit in the form of in-state tuition based on a surrogate measure of residency. The California Supreme Court should accordingly hold that section 68130.5 violates federal law.

V. CONCLUSIONS

With US soldiers still deployed abroad fighting the war on terror and an economic crisis at the forefront of American politics, the United States Congress is unlikely to implement major immigration changes any time soon. Instead, the battle will likely continue in state legislatures and state courts. The amount of state legislation on immigration issues has increased dramatically in recent years. For instance, state legislatures introduced a total of 1,305 bills and enacted 206 laws in 2008 dealing with immigration issues.⁸⁰ Three years earlier, these numbers were only 300 and 38 respectively.⁸¹ In the first quarter alone of 2009, over 1,040 bills dealing with immigration issues were introduced.⁸²

The *Martinez* case provides the first opportunity for a state

75. *Martinez*, 83 Cal. Rptr. 3d at 539.

76. *Id.* at 539–40.

77. *Id.* at 540.

78. *Id.* at 540.

79. *Id.* at 541.

80. NATIONAL CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT (April 22, 2009), <http://www.ncsl.org/print/immig/StateImmigReportFinal2008.pdf>.

81. *Id.*

82. *Id.*

supreme court to decide whether state laws such as California's section 68130.5 violate federal law. The case, however, provides insight into larger issues. It "reflects the ongoing national debate concerning immigration policies, the roles undocumented aliens and their children play in our communities, and effective access to post-secondary education."⁸³ Despite legitimate policy reasons for allowing illegal immigrants to pay in-state tuition, the California Supreme Court should hold that its state law granting in-state tuition to illegal immigrants violates federal law.

If the California Supreme Court does hold that section 68130.5 violates federal law, state courts in the other nine states that have passed similar legislation may follow suit. Each state court possesses the authority to determine how state law should be interpreted within its jurisdiction. Therefore, regardless of how the California Supreme Court rules in *Martinez*, the decision will not bind other states; the case will serve as merely persuasive authority. However, as previously mentioned, California's statute falls into the second category of statutes that does not actually use the words resident, residence, or residency. If this category of statutes violates federal law without explicitly using these words, the first category surely violates federal law as well.

If other state courts do hold as the California Supreme Court should, advocates for providing illegal immigrants with in-state tuition may have to turn to other solutions. One possible solution is proposed federal legislation called the Development, Relief, and Education for Alien Minors (DREAM) Act.⁸⁴ As previously mentioned, approximately 65,000 illegal immigrants graduate from high school each year but are unable to attend institutions of higher education.⁸⁵ Because these individuals have no access to federal financial aid and are forced to pay out-of-state tuition rates, college is simply too costly for many of them.

The DREAM Act is an attempt to remove these financial

83. *Martinez v. Regents of Univ. of Cal.*, 2006 WL 2974303, at 1 (Cal. App. Dep't Super. Ct. Oct. 4, 2006), *rev'd*, 83 Cal. Rptr. 3d 518 (Cal. Ct. App. 2008), *review granted and opinion superseded by* 198 P.3d 1 (Cal. 2008).

84. S. 729, 111th Cong. (2009). The DREAM Act was originally introduced in 2001. It failed to pass either the House or the Senate each year since. It was most recently introduced on March 26, 2009.

85. PASSEL, *supra* note 2, at 2.

hurdles. In addition to repealing section 505 of the IIRIRA, which would allow each state the opportunity to grant in-state tuition to illegal immigrants, the bill puts certain individuals on a path to citizenship. To qualify under the bill, individuals must have come to the United States before they turned sixteen, must have lived in the country for at least five years, and be of good moral character.⁸⁶ Individuals who qualify are then granted conditional permanent resident status for a period of six years.⁸⁷ During this period, the individual is required to either attend an institution of higher education for two years or serve for two years in the US military.⁸⁸ Individuals who meet these requirements are granted citizenship at the end of the six-year period.

This article began with a description of President Barack Obama's historical rise in American politics and illustrated how his family history provides hope to others aspiring to succeed in this country. It seems fitting to come full circle with his endorsement of the DREAM Act:

Something that we can do immediately that I think is very important is to pass the Dream Act, which allows children who through no fault of their own are here but have essentially grown up as Americans, allow them the opportunity for higher education. I do not want two classes of citizens in this country.⁸⁹

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86. S. 729, 111th Cong. § 4 (2009).

87. *Id.* at § 5(a)(1).

88. *Id.* at § 5(d)(1)(D).

89. Democratic Presidential Debate between Hillary Clinton and Barack Obama at the University of Texas in Austin (February 21, 2008) (transcript available at <http://www.cnn.com/2008/POLITICS/02/21/debate.transcript/>).

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