

## Redefining “American”: The Constitutionality of State Dream Acts

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### Introduction

“I’m an American; I just don’t have the right papers.”<sup>1</sup> These are the words of Jose Antonio Vargas, formerly a journalist for the *Washington Post*, who recently wrote an article describing his experience living in the United States as an undocumented immigrant.<sup>2</sup> The message of the piece is simple: Vargas, who came to the United States illegally as a child, is no less American than any other person who grew up in the United States.<sup>3</sup> Vargas believed that hard work and contribution to American society would eventually provide him with a path to citizenship.<sup>4</sup> In describing his initial struggles to find employment, Vargas recalls finding hope in the introduction of the 2003 version of the federal

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1. Jose Antonio Vargas, *Define American: Jose’s Story*, YOUTUBE (June 20, 2011), <http://www.youtube.com/watch?v=TJH1IKqF8PA>. The quoted language is part of Vargas’s definition of “American”:

I define American as someone who works hard—someone who’s proud to be in this country, and wants to contribute to it. I’m independent; I pay taxes; I’m self-sufficient. I’m an American; I just don’t have the right papers. I take full responsibility for my actions, and I’m sorry for the laws that I broke.

*Id.*

2. See Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG., June 22, 2011, available at [http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=2&pagewanted=all).

3. *Id.* In this Note, the term “American” refers to a person who grew up in the United States, regardless of immigration status. For a discussion of the psychological attachment to the United States that undocumented children often develop, see Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 665–70 (2008).

4. Vargas, *supra* note 2. As of July 2012, there has been no change in Vargas’s immigration status, although his driver’s license has been cancelled. John Hudson, *What’s Happened to Jose Antonio Vargas Since His Admission*, ATLANTIC WIRE, July 22, 2011, <http://www.theatlanticwire.com/politics/2011/07/whats-happened-jose-antonio-vargas-his-admission/40272/>.

DREAM Act.<sup>5</sup> Indeed, the federal DREAM Act, which would provide both education benefits and provide a path to citizenship for qualifying undocumented immigrants,<sup>6</sup> is exactly the type of opportunity for which Vargas had hoped.<sup>7</sup>

Unfortunately, for Vargas and over two million more undocumented immigrants<sup>8</sup> who grew up as Americans, the federal DREAM Act is not expected to pass in the near future.<sup>9</sup> There is, however, some hope for Vargas and other undocumented immigrants who wish to remain in the United States. Several states have passed legislation allowing students to attend state universities, and even receive in-state tuition, without documentation of their immigration status.<sup>10</sup> Often referred to as

5. See Vargas, *supra* note 2 (“I was hopeful. . . . [The DREAM Act] seemed like the legislative version of what I’d told myself: If I work hard and contribute, things will work out.”); see also Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. (2003), available at <http://www.gpo.gov/fdsys/pkg/BILLS-108s1545rs/pdf/BILLS-108s1545rs.pdf>. The most recent version, S. 952, 112th Cong. (2011), can be found at <http://www.gpo.gov/fdsys/pkg/BILLS-112s952is/pdf/BILLS-112s952is.pdf> [hereinafter DREAM Act].

6. In this Note, the term “undocumented immigrant” refers to a foreign-born person living within the United States without authorization. Although coming to, and living in, the United States without authorization are illegal acts under 8 U.S.C. § 1304 (2006), this Note does not use the term “illegal” to refer to people because of the pejorative connotations often associated with such terminology. See, e.g., Jose Antonio Vargas, *Not Legal, Not Leaving*, TIME, June 25, 2012, available at <http://www.time.com/time/magazine/article/0,9171,2117243,00.html> (“Why haven’t you gotten deported? That’s usually the first thing people ask me when they learn I’m an undocumented immigrant or, put more rudely, an ‘illegal.’”).

7. See S. 952. The pathway to citizenship (which state legislation cannot provide) would require that an immigrant either complete at least two years of higher education, or two years of military service. *Id.* at § 5(a)(1)(D). Those who have committed crimes while in the United States would, in general, not be eligible for citizenship. *Id.* at § 3(b)(1)(D).

8. RAUL HINOJOSA OJEDA ET AL., NO DREAMERS LEFT BEHIND: THE ECONOMIC POTENTIAL OF DREAM ACT BENEFICIARIES 2 (2010) (estimating that policy analysis suggests that approximately 2.1 million individuals could qualify for legalization under the DREAM Act).

9. See Joyce Adams, *The DREAM Lives On: Why the DREAM Act Died and Next Steps for Immigration Reform*, 25 GEO. IMMIGR. L.J. 545, 545–47 (2011) (discussing the future of the Federal Act). The last congressional vote on the DREAM Act, on December 18, 2010, resulted in a handful of Democratic senators breaking party lines and voting against the bill. *Id.* at 545–46. Some Republican senators who had previously supported the Act (including Orrin Hatch, who initially introduced the DREAM Act in 2001 and had been a strong advocate for the bill) also voted against it. *Id.* at 546. For a more detailed analysis of the federal Act, see Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623 *passim* (2011).

10. See NAT’L IMMIGR. LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS 1 (2011). The states which to date have passed such legislation are California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington. *Id.*

state Dream Acts,<sup>11</sup> this type of legislation generally provides undocumented immigrants access to educational assistance.<sup>12</sup> Generally, under state Dream Acts, those who would be eligible for permanent residency under the federal DREAM Act would be eligible for in-state tuition at public universities.<sup>13</sup> Given that the increasing cost of higher education is making financing college a major concern, in-state tuition eligibility is a significant benefit for undocumented immigrants who wish to attend college.<sup>14</sup>

For those waiting to adjust their immigration status, the importance of education cannot be overstated.<sup>15</sup> First and foremost, enrollment in college can delay deportation. Policy guidelines distributed in June of 2011 by the director of Immigrations and Customs Enforcement (ICE) list “pursuit of education in the United States” as one factor that should weigh in favor of exercising prosecutorial discretion.<sup>16</sup> Similarly, a June

11. In this Note, the federal Act is referred to as the “DREAM Act,” and state acts are referred to as “Dream Acts.”

12. See Barron, *supra* note 9, at 652. Even if the DREAM Act is passed, it will not require states to provide in-state tuition to undocumented residents. See S. 952, 112th Cong. (2011). It will, however, allow states more flexibility in structuring such legislation. *Id.* § 9(b) (giving states the option to provide postsecondary education benefits, such as in-state tuition, to undocumented immigrants).

13. See, e.g., CAL. EDUC. CODE § 68130.5 (Deering 2011) (providing that those without lawful immigration status may be granted in-state tuition upon, *inter alia*, filing an affidavit stating their intent to petition for lawful status as soon as they are eligible).

14. See GEORGES VERNEZ & LEE MIZELL, GOAL: TO DOUBLE THE RATE OF HISPANICS EARNING A BACHELOR’S DEGREE 37 (2001) (“[Seventy-five] percent of Hispanic college freshmen have financial concerns, compared with [fifty-eight] percent of their non-Hispanic [W]hite counterparts. By their senior year, one-fourth of Hispanics report they are working full-time to support themselves in college compared with [ten] percent for non-Hispanic [W]hites.”). Although this Note does not focus upon race, an overwhelming majority (approximately eighty-four percent) of potential DREAM Act beneficiaries are from Mexico and Latin America. See JEANNE BATALOVA & MARGIE MCHUGH, DREAM VS. REALITY: AN ANALYSIS OF POTENTIAL DREAM ACT BENEFICIARIES 6 (2010).

15. See VERNEZ & MIZELL, *supra* note 14, at 13 (“Education is the single most important factor in providing the skills and knowledge needed by the nation’s economy and in determining the level of individual income. Higher levels of education are also associated with better health, better job satisfaction, and participation in civic and commercial activities.”).

16. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., MEMORANDUM ON EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS 4 (2011). Other factors to be considered include “the circumstances of the person’s arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child,” and “the person’s ties and contributions to the community.” *Id.* Factors that can weigh towards deportation under the policy include criminal history, prior removal from the United States, and a lack of

2012 memorandum from the Department of Homeland Security (DHS) encourages the use of prosecutorial discretion in cases where an undocumented immigrant is currently in school.<sup>17</sup> These small measures of leniency by ICE and by DHS are of vital importance to undocumented immigrants waiting to adjust their status, as the current grounds for petitions to adjust immigration status are extremely narrow. Additionally, a student's application for a green card can result in the deportation of his entire family.<sup>18</sup> State Dream Acts will not only help undocumented immigrants access education, they will also protect students' families while the student petitions to adjust his or her status.<sup>19</sup>

Helping to prevent deportation is only one of several benefits that state Acts would confer on undocumented immigrants. By providing access to education, state Dream Acts allow people a chance to prepare themselves for higher wage jobs as soon as they attain legal status.<sup>20</sup> Though state legislation cannot offer undocumented immigrants permanent resident status as the federal Act would, state Dream Acts are undeniably an important step for those waiting for the DREAM Act to pass.

However, any state action that encroaches on federal immigration policy raises concerns of federal preemption.<sup>21</sup> The political branches of the federal government have plenary power

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cooperation with immigration officials. *Id.* These guidelines have been subject to some controversy, as they parallel many of the terms the DREAM Act would provide. See, e.g., R. Cort Kirkwood, *Circumventing Congress: Failed Dream Act Mandated by ICE Director*, NEW AMERICAN, June 27, 2011, <http://thenewamerican.com/usnews/immigration/8015-circumventing-congress-failed-dream-act-mandated-by-ice-director>.

17. JANET NAPOLITANO, U.S. DEP'T OF HOMELAND SEC., MEMORANDUM ON EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN 1 (2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

18. See VERNEZ & MIZELL, *supra* note 14, at 2.

19. See also Adams, *supra* note 9, at 546–49 (discussing the Obama administration's deportation policy and its effect on those eligible for the DREAM Act).

20. See, e.g., Roberto G. Gonzales, *State Dream Acts Offer Important Opportunities to Undocumented Students*, HUFFINGTON POST (Sept. 8, 2011, 10:40 AM), [http://www.huffingtonpost.com/roberto-g-gonzales/state-dream-acts-offer-im\\_b\\_951342.html](http://www.huffingtonpost.com/roberto-g-gonzales/state-dream-acts-offer-im_b_951342.html) ("The California and Illinois Dream Acts provide an important boost to undocumented immigrant youngsters in their states *who might otherwise find themselves making early entries into the low wage labor market.*") (emphasis added).

21. See *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, as recognized in *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

over immigration, thus any type of state action regarding immigration likely encroaches upon this power.<sup>22</sup> For example, preemption concerns prompted the Supreme Court to strike down much of an Arizona bill (S.B. 1070)<sup>23</sup> designed to heighten immigration enforcement by Arizona police.<sup>24</sup> S.B. 1070 was initially struck down by the Ninth Circuit, citing preemption concerns, and the majority of the ruling was affirmed by the Supreme Court in June 2012.<sup>25</sup> Similarly, a city housing ordinance in Escondido, California that penalized landlords renting to undocumented immigrants was also enjoined due to “serious concerns regarding the constitutionality of the Ordinance and its preemption by federal law.”<sup>26</sup> Ordinances in Farmers Branch, Texas and Hazleton, Pennsylvania have also been subject to scrutiny in the courts.<sup>27</sup> That this type of restrictionist<sup>28</sup> state legislation is preempted by federal law suggests that state legislation providing education benefits to undocumented immigrants may also be preempted.<sup>29</sup> However, state Dream Acts may avoid invalidation on preemption grounds if drafted carefully so as to be consonant with relevant federal statutes.<sup>30</sup>

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22. See JON FEERE, PLENARY POWER: SHOULD JUDGES CONTROL U.S. IMMIGRATION POLICY? 1 (2009), available at <http://www.cis.org/articles/2009/back209.pdf>; Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens Are Preempted by Federal Law*, 2009 BYU EDUC. & L.J. 197, 226–33 (2009).

23. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) [S.B. 1070].

24. *Id.*

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

26. See *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056–57 (S.D. Cal. 2006).

27. See *Lozano v. City of Hazleton*, 620 F.3d 170 (2010). Although the Hazleton ordinance was found by the Third Circuit to be unconstitutional for “disrupting a well-established federal scheme for regulating the presence and employment of immigrants in the United States,” the holding was vacated by the Supreme Court and remanded to the Court of Appeals. *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011); cf. *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (engaging in a section-by-section preemption analysis of an Alabama law akin to Arizona’s S.B. 1070).

28. This Note uses the term “restrictionist” to describe a general category of legislation promulgating restrictions against undocumented immigrants.

29. See Kasarda, *supra* note 22, at 226–30 (arguing that state Dream Acts are preempted by federal statutes). *Contra* *Martinez v. Regents of Univ. of Cal.*, 50 Cal. 4th 1277 (2010) (holding that a California statute permitting certain undocumented immigrants to receive in-state tuition was not preempted by federal law).

30. See, e.g., *Martinez*, 50 Cal. 4th 1277. The court’s summary of the “main legal issue” in *Martinez* is illustrative of how careful drafting may avoid preemption problems:

The main legal issue is this: Section 1623 provides that an alien not

This Note compares two categories of state regulation of immigration: legislation which is intended to heighten enforcement of immigration policy, and legislation which is intended to provide financial assistance for college to undocumented immigrants. By contrasting these two kinds of state action, this Note explains why the preemption concerns which have been detrimental to S.B. 1070, and similar restrictionist state actions, are not applicable to state Dream Acts. Part I of this Note describes the current debate over state Dream Acts. Part II focuses on the federal power to regulate immigration, specifically on the doctrines of plenary power and federalism.<sup>31</sup> Part III discusses anti-immigration legislation and local ordinances in the United States which have been struck down by courts as preempted by federal law. Part IV argues that the state Dream Acts are constitutional, notwithstanding preemption concerns. Part V of this Note makes recommendations to states which are considering immigration relief legislation, and describes how states which have passed Dream Acts can improve the legislation to prevent challenges in court.

### **I. The Current Debate: Providing In-State Tuition to Undocumented Immigrants**

The debate over state Dream Acts is sharply divided and often heated. Proponents of Dream Acts often present this type of legislation as correcting a moral wrong.<sup>32</sup> Opponents argue Dream

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lawfully present in this country shall not be eligible *on the basis of residence within a state* for any postsecondary education benefit unless a citizen or national of this country is eligible for that benefit. In general, nonresidents of California . . . must pay nonresident tuition. But section 68130.5, subdivision (a), exempts from this requirement students—including those not lawfully in this country—who meet certain requirements, primarily that they have attended high school in California for at least three years. The question is whether this exemption is based on residence within California in violation of section 1623.

Because the exemption is given to all who have attended high school in California for at least three years (and meet the other requirements), . . . we conclude the exemption is not based on residence in California. . . . Accordingly, section 68130.5 does not violate section 1623.

31. See Monica Guizar, *Facts About Federal Preemption: How to Analyze Whether State and Local Initiatives are an Unlawful Attempt to Enforce Federal Immigration Law or Regulate Immigration*, IMMIGR. DAILY (last visited Oct. 19, 2012, 10:00 PM), <http://www.ilw.com/articles/2008,0129-guizar.shtml>.

32. See, e.g., Sam Stein, *Huckabee Opposes Changing 14th Amendment, Setting Himself Apart From GOP Again*, HUFFINGTON POST (Aug. 12, 2010, 10:41 AM), [http://www.huffingtonpost.com/2010/08/12/huckabee-opposes-changing\\_n\\_679781.html](http://www.huffingtonpost.com/2010/08/12/huckabee-opposes-changing_n_679781.html). Former Arkansas Governor Mike Huckabee framed the argument both in terms of moral right and economic policy in this interview:

Acts will be too costly.<sup>33</sup> Fears that giving undocumented students in-state tuition will be a burden on states, or that the Acts would result in immigrants taking jobs from citizens, are frequently mentioned.<sup>34</sup> These fears, which are often couched in racism and cultural misunderstanding, simply do not withstand economic analysis.<sup>35</sup> Even if fewer than half those eligible for educational aid under the federal DREAM Act applied for benefits, the overall economic benefit to the United States would be over \$1.4 trillion over forty years.<sup>36</sup> Allowing talented, capable people to join the workforce and contribute to state and local economies is undeniably a profitable enterprise.<sup>37</sup>

Beyond the economic benefits of state Dream Acts, however, the truth is that the Acts are a manifestation of the American Dream.<sup>38</sup> The students the Acts would affect have, like Vargas, lived in the United States since they were children.<sup>39</sup> Students

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When a kid comes to his [sic] country, and he's four years old and he had no choice in it . . . it's the state's responsibility—in fact, it is the state's legal mandate—to make sure that child is in school. So let's say that kid goes to school. That kid is in our school from kindergarten through the 12th grade. He graduates as valedictorian because he's a smart kid and he works his rear end off and he becomes the valedictorian of the school. The question is: Is he better off going to college and becoming a neurosurgeon or a banker or whatever he might become, and becoming a taxpayer, and in the process having to apply for and achieve citizenship, or should we make him pick tomatoes? I think it's better if he goes to college and becomes a citizen.

*Id.*

33. See Luis Miranda, *Get the Facts of the DREAM Act*, WHITE HOUSE BLOG (Dec. 1, 2010, 7:19 PM), <http://www.whitehouse.gov/blog/2010/12/01/get-facts-dream-act>.

34. See, e.g., Barron, *supra* note 9, at 653–54 (noting that California Governor Arnold Schwarzenegger vetoed a California law that would have allowed undocumented to students to apply for state aid because of the state's fragile fiscal condition); Adams, *supra* note 9, at 549 (“Those who opposed the [DREAM Act] are heartened that the new Congress will place a greater emphasis on preventing non-citizens from ‘taking’ jobs that could be filled by Americans and on immigration enforcement.”).

35. OJEDA ET AL., *supra* note 8, at 3 (“[T]he DREAM Act represents an opportunity for American taxpayers to significantly increase the return on our current, and already spent, investment in youths that the public school system educates in their K–12 years.”). Estimates of potential benefits are high; one government estimate, for example, predicts the DREAM Act would increase government revenue by \$2.3 billion over the next ten years. Miranda, *supra* note 33.

36. Miranda, *supra* note 33.

37. See *id.* (noting that DREAM Act-eligible students have been referred to as “the cream of the crop” by top military officials).

38. See Vargas, *supra* note 2.

39. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 1. The federal DREAM Act would only provide benefits to persons who are younger than age thirty-five at the time of its passage. DREAM Act, S. 952, 112th Cong (2011). State Acts generally

who wish to attend college often face a difficult choice upon graduating high school: they can either attempt to obtain a green card and risk their family's deportation or attempt to pay out-of-state tuition rates.<sup>40</sup> Faced with these choices, such as they are, students who would otherwise be qualified to attend college find their high school achievements are worth nothing.<sup>41</sup> Without any knowledge of their home country, these students find their best option is to remain in the United States illegally, working in low-wage jobs.<sup>42</sup> Simply put, a hardworking student who has not known any country except the United States deserves better.

A. *State Dream Acts Are Supported by the Equal Protection Clause*

The passage of state Dream Acts is not only a moral imperative, but is also a way to ensure equal protection under the United States Constitution.<sup>43</sup> Under *Plyler v. Doe*,<sup>44</sup> minor children of undocumented immigrants are entitled to education in public primary and secondary schools. *Plyler's* decision hinged on a key factor: minor children whose parents bring them to the United States illegally did not make the choice to do so themselves.<sup>45</sup> The Supreme Court of the United States held that these children are not comparably situated to those who actively elect to enter the country unlawfully.<sup>46</sup> Although the Court acknowledged that unlawful entry into the United States is a crime,<sup>47</sup> the majority ultimately held that the Equal Protection Clause applies equally to all persons within the borders of the United States, whether or not their entry was lawful.<sup>48</sup> As such, the Court held that the

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require that the student have attended high school in the state for a certain period of time in order to be eligible for tuition benefits. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 2.

40. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 1.

41. Gonzales, *supra* note 20 (stating that undocumented high school students "wake up to a nightmare" upon graduation) (emphasis omitted); see also Grace Talusan, *The Thing Is, I'm Undocumented*, BOS. MAG. (July 15, 2012), available at <http://www.bostonmagazine.com/articles/2012/06/dream-act-immigration/> (reporting the indecision and fear undocumented high school students face upon graduation).

42. See NAT'L IMMIGR. LAW CTR., *supra* note 10, at 2.

43. U.S. CONST. amend. XIV, § 1.

44. 457 U.S. 202 (1982).

45. *Id.* at 220.

46. *Id.* at 219–20.

47. *Id.* at 205 (citing 8 U.S.C. § 1325 (2006)).

48. *Id.* at 215. In making their decision, the Court quoted another case: The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application,



Texas statute which denied enrollment in public schools to undocumented children, without a showing of a valid state interest, was unconstitutional.<sup>49</sup>

While the public schools at issue in *Plyler* were elementary and secondary schools, not public universities,<sup>50</sup> the issue of equal protection remains when discussing students' access to higher education. Justice Brennan's majority opinion in *Plyler* also highlighted the likelihood that having a large uneducated class would perpetuate problems of "unemployment, welfare, and crime."<sup>51</sup> As the education level of the general population rises, the value of high school degrees diminishes.<sup>52</sup> Helping undocumented students access higher education is a step towards preventing the development of a high school-educated "subclass," leading to the same problems the *Plyler* Court feared.<sup>53</sup> Denying undocumented students access to higher education in an economy full of college-educated workers is, therefore, an equal protection issue under *Plyler*.

#### B. State Dream Acts Are Economically Sound

Proponents of restrictionist legislation argue that *Plyler* is only applicable in situations where no valid state interest is at stake.<sup>54</sup> This argument relies on an understanding that restrictionist legislation is only harmful to undocumented immigrants. Unfortunately, restrictionist requirements are not only harmful to the people they target, but also burdensome to lawfully present immigrants and to society as a whole.<sup>55</sup> Still,

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to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.

*Id.* at 212 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis omitted)).

49. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

50. *Id.* at 206.

51. *Id.* at 230.

52. See, e.g., Peter T. Kilborn, *For High School Graduates, A Job Market of Dead Ends*, N.Y. TIMES, May 30, 1994 at 1, 23.

53. *Id.*

54. *Plyler*, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.").

55. See *United States v. Arizona*, 703 F. Supp. 2d 980, 996–97 (D. Ariz. 2010) (holding that a system of routinely checking immigrants' papers is an unacceptable burden on those lawfully present in the country); NAT'L IMMIGR. LAW CTR., *supra* note 10, at 2 (describing the positive effect undocumented students can have on the national economy).

opponents of state Acts argue that state financial interests should prevent granting in-state tuition to undocumented students.<sup>56</sup> Indeed, out-of-state tuition for a four-year college can be close to double the tuition charged to an in-state student, and federal financial aid sources are not available to undocumented students.<sup>57</sup> While states are understandably concerned about protecting tuition revenue, the number of undocumented students who actually attend college in states that have passed Dream Acts has remained low.<sup>58</sup> Undocumented students are also likely to attend community colleges, which offer open enrollment, as an alternative to attending public universities.<sup>59</sup> In fact, schools that charge in-state tuition to undocumented students are seeing increased revenue from students who would not otherwise be able to attend college.<sup>60</sup> Overall, any negative impact on universities and students who are citizens is negligible—but the potential benefits to states that admit students under state Dream Acts are enormous.<sup>61</sup>

Financial arguments also weigh strongly in favor of allowing undocumented students to obtain a college education.<sup>62</sup> The jobs available to high school graduates are lower paying than those available to college graduates, meaning that undocumented students who successfully complete a bachelor's degree will generally have more money to spend, and will pay higher taxes.<sup>63</sup> Arguments that undocumented immigrants would take jobs away

56. Kris Kobach, *Kris Kobach: Repealing Tuition Law isn't 'Mean-Spirited'*, WICHITA TIMES, Feb. 22, 2011, <http://www.kansas.com/2011/02/22/1730509/kris-kobach-repealing-tuition.html>; NAT'L IMMIGR. LAW CTR., *supra* note 10, at 3.

57. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 1. For example, George Mason University charges \$9,000 annually for in-state students and \$17,000 for out-of-state or undocumented students. Dina Horwedel & Christina Asquith, *For Illegal College Students, An Uncertain Future*, 23 DIVERSE ISSUES IN HIGHER EDUC. 22, 24 (2006).

58. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 1.

59. NAT'L IMMIGR. LAW CTR., THE DREAM ACT: CORRECTING MYTHS AND MISCONCEPTIONS (2010), *available at* <http://www.nilc.org/dream-correcting-myths-misperceptions.html>.

60. *Id.*

61. *See id.* (remarking that the increased tax base from students who graduate from state universities will eventually allow more students to attend college).

62. BATALOVA & MCHUGH, *supra* note 14, at 13.

63. NAT'L CTR. FOR EDUC. STAT., U.S. DEPT' OF EDUC., THE CONDITION OF EDUCATION, MEDIAN ANNUAL EARNINGS AND PERCENTAGE OF FULL-TIME, FULL-WAGE AND SALARY WORKERS AGES 25–35, BY EDUCATIONAL ATTAINMENT, SEX, AND RACE/ETHNICITY (2012), *available at* <http://nces.ed.gov/programs/coe/tables/tableer2-1.asp> (reporting the median annual earnings of workers from ages 25 to 34, separated by education, sex, and race); *see also* Miranda, *supra* note 33, at 1 (outlining the CBO's estimation that the DREAM Act will cut deficits and increase revenues).

from U.S. citizens also fall flat.<sup>64</sup> Currently, most children of undocumented immigrants find themselves forced to take illegal jobs in the cash economy.<sup>65</sup> This is in itself an economic burden on states, which have already invested money into K-12 education for undocumented students.<sup>66</sup> It makes little sense to prevent these students from using their education. State Dream Acts would allow driven, talented members of society to join the American workforce by achieving the education necessary for high-skilled jobs<sup>67</sup>—a step essential to qualifying for the federal DREAM Act when it is passed.<sup>68</sup>

C. *State Dream Acts Are Sufficiently Limited in Scope*

Opponents of state Acts also argue that allowing in-state tuition encourages immigrants to come to the United States illegally.<sup>69</sup> Both state and federal Dream Acts are portrayed as rewarding those who broke the law and encouraging those who have broken the law to continue living under the radar in the United States.<sup>70</sup> This argument is an oversimplification of the issue. Not only has the Supreme Court held that undocumented children cannot be held responsible for their parents' wrongdoing, but United States immigration policy also has a long history of recognizing the importance of ties immigrants develop with the United States itself.<sup>71</sup> State Dream Acts are in no way amnesty, as their scope is limited to tuition benefits.<sup>72</sup> Even in states that have

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64. Miranda, *supra* note 33, at 3.

65. NAT'L IMMIGR. LAW CTR., THE ECONOMIC BENEFITS OF THE DREAM ACT AND THE STUDENT ADJUSTMENT ACT (2005), *available at* [http://www.nilc.org/econ\\_bens\\_dream&stdnt\\_adjst\\_0205.html](http://www.nilc.org/econ_bens_dream&stdnt_adjst_0205.html) [hereinafter NILC Report].

66. OJEDA ET AL., *supra* note 8, at 3.

67. See Miranda, *supra* note 33, at 1. Because those eligible for the federal Act are hardworking, talented people, military recruiters have proved to be strong supporters of its passage. *Id.* The Act is now incorporated into the Department of Defense's recruiting plan. *Id.*

68. NAT'L IMMIGR. LAW CTR., *supra* note 65; see also Stein, *supra* note 32 (supporting giving opportunities to talented students through Dream Acts).

69. See, e.g., Mark Krikorian, *Why Jose Antonio Vargas Should Leave the U.S.*, NAT'L PUB. RADIO (July 7, 2011), <http://www.npr.org/2011/07/07/137653256/why-jose-antonio-vargas-should-leave-the-u-s> (arguing that Dream Acts encourage illegal immigration and calling Dream Acts a form of amnesty).

70. *Id.*

71. Plyler v. Doe, 457 U.S. 202, 228 (1982); Shah, *supra* note 3, at 653–54 (describing the history of legal recognition of ties immigrants form with the United States).

72. See, e.g., TEX. HIGHER EDUC. COORD. BD., RESIDENCY AND IN-STATE TUITION 1 (2007), *available at* [www.sos.state.tx.us/border/forms/reports-07/thechb-april2007.pdf](http://www.sos.state.tx.us/border/forms/reports-07/thechb-april2007.pdf).

passed Dream Acts, those who commit criminal acts or are otherwise a burden to society are still subject to deportation.<sup>73</sup> Immigration to the United States also has a positive correlation with the availability of jobs—in other words, the prospect of employment, rather than a desire for citizenship, is most likely the strongest motivator for immigration to the United States.<sup>74</sup> State Dream Acts are, therefore, only a way to help talented students excel academically, and eventually find higher-paying jobs for which they would not otherwise be eligible.<sup>75</sup>

## II. State Power to Delegate Immigration

The doctrine of federalism gives states the freedom to experiment and learn from each other's mistakes.<sup>76</sup> Based upon the Tenth Amendment,<sup>77</sup> this doctrine allows national sentiment to develop through state legislation, often resulting in a change in federal policy.<sup>78</sup> In the often-contentious debate over immigration policy, state Dream Acts may ultimately be of utmost importance in developing federal policy. To be effective, however, the Acts must not exceed the limits of state power.<sup>79</sup> As such, two major concerns must be kept in mind by state legislators: the federal

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73. Miranda, *supra* note 33, at 2–3; Memorandum from John Morton, Dir. of U.S. Customs and Immigration Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel 3–6 (June 17, 2011); *see also* BATALOVA & MCHUGH, *supra* note 14, at 1–2 (remarking that the federal DREAM Act does not provide amnesty, but rather allows certain undocumented immigrants to apply for a conditional permanent residency status).

74. Julia Preston, *Mexican Data Show Migration to U.S. in Decline*, N.Y. TIMES, May 15, 2009, at A1, available at <http://www.nytimes.com/2009/05/15/us/15immig.html?pagewanted=all> (“Mexican and American researchers say that the current decline [in migration to the United States] . . . is largely a result of Mexicans’ deciding to delay illegal crossings because of the lack of jobs in the ailing American economy.”).

75. *See* Gonzales, *supra* note 20.

76. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 832 (2008) (noting that states which have required high levels of documentation from migrant workers have quickly found that this detrimentally reduces the available labor force).

77. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

78. *See, e.g.*, U.S. CONST. amend. XVIII (establishing Prohibition in the United States); U.S. CONST. amend. XXI (repealing Prohibition). Both amendments were passed in response to national sentiment. *See* Kris W. Kobach, *May “We the People” Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. DAVIS L. REV. 1, 80–88 (1999) (explaining the role of state actions in repealing Prohibition).

79. *See* De Canas v. Bica, 424 U.S. 351, 354–56 (1976).

plenary power to regulate immigration, and federal laws which could preempt state legislation.<sup>80</sup>

#### A. *The Federal Plenary Power to Regulate Immigration*

The federal government's power to regulate immigration stems from Article I, Section 8 of the Constitution.<sup>81</sup> However, the language of the Constitution is silent as to whether states may also regulate immigration; it is neither expressly authorized nor expressly barred.<sup>82</sup> As such, the federal plenary power over immigration is largely based in court precedent.<sup>83</sup> Beginning in the late nineteenth century, the United States Supreme Court rejected state and local measures attempting to regulate immigration.<sup>84</sup> Specifically, the Court held that states did not have the power to enforce immigration laws through criminal sanctions.<sup>85</sup>

Even so, states and localities do have the right to impose some regulations on undocumented immigrants within their borders.<sup>86</sup> Through the 1996 passage of § 287(g) of the

80. See Debra Urteaga, *California Dreaming: A Case to Give States Discretion in Providing In-State Tuition to Its Undocumented Students*, 38 HASTINGS CONST. L.Q. 721, 731•37 (2011) (analyzing whether the California Dream Act is preempted).

81. U.S. CONST. art. I, § 8, cl. 4, 18 ("The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .").

82. See Huntington, *supra* note 86, at 812–13 (arguing that the Constitution's silence on the regulation of immigration is due to the debate over slavery at the time of its writing).

83. FEERE, *supra* note 22, at 1–2 (describing powers courts have asserted in immigration law).

84. See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). The Supreme Court first struck down a state immigration regulation in 1875, citing foreign policy concerns:

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

*Id.* For a more detailed history of immigration federalism in the late nineteenth century, see Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1566–74 (2008).

85. Stumpf, *supra* note 84, at 1574; see also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that criminal sanctions could not be applied differently to immigrants than to natural citizens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (ruling that constitutional protections applied to immigrants in criminal cases); *Bugajewitz v. Adams*, 228 U.S. 585 (1913) (holding that only the federal government has the power of deportation).

86. Huntington, *supra* note 76, at 800–05.

Immigration and Nationality Act,<sup>87</sup> state and local law enforcement were given the power to enforce federal immigration laws.<sup>88</sup> This power is limited only to state actions which do not interfere with federal regulatory interests; for example, states cannot stop and detain a person “solely on suspicion of deportability.”<sup>89</sup> Still, through the delegation of the power of enforcement, some federal authority was thereby granted to the states.<sup>90</sup> The federal government’s plenary power over immigration is therefore not absolute.<sup>91</sup>

*B. Federal Power to Preempt State Immigration Law Is Based Upon De Canas v. Bica*

The federal plenary power to regulate immigration is also supported by the Supremacy Clause, which dictates that federal law will preempt conflicting state law.<sup>92</sup> Especially in foreign affairs, where laws enacted in one state could endanger the nation as a whole, preemption is a concern that state lawmakers must consider.<sup>93</sup> As immigration and foreign policy are intimately related, state Dream Acts can only be constitutional if they do not encroach upon federal power.<sup>94</sup>

87. 8 U.S.C. § 1357(g) (2006).

88. *Id.* The statute reads in part:

[T]he Attorney General may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer . . . may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

*Id.* See also Marissa B. Litwin, *The Decentralization of Immigration Law: The Mischief of § 287(g)*, 41 SETON HALL L. REV. 399, 409–10 (2011) (criticizing the statute for leading to unconstitutional racial profiling and other breaches of constitutional law).

89. April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1152 (2004) (describing law enforcement powers under 287(g)).

90. See Litwin, *supra* note 88, at 409 (“By delegating immigrant detention to local authorities, the federal government again decentralized immigration control.”).

91. *Id.*

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

93. Huntington, *supra* note 86, at 816; see also *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (“When the national government . . . has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute . . .”).

94. See *Hines*, 312 U.S. at 64 (“One of the most important and delicate of all

Not all state statutes related to immigration status are subject to preemption, however. In *De Canas v. Bica*, the United States Supreme Court held that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”<sup>95</sup> The Court listed three situations where a state statute would be preempted by federal law: “1) where the local law attempts to regulate immigration; 2) where the local law attempts to operate in an area occupied by federal law; and 3) where implementation of the local law is an obstacle or ‘burdens or conflicts in any manner with any federal laws or treaties.’”<sup>96</sup> By naming three distinct categories, the *De Canas* Court broadened the reach of the doctrine of preemption. The first category is often referred to as facial regulation of immigration; the latter two categories have been named field and conflict preemption, respectively.<sup>97</sup>

### III. Restrictionist Legislation in Courts

This Section discusses court analysis of restrictionist legislation passed by Arizona and Alabama.<sup>98</sup> Both pieces of legislation were written as lists of provisions to be incorporated into each state’s code.<sup>99</sup> Because each bill also included a severability provision, courts were able to examine each provision separately, and invalidation of any one provision did not invalidate the bill as a whole.<sup>100</sup>

#### A. Arizona: S.B. 1070 Analyzed Under *De Canas*

In 2010, the Arizona Senate enacted the Support Our Law

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international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.”).

95. *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

96. *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1055 (S.D. Cal. 2006) (summarizing the factors outlined in *De Canas*).

97. *Id.* When a statutory scheme created by Congress is so “pervasive” that the intent was that states would not be able to “supplement it,” state regulation is subject to field preemption. When it is “impossible” to comply with both state and federal regulations, or when state law interferes with Congressional objectives, the state regulation is subject to conflict preemption, *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 n.3 (10th Cir. 1999); *McKenzie*, *supra* note 89, at 1151–52 (discussing federal preemption of state immigration statutes).

98. See S.B. 1070, *supra* note 23; Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Act No. 2011-535, Reg. Sess. (Ala. 2011), available at <http://www.ncsl.org/documents/statefed/AlabamaH56.pdf> [hereinafter H.B. 56].

99. S.B. 1070, *supra* note 23; H.B. 56, *supra* note 98.

100. S.B. 1070, *supra* note 23, at § 12(a); *United States v. Alabama*, 813 F. Supp. 2d. 1282, 1292 (N.D. Ala. 2011).

Enforcement and Safe Neighborhoods Act (S.B. 1070).<sup>101</sup> Shortly thereafter, the United States filed a complaint in United States District Court of Arizona to enjoin the bill.<sup>102</sup> The district court did enjoin key parts of S.B. 1070, including provisions which: 1) required officers to determine a person's immigration status of any person stopped, detained, or arrested; 2) created a crime for the failure to apply for or carry registration papers; 3) created a crime for an undocumented immigrant to solicit, apply for, or perform work; and 4) authorized the warrantless arrest of a person when there is probable cause they could be deported.<sup>103</sup> Of these provisions, only the provision requiring officers to determine a person's immigration status was upheld by the United States Supreme Court.<sup>104</sup> Other sections of the bill were not enjoined, as S.B. 1070 contained a severability clause.<sup>105</sup>

Notably, both the district court and the Supreme Court cited concerns with burdening lawful United States residents, as well as the burdens on federal resources this type of state law can require.<sup>106</sup> Ultimately, however, both courts were most concerned with preemption by federal statutes.<sup>107</sup> As stated by the district court, "[e]ven though Arizona's interests may be consistent with those of the federal government, it is not in the public interest for Arizona to enforce preempted laws."<sup>108</sup> Since three of the four provisions at issue were struck down by the Supreme Court, other states with similar restrictionist statutes may need to reexamine whether these statutes are preempted by federal law.

#### B. *Alabama: H.B. 56 Analyzed Under Wyeth*

Much like Arizona's S.B. 1070, Alabama's Beason-Hammon Alabama Taxpayer and Citizen Protection Act (H.B. 56),<sup>109</sup> was

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101. S.B. 1070, *supra* note 23.

102. *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

103. *Id.* at 987.

104. *Arizona v. United States*, 132 S. Ct. 2492 (2012) (upholding the provision on the grounds that federal and state officials are encouraged to communicate with one another, and refusing to consider constitutional challenges to the provision because the law was not yet in effect).

105. *Arizona*, 703 F. Supp. 2d at 993. Only the four provisions named above were considered by the Supreme Court. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

106. *Arizona*, 703 F. Supp. 2d at 996.

107. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) ("The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.").

108. *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

109. H.B. 56, *supra* note 98.



challenged by the United States as being preempted by federal law.<sup>110</sup> The district court granted motions for injunctions to certain sections of H.B. 56, but denied injunctions for other sections.<sup>111</sup> H.B. 56 included sections similar to Arizona's S.B. 1070, as well as provisions which made it unlawful to conceal, harbor, or transport an undocumented immigrant; barred employers from hiring undocumented immigrants if United States citizens had applied; and prevented undocumented immigrants from entering into contracts or business transactions.<sup>112</sup>

The district court chose to enjoin some selected provisions of this bill, but did not enjoin others, including a section which required police officers to determine a person's status upon a stop or arrest.<sup>113</sup> On appeal, the Eleventh Circuit Court of Appeals upheld the majority of the district court's ruling, but enjoined two additional provisions, sections 10 and 28.<sup>114</sup> Section 10 of H.B. 56 would have created a misdemeanor crime for immigrants to be undocumented;<sup>115</sup> section 28 of H.B. 56 would have required elementary and secondary schools to determine students' immigration status upon enrollment.<sup>116</sup> The Eleventh Circuit enjoined each of these provisions.<sup>117</sup>

Although *United States v. Alabama* is an important marker in the debate over state immigration legislation, the Eleventh Circuit's analysis is not entirely on point. Notably, only the district court produced any preemption analysis.<sup>118</sup> The opinion issued by the court of appeals only referenced the requirements for granting an injunction, without providing any analysis of preemption.<sup>119</sup> The district court's preemption analysis was based on the Supreme Court case of *Wyeth v. Levine*.<sup>120</sup> *Wyeth* does discuss the issue of preemption by federal law, but unlike *De*

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110. *United States v. Alabama (Alabama I)*, 813 F. Supp. 2d 1282 (D. Ala. 2011).

111. *United States v. Alabama*, 443 F. App'x 411 (11th Cir. 2011).

112. *Alabama I*, 813 F. Supp. 2d at 1292–93.

113. *Id.* at 1342–44.

114. *United States v. Alabama*, 443 F. App'x at 420.

115. H.B. 56, *supra* note 98, at § 10.

116. *Id.* at § 28.

117. *United States v. Alabama*, 443 F. App'x at 420.

118. *United States v. Alabama (Alabama I)*, 813 F. Supp. 2d 1282, 1299–301 (D. Ala. 2011).

119. *United States v. Alabama*, 443 F. App'x 411 (11th Cir. 2011). To date, certiorari has not been filed with the United States Supreme Court.

120. *Wyeth v. Levine*, 555 U.S. 555 (2009). *Wyeth* sets a precedent of two “cornerstones” of preemption analysis: first, the purpose of Congress in enacting federal regulations must be analyzed, and second, that a presumption against preemption applies in any field which States have traditionally regulated. *Id.* at 565–66.

*Canas*, the statute at issue in *Wyeth* was not an immigration regulation.<sup>121</sup> As such, *De Canas* and the three categories of preempted statutes it outlines provide more guidance to courts faced with state immigration statutes.

### C. *Other Challenges to Restrictionist Legislation*

The statutes challenged in Alabama and Arizona are far from the only examples of their kind, and challenges to such laws are continually being brought. On October 31, 2011, a complaint was filed by the United States against the state of South Carolina challenging a state law, Act 69.<sup>122</sup> The Act would, among other things, mandate status determinations, prohibit undocumented immigrants from working, and create an "Illegal Immigration Enforcement Unit."<sup>123</sup> The Act was expected to become effective in January 2012; however, a preliminary injunction against the law was issued by the district court shortly before the law went into effect.<sup>124</sup> The court enjoined provisions similar to those in S.B. 1070, and highlighted three major concerns about restrictionist legislation held by the federal government: federal ability to control foreign relations, the occupation of the field of immigration enforcement by the federal government, and the need for immigration control to be within the discretion and control of the federal government under the Immigration and Nationality Act.<sup>125</sup> In issuing the injunction, the court found that the United States would likely suffer irreparable harm should Act 69 be enforced.<sup>126</sup>

121. *Id.* The issue in *Wyeth* was whether the Food and Drug Administration's labeling judgments preempted state law product liability claims. *Id.* at 563–64.

122. Complaint for Declaratory and Injunctive Relief, at 1, *United States v. South Carolina* 840 F. Supp. 2d 898 (D.S.C. 2011), available at [www.justice.gov/opa/documents/us-v-sc-complaint.pdf](http://www.justice.gov/opa/documents/us-v-sc-complaint.pdf). See also Press Release, Dep't of Justice, Department of Justice Challenges South Carolina's Immigration Law (Oct. 31, 2011), available at <http://www.justice.gov/opa/pr/2011/October/11-ag-1429.html>.

123. S. 20, 2011 Gen. Assemb., 119th Sess. (S.C. 2011) §§ 6, 10, 16, available at [http://www.scstatehouse.gov/sess119\\_2011-2012/bills/20.htm](http://www.scstatehouse.gov/sess119_2011-2012/bills/20.htm).

124. Press Release, Dep't of Justice, *supra* note 122; *South Carolina*, 840 F. Supp. 2d 898.

125. *South Carolina*, 840 F. Supp. 2d at 916–17, 918, 921–22; see also Complaint for Declaratory and Injunctive Relief, *supra* note 122, at 16 (outlining the federal government's arguments against Act 69).

126. *South Carolina*, 840 F. Supp. 2d at 924–27. The only provision of Act 69 which the court did not enjoin was section 15, which prohibits making or selling counterfeit I.D.s for undocumented immigrants. *Id.* at 927. For a more detailed analysis of the South Carolina decision, see Patrick J. Charles, *Recentring Foreign Affairs Preemption in Arizona v. United States: Federal Plenary Power, the Spheres of Government, and the Constitutionality of S.B. 1070*, 60 CLEV. ST. L. REV. 133, 135–36 (2012).

These three concerns translate directly to the guidelines outlined in the Supreme Court case of *De Canas v. Bica*.<sup>127</sup> First, a regulation of immigration which conflicts with federal law, or attempts to regulate the same field, is unconstitutional.<sup>128</sup> The *De Canas* Court stated that a regulation of immigration “is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>129</sup> Second, preemption under *De Canas* applies not only to statutes that facially regulate immigration, but also to those which attempt to operate in an area occupied by federal law (field preemption).<sup>130</sup> Finally, statutes whose implementation burdens or conflicts with federal law are preempted (conflict preemption).<sup>131</sup> Like restrictionist legislation, state Dream Acts regulate immigration. In order to withstand scrutiny in courts, state Acts must not occupy the same field as federal law and must not be either field or conflict preempted.

#### IV. State Dream Acts Are Fundamentally Constitutional

Although state Dream Acts are a type of immigration policy, they are of a drastically different nature than state restrictionist legislation. While restrictionist legislation accomplishes its purpose by imposing regulations on undocumented immigrants (and, often, the general population as well), state Dream Acts are often little more than a redefinition of the term “resident.”<sup>132</sup> Restrictionist legislation operates mainly in the criminal sphere, whereas Dream Acts provide opportunities that undocumented immigrants would not otherwise be afforded.<sup>133</sup> Despite this fundamental difference, the three-part structure of *De Canas v. Bica* applies equally to both types of legislation.<sup>134</sup> And, unlike restrictionist legislation, state Dream Acts are constitutional under this three-part analysis.<sup>135</sup>

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127. *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

128. *Id.* at 357 n.5.

129. *Id.* at 355.

130. *Id.* at 356.

131. *Id.* at 357 n.5.

132. *See, e.g.*, CAL. EDUC. CODE § 68130.5 (Deering 2011).

133. *Compare* S.B. 1070, *supra* note 23, at § 5(c) (exemplifying restrictionist legislation), *with* CAL. EDUC. CODE § 68130.5 (Deering 2011) (epitomizing many state Dream Acts).

134. *See* Urteaga, *supra* note 80, at 735–46 (applying the *De Canas* test in a preemption analysis of the California Dream Act).

135. *Id.* at 745–46.

A. *Restrictionist Legislation Preempted by Federal Law*

Federal statutes and regulations come into play in an analysis of state restrictionist statutes. The first is the Immigration Reform and Control Act (IRCA), which regulates employment by sanctioning employers who hire undocumented immigrants.<sup>136</sup> Regulations passed by government authorities, such as the Attorney General or the Immigration and Naturalization Service (INS), may also preempt state regulations.<sup>137</sup> As such, state restrictionist legislation is particularly likely to either directly conflict with federal law, or be subject to field or conflict preemption.<sup>138</sup>

1. Failure to Carry Documentation: A Regulation of Immigration

In *Arizona v. United States*, the Supreme Court analyzed section 3 of S.B. 1070, which created a misdemeanor crime for failure to complete or carry an alien registration document.<sup>139</sup> The statute imposed penalties of a \$100 fine and up to twenty days in jail for a first offense.<sup>140</sup> Relying upon *Hines v. Davidowitz*, the Court held that federal regulation of alien registration was sufficiently comprehensive that "the Federal Government has occupied the field of alien registration."<sup>141</sup> Under *Hines*, states cannot enforce additional measures to such a comprehensive federal scheme.<sup>142</sup> Although S.B. 1070 did not attempt to change the federal requirements for alien registration, the Court held that "the complete scheme of registration precludes states from

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<sup>136</sup> 8 U.S.C. § 1324 (2006); see also *League of United Latin Am. Citizens v. Wilson (LULAC)*, 908 F. Supp. 755, 775 (C.D. Cal. 1995) ("Congress has fully occupied the field of immigration regulation through enactment and implementation of the INA."); *State v. Lopez*, 948 So. 2d 1121 (4th Cir. 2006) (Louisiana statute imposed harsher penalties for driving without identification than were contemplated by the federal REAL ID Act, Pub.L. No. 109-13).

<sup>137</sup> See, e.g., 8 U.S.C. § 1421 (2006) (vesting sole naturalization authority in the United States Attorney General); 8 U.S.C. § 1551-74 (2006) (establishing the INS and listing its powers and responsibilities); 8 USC § 1601(6) (2006) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.").

<sup>138</sup> See, e.g., Brief for United States, *supra* note 122.

<sup>139</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2501-03 (2012).

<sup>140</sup> ARIZ. REV. STAT. § 13-1509 (LexisNexis 2012).

<sup>141</sup> *Arizona v. United States*, 132 S. Ct. at 2502; see also *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010) (holding that federal immigration regulations created "an integrated and comprehensive system of registration.").

<sup>142</sup> *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) ("[W]here the federal government . . . has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

conflicting with or complementing the federal law.”<sup>143</sup>

A similar provision in Alabama’s H.B. 56 was challenged in *United States v. Alabama*.<sup>144</sup> Unlike the *Arizona* court, the district court in *Alabama* chose not to enjoin section 10 of H.B. 56, finding no Congressional intent to preempt state law on the subject.<sup>145</sup> The *Alabama* district court held that the state could enforce section 10, finding that the statute did not affect “the uniformity of the national standard for alien registration.”<sup>146</sup> On appeal, however, this provision was enjoined after minimal discussion.<sup>147</sup> The appellate court did, however, note that there was a substantial likelihood of irreparable harm to those affected by section 10.<sup>148</sup> Considering the *Arizona* court’s description of the substantial harms caused by such registration requirements, *Alabama*’s reversal is unsurprising.<sup>149</sup> The registration requirements are a facial regulation of immigration, falling under the first prong of the *De Canas* test, and are therefore, preempted by federal law.<sup>150</sup>

## 2. Status Determinations: An Example of Conflict Preemption

Provisions in S.B. 1070 which required police officers to determine a person’s immigration status at any lawful stop, detention, or arrest were initially enjoined by the district court in *United States v. Arizona*.<sup>151</sup> S.B. 1070 required that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.”<sup>152</sup> The district court rejected an interpretation of this sentence that only required status determinations where a reasonable suspicion exists.<sup>153</sup> Because this provision would be generally applicable in any arrest situation, the court found this requirement would be unduly

143. *Arizona*, 703 F. Supp. 2d at 999 (citing *Hines*, 312 U.S. at 66–67).

144. *United States v. Alabama (Alabama I)*, 813 F. Supp. 2d 1282 (D. Ala. 2011).

145. *Id.* at 1306 (“The United States has not directed this court to any authority for the proposition that Congress intended *exclusivity*, rather than *uniformity*.”).

146. *Id.* at 1307.

147. *United States v. Alabama (Alabama II)* 443 F.App’x. 411, 420 (11th Cir. 2011) (reversing the decision of the district court with regard to section 10 of H.B. 56).

148. *Id.* at 419–20.

149. *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (noting that section 3 of S.B. 1070 would lead to more state prosecutions for federal crimes, and would thereby alter penalties set by Congress).

150. *Id.* at 982.

151. *Id.*

152. ARIZ. REV. STAT. § 11-1051 (Lexis Nexis 2012).

153. *Arizona*, 703 F. Supp. 2d at 994.

burdensome on federal resources, and would “impermissibly shift the allocation of federal resources away from federal priorities.”<sup>154</sup> Overall, the district court found that S.B. 1070 was preempted by federal law for two key reasons: the impermissible burden placed upon those lawfully present in the United States, and the “burden on federal resources and priorities.”<sup>155</sup>

Despite the district court’s ruling that section 2(B) of S.B. 1070 was preempted, the Supreme Court chose not to enjoin this provision.<sup>156</sup> Instead of focusing on burdens such legislation would place on federal resources, the Court construed the statute to prevent any potential conflict.<sup>157</sup> While unconstitutionally lengthy detentions would likely present a conflict with federal law, the Court could not determine whether such detentions would take place once the law went into effect.<sup>158</sup> Likewise, the Court noted that Congress encouraged cooperation between state and federal authorities, as 2(B) requires.<sup>159</sup> The Court did acknowledge that section 2(B) could be preempted with a showing that the law “has other consequences that are adverse to federal law and its objectives.”<sup>160</sup> However, by making this note, the Court left the door open for a later ruling that even though it may not be preempted in theory, in practice, section 2(B) conflicts with constitutional or other federal law.

### 3. Criminalization of Seeking Employment: Field Preemption by Inaction

Both Arizona’s S.B. 1070 and Alabama’s H.B. 56 made it a misdemeanor offense for undocumented immigrants to work or apply for jobs.<sup>161</sup> Section 5(c) of Arizona’s S.B. 1070 provided that “it is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.”<sup>162</sup> The language

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154. *Id.* at 995.

155. *Id.* at 998.

156. *Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012).

157. *Id.* at 2516 (“[W]ithout the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.”).

158. *Id.*

159. *Id.* at 2509.

160. *Id.*

161. S.B. 1070, *supra* note 23, at § 5(c); H.B. 56, *supra* note 98, at § 11(a).

162. S.B. 1070, *supra* note 23, at § 5(c).

of section 11(a) of H.B. 56 was practically identical.<sup>163</sup>

The *Arizona* Court, analyzing S.B. 1070 §5(c), found that this provision was preempted because Congress had regulated the field of employment for undocumented workers to its satisfaction.<sup>164</sup> In particular, both the district court and the Supreme Court noted that the legislative history of IRCA<sup>165</sup> indicated a congressional intent to avoid punishing workers.<sup>166</sup> The district court held that, if a portion of a comprehensive federal scheme is intentionally left without regulation, an inference can be drawn that the federal scheme preempts state action.<sup>167</sup> “Congress’ inaction in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work.”<sup>168</sup> The United States District Court of Alabama, five months later, quoted and affirmed this language.<sup>169</sup> Both the *Alabama* and the *Arizona* courts emphasized that they could only make this finding when there was both action and inaction by Congress; inaction alone does not create an inference of preemption.<sup>170</sup>

Notably, the *Alabama* district court found that section 11(a) of H.B. 56 was subject to conflict preemption as well as field preemption.<sup>171</sup> Whereas the congressional scheme levied sanctions against employers who violated the law, the Alabama statute

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163. H.B. 56, *supra* note 98, at § 11(a) (“It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.”).

164. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).

165. 8 U.S.C. § 1324(a) (2006).

166. *Arizona v. United States*, 132 S. Ct. at 2505 (“The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties . . . It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.”); *United States v. Arizona*, 641 F.3d 339, 357 n. 17 (2011) (quoting *National Center for Immigrants’ Rights, Inc. v. I.N.S.*, 913 F.2d 1350, 1368 (9th Cir. 1990)) (“during the hearings which shaped IRCA, the Executive Assistant to the INS Commissioner stated that the INS did ‘not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the [INA] gives him.’”).

167. *United States v. Arizona*, 641 F.3d at 359 (“Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.”).

168. *Id.*

169. *United States v. Alabama (Alabama I)*, 813 F. Supp. 2d 1282, 1316 (D. Ala. 2011).

170. *See Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

171. *Alabama I*, 813 F. Supp. 2d at 1335–36.

penalized the workers themselves.<sup>172</sup> The district court found this to be in direct conflict with a deliberate decision by Congress.<sup>173</sup>

### B. *State Acts Are Not Preempted Under De Canas*

While state restrictionist legislation is preempted by federal legislation in several ways, state Dream Acts are not subject to the same concerns. Applicable federal statutes have been shown not to preempt Dream Acts under *De Canas*.<sup>174</sup> Furthermore, state Acts are constitutional under the Equal Protection Clause, and are not harmful to citizens.<sup>175</sup> State Dream Acts are, all told, very different in nature from restrictionist legislation.

#### 1. Applicable Federal Statutes

States enacting immigration legislation must be mindful of two federal statutes. The first, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), was passed in 1996.<sup>176</sup> Under PRWORA, undocumented immigrants are not eligible for state or local public benefits.<sup>177</sup> However, under subsection (d), states may affirmatively provide for such eligibility.<sup>178</sup> Shortly after PRWORA was signed into law, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRARA) was passed.<sup>179</sup> IIRARA provides that undocumented students cannot be eligible for postsecondary education benefits, such as in-state tuition, unless United States citizens or nationals are eligible for the same benefit.<sup>180</sup> Although state Dream Acts

172. *Id.* at 1312 ("The text of IRCA reflects a clear choice on the part of Congress to deter the employment of unauthorized aliens through a detailed scheme of civil and criminal sanctions against *employers*, not *employees*.").

173. *Id.* at 1312–13.

174. *See, e.g.,* *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

175. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Day v. Bond*, 500 F.3d 1127, 1133 (10th Cir. 2007).

176. Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. § 1621 (2006).

177. *Id.*

178. *Id.*

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.

*Id.*

179. Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1623 (2006).

180. *Id.*

[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary



have been challenged under this language, these claims have not been successful.<sup>181</sup> In-state tuition benefits are calculated to credit residents of a state for their daily contributions to the local economy.<sup>182</sup> Out-of-state students, unlike undocumented in-state students, are not contributing to the economy, and therefore, whether they are eligible for in-state tuition is not relevant to the purpose of the benefit.<sup>183</sup>

Court decisions have not been consistent as to whether PRWORA and IIRARA in combination preempt state restrictionist legislation.<sup>184</sup> For example, the court in *League of United Latin American Citizens v. Wilson* held that a state statute that barred undocumented immigrants from receiving social services, health care, and education was preempted by PRWORA.<sup>185</sup> By contrast, *Equal Access Education v. Merten* found that a state policy barring undocumented students from admission to public universities was not preempted by either PRWORA or IIRARA.<sup>186</sup>

One especially promising recent development for state Dream Acts is California's success in upholding their Act.<sup>187</sup> California's educational code provides for in-state tuition eligibility for any undocumented student who attended a California high school for more than three years, graduated, and has filed an affidavit stating their intent to legalize their immigration status.<sup>188</sup> This statute was upheld by the California Supreme Court in *Martinez*,<sup>189</sup> and the United States Supreme Court denied certiorari.<sup>190</sup> The California Act has thus become a model for other state Acts.<sup>191</sup>

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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.

*Id.*

181. *See, e.g.*, Day v. Bond, 500 F.3d 1127, 1139 (10th Cir. 2007) (rejecting out-of-state students' complaint, and noting that the plaintiffs would not have been eligible for the in-state tuition benefit even if the undocumented students were also not eligible).

182. *The DREAM Act: Correcting Myths and Misconceptions*, *supra* note 59.

183. *Id.*

184. *See, e.g.*, *League of United Latin Am. Citizens v. Wilson (LULAC)*, 997 F. Supp. 1244 (C.D. Cal. 1997); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (D. Va. 2004).

185. 997 F. Supp. at 1255.

186. 305 F. Supp. 2d at 607.

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

188. CAL. EDUC. CODE § 68130.5 (Deering 2011).

189. 241 P.3d at 870.

190. *Martinez v. Regents of the Univ. of Cal.*, 131 S. Ct. 2961 (2011).

191. Kasarda, *supra* note 22, at 226.

## 2. Language of State Dream Acts: Use of the Term "Resident"

To date, state Dream Acts have closely followed two models: the California model and the Texas model.<sup>192</sup> The California Dream Act is of particular interest, having successfully withstood a court challenge in *Martinez*.<sup>193</sup> Both Acts base eligibility for in-state tuition upon time spent attending a state high school, although there are subtle differences between the two.

New York's Dream Act is one which mirrors the California Act.<sup>194</sup> The statute provides that undocumented immigrants are eligible for in-state tuition provided they attended high school in New York, and have filed an affidavit of intent to legalize their immigration status.<sup>195</sup> The New Mexico, Oklahoma, and Utah Dream Acts also have similar requirements.<sup>196</sup> As such, the *Martinez* decision is instructive. California's Supreme Court focused upon the language of IIRARA which denies postsecondary benefits to immigrants based on residency within a state.<sup>197</sup> The court found that the California Act was not based upon a residency requirement for two reasons: first, because the language of the California Act did not apply uniformly to all undocumented immigrants, and second, because attending a high school for three years does not in and of itself constitute residency.<sup>198</sup>

The Texas Dream Act differs substantially from the California Act. Texas Education Code § 54.052 provides "resident status" to any person who maintained a domicile in Texas for one year preceding enrollment in an institution of higher education.<sup>199</sup> California's Act requires three years of high school attendance, not simply establishment of a domicile.<sup>200</sup> Texas also does not require a student to file an affidavit of intent to legalize their immigration status.<sup>201</sup> However, the Texas Act does meet the requirements listed in *Martinez*: only those undocumented immigrants who

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192. *Id.* at 226.

193. *Martinez*, 241 P.3d at 855. Because California's Supreme Court recently struck down a challenge to that state's Dream Act, there has been much written on the subject of California's legislation. See, e.g., Urteaga, *supra* note 80, at 722 (concluding that California's Dream Act is not preempted by federal law).

194. N.Y. EDUC. LAW § 6206 (7)(a-1) (McKinney 2011).

195. *Id.*

196. See N.M. STAT. ANN. § 21-1-4.6 (2008); OKLA. STAT. tit. 70, § 3242 (2008); UTAH CODE ANN. § 53B-8-106 (LexisNexis 2009).

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

198. *Id.* at 860.

199. TEX. EDUC. CODE ANN. § 54.052 (West 2011).

200. CAL. EDUC. CODE § 68130.5 (Deering 2011).

201. TEX. EDUC. CODE ANN. § 54.052 (West 2011).

have attended school for a year are eligible, and neither domicile nor attending a school constitute residency.<sup>202</sup> Under *Martinez*, therefore, the Texas Act is not preempted by federal law.

The largest difference between the California and the Texas Acts is in the description of the tuition charged. Where Texas describes resident status as a positive characteristic making a person eligible for reduced tuition, California negatively implies the same through the phrase “exempt from paying nonresident tuition.”<sup>203</sup> The California Act does not use the word “resident.”<sup>204</sup> Several other states have adopted eligibility requirements for in-state tuition similar to the Texas Act, including Illinois, Nebraska, and Washington.<sup>205</sup> Each of these state Dream Acts refers to the term “resident” in some manner.<sup>206</sup>

### 3. State Dream Acts Are Not Preempted Under *De Canas*

Analysis of state Dream Acts under the three-part *De Canas* test shows that they are not preempted by federal law. First, state Acts are not facial regulation of immigration, and are therefore not directly preempted by federal law.<sup>207</sup> States are free to create their own residency requirements, and determining who is eligible for certain tuition rates at state-funded universities is a state matter.<sup>208</sup> Nor are state acts subject to field preemption. Congress has not yet occupied the field of tuition rates for undocumented immigrants. If anything, congressional inaction on the federal DREAM Act demonstrates that the field of tuition rates is being purposefully left to the states.<sup>209</sup> The combination of the creation of the Department of Education and subsequent inaction on state tuition rates surely meets the standards outlined in *Isla*.<sup>210</sup>

202. *Id.*

203. *Id.*; CAL. EDUC. CODE § 68130.5 (Deering 2011).

204. EDUC. § 68130.5.

205. 110 ILL. COMP. STAT. 305 / 7e-5(a) (2009); NEB. REV. STAT. § 85-502(8)(a) (2008); WASH. REV. CODE § 28B.15.012 (2008).

206. 305 / 7e-5(a) (stating that anyone who meets the requirements is “an Illinois resident”); § 85-502 (using the phrase “residence requirements”); § 28B.15.012 (using the phrase “resident students”).

207. See Urteaga, *supra* note 80, at 746.

208. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 862 (Cal. 2010).

209. See *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

210. *Id.* (“Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.”); see also U.S. DEPT OF EDUC. OFFICE OF ELEMENTARY & SECONDARY EDUC., LEGISLATION, REGULATIONS, AND GUIDANCE, (2010), available at <http://ed.gov/about/offices/list/oese/legislation.html> (listing Department of

The only remaining issue under *De Canas*, then, is conflict preemption.<sup>211</sup> One potential pitfall inherent in Texas's Dream Act is that the Act centers upon determination of resident status for purposes of the education code.<sup>212</sup> While "resident status" is not based solely upon whether the person lives in Texas, such language may conflict with the IIRARA.<sup>213</sup> The fact that the issue of conflict preemption has not yet been raised in courts may indicate that this is an unduly narrow interpretation of the IIRARA. Still, the negative language used by California's Act entails much less risk.<sup>214</sup> As demonstrated by the *Martinez* decision, modeling the language of a state Act after California's may be an advisable step for states who wish to enact their own Dream Act.<sup>215</sup>

C. *Equal Protection Supports Granting In-State Tuition to Undocumented Students*

Not only are state Acts not preempted by federal law, but they can be distinguished from restrictionist legislation because they serve an important constitutional purpose. The Fourteenth Amendment's Equal Protection Clause provides an additional protection for state Dream Acts that state restrictionist legislation simply does not have.<sup>216</sup> While restrictionist legislation has a tendency to run afoul of equal protection principles by singling out minority groups for extra burdens,<sup>217</sup> state Dream Acts strive towards equalizing educational opportunities for students in U.S. schools.<sup>218</sup> As the Supreme Court held in *Plyler v. Doe*, "legislation

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Education legislation and regulations which Congress has implemented).

211. *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)) ("State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.").

212. TEX. EDUC. CODE ANN. § 54.052 (West 2011) (entitled "Determination of Resident Status").

213. Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1623 (2006) ("Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit.").

214. See Urteaga, *supra* note 80, at 726.

215. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010) (holding that Act was neither in violation of federal statute, nor was it federally preempted).

216. U.S. CONST. amend. XIV.

217. See, e.g., *United States v. Arizona*, 703 F. Supp. 2d 980, 997 (D. Ariz. 2011) (discussing the burden that routine immigration checks place on those lawfully present in the United States).

218. See *Plyler v. Doe*, 457 U.S. 202, 217 (1982) (stating that legislative

directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."<sup>219</sup> Although the *Plyler* Court recognized that there is no constitutional right to education,<sup>220</sup> the court simultaneously emphasized the importance of access to education by quoting *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>221</sup>

The *Plyler* Court's determination that Texas had no valid state interest in denying education to undocumented students also emphasized the detrimental effects of denying education to an entire class of citizens.<sup>222</sup> "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."<sup>223</sup> It is similarly difficult to understand why a state would pass restrictionist legislation that prevents an entire class of people from working. As emphasized by the court in *United States v. Arizona*, individuals are not expected to starve in the United States while they are attempting to legalize their status.<sup>224</sup> Thus, equal protection both argues against restrictionist legislation, and supports educational opportunities for undocumented immigrants.

#### D. State Dream Acts Are Not Harmful to Citizens

One Tenth Circuit decision regarding state Dream Acts is particularly illuminating. In *Day v. Bond*, out-of-state students at universities in Kansas sought to overturn the Kansas Dream

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classifications which disadvantage certain classes of people are "treated as presumptively invidious" by courts).

219. *Id.* at 220.

220. *Id.* at 223.

221. *Id.* at 222–23 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

222. *Plyler*, 457 U.S. at 230.

223. *Id.*

224. See *United States v. Arizona*, 641 F.3d 339, 360 (9th Cir. 2011) (recognizing that Congress criminalized the employment of undocumented immigrants, not working while undocumented); see also *Alabama I*, 813 F. Supp. 2d at 1335–36. (observing that the IRCA places sanctions on employers, not employees).

Act.<sup>225</sup> The plaintiffs argued that because they were paying higher tuition rates than undocumented students, the Dream Act violated the Equal Protection clause.<sup>226</sup> The claim was defeated by a motion for summary judgment in district court, and the Tenth Circuit affirmed.<sup>227</sup> Because the injury plaintiffs alleged was “too conjectural and speculative,” they had no standing to bring the claim.<sup>228</sup> The plaintiffs in *Day v. Bond* also argued that the Dream Act was preempted by IIRARA.<sup>229</sup> This claim was also unsuccessful; the court found that IIRARA did not provide a cause of action for private parties.<sup>230</sup>

*Day v. Bond* illustrates two key principles. First, it demonstrates the simple truth that state Dream Acts are not harmful to United States citizens.<sup>231</sup> The plaintiffs’ standing claims were defeated twice on summary judgment because they could not show any concrete injury based upon discriminatory treatment.<sup>232</sup> Second, *Day v. Bond* shows the power of IIRARA: if a state Dream Act is to be challenged, it cannot be challenged by individual citizens.<sup>233</sup> Even if some state citizens disagree with the enactment of a state Dream Act, it is not up to them to challenge the Act’s constitutionality. State Dream Acts are not harmful to United States citizens, but are extremely important to those they help.<sup>234</sup>

## V. Recommendations

As stated above, state Dream Acts, unlike state restrictionist legislation, are not preempted by federal law.<sup>235</sup> However, states which enact Dream Acts must be prepared for potential litigation.<sup>236</sup> Although claims against state Acts have been successful so far, there are several steps legislators can take to

225. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007); see also KAN. STAT. ANN. § 76-731(a) (2011).

226. *Day*, 500 F.3d at 1130.

227. *Id.* at 1140; see also *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005) (holding previously that the *Day v. Bond* plaintiffs did not have standing).

228. *Day*, 500 F.3d at 1139.

229. *Id.* at 1135.

230. *Id.* at 1139.

231. *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007).

232. *Id.* at 1132.

233. *Id.* at 1139 (holding that IIRARA’s focus is upon institutions, rather than students, and that as such, individuals do not have a private right of action under IIRARA).

234. See BATALOVA & MCHUGH, *supra* note 14, at 17.

235. See *supra* notes 1764–2145 and accompanying text.

236. See, e.g., *Day*, 500 F.3d 1127 (challenging the Kansas Act).

ensure the acts are not struck down in court.<sup>237</sup>

First, and most apparent, any state Dream Act must contain a severability provision.<sup>238</sup> The courts in both *Alabama* and *Arizona*, faced with long lists of provisions in the respective state statutes, were able to examine each provision separately because the legislators had provided a severability provision.<sup>239</sup> While state Dream Acts are often relatively simple pieces of legislation, severability is one way to prevent an Act from being found unconstitutional as a whole.

States must also be careful to avoid passing Dream Act legislation that is based upon residency.<sup>240</sup> The IIRARA expressly bars any educational benefit to undocumented students on the basis of residency.<sup>241</sup> Since the court in *Martinez* found that high school attendance in a state and graduation from a school in-state do not constitute residency in and of themselves, using such requirements is one avenue states can choose in writing Dream Act legislation.<sup>242</sup> Particularly, states writing such legislation may wish to model the statute after the California Act, rather than the Texas Act.<sup>243</sup> Where the Texas statute focuses on “determination of resident status,” the California Act uses the language “exempt from paying nonresident tuition.”<sup>244</sup> Even this small difference in language can be determinative of whether the Act violates the IIRARA.

The IIRARA also prohibits state Dream Acts from describing in-state tuition as a postsecondary education benefit.<sup>245</sup> Under the IIRARA, such benefits can only be available to those not lawfully in the United States as long as the benefits are equally available to United States citizens and nationals.<sup>246</sup> PRWORA may also be problematic for state acts who describe in-state tuition as a benefit, since undocumented immigrants are not eligible for state

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

238. *See, e.g.*, H.B. 56, *supra* note 98, at § (11)(a) (finding restrictionist legislation only partially preempted because it contained a severability provision); S.B. 1070, *supra* note 23, at § 5(c).

239. *United States v. Alabama (Alabama II)*, 443 F. App'x 411 (11th Cir. 2011); *United States v. Arizona*, 703 F. Supp. 2d 980, 998 (D. Ariz. 2010).

240. Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1623 (2006).

241. *Id.*

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

243. *See Urteaga, supra* note 80.

244. CAL. EDUC. CODE § 68130.5 (Deering 2011).

245. 8 U.S.C. § 1623.

246. *Id.*

or local public benefits under the federal statute.<sup>247</sup> Although *Day v. Bond* held that in-state tuition was equally available to both citizens and undocumented immigrants because the benefit was based on residency alone, describing in-state tuition as a benefit could potentially open the door to unnecessary litigation under both IIRARA and PRWORA.<sup>248</sup>

Another avenue towards preventing challenges to state Dream Acts lies in standing. *Day v. Bond* is also instructional in this area, as the court held that preemption analysis can be prevented if no party will have standing to bring an action against the statute.<sup>249</sup> Where no private parties had been injured, and where the statute itself did not allow for a private right of action, there was no cause of action.<sup>250</sup> Although specifically providing against a private right of action is not a perfect solution, it is certainly one means of preventing unnecessary legislation against Dream Acts.

### Conclusion

State Dream Acts are not amnesty.<sup>251</sup> They are not a reward for having broken the law, nor are they costly to states.<sup>252</sup> The Acts are, however, recognition of the fact that young children who have only known the United States are no less American than any other child their age.<sup>253</sup> Dream Acts also have the potential to be enormously economically beneficial to states.<sup>254</sup> Under the Acts, these young people—who number in the millions—will have the chance to contribute economically to the country to which they belong.<sup>255</sup> Unlike restrictionist legislation, DREAM Acts operate outside the sphere of federal plenary power; their power is not preempted, but has been left to the states.<sup>256</sup>

While state Dream Acts are crucial to the economic success of both young immigrants and the states in which they grew up, state Acts remain only a stepping stone towards a much more

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247. Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. § 1621 (2006).

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

249. *Id.*

250. *Id.* at 1136; see also KAN. STAT. ANN. § 76-731a (2011) (the underlying statute).

251. See OJEDA ET AL., *supra* note 8, at 2.

252. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 2.

253. See DEFINE AMERICAN, *supra* note 1.

254. NAT'L IMMIGR. LAW CTR., *supra* note 10, at 2.

255. OJEDA ET AL., *supra* note 8.

256. Urteaga, *supra* note 80.



important goal: passage of the federal DREAM Act. While the DREAM Act will not mandate that states provide in-state tuition to undocumented students, it will repeal the limiting language of the IIRARA, and restore the ability to determine residency to individual states.<sup>257</sup> Even more importantly, the DREAM Act will allow for conditional permanent residency for undocumented students, and eventually, citizenship—two goals state Acts simply cannot achieve.<sup>258</sup> Federal recognition of these students' achievements in school, and their contributions to society and the national economy, would be a positive change in immigration reform.<sup>259</sup> Until the DREAM Act can be passed, however, undocumented students must rely on state Acts to help them obtain higher education, and give back to the country they call home.

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257. DREAM Act, *supra* note 5.

258. *Id.*

259. See BATALOVA & MCHUGH, *supra* note 14.

