

A Dormant Challenge to Excelsior: Why the Celebrated New York State Free College Program is Likely Unconstitutional

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I. INTRODUCTION

Meet Joselyn Benitez,¹ a senior at Glen Cove High School on New York's Long Island. Although Long Island is one of the wealthiest areas in the country,² Glen Cove is unique in that over 60% of its students are eligible for free or reduced-price lunch³ and approximately 75% of its students come from racial minority groups—62% being Hispanic or Latino.⁴ Joselyn falls into both of those categories. She was born in New York to immigrant parents from Central America and speaks primarily Spanish with her family. Her mother works as a housekeeper, and her father as a general contractor. Joselyn is the second of three children and wants to go to college to become a middle school teacher or potentially go abroad to teach English through the Peace Corps or a Fulbright Scholarship.

During the fall semester of her senior year at Glen Cove High School, Joselyn worked closely with her guidance counselor and teachers to figure out which colleges and universities she should apply to. Her grades, extracurriculars, and leadership positions were of course all important factors in creating this list, but Joselyn was also keenly aware of the cost of college, as she would have to shoulder some of the cost from her educational expenses. The rise in college tuition costs has increased dramatically, with one report finding that the price of college has increased approximately eight times faster than wages.⁵ Joselyn's parents, also acutely aware of the cost of college, have cautioned her to pay close attention to the loans and expenses she may have to take on depending on where she decides to apply.

Political leaders across all levels of government have recognized the dilemma that rising college costs present to Joselyn and millions of other students throughout the country.⁶ To address this problem in his home state, New York Governor Andrew Cuomo unveiled his version of a solution to the problem in 2017—titled the Excelsior Scholarship Program—which “would provide tuition-free college for students accepted to two- and four-year colleges at all state and city universities” for students with households

¹ This is a fictional character used to represent and illustrate the otherwise very real considerations of high school students at Glen Cove High School, the author's alma mater, and other schools in New York State that fall under the shadow of the Excelsior Scholarship Program.

² Emi Endo, *32 LI Communities on Forbes' Richest List*, NEWSDAY (Sept. 28, 2010, 11:13 PM), [https://perma.cc/2WGQ-HYHJ].

³ See *Glen Cove City School District – School Report Card Data [2015-16]*, N.Y. STATE EDUC. DEP'T, [https://perma.cc/C6PB-7ZL2] (last visited June 8, 2021).

⁴ *Glen Cove City School District Enrollment (2018-19)*, N.Y. STATE EDUC. DEP'T, [https://perma.cc/XW6K-PUEH] (last visited June 8, 2021).

⁵ Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM), [https://perma.cc/74FE-C459].

⁶ John Russell et al., *Politicians Suggest Ways to Reduce Tuition*, VOA LEARNING ENGLISH (Feb. 6, 2016), [https://perma.cc/WU94-W5WP].

earning \$125,000 or less in 2019.⁷ As a resident of New York State, Joselyn would benefit from the Excelsior Scholarship Program. In fact, the Excelsior Scholarship Program is one of the biggest reasons Joselyn's college list contains mostly State University of New York (SUNY) system schools, like SUNY Cortland, Stony Brook, and Oswego. Although Joselyn's list includes some private schools, as well as some out-of-state schools, her top choices are schools that are part of the SUNY system.

To the SUNY system's credit, there are many fantastic schools available to New York State residents at an affordable rate. SUNY Buffalo is ranked 88th in the 2021 U.S. News and World Report National Universities list, tied with fellow SUNY schools Binghamton University and Stony Brook University.⁸ Additionally, private Cornell University (although not itself a SUNY school) is home to "four contract colleges and schools that were created by an Act of the New York State Legislature."⁹ This permits New York state residents accepted into these contract colleges to attend and pay in-state New York resident tuition, rather than the private Cornell tuition—approximately "\$15,000 less than tuition for out-of-state residents."¹⁰ These nationally-ranked SUNY institutions, along with the other schools that are part of the SUNY system, are all available to New York State residents at yearly in-state tuition rates below approximately \$10,100 at the 4-year institutions.¹¹ The variety of schools found within the SUNY system and the lower in-state tuition costs, combined with the Excelsior Scholarship Program, ostensibly make these schools a great bargain if a student and his or her family qualifies—leaving a student like Joselyn to deal with only room and board expenses.

Although the Excelsior Scholarship Program attempts to remedy some of the challenges students like Joselyn face when deciding where to attend college—or whether to even pursue a college degree in the first place—this Note argues that the Excelsior Scholarship Program (as it currently exists) is not only unconstitutional, but it actually hurts the very students it portends to assist. Assisting students like Joselyn by making a college education more accessible is a noble endeavor, and one that should be pursued and celebrated. However, the Excelsior Scholarship Program does this by attaching conditions to the receipt of scholarship funds that restrict scholarship

⁷ Keshia Clukey & Conor Skelding, *Cuomo Enlists Bernie Sanders to Unveil Free Public College Proposal*, POLITICO (Jan. 3, 2017, 3:36 PM), [https://perma.cc/QX8K-YQP6].

⁸ *2021 Best National University Rankings*, U.S. NEWS & WORLD REPORT, [https://perma.cc/V2XT-CL8U] (last visited June 8, 2021).

⁹ *NYS Colleges at Cornell University*, STATE UNIV. OF N.Y., [https://perma.cc/KW5A-ITKW] (last visited June 8, 2021).

¹⁰ *Tuition & Financial Support*, CORNELL COLL. OF AGRIC. AND LIFE SCIS., [https://perma.cc/DFS6-K3UE] (last visited June 8, 2021).

¹¹ *Costs & Aid*, STONY BROOK UNIV., [https://perma.cc/R3LR-KW5W] (last visited June 8, 2021).

recipients' participation in the national workforce, violating the Constitution in the process.

In Part II, this Note will provide a brief overview of the contemporary conversation around the free college movement today. Important to this discussion is an overview of the development of the public education system in the United States, including its origins and growth as measured by its reach and accessibility throughout the country. Part III will provide a brief introduction to the Commerce Clause and dormant Commerce Clause of the Constitution, including relevant exceptions to the dormant Commerce Clause in order to illustrate how exactly the Excelsior Scholarship Program offends the Constitution.

In Part IV, this Note will analyze the Excelsior Scholarship and the conditions the scholarship calls for under the established dormant Commerce Clause framework as provided in Part III, concluding that the conditions are unconstitutional. Finally, this Part recommends how New York should proceed, in a manner that would allow the Excelsior Scholarship Program to achieve its underlying goals without violating the Constitution.

II. AMERICAN EDUCATION: PAST, PRESENT, & FUTURE

This Part will first provide a historical walkthrough of the recent discussions around the idea of free college, beginning with President Obama and the 2016 presidential campaign, and then discussing different state plans that provide financial assistance to college students, including some similar to Excelsior. Second, this Part will provide a brief background on the development of public education in this country, and how education is perceived and approached today compared to different points in the history of the nation.

A. *Free College as a 2016 Campaign Promise and its Outgrowth in New York & Beyond*

The 2016 Presidential campaign and election was one of historic firsts.¹² Hillary Clinton was “the first woman to [secure] the presidential nomination of a major political party”, Donald Trump was the first to win the presidency in almost 70 years without any prior legislative or executive experience, and for the first time in a presidential election, foreign interference was a central focus and talking point.¹³ The outcome was similarly historic, as for only the fifth time in history, the winner of the Electoral College actually lost the popular vote—at a margin of almost 3 million votes, which was the widest margin ever.¹⁴

¹² *The 2016 U.S. Presidential Election*, HISTORY (Nov. 29, 2019), [<https://perma.cc/P362-C5T5>] (last updated Aug. 5, 2019).

¹³ *Id.*

¹⁴ *Id.*

While the 2016 election had several historic milestones, it also marked the normalization of free college for all as a major political party platform item.¹⁵ In early 2015, President Obama announced his plans for free community college, jumpstarting a national conversation around the issue.¹⁶ In May of 2015, then-candidate Senator Bernie Sanders went one step further by introducing a bill to make four-year colleges free.¹⁷ Shortly afterwards, other presidential candidates, such as Senator Elizabeth Warren and Secretary Clinton, adopted their own versions of the idea and brought their college plans to voters on the 2016 campaign trail.¹⁸ Addressing the rising costs of college eventually became a bipartisan issue, as then-candidate Senator Marco Rubio released a plan to deal with rising costs of higher education through his “Student Investment Plans” idea in the Republican race.¹⁹ The momentum around free college continued even after the 2016 election came to a close, when New York Governor Andrew Cuomo introduced his version of free college for state residents—with Senator Bernie Sanders at his side—in January 2017.²⁰

Although Cuomo’s plan was not met with universal praise,²¹ it was significant that the program applied to both two- and four-year programs—something that separated it from other free college programs that applied only to community colleges.²² Just four months after Cuomo announced his plan with Senator Sanders by his side, he appeared with Secretary Clinton. This time, it was to sign the plan into legislation—it eventually came to be known as the Excelsior Scholarship Program.²³ At the ceremony, both Governor Cuomo and Secretary Clinton spoke at length about the importance of the program and how far it would go in assisting New York State residents,

¹⁵ Sam Frizell, *Hillary Clinton Adopts Major Bernie Sanders’ Idea: Free College for (Almost) Everyone*, TIME (July 6, 2016), [https://perma.cc/ZPN8-HHHJ].

¹⁶ Steve Holland, *Obama Pushes \$60 Billion Plan for Free Community College*, REUTERS (Jan. 9, 2015, 1:09 PM), [https://perma.cc/DHH6-3U4T].

¹⁷ Michael Schramm, *Bernie Sanders Issues Bill to Make 4-Year Colleges Tuition-Free*, USA TODAY (May 19, 2015), [https://perma.cc/A9QB-T4TA].

¹⁸ Adam Harris, *America Wakes Up From Its Dream of Free College*, THE ATLANTIC (Sept. 11, 2018), [https://perma.cc/XE7Y-TNEN].

¹⁹ John Russell et al., *supra* note 6.

²⁰ Clukey & Skelding, *supra* note 7; Melanie Grayce West & Melissa Korn, *Proposal: Free Tuition at SUNY and CUNY for Low and Middle Income Students*, WALL ST. J. (Jan. 3, 2017, 5:21 PM), [https://perma.cc/68XF-M8CN].

²¹ Editorial Board, *Mr. Cuomo’s Free* College Plan*, N.Y. TIMES (April 14, 2017), [https://perma.cc/6AGN-KFRK].

²² Bethany Bump, *9 Things to Know About Gov. Cuomo’s Free Tuition Plan*, TIMES UNION (Jan. 25, 2017, 9:58 AM), [https://perma.cc/U2AZ-XGBB].

²³ Press Release, Andrew M. Cuomo, Governor, New York State, Governor Cuomo Signs Legislation Enacting First-In-The-Nation Excelsior Scholarship Program to Provide Tuition-Free College to Middle-Class Families (April 12, 2017) [hereinafter N.Y. Governor’s Press Office], [https://perma.cc/6PWV-DFMF].

with Governor Cuomo likening the free college movement of the day to the seismic shift towards free high school education in this country in the early to mid-20th century:

Look, 70 years ago, we made a decision as a society that people needed high school. And some people said, oh, you're being frivolous. You don't need a high school education. But society said, yes we do. If you want to continue to grow, to continue to educate and prosper, we need high school. And we had free public high school for everyone. And that was a bold step. Well today my friends college is what high school was 70 years ago.²⁴

Although the program that Governor Cuomo signed into legislation with Clinton by his side in April 2017 largely mirrored the program Cuomo introduced with Sanders by his side in January 2017, there was one important difference between the two versions: a new post-graduation residency requirement.²⁵ When the plan was introduced in January 2017, there were some whispers amongst lawmakers about including a residency requirement to keep recipients of the scholarship in New York after graduation, but nothing was official, as the plan had yet to be finalized.²⁶ However, as the *New York Daily News* reported: “[i]n the eleventh hour, a provision was added to Cuomo's plan which will require students to live in New York for as long as they received the Excelsior Scholarship.”²⁷

Despite reports that indicate eighty percent of New York college graduates²⁸ and between eighty-five and ninety percent of SUNY graduates²⁹ remain in-state after graduating from college, Cuomo made it clear that he viewed the residency requirement as a protection on the State's investment in the program: “[w]hy should New Yorkers pay for your college education and then you take off and you move to California? . . . The concept of investing in you and your education is that you're going to stay here.”³⁰ Governor Cuomo wasn't the only one making clear that he viewed this requirement as a proverbial stick attached to the carrot. In April 2017, New York

²⁴ *Id.*

²⁵ Bethany Bump, *supra* note 22; *Excelsior Scholarship FAQs*, HIGHER EDUC. SERVS. CORP, [https://perma.cc/R5HS-49SK] (last visited June 8, 2021), .

²⁶ Bump, *supra* note 22.

²⁷ Beth Akers, *The Residency Requirement in Cuomo's Free Tuition Plan Makes a Bad Idea Worse*, N.Y. DAILY NEWS (Apr. 12, 2017, 12:11 PM), [https://perma.cc/4D]4-9HGN].

²⁸ *Id.*; Emma Whitford, *Cuomo's Tuition-Free College Plan Has A Big Catch, Critics Say*, GOTHAMIST (Apr. 10, 2017, 1:45 PM), [https://perma.cc/L869-JPD6].

²⁹ David W. Chen, *New York's Free-Tuition Program Will Help Traditional, but Not Typical, Students*, THE NEW YORK TIMES (Apr. 11, 2017), [https://perma.cc/CS25-NSVF].

³⁰ Leslie Brody, *New York State Says Students Who Get Tuition-Free College Must Stay in State Afterward*, THE WALL ST. J. (Apr. 10, 2017, 4:51 PM), [https://perma.cc/M4E7-DB8F].

State Education Department spokeswoman Abbey Fashouer said that “[b]y ensuring our highly-skilled, highly-qualified students live . . . in-state for the number of years they received the Excelsior Scholarship, we are guaranteeing this investment pays dividends right here at home.”³¹ At an event in April 2017, Cuomo declared “if you don’t stay here, then go to California and let them pay for your college education.”³²

Additionally, if an Excelsior Scholarship recipient lived in New York but entered the workforce during the time they are required to live in-state, as part of the conditions added to the program at the eleventh hour, then that recipient must similarly work in New York State.³³ The official language around the residency requirement dictates that “an applicant must execute a Contract agreeing to reside in [New York State] for the length of time the award is received, and, if employed during such time, be employed in [New York State].”³⁴ This language creates multiple post-award obligations on the scholarship recipient, and if the recipient establishes residency outside of New York or is employed outside of New York, the award will be converted to a prorated loan: “[i]f you received awards for four years and resided in NYS for three years, you will be required to repay one-fourth of the award as a no-interest loan.”³⁵

This residency requirement, attached to the otherwise noble goal of increasing college accessibility and affordability, violates the dormant Commerce Clause of the U.S. Constitution, and in doing so, it disproportionately affects poor, minority populations in a negative manner. This last-minute provision means that if Glen Cove High School student Joselyn graduates from a SUNY school, with assistance from the Excelsior Scholarship program for all four years of her time in college, she will then be required to both live and work in New York State for four years after her graduation. Even if Joselyn lives in New York but gets a job as a teacher across the river in Hoboken, New Jersey, she would still violate the terms of the program by working outside of New York State and would thus be required to pay back the appropriate amount of the scholarship converted into a loan.

1. Different State Approaches to Free or Affordable College

A college degree is valuable to employers and employees alike; according to Georgetown University’s Center on Education and the Workforce, Bachelor’s degree holders earn “84% more than those with just a high school

³¹ Monica Disare, *Cuomo’s Promise of Free College Tuition Has A Major Catch, Experts Say*, CHALKBEAT (Apr. 10, 2017), [<https://perma.cc/H5V6-Q9PC>].

³² Chen, *supra* note 29.

³³ *Excelsior Scholarship FAQs*, *supra* note 25.

³⁴ *Excelsior Scholarship Program—How Eligibility is Determined*, N.Y. STATE, [<https://perma.cc/FT6Q-XV8Q>] (last visited June 8, 2021).

³⁵ *Excelsior Scholarship FAQs*, *supra* note 25.

diploma.”³⁶ If a college degree is vital in providing its holder a more comfortable and stable financial situation moving forward, it should follow that making a college degree more affordable and accessible is critical, both to individual members of the workforce and to government and businesses. Many free college programs, like Georgia’s HOPE Scholarship program and Rhode Island’s Promise Scholarship, have done (and continue to do) just that.³⁷

In 1993, well before President Obama in 2015 and candidates in the 2016 presidential election started talking about free college programs, Georgia created the HOPE Scholarship Program.³⁸ HOPE—standing for Helping Outstanding Pupils Educationally—“has helped more than 1.8 million students at eligible state public and private universities and public technical schools to create the ‘better-educated work force . . . and invest in (Georgia’s) economic future.’”³⁹ Unlike the Excelsior Scholarship Program, family income levels are not taken into account with the HOPE Scholarship; instead, the HOPE Scholarship is a merit-based award available to Georgia residents that graduate from high school with a minimum GPA.⁴⁰ As a result of the HOPE Scholarship, standardized testing scores (like the SAT) improved and students admitted to paying attention to the cost of an out-of-state school in a way they otherwise wouldn’t have.⁴¹ The success of the HOPE scholarship was tremendous, and it was “considered so innovative that 15 states copied it.”⁴²

In January 2017, at the same time as New York’s Excelsior Scholarship Program announcement, Rhode Island Governor Gina M. Raimondo proposed her version of a solution to the rising costs of higher education.⁴³ The Promise Scholarship was initially meant to cover two years at a Rhode Island community college, or the third and fourth years at either of the two universities in the Rhode Island system, Rhode Island College or the University of Rhode Island.⁴⁴ As the program was finalized, though, the benefits were

³⁶ ANTHONY P. CARNEVALE ET. AL., GEO. UNIV. CTR. ON EDUC. & THE WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 1 (2011), [<https://perma.cc/53H5-BTZC>].

³⁷ Kim Severson, *Georgia Facing a Hard Choice on Free Tuition*, N.Y. TIMES (Jan. 6, 2011), [<https://perma.cc/RN8Z-TA74>].

³⁸ HOPE, GA. STUDENT FIN. COMM’N, [<https://perma.cc/6XFC-6EMN>] (last visited June 8, 2021).

³⁹ *Id.* (citing Governor Zell Miller, State of the State Address (Jan. 25, 1992)).

⁴⁰ Severson, *supra* note 39.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Scott Jaschik, *Two Tuition-Free Years*, INSIDE HIGHER ED (Jan. 16, 2017), [<https://perma.cc/PSY9-YFJ4>].

⁴⁴ *Id.*

limited just to Community College of Rhode Island students.⁴⁵ Unlike Georgia's HOPE Scholarship and New York's Excelsior Scholarship, high school GPA and family income levels are not taken into account when determining Promise Scholarship eligibility; a person is eligible for the Rhode Island program if he or she is (1) a Rhode Island resident, (2) has graduated high school, and (3) is enrolled in the Rhode Island Community College.⁴⁶ Although both Rhode Island's Promise Scholarship and the New York's Excelsior Scholarship were born in the wake of the 2016 presidential campaign, a closer look at the two programs shows at least one other stark difference between them. Most relevant to this Note is that the Rhode Island Promise Scholarship only asks recipients "to commit to staying in Rhode Island because we hope they will see the value of returning on that investment right here",⁴⁷ whereas New York's Excelsior Scholarship requires it.⁴⁸ In case a participant in either program does leave the state, whereas New York levies a financial penalty against an Excelsior participant, for a Rhode Islander, the "program does not contain a penalty for leaving the state."⁴⁹

2. Other States with Post-Graduation Residency Requirements

Although New York's Excelsior Scholarship Program received much attention when it was released, including from national news outlets like The New York Times,⁵⁰ Forbes,⁵¹ and The Wall Street Journal,⁵² it isn't the only state scholarship program that imposes some type of a post-graduation residency requirement and potential penalty. South Dakota started using a residency requirement before New York, and unlike New York, South Dakota uses it across multiple scholarship programs.⁵³ For example, Build Dakota Scholarship recipients commit to "work full-time in South Dakota in the field

⁴⁵ Compare *id.* ("Students at the Community College of Rhode Island would pay no tuition while earning an associate degree. For state residents who start at Rhode Island College or the University of Rhode Island, their junior and senior years would be tuition-free."), with *Frequently Asked Questions About Rhode Island Promise*, CMTY. COLL. OF R.I., [https://perma.cc/7U4Y-RCC8] (last visited June 8, 2021) [hereinafter *Rhode Island Promise FAQ*] ("Who is eligible for Rhode Island Promise? . . . You must be admitted to CCRI and enrolling in the semester immediately following high school graduation or the receipt of a high school equivalency diploma.").

⁴⁶*Id.*

⁴⁷ *Id.*

⁴⁸ *Excelsior Scholarship FAQs*, *supra* note 25.

⁴⁹ *Rhode Island Promise FAQ*, *supra* note 47.

⁵⁰ Chen, *supra* note 29.

⁵¹ Zack Friedman, *Why New York's 'Tuition-Free' College Is Not Exactly Free*, FORBES (Feb. 6, 2017, 8:02 AM), [https://perma.cc/M5XA-4VKM].

⁵² Brody, *supra* note 32.

⁵³ *Scholarships*, S.D. DEP'T. OF EDUC., [https://perma.cc/7MF4-FCNB].

of study for a minimum of three years [following graduation];”⁵⁴ Critical Thinking Needs Scholarship recipients “[a]gree in writing to stay in South Dakota and work in a critical teaching need occupation for five years after graduating,”⁵⁵ and Dakota Corps Scholarship Program recipients promise to live and work in South Dakota “equal to the sum of the number of years of scholarship received, plus one year.”⁵⁶

Another state that uses a residency requirement and penalty is Arizona, though this program was announced in November 2019—almost three years after New York’s Excelsior was introduced.⁵⁷ Arizona uses the residency requirement as part the state’s effort to address physician shortages in primarily rural areas of the state, and similar to Excelsior, Arizona recipients receive the scholarship for the number of years the recipients “will commit to practicing in a rural or urban underserved community.”⁵⁸ Although New York and South Dakota convert scholarships to loans if a recipient does not fulfill their commitment, media reports around the Arizona program indicate that Arizona recipients “who don’t fulfill the commitment will have to return the tuition money.”⁵⁹

It is important to note that although there are other states that have similar residency requirement criteria and financial penalties tied to the receipt of certain higher education scholarship funds, the focus of this Note is on New York’s Excelsior Scholarship Program. Although there are many similarities among the aforementioned scholarship programs in New York, South Dakota, and Arizona, a deep-dive into their differences, and whether those differences are material to the question of constitutional legality is not the purpose of this Note. For example, some of the South Dakota scholarships are provided from a pool of funds that includes investments from non-profits, local business leaders, philanthropists, and the government.⁶⁰ Whether any of those facts change the analysis of the constitutionality of the residency requirements and financial penalties may be better addressed in a different Note or Comment altogether.

⁵⁴ *Frequently Asked Questions*, BUILD DAKOTA SCHOLARSHIP FUND, [https://perma.cc/6EXE-PD64].

⁵⁵ *Critical Teaching Needs Scholarship*, S.D. BD. OF REGENTS, [https://perma.cc/QD7Z-V22N].

⁵⁶ *What is Dakota Corps?*, DAKOTA CORPS SCHOLARSHIP PROGRAM, [https://perma.cc/4UXT-TNY6] (last visited June 8, 2021).

⁵⁷ *UArizona Colleges of Medicine to Provide Free Tuition for Primary Care Medical Students*, THE UNIV. OF ARIZ. (Nov. 22, 2019) [hereinafter *UArizona Colleges of Medicine*], [https://perma.cc/G5CW-BFY7].

⁵⁸ *University of Arizona Health Sciences Initiative Expands Health Care Access, Reduces Student Debt*, THE UNIV. OF ARIZ. (Nov. 22, 2019), [https://perma.cc/2339-HGBV].

⁵⁹ Stephanie Innes, *Medical Students Get Free Tuition for Promising to Practice in Rural Arizona*, ARIZ. CENT. (Nov. 22, 2019, 9:30 AM), [https://perma.cc/KG8M-VZVH].

⁶⁰ *Redefining Success*, BUILD DAKOTA SCHOLARSHIP FUND, [https://perma.cc/N4QH-SNPG] (last visited June 8, 2021).

B. History and Evolution of the Educational Apparatus in American Society

At the 2017 legislative ceremony where Governor Cuomo signed the Excelsior Scholarship bill into legislation, he commented on the similarity between the free college movement in that particular moment in time and free high school 70 years ago.⁶¹ This parallel, even if not entirely accurate (since free high school as a concept started to take root decades before the time period Governor Cuomo mentioned),⁶² is critical in couching the debate around free college and college accessibility in the greater context of education in this country today. His comment drew attention to the very question of how public education began in this country, how it developed, and how it eventually settled on the current educational model. By providing a brief background on the history and development of the American educational system writ large, the aim of this focus is to place the prospect of free college on the spectrum of this evolution, and in the appropriate context of how education in the United States today came to be what it is.

In providing an overview of the history and development of education in this country, the best place to start is the early settling of the colonies. The very decentralized nature of the American educational system today traces its roots to this period: “[c]olonial legislatures, royal governors, proprietors, and stock companies were delegated educational authority along with political powers, but the degree to which civil governments took an interest in education differed greatly from one colony to another.”⁶³ The colonies were initially settled by different groups of people from various parts of Europe with their own religions and cultures, and some of these groups focused on education in a way that others did not.⁶⁴ For example, “[f]rom its very beginning the Dutch West India Company accepted its obligation to provide schools, and it demanded careful records showing every expenditure down to and including paper and ink.”⁶⁵ Even after the British overtook the Dutch in the colonies, the emphasis, focus, and expenditure on education established by the Dutch remained strong enough that “Dutch schools continued to exist very much as they had before.”⁶⁶

Although the Dutch prioritized education in present-day New York, they were not the only ones to do so in the colonies.⁶⁷ The middle colonies, including Maryland, Pennsylvania, and New York, “were the melting pot of colonial America, having much more heterogeneity than the Puritan

⁶¹ N.Y. Governor’s Press Office, *supra* note 23.

⁶² See JOHN D. PULLIAM, HISTORY OF EDUCATION IN AMERICA 68 (1968).

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 18.

settlements of New England or the Anglican plantations of the South.”⁶⁸ As a result of having the largest number of both national and religious groups, residents of the middle colonies “tended to develop many kinds of schools.”⁶⁹ Some of the schools established included vocational schools dedicated to apprenticeships and trade training; Latin Grammar Schools focused on college preparation and a traditional curriculum studying classics;⁷⁰ denominational schools, such as Quaker schools that “taught reading, writing, arithmetic, and probably bookkeeping as well as religion;”⁷¹ and even some private common schools that, though mostly focused on the wealthy, sometimes made “accommodations for sons of workmen and artisans of the middle class.”⁷² Although none of these schools were part of a united educational system—in fact, they were often in competition with one another since the “schools were non-public in nature and intolerant of individuals representing other churches”⁷³—the very existence of an educational system on a macro level showed the powerful role different peoples and their cultures had in the early establishment of education in this country.

Just as the different groups of European settlers in North America played a role in the initial focus (or lack thereof) on education, so too did geography and the physical landscape of the colonies.⁷⁴ Huge swaths of the American South, including Virginia, the Carolinas, and the area around the Mississippi Delta, became prime areas for plantations because of their fertile lands, which made them perfectly suited for large-scale cash crop agriculture.⁷⁵ It was this economic structure, built almost entirely on the use of plantations in the Antebellum South, which played a critical role in the lack of educational infrastructure in the region during its earliest beginnings.⁷⁶

On Southern plantations (some as large as hundreds of thousands of acres of farmland), wealthy planters created “plantation schools” where they “hired learned tutors to train their sons and frequently their daughters as well. When there was time and interest, such a tutorial system was also used by others attached to the plantation, such as the sons of foremen or managers.”⁷⁷ However, to call this educational structure a school is a misnomer, as the

⁶⁸ PULLIAM, *supra* note 64, at 19.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 21.

⁷² *Id.*

⁷³ *Id.* at 20.

⁷⁴ PULLIAM, *supra* note 64, at 14.

⁷⁵ Linda Alchin, *Plantations: The Forced Labor of Slaves to Harvest Cotton, Rice, Sugar and Tobacco Crops*, LAND OF THE BRAVE (Feb. 2017), [<https://perma.cc/YA4A-2CUV>].

⁷⁶ PULLIAM, *supra* note 64, at 14-18.

⁷⁷ *Id.* at 16.

setup more closely resembled a private tutoring session limited to the children of the wealthy; slaves and indentured servants “were entirely dependent upon the wealthy and powerful for what little education they received.”⁷⁸ The plantation owners may have been interested in the education of their children, but when it came to the rest of the community, like the slaves or indentured servants, “[s]kills needed to operate farms and plantations were not taught in schools,” they were taught in the fields.⁷⁹ Ultimately, educational systems in the Antebellum South failed to materialize in no small part due to the plantation-style economic model consisting of “widely scattered populations not concentrated in cities and towns” where the “physical remoteness made an educational system almost impossible.”⁸⁰

Whereas the geography and fertile physical landscape of the Southern colonies produced a population that was scattered over large swaths of farmland, New England was different; “the farm ground was not especially fertile and so early on people turned to such occupations as shipbuilding, manufacturing, and trade.”⁸¹ For settlements along the New England coast, colonists “made their living fishing, whaling, and shipbuilding.”⁸² The emphasis on trade, and not farming, led to the development of a merchant class “which had need of people who could take care of business accounts and who could work with all sorts of business documents.”⁸³ Whether the trade was directed to the European continent or to any of the many Native populations in the region, it was “an economic necessity to have large numbers of people, able not only to read and write, but also to cast accounts.”⁸⁴ Where large-scale plantations in the South were not conducive to establishing dense populations, the geography and physical landscape of New England was the opposite—fishing, shipbuilding, and trading “led to towns and villages sufficiently dense in population for the maintenance of schools.”⁸⁵

This economic reality led New England’s governments to address the question of education almost immediately upon settling in the region.⁸⁶ In 1647, the General Court of Massachusetts passed the Old Deluder Satan Act which required every town with more than 50 households to appoint a

⁷⁸ *Id.* at 15.

⁷⁹ *Id.* at 15.

⁸⁰ *Id.* at 18.

⁸¹ *Id.* at 23.

⁸² Linda Alchin, *Plantations: The New England Colonies: Establishment and Settlement of the 13 Original Colonies*, LAND OF THE BRAVE (Feb. 2017), [<https://perma.cc/2Q9G-WRJJ>].

⁸³ PULLIAM, *supra* note 64, at 23.

⁸⁴ *Id.* at 24.

⁸⁵ *Id.* at 14.

⁸⁶ *Id.* at 24.

teacher, and for towns with more than 100 households to establish a school.⁸⁷ Just a year later, “the first tax on property for local schools was passed in Dedham, Massachusetts,” a practice which was mimicked in New Hampshire towards the end of the 17th century.⁸⁸ Even though New England schools charged tuition fees, these property taxes were critical in establishing the reach and interest of the state in promoting education, where taxes were used for critical elements including teacher wages and school construction.⁸⁹

The Constitution does not mention or reference education,⁹⁰ but that does not mean the Founding Fathers of the country did not have a vested interest in promoting education in this country. For example, “James Madison supported a general tax for schools,” but he and other leaders “were unable to convince Congress.”⁹¹ Immediately after the ratification of the Constitution, efforts towards developing a national system of education were underway, but were uniformly rejected by Congress, likely due to the debt the newly formed nation had incurred as a result of the Revolutionary War.⁹²

Still, even with the absence of any reference to education in the Constitution and a refusal by Congress to act after the Revolutionary War came to a close, leaders of the time were conscious of the need for education in this country.⁹³ Within the Bill of Rights, the founders provided for “individual state control and the secular nature of public schools” as “assured by the First and the Tenth Amendments.”⁹⁴ Although the separation of church and state text did not immediately take religion out of schools,⁹⁵ it was the first step needed for future decisions that would finally establish the separation.⁹⁶ President George Washington, in his farewell speech, “emphasized the need for promotion and diffusion of knowledge,”⁹⁷ and early national legislation that dealt with the westward expansion and establishment of future territories “provided that the sixteenth section . . . of each township be reserved for maintenance of public schools and that education should forever be

⁸⁷ *Old Deluder Satan Law of 1647*, COMMONWEALTH OF MASS., [<https://perma.cc/SR59-XHWR>] (last visited June 8, 2021).

⁸⁸ PULLIAM, *supra* note 64, at 24.

⁸⁹ *Id.*

⁹⁰ David Boaz, *Education and the Constitution*, CATO INST. (May 1, 2006, 10:25 AM), [<https://perma.cc/8MLY-RP8N>].

⁹¹ PULLIAM, *supra* note 64, at 37.

⁹² *Id.* at 36.

⁹³ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 426-27 (1998).

⁹⁴ PULLIAM, *supra* note 64, at 37.

⁹⁵ *Id.* at 39.

⁹⁶ *Reynolds v. United States*, 98 U.S. 145 (1879).

⁹⁷ PULLIAM, *supra* note 64, at 36.

encouraged.”⁹⁸ The Revolutionary period was the first time the federal government of the United States spoke in a united voice about the importance of education, where it established “an early policy of grants of land and money to the states for public schools.”⁹⁹

With the establishment of local control over education via early colonial settlers, the 17th century innovation of taxes supporting schools, and signs that the federal government supported education as a priority in the 18th century, the country was ready to implement an educational system. However, there were still many obstacles in the way. First, many of the difficulties that arose in the colonial South remained and the region’s “little interest in public schools” continued “because of the economies of the area and the slave system. Just as wealthy planters in colonial times had provided for the education of their own children, so the planters of the early national period continued to support only private schools.”¹⁰⁰

By the mid-19th century, the focus on education previously seen in New England began to spread. For example, in 1832, New York City “took over the schools of [a private school system]” and “launched a movement which triumphed in New York and set a precedent for the rest of the country.”¹⁰¹ Additionally, states also made legislative attempts at improving the educational opportunities available to their residents, including an 1827 law in Massachusetts that “required mandatory [school] districts,”¹⁰² and an 1834 Pennsylvania bill that made the establishment of a public school optional, but “52 percent of the districts voted to support one”¹⁰³ anyway. By 1850, almost half of the nation’s youth between the ages of five and twenty were attending some form of school.¹⁰⁴ Although this figure might appear encouraging, author and scholar John D. Pulliam cautioned “not to infer that this was a golden age of education.”¹⁰⁵ Pulliam commented that “[t]he typical common elementary school of 1860 was a crowded, one-room institution with poor lighting, bad ventilation, and inadequate furniture. . . . There was no systematic program for the teacher to follow, and much of the time was taken up with individual recitations.”¹⁰⁶ In fact, teaching professionals were such a rarity that the early to mid-1800s was when the monitorial system was born,

⁹⁸ *Id.* at 37.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 48.

¹⁰¹ *Id.* at 49.

¹⁰² *Id.* at 48.

¹⁰³ PULLIAM, *supra* note 64, at 49.

¹⁰⁴ *Id.* at 50.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 50–51.

where “teachers outsourced many of their duties to the students themselves.”¹⁰⁷

These figures and critiques of the educational system of the nation in the mid-19th century track remarkably close to what was taking place in Joselyn’s hometown: Glen Cove. In 1821, a single-room schoolhouse was constructed, and around the same time period, a board of education was formed to serve the children of the region even though “less than half of the 226 school-age children actually attended school.”¹⁰⁸ Even with these progressive steps and exciting participation figures, seen in both Glen Cove and on a national scale, progress in educating the nation’s youth was very slow to achieve, for a variety of reasons:

[T]he states moved slowly in the passage of laws which set up their various educational systems. The state superintendent of free schools or common schools . . . often had very feeble powers. Even when the states passed laws necessary for a real school system they tended to be very slow in the enforcement of those laws. For a long time it was difficult to collect school taxes and nearly impossible to insure compulsory attendance, even when such attendance was a legal requirement. Hence the development of the state school systems varied as the interest of the people tended to wax and wane.¹⁰⁹

Just as individuals and communities played a huge part in the early establishment of education in the colonies, they also played a large role in the slow, delayed adoption of a strong national educational apparatus in the mid- to late 19th century. Although early laws from New England and the middle colonies providing for a “school tax and some form of state control” were “found all over the nation,”¹¹⁰ by the 1870s, the failure of communities across the country to adhere to these new attendance requirements meant that the impact of these national laws were muted through low participation rates.¹¹¹

Even though individuals and communities were sometimes slow to catch up to the educational building blocks being put forth by local and state governments in the 1800s, many educational concepts that we think of as normal today were born in the 19th century.¹¹² In 1856, for example, Mrs. Carl

¹⁰⁷ Erin Blakemore, *In Early 1800s American Classrooms, Students Governed Themselves*, HISTORY (Sept. 6, 2017), [https://perma.cc/MA6E-D488] (last updated Aug. 22, 2018).

¹⁰⁸ JOAN HARRISON, GLEN COVE REVISITED 99 (2010).

¹⁰⁹ PULLIAM, *supra* note 64, at 46-47.

¹¹⁰ *Id.* at 61.

¹¹¹ *Id.* at 50; HARRISON, *supra* note 110, at 99.

¹¹² Dave Person, *Publicly Supported High Schools May Have Started in Kalamazoo*, MLIVE (June 7, 2010), [https://perma.cc/3N5N-67NQ] (last updated Jan. 21, 2019).

Schurz “established the first American kindergarten” in Wisconsin.¹¹³ Kindergarten began in Germany, but saw “its greatest development” in the United States.¹¹⁴ By the 1960s, a full century after Schurz brought kindergarten to the United States from Germany, almost half of America’s five-year-olds were enrolled in either public or private kindergarten programs.¹¹⁵ Today, the focus of early education has shifted even beyond kindergarten¹¹⁶ to preprimary programs like universal pre-K.¹¹⁷ In 2019, 86 percent of 5-year-olds and 49 percent of 3- to 4-year-olds were enrolled in preprimary programs,¹¹⁸ showing the slow but steady growth of preprimary programs continuing even to this day.

Two years later in 1858, Kalamazoo, Michigan established a high school.¹¹⁹ Up until that point, “to go to school[,] you would go through eighth grade” with “whatever textbook you had . . . and you’d study with the teacher’s help,” and “[w]hen the teacher thought you’d done enough, you were done with school.”¹²⁰ The core of the argument put forth by residents who opposed compulsory high school was that high school “was not part of the common school system” as it had developed up until that point.¹²¹ The Michigan Supreme Court sided with the school district and found that the school district could in fact tax residents for a high school, which “set a precedent for using public taxes as a means of revenue for high schools.”¹²² Though it was not until the turn of the 20th century when a concept of modern high school became the primary method of secondary education in this country,¹²³ the adoption of this concept was a slow and grinding movement. Today, high school is as regular a part of American society as any other embedded tradition or rite of passage, and there are 15.4 million public education students enrolled in grades 9-12.¹²⁴

¹¹³ PULLIAM, *supra* note 64, at 57.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Emma G. Fitzsimmons & Jeffery C. Mays, *After Six Years in Office, New York’s Mayor Vows to “Save Our City,”* N.Y. TIMES (Feb. 6, 2020), [https://perma.cc/ZKB7-SF69].

¹¹⁷ Abbie Lieberman, *Policy Recommendations: Universal Pre-K*, NEW AMERICA, [https://perma.cc/5BCR-D56C] (last visited June 8, 2021).

¹¹⁸ *Enrollment Rates of Young Children*, NAT’L CTR. FOR EDUC. STAT., [https://perma.cc/6RVA-2T99] (last updated May 2021).

¹¹⁹ PULLIAM, *supra* note 64, at 68.

¹²⁰ Person, *supra* note 114.

¹²¹ PULLIAM, *supra* note 64, at 68.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Fast Facts: Back to School Statistics*, NAT’L CTR. FOR EDUC. STAT., [https://perma.cc/A8NL-FEF6] (last visited June 8, 2021).

In the context of the development of the American educational system, Governor Cuomo framed the Excelsior Scholarship Program as a natural extension of education's evolutionary process.¹²⁵ Ignoring cost and accessibility, enrollment figures alone suggest that Governor Cuomo may be correct.¹²⁶ For example, in Fall 2019, almost 20 million students attended colleges and universities, about five percent lower than the peak of more than 21 million in 2010.¹²⁷ Even still, that enrollment is double the enrollment rate from 1974 and dwarfs the almost 2.5 million enrolled students in 1947.¹²⁸ However, the most pressing problem is that college costs and tuitions have continued to increase,¹²⁹ for a variety of reasons.¹³⁰ The Excelsior Scholarship Program is not the first state-sponsored program to attempt to fix this problem,¹³¹ but it does so in a way that undermines the very goals it attempts to accomplish. If free college does become the next step in this evolution of the American educational apparatus, it cannot do so with the conditions the Excelsior Scholarship Program attaches.

III. THE (DORMANT) COMMERCE CLAUSE

This Part will first provide an overview to modern Commerce Clause jurisprudence, and then discuss the dormant Commerce Clause. Then, focus will shift to exceptions to the dormant Commerce Clause, which are especially relevant to the Excelsior Scholarship Program. Although the dormant Commerce Clause has been described as “implicit in the Commerce Clause,”¹³² this Note will introduce each concept, as well as their exceptions, separately.

¹²⁵ N.Y. Governor's Press Office, *supra* note 23.

¹²⁶ Lauren Camera, *College Enrollment Stays Flat, Continuing a Decade-Long Trend*, U.S. NEWS & WORLD REPORT (Apr. 25, 2019, 12:15 PM), [https://perma.cc/K3M2-JPBG].

¹²⁷ *Back to School by the Numbers: 2019-20 School Year*, NAT'L CTR. FOR EDUC. STAT. BLOG, (Aug. 13, 2019) [hereinafter *Back to School by the Numbers*], [https://perma.cc/Y7MH-8YH9].

¹²⁸ *Total Fall Enrollment in Degree-Granting Postsecondary Institutions, by Attendance Status, Sex of Student, and Control of Institution: Selected Years, 1947 Through 2028*, NAT'L CTR. FOR EDUC. STAT., [https://perma.cc/5YWF-ACPE].

¹²⁹ Rick Seltzer, *Net Price Keeps Creeping Up*, INSIDE HIGHER ED (Oct. 25, 2017), [https://perma.cc/Q38Q-7DJK].

¹³⁰ Jessica Dickler, *Why College Tuition Keeps Rising*, CNBC (Oct. 24, 2019, 7:31 AM), [https://perma.cc/T94T-VQRT]; Hillary Hoffower, *College Is More Expensive Than It's Ever Been, and the 5 Reasons Why Suggest It's Only Going to Get Worse*, BUSINESS INSIDER (June 26, 2019, 9:23 AM), [https://perma.cc/4EW6-58NP].

¹³¹ *HOPE*, *supra* note 40.

¹³² *Commerce Clause*, CORNELL LEGAL INFO. INST., [https://perma.cc/PUN7-9GAY] (last visited June 8, 2021).

A. The Commerce Clause

The Constitution grants Congress the power “[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹³³ This language is explicit, and grants Congress an affirmative power to regulate. The first significant case that raised the question of what exactly qualified as commerce, and thus whether it would be subject to Congressional regulation, was the 1824 case *Gibbons v. Ogden*.¹³⁴ In this case, New York passed a law that provided exclusive use of the state’s waterways for 30 years, and Gibbons violated the law when he navigated the waterways without the rights to do so.¹³⁵ Whereas the Constitution does not define commerce, this case provided an early definition, and in doing so, set the boundaries of power the Constitution granted to Congress: “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”¹³⁶

The definition of commerce, and thus the reach of Congressional regulatory power, has shifted repeatedly since that definition provided in 1824. The Court started modifying its definition of “commerce” closer towards the modern Commerce Clause framework beginning in the late 1930s with *NLRB v. Jones & Laughlin Steel Corp.*¹³⁷ Here, the Court found that Congress was permissible in its regulation of labor relations because labor relations “have such a close and substantial relation to interstate commerce that their control is essential . . . to protect that commerce from burdens and obstructions.”¹³⁸ In 1942, the Court extended the definition of “commerce” even further to allow for regulation of local activities if the activity, in the aggregate, would affect interstate commerce.¹³⁹ Between the 1930s and the 1990s the Court extended the power of Congressional regulation via the Commerce Clause almost universally, including across civil rights, consumer financial protections, and the food and restaurant industries.¹⁴⁰

The modern Commerce Clause framework, and the outer limits of that framework, came to fruition beginning in the 1990s with *United States v.*

¹³³ U.S. CONST. art. I, § 8, cl. 3.

¹³⁴ See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹³⁵ *Id.* at 1-3.

¹³⁶ *Id.* at 189-90.

¹³⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹³⁸ *Id.* at 37.

¹³⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁴⁰ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Perez v. United States*, 402 U.S. 146 (1971).

Lopez.¹⁴¹ In *Lopez*, the Court established that the Commerce Clause gives Congress the power to regulate three broad categories of activity: “First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.”¹⁴² In 2000, the Court added an additional step to the Commerce Clause framework it announced in *Lopez*: an analysis into whether the regulated activity is an economic activity or not.¹⁴³ In *United States v. Morrison*, the Court found that Congress lacked the authority to authorize a particular section of the Violence Against Women Act because “gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹⁴⁴ Finally, in *Gonzales v. Raich*, the Court found that Congress could permissibly regulate the use and production of home-grown marijuana because “Congress has the power to regulate activities that substantially affect interstate commerce,”¹⁴⁵ as was provided for in *Lopez*, and because the Court found that growing marijuana was an economic activity, as provided for in *Morrison*.¹⁴⁶ Critically, the Court in *Raich* defined economic activity as “the production, distribution, and consumption of commodities.”¹⁴⁷

B. *The Dormant Commerce Clause*

As previously discussed, the Constitution is explicit in establishing an affirmative Congressional power to regulate interstate commerce, which is known as the Commerce Clause.¹⁴⁸ Although there is no similar explicit declaration of a dormant Commerce Clause in the Constitution, the Court has acknowledged the dormant Commerce Clause as a natural and necessary extension of the Commerce Clause since one of its earliest decisions: *Gibbons v. Ogden*.¹⁴⁹ In explaining what it meant that the Constitution granted Congress the power to regulate commerce, the *Ogden* Court discussed the parameters of this power, including the fact that the states themselves could not regulate interstate commerce as a necessary corollary of Congress’ power under the Commerce Clause:

¹⁴¹ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁴² *Id.* at 558 (citations omitted).

¹⁴³ *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁴⁴ *Id.* at 613.

¹⁴⁵ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

¹⁴⁶ *Id.* at 23-26.

¹⁴⁷ *Id.* at 25.

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁹ *Gibbons v. Ogden*, 22 U.S. 1, 206-10 (1824).

It is not, indeed, said, that Congress shall have the exclusive power, but it is said that they shall have power to do a certain act, which, when done, shall be exclusive in its operation. The power to do such an act, must be an exclusive power. It can, in the nature of things, be performed only by a single hand. Is not the power of one sovereign to confer exclusive rights, on a given subject, within a certain territory, inconsistent with a power in another independent sovereign, to confer exclusive rights on the same subject, in the same territory? Do not the powers clash? The right to be conferred by Congress, is to exclude all other rights on the subject in the United States; New-York being one of those States. The right to be conferred by New-York, is to exclude all other rights on the subject within the State of New-York. That one right may exclude another, is perfectly intelligible; but that two rights should reciprocally exclude each other, and yet both continue to subsist in perfect harmony, is inconceivable.¹⁵⁰

For almost 200 years, the Court recognized the power of the dormant Commerce Clause as one that would “prevent the states—in the absence of congressional action—from creating insurmountable barriers among themselves, thereby eradicating the unity that the Framers of our Constitution strove to create.”¹⁵¹ And although other scholars pin the beginnings of the dormant Commerce Clause doctrine to an 1851 case, it is indisputable that the doctrine has been acknowledged and present for a vast majority of our nation’s history.¹⁵²

Although the very core of the dormant Commerce Clause has been recognized since the 19th century, the concept has its fair share of detractors. Articles and comments have populated legal academic journals for decades, proposing changes to the dormant Commerce Clause and even questioning the very existence of the doctrine in the first place.¹⁵³ Many outspoken jurists, including Supreme Court Justices, have also been critical of the dormant Commerce Clause, with Justice Scalia going so far as to call the dormant Commerce Clause “judicial fraud” in a 2015 dissenting opinion, joined by

¹⁵⁰ *Id.* at 168.

¹⁵¹ Amy M. Petragani, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1215 (1994).

¹⁵² Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 577 (1987).

¹⁵³ See e.g., Mark Tushet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

Justice Thomas.¹⁵⁴ However, even with these criticisms lobbed at the dormant Commerce Clause it continues to be an important and useful tool employed by the Court—as recently as 2019, the Supreme Court ruled 7-2 in favor of local businesses challenging a two-year residency requirement that Tennessee imposed on entities that sought to operate retail liquor stores, using the dormant Commerce Clause as the primary mechanism to decide the outcome of the case.¹⁵⁵

Supreme Court case law has illustrated that there are two broad categories of dormant Commerce Clause analysis: facially discriminatory state laws and facially neutral laws, with an additional analysis required in the facially neutral category.¹⁵⁶ Since the dormant Commerce Clause is concerned with precluding states from encroaching on Congress' constitutionally granted power to regulate commerce, the focus of these categories on state laws is unsurprising.¹⁵⁷ The 1978 case *Philadelphia v. New Jersey* has been characterized as “the most influential dormant Commerce Clause” decision, and it serves as a perfect illustration of the facially discriminatory category.¹⁵⁸

1. Facially Discriminatory State Laws

In 1973, New Jersey passed a law that was ostensibly aimed at improving the health, safety, and wellness of state residents by barring any garbage or waste that either originated or was collected outside of the state.¹⁵⁹ Located between New York City and Philadelphia, the two largest cities on the East Coast, New Jersey was “long a dumping ground for waste.”¹⁶⁰ In response to the 1973 New Jersey statute, the City of Philadelphia, other out-of-state municipalities, and operators of private landfills in New Jersey all brought suit seeking to invalidate the statute.¹⁶¹ Ultimately, the Court found that there was no difference between out-of-state waste and waste emanating from New Jersey, and by only preventing out-of-state waste from entering the state, New Jersey was improperly discriminating in interstate commerce: “The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites.”¹⁶² From this decision, the Court

¹⁵⁴ *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1808 (2015).

¹⁵⁵ *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

¹⁵⁶ Petragani, *supra* note 153, at 1216-21.

¹⁵⁷ *Gibbons v. Ogden*, 22 U.S. 1, 206-10 (1824).

¹⁵⁸ Petragani, *supra* note 153, at 1215-16.

¹⁵⁹ *Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978).

¹⁶⁰ Karem Tumulty, *Trash Disposal Crisis: No Dumping (There's No More Dump)*, L.A. TIMES (Sept. 2, 1988), [<https://perma.cc/J7MY-CH68>].

¹⁶¹ *Philadelphia v. New Jersey*, 437 U.S. at 619.

¹⁶² *Id.* at 629.

established the principle that if a statute discriminates on its face “by giving economic protection to in-state entities at the expense of out-of-state entities” then “the statute is deemed per se invalid, justifiable only by a compelling state interest.”¹⁶³ This compelling state interest is an exceedingly difficult legal hurdle to clear, and to date, a facially discriminatory state law has been upheld only once by the Court.¹⁶⁴

2. Facially Neutral State Laws

The Court also mentioned the next category of dormant Commerce Clause analysis, focusing on facially neutral laws, in *Philadelphia*,¹⁶⁵ but it was first introduced in the 1970 case *Pike v. Bruce Church*.¹⁶⁶ The *Pike* balancing test arose from this case, and weighs the local public interest against the burden the otherwise facially neutral law imposes on interstate commerce; “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits,” the law will be upheld.¹⁶⁷ Similar to the first category of dormant Commerce Clause analysis, attention is paid to discrimination, since a law subjected to the *Pike* balancing test and later found to have the purpose or effect of discrimination violates the dormant Commerce Clause and is thus unconstitutional.¹⁶⁸ This is often incredibly difficult to ascertain, leading to critiques of the *Pike* balancing test, but it is critical to understand because the *Pike* balancing test is so outcome-determinative.¹⁶⁹

For example, the Court was confronted with a facially neutral law in *Hunt v. Washington State Apple Advertising Commission* and accordingly applied the *Pike* balancing test.¹⁷⁰ Whether the effects of that facially neutral law were considered discriminatory (and thus invalid) or simply an incidental burden (and thus valid), remarkably hung on the loose lips of a North Carolina Agriculture Commissioner:

Despite the statute’s facial neutrality, the Commission suggests that [the law’s] discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission’s request for an exemption

¹⁶³ Petragani, *supra* note 150, at 1217.

¹⁶⁴ *Maine v. Taylor*, 477 U.S. 131 (1986).

¹⁶⁵ *Philadelphia v. New Jersey*, 437 U.S. at 624.

¹⁶⁶ *Pike v. Bruce Church*, 397 U.S. 137 (1970).

¹⁶⁷ *Id.* at 142.

¹⁶⁸ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977).

¹⁶⁹ Nathan Gniewek, Note, *Deference vs. Evidence: An Exploration of the Appropriate Application of Putative Benefits to the Pike Balancing Test*, 68 CATH. U.L. REV. 163, 177-78 (2019).

¹⁷⁰ *Hunt*, 432 U.S. at 350–51.

following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers since they were mainly responsible for the legislation being passed" ¹⁷¹

The outcome of *Hunt*, declaring the North Carolina law in question invalid even though it was facially neutral, shows both the powerful outcome-determinative nature of the *Pike* balancing test and the difficulty in ascertaining the true intent of an otherwise facially neutral law. If a court finds discrimination in a facially neutral law, as the Court did in *Hunt*, then the inquiry shifts back to the analysis called for with facially discriminatory laws where "the burden falls on the State to justify [the statute] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."¹⁷² Regardless of the difficulty in ascertaining the true intent behind the enactment of a particular statute, and whether a law is considered presumptively invalid or valid, this is currently the test that governs the facially neutral category of dormant Commerce Clause analysis.

C. *Exceptions to the Dormant Commerce Clause*

The dormant Commerce Clause's almost 200-year existence doesn't mean the power of the doctrine is unlimited—its development has also been accompanied by different exceptions.¹⁷³ As there is already a test in place for the facially neutral category of Dormant Commerce Clause analysis,¹⁷⁴ the three primary exceptions to the dormant Commerce Clause function as exceptions primarily to discriminatory laws, either facially or in effect or purpose. The three exceptions to discriminatory laws in dormant Commerce Clause analysis are the "public benefit" exception,¹⁷⁵ the express congressional authorization exception,¹⁷⁶ and the market-participant doctrine.¹⁷⁷

1. "Public Benefit" Exception

The "public benefit" exception is illustrated in *United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Management Authority*, where the Court upheld a

¹⁷¹ *Id.* at 352.

¹⁷² *Id.* at 353.

¹⁷³ See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

¹⁷⁴ *Pike v. Bruce Church*, 397 U.S. 137 (1970).

¹⁷⁵ Natalie K. Mitchell, *United Haulers v. Oneida-Herkimer Solid Waste Management Authority: Introducing the "Public Benefit" Exception to the Dormant Commerce Clause*, 21 *TUL. ENV'T. L.J.* 135, 149 (2007).

¹⁷⁶ *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 92–93.

¹⁷⁷ *White v. Mass. Council of Constr. Emp.*, 460 U.S. 204, 206–08 (1983).

local ordinance requiring that all solid waste generated in certain counties be disposed of at a government-owned dump.¹⁷⁸ Although this case parallels *Philadelphia v. New Jersey* in some respects, the Court came out in the opposite way, largely due to the local government's ownership of the waste facility: "when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of 'simple economic protectionism.' Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism."¹⁷⁹ The Court rested its decision on the lack of any protectionist intentions and on the fact that waste disposal is, and has largely been, "a local government function", thus showing great deference to the role of local governments and their administration of established and uncontested local duties.¹⁸⁰

2. Express Congressional Authorization Exception

The second and third exceptions to discriminatory laws in dormant Commerce Clause analysis are both discussed in *South-Central Timber v. Wunnicke*.¹⁸¹ In 1980, Alaska announced that it would sell almost 50 million board-feet of timber.¹⁸² The proposed contract for the sale of the timber was in accordance with an Alaska state statute that required the successful bidder of the sale to "partially process the timber prior to shipping it outside of the State."¹⁸³ The stated purpose of the 1974 Alaska statute was to "protect existing industries, provide for the establishment of new industries, derive revenue from all timber resources, and manage the State's forests on a sustained yield basis."¹⁸⁴ South-Central Timber Development, Inc. was in the business of purchasing timber and then shipping it abroad.¹⁸⁵ However, South-Central Timber "customarily [sold] unprocessed logs," which would be impossible if the company was forced to abide by the 1974 Alaska statute.¹⁸⁶ And so, it commenced the action to seek an injunction.¹⁸⁷

The Court of Appeals for the Ninth Circuit found the Alaska statute in question valid "because it found implicit congressional authorization in the

¹⁷⁸ *United Haulers Ass'n*, 550 U.S. at 347.

¹⁷⁹ *Id.* at 343 (internal citations omitted).

¹⁸⁰ *Id.* at 344 (citing *United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d Cir. 2001) (J. Calabresi concurring)).

¹⁸¹ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92-93 (1984).

¹⁸² *Id.* at 84.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 85.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 86.

¹⁸⁷ *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 86.

federal policy of imposing a primary-manufacture requirement on timber taken from federal land in Alaska.”¹⁸⁸ The Court of Appeals found, and the Supreme Court confirmed, that “Congress may ‘redefine the distribution of power over interstate commerce’ by ‘[permitting] the states to regulate the commerce in a manner which would otherwise not be permissible.’”¹⁸⁹ When Congress permits the states to do something they normally wouldn’t be able to do under the guise of the Commerce Clause, it then becomes permissible because Congress is exercising its Commerce Clause power in regulating interstate commerce.¹⁹⁰ This is the express congressional authorization exception to the dormant Commerce Clause. However, the Supreme Court did not find that the express congressional authorization exception applied in this case, saying that Alaska could not take Congressional language on federal lands and “infer from that fact that it intended to authorize a similar policy with respect to state lands.”¹⁹¹ Because the Court did not find this exception applicable in *South-Central Timber*, it moved onto the third dormant Commerce Clause exception.¹⁹²

3. Market-Participant Exception

Up until *South-Central Timber*, the Court had only applied the market-participant exception to the dormant Commerce Clause three times before, and so, the “precise contours of the [doctrine] ha[d] yet to be established.”¹⁹³ Together, those cases make clear that the market-participant doctrine says “if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.”¹⁹⁴ Alaska tried to argue that its role as a seller of timber, and the conditions attached to that sale, placed the state squarely into that exception to the dormant Commerce Clause as a market participant.¹⁹⁵ However, the Court disagreed and focused primarily on one of the conditions Alaska attached to the sale of the timber, that all timber the State sells must then be processed in the State:

Alaska . . . participates in the timber market, but imposes conditions downstream in the timber-processing market. Alaska is not merely subsidizing local timber processing in an amount “roughly equal to the difference between the price the timber would fetch in the absence of such a

¹⁸⁸ *Id.* at 87.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 82, 92–93.

¹⁹² *Id.* at 82, 93.

¹⁹³ *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 82, 93.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 82, 95.

requirement and the amount the state actually receives.” If the State directly subsidized the timber-processing industry by such an amount, the purchaser would retain the option of taking advantage of the subsidy by processing timber in the State or forgoing the benefits of the subsidy and exporting unprocessed timber. Under the Alaska requirement, however, the choice is made for him: if he buys timber from the State he is not free to take the timber out of state prior to processing.¹⁹⁶

The Court noted that in a normal commercial context, “the seller usually has no say over, and no interest in, how the product is to be used after the sale.”¹⁹⁷ Because the Court agreed with South-Timber that “although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant[,]”¹⁹⁸ it found that the downstream conditions attached to the transaction by Alaska fell outside of the market-participant exception and, as a result, was unconstitutional.¹⁹⁹ Alaska’s attachment of downstream conditions after the transaction was deadly to the State’s case and to the 1974 statute because it pushed Alaska away from its status as a market-participant into a market-regulator, and “[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.”²⁰⁰ Finally, the Court also explicitly called out a special concern over the statute because, since South-Timber sold timber abroad, foreign commerce would have been affected.²⁰¹ The Court highlighted this concern when it said that “[i]t is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation’s foreign policy that “the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments.”²⁰²

D. The Dormant Commerce Clause and Federalism in Education, Today

The Constitution of the United States created a federal system of power, and did so in a way that simultaneously assumes and demands a balance between the federal government and the different state governments. There are many problems that arise as a result of this dual system of governance where

¹⁹⁶ *Id.* at 95.

¹⁹⁷ *Id.* at 96.

¹⁹⁸ *Id.* at 98.

¹⁹⁹ *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 101.

²⁰⁰ *Id.* at 97.

²⁰¹ *Id.* at 85.

²⁰² *Id.* at 100.

the different authorities may come in conflict with one another, and the Dormant Commerce Clause is but one example.²⁰³ Although education has historically been left to the states to tax, develop, and administer²⁰⁴—and therefore avoiding the conflict the dormant Commerce Clause addresses—the history of education in the United States occurred primarily in a hyper-local society. For example, in 1900, “95 percent of the people living in the Carolinas were born there,” whereas in 2012 only 58 percent of residents of North or South Carolina were born there.²⁰⁵ When people stayed where they were born, the local focus of the disparate educational systems throughout the country made sense.

Today, however, migration in the United States is still robust, even if it “has fallen noticeably since the 1980s.”²⁰⁶ “Those with college and professional degrees are much more likely to live farther from their parents than those with a high school education, in part because they have more job opportunities in big cities.”²⁰⁷ Even without factoring in education or income, approximately a quarter of American adults reported moving within five years of the study and the average American moves residences more than 11 times in their lifetime.²⁰⁸ This internal migration can also be seen through out-of-state student enrollment figures at publicly funded state universities. For example, in 2019, less than 40% of students enrolled at the University of Alabama were from Alabama.²⁰⁹ In 1990, Pennsylvania residents made up 76.5% of students at Pennsylvania State University, but that number shrunk to only 56% by 2015.²¹⁰

As more and more students go to college²¹¹ and as the connection between higher education and higher rates of migration becomes more pronounced,²¹² conflict between the States and federal government in the once hyper-local realm of education should have been expected. Moreover, since

²⁰³ Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571.

²⁰⁴ See discussion *supra* Section II.B.

²⁰⁵ Gregor Aisch & Robert Gebeloff, *Mapping Migration in the United States*, N.Y. TIMES (Aug. 15, 2014), [<https://perma.cc/AX86-DGY3>].

²⁰⁶ Raven Molloy, et al., *Internal Migration in the United States*, FED. RES. BD. (2011), [<https://perma.cc/N2LF-KLM8>].

²⁰⁷ Quoc Trung Bui & Claire Cain Miller, *The Typical American Lives Only 18 Miles From Mom*, N.Y. TIMES (Dec. 23, 2015), [<https://perma.cc/CE8B-NAEE>].

²⁰⁸ Adam Chandler, *Why Do Americans Move So Much More Than Europeans?*, THE ATLANTIC (Oct. 21, 2016), [<https://perma.cc/2EQ4-JNMN>].

²⁰⁹ *Quick Facts*, U. OF ALA., [<https://perma.cc/EXW9-TPFN>] (last visited June 8, 2021).

²¹⁰ Scott Jaschik, *Audit Blasts Penn State on Out-of-State Students*, INSIDE HIGHER ED (June 23, 2017), [<https://perma.cc/J8JS-9EF7>].

²¹¹ *Back to School by the Numbers*, *supra* note 129.

²¹² Bui & Miller, *supra* note 209.

education remains in the hands of state and local governments but residents continue to cross state lines to attend both public and private institutions of higher education, states like New York have felt it necessary to attempt to slow the otherwise well-established internal migration patterns that have taken place for decades, going so far as to establish financial penalties to do so.²¹³

However, New York already had established (and approved) mechanisms in place to protect its finite resources—a stated goal of the Excelsior residency requirement and financial penalty²¹⁴—through charging differing tuition rates for in-state and out-of-state students and setting the terms of the residency requirement to qualify for in-state tuition in the first place.²¹⁵ The Supreme Court declared that when a benefit in question is portable, such as education or divorce, States have the power to demand something more in order to prevent an individual from abusing those state resources.²¹⁶ In doing so, the Court confirmed that the residency requirements public colleges and universities employ across the country are acceptable.²¹⁷ However, with the Excelsior post-graduation residency requirement and financial penalty, New York is moving beyond the court-sanctioned protective measures and is essentially double-dipping, requiring Excelsior applicants to have lived in New York long enough to establish residency before applying, and then requiring Excelsior applicants to live in New York after graduating.²¹⁸ This next Part illustrates that this double-dipping extension into post-graduation residency and employee requirements goes beyond the permissible protective measures and violates the Constitution.

IV. ANALYSIS

The Excelsior Scholarship post-graduation residency and employment requirements, as well as the built-in financial penalty, violate the Constitution for at least two reasons. First, these elements of Excelsior fall outside of the permissible parameters provided for by the market-participant doctrine in dormant Commerce Clause analysis, figuratively bumping New York State out of the exception. By attempting to regulate a different, additional market through downstream conditions, New York State forfeits the market-

²¹³ Anya Kamenetz, *Here's the Fine Print on the Country's Biggest-Ever Free College Plan*, NPR (Apr. 11, 2017), [<https://perma.cc/577F-XHBJ>].

²¹⁴ Brody, *supra* note 32.

²¹⁵ *New York State Residency*, BROOKLYN COLL., [<https://perma.cc/72UC-E4TS>] (last visited June 8, 2021).

²¹⁶ *See generally* Saenz v. Roe, 526 U.S. 489 (1999) (holding a California statute imposing durational residency requirement by limiting Temporary Assistance to Needy Families benefits through recipient's first year of residency unconstitutional).

²¹⁷ *Id.*

²¹⁸ *Excelsior Scholarship FAQs*, *supra* note 25.

participant exception. Second, the post-graduation residency requirement and financial penalty violate the dormant Commerce Clause because of the presence of discrimination found in the explanations given for the inclusion of the elements.

A. Excelsior Violates the Market-Participant Exception to the Dormant Commerce Clause

South-Central Timber made it clear that attaching conditions downstream was determinative in finding that a State was no longer acting in a normal commercial context, where the seller has no say in how the product is used after the transaction.²¹⁹ New York requires Excelsior Scholarship recipients to be in-state residents, and that is permissible. New York, like Georgia, Rhode Island, and other states, looks at factors like family income-levels and GPA when determining scholarship eligibility, and that is permissible. But when New York mandates that an Excelsior Scholarship recipient live in New York and work in New York for up to four years *after* graduating, it impermissibly crosses the line by imposing a downstream condition that impacts the recipient up to four years after their graduation and, more importantly, well after the transaction of accepting the funds. Just as the Supreme Court said Alaska could participate in the timber market, but could not regulate in the processing market after the fact,²²⁰ New York cannot participate in the financial services market and, in the process, exert regulation downstream, after the fact.²²¹

Joselyn and her situation make this conclusion inescapable. Joselyn is a native-Spanish speaker with dreams of becoming a teacher, either in the United States or abroad. She would likely have no problem qualifying for in-state tuition, meeting the GPA and family-income requirements, and she is otherwise enthusiastic about attending SUNY schools where the Excelsior Scholarship is available. But if Joselyn applied to any private college or university in the country, not a single one would attach a post-graduation residency requirement to financial aid like New York does. Aside from the Arizona and South Dakota models, not a single public school would attach a post-residency requirement to financial aid at all.²²² If Joselyn applied to a local bank or credit union to take out student loans, not a single one would condition granting a loan on a residency requirement. We could expand this inquiry out from student loans and into car loans, mortgages, lines of credit,

²¹⁹ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984).

²²⁰ *Id.* at 97.

²²¹ *See generally* *Saenz v. Roe*, 526 U.S. 489 (1999).

²²² Although Arizona and South Dakota both have similar post-obligation residency requirements, Arizona's program was instituted three years after New York's, and there are differences between South Dakota's programs and New York's that could be determinative.

or anything else in the financial services sector, but the outcome would remain the same—residency requirements are not part of this market.

By looking at the financial assistance market, we are able to figure out what the normal commercial circumstances in the market are, and nowhere in those circumstances are there mandates that force you to live somewhere—and explicitly prevent you from living elsewhere—for a certain number of years. And just as the Court found that no part of the timber-buying market involved attaching downstream condition, so too are there no downstream conditions in the financial assistance market that force someone to live somewhere. Instead, what the post-graduation residency requirements in New York actually do is provide New York a back-door means to regulate an entirely different market than the financial assistance market, which the Court declared in *South-Central Timber* as an impermissible use of the market-participant doctrine.²²³

B. Excelsior May Fail the Pike Balancing Test Due to Discriminatory Intent

Governor Cuomo made it clear that he viewed the residency requirement and financial penalty as a proverbial stick—not a carrot—when he condescendingly asked why he should pay for someone to attend college with the Excelsior Scholarship only for them to move to California. This comment however is shortsighted, both for missing the mark of the reality with New York college graduates and, more critically, for being potentially indicative of Excelsior’s discriminatory effects or its purpose against other states. As discussed earlier, anywhere from 80-90 percent of graduates of colleges in New York State already remain there upon graduation.²²⁴ As a result, it would be incredibly difficult for New York to show that the post-graduation residency requirement and financial penalty serve a legitimate government purpose.

Although the *Pike* balancing test is difficult to project, with its reliance on intent to figure out whether a statute is discriminatory in effect or simply has an incidental burden on commerce,²²⁵ the Court placed much weight on an otherwise innocuous comment made by a North Carolina government official in finding the law in *Hunt* as unconstitutional.²²⁶ As a result, the comments made by Governor Cuomo, representatives of the New York State Education Department, and other government officials may be critical in illustrating that the true reason for the post-graduation residency requirement and financial penalty was not to serve a legitimate government interest, but rather to discriminate against other states by keeping educated citizens in New York and away from them. As was also illustrated in *Hunt*, sometimes an innocuous, off-the-cuff comment is all the Court needs to find that there

²²³ *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 97.

²²⁴ Chen, *supra* note 29.

²²⁵ Gniewek, *supra* note 171, at 177-78.

²²⁶ *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 352 (1977).

was underlying discriminatory intent, even in an otherwise facially neutral statute.

Because of the difficulty in ascertaining intent, as called for by the *Pike* balancing test, this Section is not as exhaustive as the prior one. However, the comments made by both Governor Cuomo and other state officials²²⁷ appear to be illustrative in proving that the underlying purpose of the residency requirement and financial penalty have little to do with New York's participation in the financial assistance market and, instead, are crafted as a discriminatory tool to prevent migration of college graduates to other states. Focusing on the market-participant doctrine is not a concession that the Excelsior Scholarship residency requirement and financial penalty are not potentially unconstitutional under the *Pike* balancing test, but rather a recognition that there should be little doubt that both elements are almost certainly unconstitutional under the market-participant doctrine analysis.

C. Additional Considerations

The Court's discussion of the special attention it pays towards foreign commerce from *South-Central Timber* makes Joselyn's example even more powerful. As a native Spanish speaker born to immigrant parents from Central America, with her eyes set on the Peace Corps or a Fulbright Grant, Joselyn is essentially precluded from even applying to either program if she is an Excelsior recipient. If Joselyn attended college with an Excelsior Scholarship and was then accepted into the Peace Corps or selected for a Fulbright, she would have to either forego the opportunity or voluntarily take on the financial penalty. In *South-Central Timber*, the Court was explicit that "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."²²⁸ Joselyn's ability to fly to a foreign country, live there, go grocery shopping, or travel within that country all qualify as foreign commerce and would all be severely restricted, if not entirely cut off, if Excelsior can regulate in the market of movement of people by restricting her from leaving New York.

From a public policy perspective, the post-graduation employment requirement is also simply bad policy. Returning to Joselyn, if she was to attend a SUNY institution with an Excelsior Scholarship, she would be precluded from even searching for jobs in New Jersey or Connecticut. If she attended SUNY Buffalo, she'd be able to cross the Peace Bridge into Canada, but wouldn't be allowed to apply for a job on the other side of the bridge. Montreal, the second largest city in Canada, would be entirely off limits to Joselyn if she attended SUNY Potsdam, only an hour and fifteen minutes driving from the city. Although Connecticut, New Jersey, or Vermont would not be obstructing Joselyn's ability to move into the respective states, New York

²²⁷ Disare, *supra* note 33.

²²⁸ *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 100.

would. As a potential graduate of SUNY Fredonia, Joselyn would be forced to consider the fact that if she found a job in Cleveland immediately upon graduation (approximately two hours away), it would come with the reality of her entire Scholarship being turned into a loan, functionally hanging over her head like a \$20,000 tax or penalty if she were to take the job. New York State is uniquely situated near many other states, and even another country, yet the Excelsior Scholarship Program as it currently stands would effectively create an economic protectionism barrier between scholarship-recipient graduates of SUNY schools and jobs located (sometimes only a stone's throw away) across the river in a bordering state.

New York has already acted according to constitutionally permissible bounds in protecting its finite state resources through the initial in-state residency requirement. By including a residency requirement that is potentially 400 percent longer after the fact, New York is extending well beyond constitutionally permissible bounds and, in doing so, is presenting the young people of New York State with an incredibly difficult decision to make.

In order to provide financial assistance to those that need it most, in a way that doesn't offend the Commerce Clause, dormant Commerce Clause, and the Constitution, New York State should drop the post-graduation residency requirement and remove the corresponding financial penalty as well. Although there may be policy reasons for making other changes to the Excelsior Scholarship Program, like increasing access, raising the award amount, etc., this Note is concerned with the constitutionality of the program. Insofar as the residency requirement and financial penalty can be stricken from the Excelsior Scholarship Program as a whole, this Note recommends that it be done.

V. CONCLUSION

The Excelsior Scholarship Program was a significant step towards realizing the goal of college as the next logical step in the educational system in this country, just as Governor Cuomo said when he discussed the push for public high school 70 years ago.²²⁹ The State University of New York educational system is a point of pride for the State, with many beautiful campuses, top-of-the-line programs and faculty, and its service to one of the most diverse, educated, and influential states in the Union. That all of this is accomplished through the relatively low cost of tuition in the SUNY system is all the more remarkable, as it truly speaks to the level of investment New York State has committed to education. However, if the purpose of the Excelsior Scholarship Program is to increase access to the SUNY and CUNY community colleges, colleges, and universities, then New York would be wise to drop the residency requirement and corresponding financial penalty. Not only do these policies force students like Joselyn to think twice about applying in the

²²⁹ N.Y. Governor's Press Office, *supra* note 23.

first place, for fear of cutting off opportunities the rest of the country and world might provide, they are unconstitutional as a violation of the Dormant Commerce Clause. And, just as other states have mimicked the residency requirement and financial penalty,²³⁰ so too have local New York government officials called for the program to be extended.²³¹ New York State should drop the post-graduation residency requirement and remove the corresponding financial penalty to save the Excelsior Scholarship Program as a whole, and to guarantee that the core mission of the program—expanding access to higher education—lives on successfully.

²³⁰ *UArizona Colleges of Medicine, supra* note 59.

²³¹ Joseph A. Griffo, *Lawmakers: Do More to Lure Rural Doctors*, ROME SENTINEL (Jan. 17, 2020, 4:00 PM), [<https://perma.cc/5WAL-MWB3>].