IMMIGRATION-RELATED STATE STATUTES AND LOCAL ORDINANCES: PREEMPTION, PREJUDICE, AND THE PROPER ROLE FOR ENFORCEMENT*

by Michael A. Olivas

I. Introduction

In a forum a dozen years ago on preemption issues and the proper balance between national immigration obligations and the role to be accorded States in immigration enforcement, I disagreed with those persons, such as Professor Peter Spiro, who saw the failure of federal enforcement as an opening for more robust state assumption of the needed actions. (We did not consider local, county, or other sub-state jurisdictions, but I believe that the same principles would apply in our formulations.)

Abridged, here was my take:

> Peter Spiro's thoughtful Article[1] offers the tempting thesis: what if immigration policy were regulated by the individual states rather than being preempted by federal powers? What would U.S. immigration policies be if they could be determined at the state level, in 50 "laboratories," instead of the stale, preclusionary logic mindlessly applied to the implementation of federal immigration and nationality law? Could such a scheme work, and would it lead to better results? Has the doctrine of federal preemption run its course, leading to hidebound practices, state-level frustration, and a moribund jurisprudence? Professor Spiro certainly believes that the traditional reasons advanced for preemption in the immigration and nationality context have not kept pace with developments in the modern federalism that is the United States.
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> He contrasts the "extreme skepticism"[2] with which state immigration measures are received by courts with the "federal discretion [that is] so unfettered by judicial constraint."[3] He then critiques a three-part equation: that immigration is an aspect of foreign policy and is therefore intrinsically federal; admissions decisions are in the federal domain and cannot be undermined by state level plans to discriminate against aliens; and the equal protection doctrine extends to resident and undocumented aliens. This trilogy of reasons underpinning the preemption doctrine is a weak foundation for Spiro, and he gives short shrift to the second and third justifications. Because of the abject failure of the government to control the flow of undocumented (and to a lesser, and different extent, resident) aliens, "[t]he near-complete disabling of the states on immigration matters . . . can ultimately hang only by the foreign relations thread. If this premise unravels, the existing imbalance in the institutional allocation of power must also fall."[4]
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> This is a tantalizing premise, one that has surface appeal both to the political left and right: while progressive immigration advocates could see the possibility of safe havens, local exceptions to a harsh federal scheme, and decentralized opportunities for relaxed enforcement, conservatives or immigration restrictionists can be attracted by the tightening up of alien benefits, more vigorous state border enforcement, and by the possibility of improved local control of political communities. Moreover, there is a surface plausibility, an intuitive sense that Professor Spiro is onto an ineffable and subtle truth. It is almost foolish to dispute the rise of unauthorized immigration, to ignore the deep recession in California [in 1993-94], to be unconcerned with the growth of the welfare state, or to ignore a relationship among these observations: there are data to show that people of color — those most likely to be in direct contact and competition with undocumented worker populations — are increasingly restrictionist in their attitudes towards immigration. There is even some preliminary evidence that Latinos are

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[1] Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 Va. J. Int'l L. 121 (1994).

[2] *Id.* at 134.

[3] *Id.*

[4] *Id.*

increasingly concerned with undocumented immigration.

Given this backdrop, including, most notably, California's overwhelming passage of Proposition 187, an avowedly anti-alien ballot measure, the preemption doctrine seems, to Professor Spiro, to be ineffectual and antiquated: If in fact immigration no longer involves foreign relations or foreign relations no longer remains an exclusive federal responsibility, then the states are not properly excluded from acting in certain ways that affect immigration and the treatment of aliens.[5] The problem with this particular reasoning, indeed, this entire line of reasoning, is that there is no compelling reason to discard the preemption power, as it retains its common law and statutory vitality; the premises behind the state preclusion/state rights equation are not as one-sided as Spiro (or restrictionists, generally) would have us believe; and the momentum of "demi-sovereignties" runs in the opposite direction, that is, it is not the individual 50 states that are shedding their traditional place in federalism's constitutional arrangement, rather it is the nation-state repositioning itself in regional, transnational, multilateral compacts and arrangements between and among nations that is evident in the world polity. If anything, preemption may be on the rise in the immigration context, as it is in other complex arenas, due to the internationalization of the United States and world economies. Professor Spiro may be misreading the clear signposts of a postmodern economy, one in which federalism further subsumes its members' subfederal ties deeper into a national or regional domicile. Those who wish to see preemption's raw political capability or enforcement power decline may be overlooking the clear and unmistakable signs of its resurgence and longevity. Reports of its demise are premature.[6]

I do not want to re-argue these points here, but I do wish to unpack the first premise of Spiro's argument, which I dubbed the "Hydraulic Doctrine of Preemption," as it is this feature I believe most accurately describes the current landscape:

> My argument follows [the first of the] three strands of Professor Spiro's argumentation. First, I review his treatment of the doctrine of preemption: he sees preemption as an essentially unprincipled abrogation of states' rights, one that has led to a moribund, formulaic refusal to deal meaningfully with immigration realities. The various states are forced to act not because of any preference for state action, but out of sheer necessity, due to a failure of the federal government to patrol U.S. borders. In contrast, I see preemption as an [sic] hydraulic principle, one that symmetrically flows between states and the federal government: there is a constant tug between the two levels, in an almost-hydraulic relationship. As the federal piston pulls, state powers are accordingly diminished; as the state powers increase, the federal piston correspondingly decreases. This equipoise relationship more accurately reflects current preemption doctrine than does Professor Spiro's more all-or-nothing approach.[7]

Inherent in this approach is a clear calculus: "[i]f in fact immigration no longer involves foreign relations or foreign relations no longer remains an exclusive federal responsibility, then the States are not properly excluded from acting in certain ways that affect immigration and the treatment of aliens."[8] I questioned Spiro's reading of Gerald Neuman's characterization of nascent nineteenth century U.S. immigration policy,[9] and employed several examples where preemption doctrine was alive and well,[10] or even "firmly-rooted [sic] and on the rise."[11] Here, I also skip over the other two legs of his tripod, the assertions about system failure ("impacts and responses")[12] and international law norms (foreign relations power and what he labels a "sort of medieval construct in which multifarious sources of authority find their place on a vertical chain of hierarchy, one that tolerates gross inequalities, but at the same time acknowledges all powers").[13] I concluded then, and still believe, that "[p]reemption, for all its detriments and foolish inconsistencies, is the devil we know. A postmodern state cannot coexist with medieval constructs."[14]

Then 1996 occurred, dialing back the Immigration and Reform Control Act of 1986's (IRCA)[15] gains by the enactment of the Personal Responsibility and Work

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[5] *See id.*

[6] Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 Va. J. Int'l L. 217, 217-19 (1994).

[7] *Id.* at 219-20.

[8] *Id.* at 219; Spiro, *supra* note 1, at 134.

[9] Olivas, *supra* note 6, at 220-21.

[10] *Id.* at 224-25.

[11] *Id.* at 225.

[12] *Id.* at 227; Spiro, *supra* note 1, at 123-34.

[13] Olivas, *supra* note 6, at 234-36; Spiro, *supra* note 1, at 174-78.

[14] Olivas, *supra* note 6, at 236.

[15] Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. (2000)).

Opportunity Reconciliation Act of 1996 (PRWORA)[16] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[17] As I wrote that 1994 piece, I did not know that the time was the high water mark of immigrant rights legislation, and that virtually every bit of slack in the system would be removed and all the holes plugged. It did not seem like a golden age at the time for me, for my clients, and for the undocumented community, but it surely was. In fact, if I were pressed, I would identify 1982's *Plyler v. Doe*[18] as the real high water mark.

All this said, things today are decidedly worse, at least on my side of the bar. (In fairness, my many students who work and litigate for Immigration and Customs Enforcement (ICE), Citizenship and Immigration Services (CIS), and various immigration-related agencies are in clover.) It is true that there are occasional spectacular victories for immigrant rights groups, sometimes even in the unexpected quarter of the Seventh Circuit, where judges seem to revel in beating up on hapless Board of Immigration Appeals (BIA) members or government lawyers[19] (reminding me of the Seinfeld joke, "not that there's anything wrong with that").

With a torrent of state legislation related to immigration, it is clear that the polity is more concerned with localized conditions than with foreign relations or demi-sovereignty. As the best indicator of this trend, the National Conference of State Legislatures (NCSL) tracks state immigration legislation, and noted that from January through October 2006, over 500 immigration-related bills had been introduced in state legislatures, and that eighty-four had been enacted in thirty-two States (six more had been vetoed successfully).[20]

TABLE ONE: ENACTED BILL COUNT
(January 1, 2006 – October 31, 2006)

TOPIC	NUMBER OF BILLS	NUMBER OF STATES
Education	3	3
Employment	14	9
Identification & Driver License	6	5
Law Enforcement	8	6
Legal Services	5	5
Omnibus	1	1
Public Benefits	10	7
Trafficking	13	9
Voting	6	6
Resolutions	12	6
Miscellaneous	6	6

These eighty-four bills were enacted between January 1, 2006, and October 31, 2006, in: Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wisconsin, and Wyoming.[21]

These recent changes run the gamut, from the enactment of two pro-immigrant state programs for college tuition[22] (one of which, in Nebraska, even extends to the undocumented)[23] to a number of blatantly restrictionist statutes. For instance, one in Georgia covers the waterfront: work authorization, human trafficking, enforcement provisions, regulation of immigration assistance services, penalties and deductions for business expenses and tax withholding, and overall benefit eligibility.[24] The Georgia statute

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[16] Pub. L. No. 104-193, 110 Stat 2105 (1996) (codified as amended in scattered sections of the INA, 8 U.S.C. (2000)).

[17] Div. C, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat 3009-546 to -724 (1996) (codified as amended in scattered sections of the INA, 8 U.S.C. (2000)).

[18] 457 U.S. 202 (1982) (holding that the denial of public school admission to undocumented children was a violation of the Fourteenth Amendment and that undocumented immigrants are entitled to equal protection of the laws within a State's jurisdiction).

[19] "[A]dministrative agencies can change their minds. But they are required to give reasons for doing so. In the cases we've cited — as in this case — the Board had failed to explain how their rejection of the claimed social group squared with the test the Board had adopted in *Acosta*." Sepulveda v. Gonzales, 464 F.3d 770, 772 (7th Cir. 2006) (internal citations omitted).

[20] Ann Morse, et al., 2006 State Legislation Related to Immigration: Enacted and Vetoed (Nat'l Conference of State Legislatures Oct. 31, 2006), *available at* http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm (last visited June 26, 2007).

[21] *Id.*

[22] L.B. 239, 99th Leg., 1st Sess. (Neb. 2006) (codified at Neb. Rev. Stat. Ann. §85-502 (LexisNexis 2006)) (revising the statute over the governor's veto and allowing unauthorized immigrant students to qualify for in-state tuition upon proof of Nebraska residency of at least 180 days); S.B. 542, Gen. Assemb., Reg. Sess. (Va. 2006) (codified at Va. Code Ann. §23-7.4 (2006)) (establishing eligibility for in-state tuition for those "holding an immigration visa or classified as a political refugee" in the same manner as any other resident student and establishing that students with temporary or student visa status are ineligible for Virginia resident status and in-state tuition).

[23] Neb. Rev. Stat. Ann. §85-502(8) (LexisNexis 2006).

[24] S.B. 529, Gen. Assemb., 2005-2006 Legis. Sess. (Ga. 2006) (codified in scattered sections of Ga. Code. Ann. (2006)); *see also* Rachel L. Swarns, *In Georgia, Newest Immigrants Unsettle an Old Sense of Place*, N.Y. Times, Aug. 4, 2006, at A1.

even exceeds California's Proposition 187, virtually all of which was struck down in court.[25] These state statutes are mirrored by an increasing array of city, county, and regional laws and regulations also reaching immigration, while a variety of long-existing (or dormant) codes are being dusted off, redeployed, and applied to aliens. In the former, a Maricopa County (Phoenix, Arizona) statute was interpreted to deem undocumented presence as violative of state smuggling law,[26] while in New Hampshire, longstanding trespass ordinances were used to conduct alien sweeps.[27] The Hazleton, Pennsylvania, City Council enacted a comprehensive "Illegal Immigration Relief Act Ordinance" in July 2006, with harsh provisions involving alien renters, English-only documents, and the provision of municipal services.[28] A federal judge has enjoined the Hazleton ordinance[29] (and its successors), and the matter is pending as of June 2007.[30] Other commercial, technical, and tax issues are also implicated by such statutes and ordinances.[31]

As Table One indicates, the subject matter addressed by States includes education, employment, identification, driver licenses, law enforcement, legal services, omnibus immigration matters, public benefits, housing and rentals, trafficking, voting, and miscellaneous issues such as alcohol and tobacco purchase identification, gun and firearms permits, residency/domicile determinations, and juvenile reporting requirements. This extraordinary rise in such legislative interests is undoubtedly due to overburdened locales, well publicized and highly polarized federal failures in immigration enforcement, a sharp rise in conservative media and advocates flogging the issue, and a decline in President Bush's popularity, all of which have led to a leadership vacuum in the field. In some ways, it has been a "perfect storm" of anti-alien factors.

My thesis is that state, county, and local statutes and ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers. If purely state, county, or local interests are governed and if federal preemptory powers are not triggered, such laws could be properly enacted, provided they are not subterfuges for replacing or substituting for federal authority. As one example, purely state benefits can be extended or withheld to undocumented college students because tuition benefits and state residency determinations are properly designated as state classifications that reference, but do not determine, immigration status.[32] And the federal government has enacted statutes and promulgated regulations that subcontract or designate state or sub-federal immigration enforcement; included among many

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[25] LULAC v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (striking down state referendum prohibiting social services and benefits to undocumented residents in scheme to deter immigration).

[26] Maricopa County undertook to prosecute undocumented persons for having conspired to smuggle themselves in violation of Arizona's anti-smuggling statute. *See* Ariz. Rev. Stat. §§13-1003, -2319 (LexisNexis 2006) (addressing general conspiracy statute and "human smuggling," respectively); *see also* Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. Times, Oct. 15, 2006, §6 (Magazine), at 40. *See generally* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Tex. Hisp. J.L. & Pol'y 45 (2006), *reprinted at* 11 Bender's Immigr. Bull. 7 (Jan. 1, 2006); Christopher Caldwell, *A Family or a Crowd?*, N.Y. Times, Feb. 26, 2006, §6 (Magazine), at 9.

[27] New Hampshire v. Barros-Batistele, No. 05-CR-1474, at 5 (Jaffrey-Peterborough & Nashua Dist. Ct. Aug. 12, 2005), *available at* http://www.courts.state.nh.us/district/criminal_trespass_decision.pdf (last visited June 26, 2007) ("The import of the analysis the court has conducted . . . is that even if the police departments have applied the [state] statute in a manner not otherwise unlawful, its application in that manner violates the Supremacy Clause of the United States Constitution, and is thus barred by federal preemption."); *see also* Pam Belluck, *Towns Lose Tool Against Illegal Immigrants*, N.Y. Times, Aug. 13, 2005, at A7; Julia Preston, *Sheriff Defies Transgressors by Billboard and by Blog*, N.Y. Times, July 31, 2006, at A15; Paul Vitello, *Path to Deportation Can Start with a Traffic Stop*, N.Y. Times, Apr. 14, 2006, at A1. Sometimes, a local regulation is just a regulation, as in liberal Santa Fe, New Mexico, where the aim was not to harass immigrants, but to keep peddlers and nuisances off of historic Santa Fe Plaza. Erica Cordoza, *Buskers Claim They're Bullied*, Albuquerque J., Aug. 8, 2006, at A1.

[28] *Hazleton, Pennsylvania, Agrees Not to Enforce "Illegal Immigration Relief Act Ordinance" for Now*, 83 Interpreter Releases 1947, 1947-48 (Sept. 11, 2006); *see also* Jenny Jarvie, *Georgia Law Chills Its Latino Housing Market*, L.A. Times, June 19, 2006, at A4; Deborah Post, *Two Cases, Two Reactions, Same Lingering Problem*, Newsday, Sept. 25, 2005, at A49.

[29] Lozano v. City of Hazleton, 459 F. Supp. 2d 332 (M.D. Penn. 2006).

[30] Lozano v. City of Hazleton, No. 3:06-cv-1586 (M.D. Pa. argued Mar. 12-22, 2007) (second amended complaint available at http://www.aclupa.org/downloads/Hz2dAmendedComplaint.pdf (last visited June 26, 2007)).

[31] *See, e.g.*, Cara Buckley, *With Millions in 9/11 Payments, Bereaved Can't Buy Green Cards*, N.Y. Times, Sept. 3, 2006, at A1; Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. Times, June 19, 2006, at A1; Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. Times, Apr. 5, 2005, at A1; Paula Singer, *IRS Tightens Controls on ITINs*, Immigr. L. Today, Mar.-Apr. 2004, at 34.

[32] Michael A. Olivas, *IIRIRA, the Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004); Michael A. Olivas, *IIRAIRA, the Dream Act, and Undocumented College Student Residency*, 9 Bender's Immigr. Bull. 307 (Mar. 15, 2004).

examples are assorted Memoranda of Understanding (MOU) that calibrate and regulate a proper role for effectuating federal obligations. But the common law and a number of Supreme Court decisions do not reserve or allow a substantive nonfederal role for local, county, state, or multi-state authorities in immigration enforcement absent such delegation and carefully controlled, designated purposes.[33]

In my earlier reply to Professor Spiro, I laid out this argument at the higher end, that of preemption theory in accord with his philosophy of demi-sovereigns and the foreign relations power.[34] Here, I ground this assertion (that state and local laws implementing immigration functions must be struck down) in the other end of the spectrum, and posit not that the federal government's failure to enforce its immigration laws requires the fifty States step in to do so (and by extension, counties and municipalities), but the opposite. Shifting immigration enforcement powers to sub-federal levels will more likely lead to weaker federal enforcement and even less effective national security resources aimed at immigration enforcement and administration. In my view, not only is shifting immigration authority downward contrary to constitutional law and theory, it is bad policy and will lead to bad results in both immigration enforcement and local law enforcement. Restrictionist proposals must of necessity meet a very high burden of persuasion to enact major changes to the established order of things. We do not want fifty Border Patrols any more than we want fifty foreign policies in the immigration context, and such a shift would leave the United States worse off in every respect. For starters, there is no excess slack in the law enforcement system at present, and the high fiscal and political cost of decentralizing immigration enforcement will be predictably ruinous and prejudicial.

In the remaining section of this analysis, I demonstrate this hypothesis by three interlocking points. First, I examine one well established area in detail, noting how *Plyler v. Doe*[35] has morphed beyond its K-12 public-school-tuition moorings. This attestation to an important feature of immigrant life and the U.S. polity demonstrates that even after twenty-five years, immigrant children's rights have not been fully resolved and have required additional litigation and additional vigilance to secure the Supreme Court's narrow ruling. Second, I review the assertions by a leading restrictionist scholar, Kris Kobach, who has litigated benefits issues and advanced a theory of "inherent authority" to justify extending immigration apprehensions and enforcement to local levels by using a "quintessential force multiplier" rationale.[36] Finally, I refer back to my hydraulic metaphor to recalibrate general immigration provisions, post-9/11.

II. Life After *Plyler v. Doe*[37]

To restate my thesis, I believe there is no good or allowable reason to extend immigration enforcement to nonfederal authorities any more than current law already allocates. In the next section, I take this on straight ahead by contesting Kobach's worldview and prescriptions. However, I believe this thesis can also be advanced by thick descriptions of a case where more of an equilibrium has been reached — the case of undocumented school children, where the record reveals substantial and longstanding accommodation to the 1982 development of *Plyler v. Doe*.[38] Even this settled case has been contested regularly in school board meetings and classroom buildings, and as this record will show, the group that successfully litigated this case has never been able to rest,[39] litigating it as

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[33] Mathews v. Diaz, 426 U.S. 67, 81 (1976) (upholding medical benefit restrictions on theory that "decisions in [immigration] matters may implicate our relations with foreign powers"); DeCanas v. Bica, 424 U.S. 351, 354 (1976) (regulating immigration with modest and explicit exceptions "is unquestionably exclusively a federal power"); Graham v. Richardson, 403 U.S. 365 (1971) (striking down welfare restrictions on equal protection and preemption grounds); Hines v. Davidowitz, 312 U.S. 52 (1941) (preempting Pennsylvania state law requiring alien registration, fee); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down state English-only provisions that "cannot be coerced by methods which conflict with the Constitution"); *see also* Toll v. Moreno, 458 U.S. 1 (1982) (outlining that if federal immigration classification acts to apportion a state benefit and if the scheme makes distinctions clear, the State may use immigration classifications); Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255 (1984); *cf.* Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499 (1995).

[34] Olivas, *supra* note 6, at 219; Spiro, *supra* note 1.

[35] 457 U.S. 202 (1982).

[36] Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179 (2005); *see also* Hannah Gladstein et al., Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004, at 3, 9 (Muzaffar A. Chishti, ed., Migration Policy Inst. 2005), *available at* http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf (last visited June 26, 2007).

[37] 457 U.S. 202 (1982).

[38] *Id.*

[39] Michael A. Olivas, *The Story of* Plyler v. Doe, *the Education of Undocumented Children, and the Polity*, *in* Immigration Stories 197 (David Martin & Peter Schuck eds., Foundation Press 2005).

recently as spring 2006.[40] Thus, *Plyler*[41] issues have stretched over more than thirty years, since Texas enacted a state law in 1975 that enabled its public school districts to charge tuition to undocumented schoolchildren.[42] Although the underlying legislative history is unclear, and although no public hearings were ever held on the provision, certain Texas border school superintendents had urged the enactment of the legislation without controversy, as a small piece of larger, routine education statutes.[43] In 1982, Mexican American Legal Defense and Educational Fund (MALDEF) attorneys prevailed in the U.S. Supreme Court in a 5-4 decision authored by Justice William Brennan.[44]

Justice Brennan struck down the Texas statute, finding that the State's theory was "nothing more than an assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools."[45] He determined that Texas could not enact legislation "merely by defining a disfavored group as nonresident."[46] Justice Brennan did not reach the issue of preemption, as he was able to strike down the statute's provisions on more narrow, equal protection grounds.[47] He dismissed the three arguments that Texas advanced: that it was preserving "limited resources,"[48] that it had narrowly tailored the legislation "to stem the tide of illegal immigration,"[49] and that the State singled out these children because their undocumented presence meant that they might not be allowed to remain in the State once the educational benefit had been consumed.[50] In all, Justice Brennan held that the children had not violated immigration law and that the provision did "not comport with fundamental conceptions of justice."[51] In addition, in a footnote, he indicated, "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."[52]

Texas appealed the case, but the Supreme Court denied rehearing.[53] Subsequent news stories about the alien children from Tyler, Texas, revealed that most of them graduated from the public schools and that they regularized their legal status.[54] In 1983, a corollary issue was litigated, involving a U.S. citizen child of undocumented Mexican parents who left the child in the care of his adult sister in a Texas town.[55] This time, the Court determined that the child's domicile was not in Texas because a precept of traditional family law holds that the domicile of unemancipated children is that of their parents.[56] In this instance, the child was not a legal charge of his sister, so he could not be considered a "resident" of the Texas school district.[57] (This is a legal infirmity that could be remedied by several means. [58]) *Martinez v. Bynum*[59] did not limit the earlier *Plyler*,[60] and no other K-12 residency-related immigration case has been decided by the U.S. Supreme Court since 1983.[61] A postsecondary residency case involving nonimmigrant visa holders was decided in 1982 for the alien college students on preemption grounds, [62] and *Plyler*[63] has remained in force, undisturbed since 1982.[64]

This is not to say that it has not been contested or challenged, at a variety of levels, in the twenty-five

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[40] Gonzalez v. APS, No. 1:05-cv-00580-JB (D. N.M. filed May 25, 2005); *see also* Amy Miller, *APS Safe for Migrant Students*, Albuquerque J., June 2, 2006, at A1 (stating that school district agreed to stop turning students over to immigration authorities).
[41] 457 U.S. 202 (1982).
[42] Tex. Educ. Code Ann. §21.031 (Vernon Supp. 1981).
[43] Plyler v. Doe, 457 U.S. 202, 205-10 (1982).
[44] *Id.* at 202-05; *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 54 (1984) (noting the "epochal significance" of the case for the undocumented).
[45] *Plyler*, 457 U.S. at 227 n.22.
[46] *Id.*
[47] *Id.* at 223-30.
[48] *Id.* at 227.
[49] *Id.* at 228.
[50] *Id.* at 229-30.
[51] *Plyler*, 457 U.S. at 220.
[52] *Id.* at 227 n.22.
[53] Plyler v. Doe, 458 U.S. 1131 (1982).
[54] Paul Feldman, *Texas Case Looms Over Prop. 187's Legal Future*, L.A. Times, Oct. 23, 1994, at A1.
[55] Martinez v. Bynum, 461 U.S. 321, 322-23 (1983).
[56] *See id.* at 333 n.14.
[57] *Id.* at 323.
[58] For instance, the sister could have become his legal guardian, a routine process, as long as she was residing in the school district, or a family member could have adopted the child. Immigration laws interact with family law and comparative law for determining such status. *See, e.g.*, Kaho v. Ilchert, 765 F.2d 877, 885 (9th Cir. 1985) (stating that "adoption[s] need not conform to the BIA's or Anglo-American notions of adoption; the adoption need only be recognized under the law of the country where the adoption occurred"); *see also* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Tex. Hisp. J.L. & Pol'y 45 (2006), *reprinted at* 11 Bender's Immigr. Bull. 7 (Jan. 1, 2006).
[59] 461 U.S. 321 (1983).
[60] 457 U.S. 202 (1982).
[61] Maria Pabon Lopez, *Immigration: Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyler v. Doe, 35 Seton Hall L. Rev. 1373 (2005).
[62] Toll v. Moreno, 458 U.S. 1 (1982) (deciding that students were eligible for in-state tuition in a higher education case concerning residency requirements for long-time nonimmigrants, heard by the *Plyler* Supreme Court); *see also* Michael A. Olivas, Plyler v. Doe, Toll v. Moreno, *and Postsecondary Admissions: Undocumented Adults and Enduring Disability*, 15 J.L. & Educ. 19 (1986).
[63] 457 U.S. 202 (1982).
[64] *Cf.* Olivas, *supra* note 62; Pabon Lopez, *supra* note 61.

years since it was decided. As it happens, both Chief Justice Roberts and Justice Alito, then in governmental and private practice, went on the record to say that they considered *Plyler*[65] as wrongly decided; their views surfaced during their Supreme Court nomination hearings.[66] On the more quotidian level, MALDEF lawyers have had to file several dozen actions since the early 1980s to enforce *Plyler's*[67] clear holding, challenging school board actions to require Social Security numbers, school requests for driver licenses to identify parents, additional "registration" of immigrant children, "safety notification" for immigrant parents, separate schools for immigrant children, college tuition policies, and other policies and practices designed to identify immigration status or single out undocumented children.[68]

In 1994, with sagging popularity, California's Republican Governor Pete Wilson backed a popular state referendum, Proposition 187, which would have denied virtually all state-funded benefits (including public education) to undocumented Californians.[69] Proposition 187 passed with nearly 60%, and Wilson was reelected.[70] Before U.S. Senator Robert Dole won his party's presidential nomination, Wilson also mounted a presidential campaign with a get-tough-on-immigration platform.[71] MALDEF went to federal court and was able to strike down almost all of Proposition 187's provisions,[72] ultimately reaching an agreement with Wilson's successor, Governor Gray Davis.[73] The year 1996 saw the reelection of President Clinton,[74] the enactment of the restrictionist federal legislation IIRAIRA[75] and PWRORA,[76] and the efforts of California's U.S. Representative Elton Gallegly to amend federal law to allow States to enact the type of legislation that Texas passed in 1975 and led to *Plyler*.[77] The "Gallegly Amendment" drew sufficient negative attention to force its withdrawal from a number of other legislative proposals that were enacted.[78] Thus, the political process worked to

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[65] 457 U.S. 202 (1982).

[66] Many consider Roberts' remarks particularly offensive, referring to "illegal amigos" in a Department of Justice (DOJ) memo that he later explained as akin to ethnic politicking, similar to candidates speaking Spanish to Latino voters, etc. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Before the S. Comm. on the Judiciary*, 109th Cong., 260 (2005), *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html (last visited June 26, 2007) (follow "S. Hrg. 109-158" link) (defending his "illegal amigos" remark in DOJ memo); *id.* at 390-93, 596 (defending DOJ memo and expressing views about *Plyler* as precedent); *id.* at 1042-64 (outlining MALDEF's opposition to Judge Roberts' nomination citing, in part, his views on *Plyler*); *see also Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, Before the S. Comm. on the Judiciary*, 109th Cong., 787-90 (2006), *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh109-277/browse.html (last visited June 26, 2007) (follow "Alito Nomination Hearing" link) (responding to questions about immigration cases and 1986 memo); *id.* at 1268-70 (outlining MALDEF's opposition to Judge Alito's nomination citing, in part, his failure to recognize the importance of *Plyler* in a memo).

[67] 457 U.S. 202 (1982).

[68] *See* Olivas, *supra* note 39, at 212-13; Pabon Lopez, *supra* note 61, at 1395-98.

[69] Lolita K. Buckner Inniss, *California's Proposition 187 – Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 Geo. Immigr. L.J. 577 (1996); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. Rev. 1509, 1561-63 (1995).

[70] Buckner Inniss, *supra* note 69, at 578.

[71] For excellent summaries of the racial politics of Proposition 187 and Wilson's role, see generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 Wash. L. rev. 629, 672-73 (1995), and Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 Chicano-Latino L. Rev. 118, 118-19 (1995) (reviewing racial politics of Proposition 187).

[72] Olivas, *supra* note 39, at 212-13; Pabon Lopez, *supra* note 61, at 1396-97.

[73] Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices*, L.A. Times, July 30, 1999, at A3.

[74] *See generally* Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds (Renaissance Books 1999) (relating views of Clinton political consultant on 1996 reelection, including documents and memoranda from campaign).

[75] *Supra* note 17; *see* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 Harv. L. Rev. 1963 (2000).

[76] *Supra* note 16.

[77] 457 U.S. 202 (1982); Halle I. Butler, Note, *Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States*, 58 Ohio St. L.J. 1473, 1484-85 (1997). Sometimes undocumented children surface when they are outed by public achievements, such as when they win national awards that bring press coverage. Miriam Jordan, *Princeton's 2006 Salutatorian Heads to Oxford, Still an Illegal Immigrant*, Wall St. J., Sept. 14, 2006, at B1. For two such stories about Senegalese/Mexican undocumented high school students, both resulting from robotics competitions, see Nina Bernstein, *Senegalese Teenager in Deportation Fight Wins Right to Study in America*, N.Y. Times, July 29, 2006, at A13; Nina Bernstein, *Student's Prize Is a Trip into Immigration Limbo*, N.Y. Times, Apr. 26, 2006, at A1; Peter Carlson, *Stinky the Robot, Four Kids and a Brief Whiff of Success*, Wash. Post, Mar. 29, 2005, at C1; Mel Melendez, *Ingenuity Brightens Future*, Ariz. Republic, Apr. 23, 2005, at 1A.

[78] Butler, *supra* note 77, at 1485; Pabon Lopez, *supra* note 61, at 1395-96.

ameliorate challenges to undocumented K-12 enrollment at the state and federal levels, even as tightened immigration restrictions were enacted into law.

Although there have been regular end-runs and local school board implementation issues since 1982, two new threats arose in 2006 at the school level that ultimately resolved themselves. In March 2006, the school board in Elmwood Park, Illinois, refused to let an undocumented student enroll on the ground that she and her family had entered on long-expired tourist visas.[79]

Citing *Plyler*,[80] the Illinois State Board of Education threatened to remove funds, and the local board blinked, revising its attendance policies.[81] Even though persons can become undocumented either by surreptitious entry or by violating the terms of legal entry, earlier education decisions did not turn on the means by which unauthorized status or entry was effected.[82] Cases turned on undocumented status, not upon exactly how the alien had gained undocumented status. In June 2006, a federal suit against the Albuquerque, New Mexico, Public Schools (APS) was settled, eliminating an APS practice of arresting students who were adjacent to school property and suspected of being out of status and then turning the students in to the Border Patrol.[83]

The issue of undocumented students is not limited to K-12 public school students. A number of cases before and since *Plyler*[84] have dealt with the corollary issue of undocumented college students and the extent to which college resident tuition and admissions benefits are to be extended to the postsecondary, post-compulsory schooling level.[85] Since 2001, when Texas Governor Bush's successor signed legislation granting postsecondary residency to undocumented students, more than a dozen States have acted, with ten allowing residency, and several denying it.[86] Two federal district courts have upheld the state practices — Kansas allowing residency[87] and Virginia denying such

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[79] She was the dependent of a tourist with a B-2 visa. Rosalind Rossi, *State Strips Schools of $3.5 Million*, Chi. Sun-Times, Feb. 24, 2006, at A8; *see* Eric Herman, *Elmwood Park Schools Reinstated*, Chi. Sun-Times, Feb. 25, 2006, at A3; *see also* Nina Bernstein, *On Lucille Avenue, the Immigration Debate*, N.Y. Times, June 26, 2006, at A1; Sam Dillon, *In Schools Across U.S., the Melting Pot Overflows*, N.Y. Times, Aug. 27, 2006, at 1-1; Jennifer Radcliffe, *1982 Ruling a Catalyst in Immigration Debate*, Hous. Chron, May 21, 2006, at B1.

[80] 457 U.S. 202 (1982).

[81] Colleen Mastony & Diane Redo, *Barred Teen Pleased as Lawsuit is Dropped*, Chi. Trib., Feb. 28, 2006, at Metro-1; Colleen Mastony & Diane Redo, *Elmwood Park Schools Give In*, Chi. Trib., Feb. 25, 2006, at News-1. For another example of a nonimmigrant visa holder, one a bit less disadvantaged (an E-2, the dependent of a treaty investor), who was precluded from securing a student visa (an F-1), see Posting of Kelly Griffith to Orlando Sentinel Blog, E-2 Kids Hoping For a Dream, http://blogs.orlandosentinel.com/news_local_southwest_brit/2006/09/if_jamie_embers.html (Sept. 10, 2006, 1:00:00 AM EST) (cached on Google™ as of June 26, 2007). Although the article does not say so, the likely culprit was the requirement that an applicant for a student visa not be an "intending immigrant." That is, students must not intend to remain in the United States after they complete their studies, else the consular official will, with virtually unreviewable discretion, refuse admission into the country. *See* Dan Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 Geo. Immigr. L.J. 473, 476-77, 480 (2003).

[82] There are two ways to become undocumented. One way is to enter surreptitiously by evading inspection ("entered without inspection" or EWI), including smuggling one's children into the country. The second common way is to effect a legal entry and subsequently engage in behavior that renders the person removable, such as overstaying a visa, engaging in unauthorized employment, or committing certain crimes. *See generally* Stephen H. Legomsky, Immigration and Refugee Law and Policy 526-30 (Foundation Press 2004) (1992).

[83] Miller, *supra* note 40, at A1. *See also* Amy Miller, *Migrants Are Safe at APS*, Albuquerque J., June 15, 2006, at C1. While MALDEF settled with the school district, there are additional defendants, including the City of Albuquerque and the Albuquerque Police Department, who had still refused to settle as of late 2006. Gonzalez v. APS, No. 1:05-cv-00580-JB (D. N.M. filed May 25, 2005); Discussions with MALDEF Attorney, in San Antonio, Tex. (Apr. 4, 2007). An earlier such case in El Paso prevented the then Immigration and Naturalization Service (INS) from conducting sweeps on school campuses. Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992) (enjoining immigration officers from searching El Paso high school students based on Mexican appearance and suspicion of immigration noncompliance). More recently, the matter arose in the context of children's summer camp funding. Stephanie Sandoval, *Funding Intact for Youth Group*, Dallas Morning News, Sept. 21, 2006, at 1B.

[84] 457 U.S. 202 (1982).

[85] *See generally* Olivas, *supra* note 32 (reviewing postsecondary residency policies).

[86] The updated information in Tables Two and Three below is taken from available state data, including information from the National Immigration Law Center (NILC), which tracks DREAM Act issues. Nat'l Immigration Law Ctr., Immigration Law & Policy: Immigrant Student Adjustment/DREAM Act (2007), http://www.nilc.org/immlawpolicy/DREAM/index.htm (last visited Apr. 2, 2007); *see also* Olivas, *supra* note 32, at 454 n.122; Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 Geo. Immigr. L.J. 357 (2003); Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. Int'l L. & Com. Reg. 393 (2002).

[87] Kan. Stat. Ann. §76-731a (2006); Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005) (upholding state statute), *argued*, No. 05-3309 (10th Cir. Sept. 27, 2006). Technically, the district court dismissed the plaintiffs as having no

status.[88] The Kansas case is pending in the Tenth Circuit[89] in a case brought by a restrictionist group and their lawyer, Professor Kris Kobach. The same case was filed in California state court, where the plaintiffs lost; an appeal is pending in 2007.[90] Additionally, Congress is considering a federal version of the state statutes, the Development, Relief, and Education for Alien Minors Act (DREAM Act),[91] which will also accord limited legalization benefits if enacted.[92]

TABLE TWO: STATE LEGISLATION CONCERNING UNDOCUMENTED COLLEGE STUDENTS (Fall 2006)

STATES THAT ALLOW UNDOCUMENTED STUDENTS TO GAIN RESIDENT TUITION STATUS THROUGH STATUTE	
STATES	LEGISLATION and STATUTE
California	A.B. 540, 2001-02 Leg., Reg. Sess. (Cal. 2001) (codified at CAL. EDUC. CODE §68130.5 (Deering 2007)).
Illinois	H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003) (codified in various sections of 110 ILL. COMP. STAT. ANN. (LexisNexis 2007)).
Kansas	H.B. 2145, 2003-2004 Leg., Reg. Sess. (Kan. 2004) (codified at KAN. STAT. ANN. §76-731a (2006)).
Nebraska	L.B. 239, 99th Leg., 1st Sess. (Neb. 2006) (codified at NEB. REV. STAT. ANN. §85-502 (LexisNexis 2006)) (overriding governor's veto).
New Mexico	S.B. 582, 47th Leg., Reg. Sess. (N.M. 2005) (codified at N.M. Stat. Ann. §21-1-4.6 (LexisNexis 2007)).
New York	S. B. 7784, 225th Leg., 2001 Sess. (N.Y. 2002) (codified at N.Y. EDUC. LAW §355(2)(h)(8) (Consol. 2007)).
Oklahoma	S.B. 596, 49th Leg., 1st Reg. Sess. (Okla. 2003) (codified at OKLA. STAT. ANN. tit. 70, §3242 (West 2006)).
Texas	H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) (codified as amended by S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005) in various sections of TEX. EDUC. CODE ANN. ch. 54 (Vernon 2007)).
Utah	H.B. 144, 54th Leg., Gen. Sess. (Utah 2002) (codified at UTAH CODE ANN. §53B-8-106 (2006)).
Washington	H.B. 1079, 58th Leg., 2003 Reg. Sess. (Wash. 2003) (codified at WASH. REV. CODE ANN. §28B.15.012 (LexisNexis 2007)).

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standing, but doing so allows the statute to remain in force. If aggrieved nonresidents are ineligible to bring a case, the statute continues to be controlling law in the state. The case has been argued at the Tenth Circuit's Court of Appeals, and as of May 2007, has not been decided.

[88] Va. Code Ann. §23-7.4 (2006); Equal Access Educ. v. Merten, 325 F. Supp. 2d 655 (E.D. Va. 2004) (deciding the case on the merits); Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004) (dismissing plaintiffs' Foreign Commerce and Due Process Clause claims and dismissing, in part, plaintiffs' Supremacy Clause claim); Doe 1 v. Merten, 219 F.R.D. 387 (E.D. Va. 2004) (denying students' request to proceed anonymously); Olivas, *supra* note 32, at 454 n.122.

[89] Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *argued*, No. 05-3309 (10th Cir. Sept. 27, 2006).

[90] Martinez v. Regents of Univ. of Cal., No. CV-05-2064 (Cal. Super. Ct., Yolo County Oct. 6, 2006) (issuing order on demurrers, motion to strike, and motions by proposed intervenors and dismissing challenge to state residency statute), *appeal filed*, No. CV-05-2064 (Cal. Ct. App. Nov. 9, 2006). This action was the state equivalent of the *Day v. Sebelius* federal case in Kansas. In an unrelated case, MALDEF and others challenged California Education Code §68040 (Deering 2007) and the state constitution. Student Advocates for Higher Educ. v. Bd. of Tr. of Cal. St. Univ., CPF-06-506755 (Cal. Super Ct., S.F. County Nov. 3, 2006), status available at http://www.sftc.org (scroll down and enter case number or party name), and petition available at http://lawprofessors.typepad.com/immigration/2006/week46/index.html (scroll to "New Higher Education Case" and follow link) (challenging postsecondary residency and financial aid provisions) (last visited Apr. 2, 2007).

[91] H.R. 1275, 110th Cong. (2007).

[92] There is a remarkable amount of literature on this small topic. *See, e.g.*, AB 540 College Access Network, The College & Financial Guide for: AB540 Undocumented Immigrant Students (Paz M. Olivérez, et al. eds., Univ. S. Cal. Ctr. for Higher Educ. Policy Analysis July 20, 2006), *available at* http://www.usc.edu/dept/chepa/pdf/AB%20540%20final.pdf (last visited June 26, 2007); Jody Feder, Congressional Research Serv., Order Code No. RS22500, Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis (2006), *available at* http://www.law.uh.edu/ihelg/undocumented/UnauthorizedAlienStudentsHigher%20EducationandIn-State.pdf (last visited June 26, 2007); Kris W. Kobach, The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act Is a Nightmare (Heritage Foundation No. 1960, 2006), *available at* http://www.heritage.org/ research/immigration/bg1960.cfm (last visited June 26, 2007); *see also* Jeanne Batalova & Michael Fix, New Estimates of Unauthorized Youth Eligible for Legal Status under the DREAM Act (Migration Policy Inst. Oct. 2006), *available at* http://www.migrationpolicy.org/pubs/Backgrounder1_Dream _Act.pdf (last visited June 26, 2007). I believe the Migration Policy Institute report considerably overstates the extent to which students will take advantage of the DREAM Act, which is sure to turn on the details and requirements of the legislation, should Congress enact it. In addition, there have been developments in access to college education for other immigration categories, such as for victims of human trafficking (T nonimmigrant visas). Press Release, U.S. Dep't. of Educ., New Process Benefits Victims of Human Trafficking Seeking College Aid (May 9, 2006), *available at* http://www.ed.gov/news/pressreleases/2006/05/05102006 .html (last visited June 26, 2006) (announcing college scholarship funds for T-visa holders).

TABLE THREE: STATES FORMALLY CONSIDERING LEGISLATION REGARDING UNDOCUMENTED STUDENTS AND RESIDENCY TUITION STATUS

LEGISLATION INTRODUCED BY FALL 2006	
Alaska	Michigan
Arizona	Mississippi
California (eligibility for state financial aid)*	Missouri
Colorado	New Jersey
Delaware**	North Carolina
Florida	Oregon
Hawaii	Rhode Island
Kansas***	Utah***
Maryland*	Virginia****
Massachusetts*	Wyoming*****

* Pro-immigrant bill vetoed by governor.
** Public institutions in Delaware have agreed to allow undocumented students to establish residency status, in lieu of legislation that introduced in the Delaware General Assembly.
*** Bill introduced to repeal existing residency statute.
**** Anti-immigrant bill vetoed by governor.[93]
***** Enacted bill limits state scholarships to legal permanent residents and citizens.[94]

In sum, *Plyler*[95] has proven quite resilient, fending off court challenges and federal and state legislative efforts to overturn it, while nurturing efforts to extend its reach to college students who were allowed to stay in school by the original case. IIRAIRA[96] and PWRORA,[97] however imperfectly, gave *Plyler*[98] additional life by choking off the Gallegly Amendment.[99] *Plyler*[100] has had to be reinforced by vigilant efforts, but it has proven more hardy than it appeared twenty-five years ago. Wide-ranging discussions with many restrictionist advocates have convinced me that the real purpose behind their comprehensive effort is to reverse *Plyler*,[101] in the hopes that doing so will deter families from entering the country illegally.

III. "The Quintessential Force Multiplier"[102] Effect

The law of political thermodynamics holds that for every academic civil rights action, there is an equal and opposite reaction. So it is with the hydraulic principle of immigrants' rights. The modest successes have been matched by a substantial blowback in the political arena, as evidenced by the NCSL data in Table One. The essential failure of Proposition 187 required enormous political and legal capital to be expended by immigrant rights groups, but the constitutional provision was largely overturned.[103] The efforts clearly slowed state and local initiatives to enact comprehensive anti-alien legislation. Even the enactment of IIRAIRA[104] and PWROA[105] in 1996, as reactionary as any immigration legislation in the late twentieth century, still occurred at a time when IRCA's[106] legalization program and successes (enacted in the Reagan presidency) were playing out.[107] The terrorist attacks of 2001[108] stalled any legalization or regularization initiatives President Bush might have undertaken,[109] but the changed circumstances in the postsecondary residency area have been instructive as to how local and state politics can surprise. Except for the Texas statute, signed by Republican Governor Rick Perry (who assumed office when Governor Bush

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[93] Additionally, a 2006 bill affected refugee tuition. S.B. 542, Gen. Assemb., Reg. Sess. (Va. 2006) (codified at Va. Code Ann. §23-7.4).
[94] S.F. 85, 58th Leg., Gen. Sess. (Wyo. 2006) (codified at Wyo. Stat. Ann. §21-16-1303 (2006)).
[95] 457 U.S. 202 (1982).
[96] *Supra* note 17.
[97] *Supra* note 16.
[98] 457 U.S. 202 (1982).
[99] *See* Butler, *supra* note 77, at 1485; Pabon Lopez, *supra* note 61, at 1395-96.
[100] 457 U.S. 202 (1982).
[101] *Id.*
[102] Kobach, *supra* note 36.
[103] Buckner Inniss, *supra* note 69; Johnson, *supra* note 69; *see* Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 Hastings Const. L.Q. 1019, 1057-1061 (1995) (detailing the court's error in mischaracterizing federal law on undocumented college residency). For a more modern mistake on the same issue, this one by restrictionist groups and lawyers, see Kobach, *supra* note 92; Dan Stein, *Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies*, U. Bus., Apr. 2002, at 64. *But see* Michael A. Olivas, *A Rebuttal to FAIR*, U. Bus., June 2002, at 72.
[104] *Supra* note 17.
[105] *Supra* note 16.
[106] Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of the INA, 8 U.S.C. (2000)).
[107] *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047 (1994); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 St. Mary's L.J. 833 (1997).
[108] Steven Erlanger, *A Day of Terror: The World's Reaction*, N.Y. Times, Sept. 12, 2001, at A23.
[109] Elisabeth Bumiller, *White House Letter; Two Presidential Pals, Until 9/11 Intervened*, N.Y. Times, Mar. 3, 2003, at A17 (reviewing deterioration of U.S.-Mexico diplomatic relations after 9/11); *see also* Olivas, *supra* note 32, at 457-63.

became President Bush) just before 9/11, all of the residency statutes have been signed into law after the terrorist attacks against the United States. Major immigrant-receiving States such as Texas, California, Illinois, New Mexico, and New York have granted residency to undocumented college students, but so have surprising ones such as Nebraska, Kansas, Oklahoma, and Utah.[110] Along with other senators, conservative Utah Republican U.S. Senator Orrin Hatch has advocated for the DREAM Act at the federal level.[111] Support for residency tuition classification by some politicians (or even the failure to sufficiently oppose such a measure), however, has created controversy in some states where wedge issues have resulted in polarized electorates.[112]

Notwithstanding the broad-based support for *Plyler*[113] college students, of course there is another side: persons who feel that the students should not benefit from their parents' actions and that the students, in essence, do not have clean hands. One such believer is Professor Kris W. Kobach, who teaches at the University of Missouri-Kansas City Law School. He has undertaken lawsuits (in Kansas and California), has advocated through national organizations for the repeal of state laws and against federal legislation, and has written articles and reports against alien benefits generally.[114] He also ran for Congress in Kansas in an anti-alien campaign, and although he lost,[115] he has continued his advocacy efforts.[116]

In a long 2005 piece in the *Albany Law Review* entitled "The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests,"[117] Professor Kobach makes a forceful argument that municipal authorities have all of the intrinsic authorization they need to enforce laws, including laws affecting immigration and immigrants (and nonimmigrants, in or out of proper status). His thesis is straightforward: "This inherent arrest authority has been possessed and exercised by state and local police since the earliest days of federal immigration law."[118]

And while he may or may not be correct in his analysis, he is not in doubt. Here is his breathless take on the 9/11 terrorists, in his first paragraph:

> The terrorist attacks of September 11, 2001[,] underscored for all Americans the link between immigration law enforcement and terrorism. Nineteen alien terrorists had been able to enter the country legally and undetected, overstay their visas or violate their immigration statuses with impunity, and move freely within the country without significant interference from federal or local law enforcement. The abuse of U.S. immigration laws was instrumental in the deaths of nearly 3,000 people. Moreover, any suicide attack by an alien terrorist in the future will likely entail additional violations of U.S. immigration laws. Either the terrorist will attempt to enter the United States legally and will violate the terms of his nonimmigrant status in the planning and execution of his attack, or the alien terrorist will enter without inspection (EWI), which is itself a violation of U.S. immigration law.[119]

While it is difficult to envision a principled defense of the terrorists' perfidious crimes, it is not at all clear

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[110] In a number of these legislative sessions, the discussions and politics have been quite fascinating. For example, on April 13, 2006, Nebraska became the tenth State to provide in-state, resident tuition to undocumented immigrant students who attend and graduate from Nebraska high schools. It did so in dramatic fashion, overriding Governor Dave Heineman's veto. The bill passed with twenty-seven votes, but needed thirty for an override, and one supporter was not available. Supporters managed to gain exactly four votes to get the necessary thirty. Cindy Gonzalez, *Activists applaud new law on tuition*, Omaha World-Herald, Apr. 15, 2006, at 1B.

[111] Josh Bernstein, *DREAM Act reintroduced in Senate* (Nov. 21, 2005) (Hatch sponsored it in 2003), *available at* http://www.nilc.org/immlawpolicy/DREAM/Dream002.html (last visited June 26, 2007).

[112] Carl Hulse, *In Bellwether District, G.O.P. Runs on Immigration*, N.Y. Times, Sept. 6, 2006, at A1; Joyce Purnick, *In a G.O.P. Stronghold, 3 Districts in Indiana Are Now Battlegrounds*, N.Y. Times, Oct. 21, 2006, at A11. After the November 2006 elections, the returns appear to reflect a moderation of anti-immigrant views. Trust but verify. Randal C. Archibold, *Democratic Victory Raises Spirits of Those Favoring Citizenship for Illegal Aliens*, N.Y. Times, Nov. 10, 2006, at A27 (assessing election results for ballot initiatives, anti-immigrant candidates).

[113] 457 U.S. 202 (1982).

[114] Kobach, *supra* note 92; Kobach, *supra* note 36.

[115] *The Races for the House*, N.Y. Times, Nov. 4, 2004, at P12 (showing results of congressional race in Kansas).

[116] Professor Kobach has litigated both the *Day* case in Kansas federal court and the *Martinez* case in California state court. Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *argued*, No. 05-3309 (10th Cir. Sept. 27, 2006); Martinez v. Regents of Univ. of Cal., No. CV-05-2064 (Cal. Super. Ct., Yolo County Oct. 6, 2006), *appeal filed*, No. CV-05-2064 (Cal. Ct. App. Nov. 9, 2006). I assisted state legislative staff in drafting the Kansas statute, assisted the defendant in discussions and brief-writing at both the district court and Tenth Circuit levels, and served as one of the State's witnesses in the federal case.

[117] Kobach, *supra* note 36.

[118] *Id.* at 183.

[119] *Id.* at 179.

that the lesson to be drawn is that immigration law was an enabler, at least not in the manner Kobach sketches. He goes on to cite the terrorists' involvement in various transgressions, and he draws terrifying linkages:

> Of critical importance is the fact that all four of the hijackers who were stopped by local police prior to 9/11 had violated federal immigration laws and could have been detained by the state or local police officers. Indeed, there were only five hijackers who were clearly in violation of immigration laws while in the United States — and four of the five were encountered by state or local police officers. These were four missed opportunities of tragic dimension. Had information about their immigration violations been disseminated to state and local police through the NCIC system, the four terrorist aliens could have been detained for their violations. Adding even greater poignancy to these missed opportunities is the fact that they involved three of the four terrorist pilots of 9/11. Had the police officers involved been able to detain Atta, Hanjour, and Jarrah, these three pilots would have been out of the picture. It is difficult to imagine the hijackings proceeding without three of the four pilots. The four traffic stops also offered an opportunity to detain the leadership of the 9/11 terrorists. Had the police arrested Atta and Hazmi, the operation leader and his second-in-command would have been out of the picture. Again, it is difficult to imagine the attacks taking place with such essential members of the 9/11 cohort in custody.
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> Importantly, all of these transgressions were civil, not criminal, violations of the INA. Therefore, according to the view of those who contend that Congress has preempted state and local police from making arrests for civil violations of the INA, no local police officer would have had the authority to arrest any of these hijackers on the basis of his immigration violation(s). In other words, even if the INS had developed a program to detect such violations and report the names of violators to local law enforcement agencies prior to the 9/11 attacks, the hands of local police would have been tied, and they would have been unable to help stop the attacks. Not only is it implausible to assert that Congress would have intended such a consequence as a policy matter, it is difficult to sustain such an assertion as a legal matter. . . .[120]

For want of a nail — or a traffic stop. But as compelling as this saga is, it is not a justification for additional local or state enforcement of immigration laws. By Kobach's count, four of the terrorists had violated various laws or regulations sufficient to have drawn attention to their murderous intentions.[121] Yet, by his own data, almost seventeen million drivers in 2002 were stopped by the police, or 8.7% of all the licensed drivers in the United States (or, more accurately, licensed and unlicensed drivers over sixteen years of age).[122] As irksome, or even as dangerous as such apprehensions are, it is hardly an argument that the undocumented and nonimmigrants are a sizeable proportion of such threats to the highway. Indeed, if they were a sizeable or disproportionate percentage of stopped drivers, such a condition would plausibly and convincingly argue that this population should be required to obtain, not prohibited from obtaining, driver licenses and the attendant registration, tests, and insurance.[123] Counting these minor violations as likely occasions for intercepting terrorists is chimerical and obscures the real problems — the poor condition of the data and the inability of national defense agencies to coordinate with each other.[124] There is plenty of active and passive blame to go around, no matter one's political affiliation.

Professor Kobach also argues that the hijackers were in violation of laws by enrolling in flying school classes with B-2 visas,[125] when this is not accurate.[126] Not only were B-2 students allowed to enroll in such short courses, but a flight school received visa approval letters for two of the hijackers' during the regular course of 2001 business, six months to the day after the

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[120] *Id.* at 187-88.

[121] *Id.* at 184.

[122] Erica L. Smith & Matthew R. Durose, Characteristics of Drivers Stopped by Police, 2002, at 1 (Carolyn C. Williams ed., U.S. Bureau of Justice Statistics 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cdsp02.pdf (last visited June 26, 2007).

[123] *See* Maria Pabon Lopez, *More than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. Ill. U. L.J. 91 (2004).

[124] Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report 145-277 (Stephanie L. Kaplan ed., W. W. Norton & Co. 2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (last visited June 26, 2007) [hereinafter *9/11 Report*]. Quite implausibly, Timothy McVeigh was caught in a traffic stop, despite early assumptions that foreign terrorists had bombed the Oklahoma City federal building. Jo Thomas, *The Bombing Verdict: The Overview*, Dec. 24, 1997, at A1; Jo Thomas, *The Oklahoma City Bombing*, N.Y. Times, June 3, 1997, at A1.

[125] Kobach, *supra* note 36, at 184-86.

[126] David Firestone & Matthew L. Wald, *Flight Schools See Downside to Crackdown*, N.Y. Times, May 27, 2002 at A1; *see also* Kate Murphy, *In Choosing a Flight School, Check Beyond the Cockpit*, N.Y. Times, Oct. 29, 2006, at 3-5.

September 11, 2001, attacks, causing great embarrassment to the then-INS.[127]

My purpose here is not to rebut each point of Professor Kobach's overheated version of events, and I certainly do not wish to debate the merits of the Mara Salvatrucha – 13 drogeros,[128] but it is essential that these matters be kept in perspective, not linked to every global threat that might harm us. After all, the real laxity, according to the bipartisan 9/11 Commission, was in bureaucratic territoriality preventing linkage of all of the dots and the government's failure to take the rise of radical Islam seriously following the earlier bombing of the World Trade Center.[129] Indeed, educational authorities properly and courageously reported Zacarias Moussaoui when he tried to learn flight steering — but not takeoff or landing measures.[130] Regardless, off-the-shelf aviation training computer software was available for instructional purposes.[131]

And it is difficult to quarrel with Professor Kobach's assertion that various police authorities should cooperate more with each other, although the key is the extent to which this is feasible and efficacious. There are already a number of provisions that allow local and state law enforcement agencies to enter into Memoranda of Understanding (MOU), under the authority of IRRAIRA,[132] and these have been in place for almost a dozen years.[133] However, these provisions were not taken advantage of until 2002, when Florida entered into a MOU to train thirty-five state and local officers.[134] Since 2002, ICE has entered into MOU with only four States and some other entities, to train several hundred officers.[135] The law enforcement persons most familiar with the issues, those closest to the ground, have known of the opportunities available to coordinate with federal authorities, yet have chosen overwhelmingly not to do so — even after 9/11.

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[127] Sara Hebel, *Visa Flap Renews Calls for INS Database*, Chron. of Higher Educ., Mar. 22, 2002, at A24 (reporting that six months after 9/11 attacks, two flight schools received notification from the INS that student visa applications submitted by hijackers Mohammed Atta and Marwan al-Shehhi had been approved). *See generally* Leonard M. Baynes, *Racial Profiling, September 11th, and the Media: A Critical Race Theory Analysis*, 2 Va. Sports & Ent. L.J. 1 (2002); Robert Pear, *Senate Passes Bill to Strengthen Border Security*, N.Y. Times, Apr. 19, 2002, at A14; Diana Jean Schemo, *College Officials Are Wary on Visa Enforcement*, N.Y. Times, Dec. 15, 2001, at B6; Rachel L. Swarns, *Program's Value in Dispute as a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.

[128] Kobach, *supra* note 36, at 193-94; Ginger Thompson, *Shuttling Between Nations, Latino Gangs Confound the Law*, N.Y. Times, Sept. 26, 2004, at 1-1.

[129] *9/11 Report*, *supra* note 124.

[130] *Id.* at 247, 273-76; *see also* Associated Press, *F.B.I. Whistle-Blower Is Criticized in Report*, N.Y. Times, June 20, 2006, at A12; David Johnston & Jim Dwyer, *Pre-9/11 Files Show Warnings Were More Dire and Persistent*, N.Y. Times, Apr. 18, 2004, at 1-1.

[131] Philip D. Zelikow et al., The Four Flights: Staff Statement No. 4, at 5-6 (Nat'l Comm'n on Terrorist Attacks Upon the United States 2004), *available at* http://www.9-11commission.gov/staff_statements/staff_statement_4.pdf (last visited June 26, 2007). For a sense of how flight simulators operate, see Mark J. Prendergast, *Soaring at 4,500 Feet, Steps From the Fridge*, N.Y. Times, Apr. 16, 1998, at G9 (reviewing several computerized flight training programs, implicating security issues).

[132] IIRAIRA, *supra* note 17, §133 (codified at INA 287(g), 8 U.S.C. 1357(g) (2000)).

[133] Fact Sheet, U.S. Immigration & Customs Enforcement, Section 287(g) Immigration and Nationality Act: Delegation of Immigration Authority (June 22, 2007), *available at* http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm; Fact Sheet, USICE, Section 287(g), Delegation of Immigration Authority: Immigration and Nationality Act (June 22, 2007), *available at* http://www.ice.gov/pi/news/factsheets/070511factsheet287gtraining.htm (both last visited June 26, 2007). *But see* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373 (2006); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493 (2001).

[134] Kobach, *supra* note 36, at 197; Pham, *supra* note 133, at 1374 n.5.

[135] Fact Sheet, USICE, Section 287(g), Delegation of Immigration Authority: Immigration and Nationality Act (June 22, 2007), *available at* http://www.ice.gov/pi/news/factsheets/070511factsheet287gtraining.htm (last visited June 26, 2007); *see also* Kobach, *supra* note 36, at 197; Pham, *supra* note 133, at 1374 n.5.

The Houston Police Department revised its procedures following the murder of a police officer who had arrested a once-deported felon alien who had entered without inspection a second time. The officer had handcuffed the alien and placed him in the back of the police vehicle, but the alien apparently had a gun that was not evident when the officer frisked him. I watched in horror as these events unfolded in the media and then cringed as the issue dominated Houston news and politics for several weeks leading up to the 2006 elections. Alexis Grant & Kristen Mack, *Court to Decide: Does Deportation Fit Crime?*, Hous. Chron., Oct. 1, 2006, at A1; Anne Marie Kilday et al., *Shooting Raises Issue of Policing Immigrants*, Hous. Chron., Sept. 23, 2006 at A1; Matt Stiles, *HPD Revising Its Immigration Policy*, Hous. Chron., Oct. 1, 2006, at A1. According to Mexican American Bar Association officials in Houston, as soon as the Houston Police Department announced this policy, the criminal courts in Harris County began requiring anyone in need of translation assistance for non-immigration-related charges to be turned over to ICE officials. According to these lawyers, the District Attorney's office is now transmitting the fingerprints to ICE, even as cases are pending. Discussions with Mexican American Bar of Houston Officials in San Antonio, Tex. (Mar. 29, 2007).

That Congress has expressly allowed for MOU to delegate and share enforcement in certain narrow categories would rebut Kobach's wider, boundless reading of the preemption powers. I do not parse all of his arguments, as I believe others have done so persuasively and in great detail,[136] but it is hard to reconcile the legislative history of MOU with an "inherent power"[137] theory — one that, if correct, would obviate the need for law enforcement to ever enter into the cooperative agreements. It is one thing to delegate training, to share resources, and to agree to cooperate, but it is quite another to consider such non-emergency federal measures as impliedly conceding enforcement authority. Moreover, the MOU are certainly not an indication of "inherent authority,"[138] but the reverse. The MOU are a textbook example of the proper delegation of powers.

There are provisions that reserve exclusive enforcement authority to ICE and other federal immigration authorities, and Congress has granted authority to share some aspects of enforcement — but in narrow, formal fashion. For example, 8 U.S.C. §1324(c) (2000)[139] ("Authority to arrest") gives the right to "make any arrest for a violation of [the harboring provisions to] officers and employees of the [former INS] designated by the Attorney General … and all other officers whose duty it is to enforce criminal laws." Provisions for cooperative arrangements to share data and liaison with internal security officers are spelled out in 8 U.S.C. §1105 (2000).[140] Another example of such modest delegation of law enforcement authority is the INA §287(g)[141] provisions for non-emergency assistance in the enforcement of immigration laws. It is clear that Congress acted in these places and that it did not make concessions of interest or intrinsic authority, but rather the opposite.

These provisions, or any other such narrow cooperative arrangement, do not implicate core immigration functions, nor do they exemplify inherent authority. Thus, limited cooperative assistance is carefully set out by Congress as a modest delegation — one that very few jurisdictions have undertaken. Clearly, even with its impatience at the underwhelming federal success in undertaking border security and immigration enforcement, Congress has made provisions for only a small sub-federal role, one that does not necessitate or create realignment of responsibilities. And local law enforcement and governmental authorities have chosen not to use even these modest tools, not even those that might arguably help them combat overall crime in their jurisdictions.

Kobach's argument[142] is more grounded than was Spiro's[143] in the sense that he provides detail about on-the-ground law enforcement,[144] whereas the demi-sovereignty ideal is more ethereal and rooted in the foreign powers;[145] but the essence is the same, whether one tries to stretch preemption by fire or by ice. Congress does not want, and the separation of powers and preemption theories do not allow, a substantial subcontracting of federal immigration authority to state and local governments. We do not want fifty foreign affairs policies, or fifty immigration policies. We certainly do not want and cannot tolerate hundreds of immigration policies, allowing liberal Santa Fe, New Mexico, to carve out a "sanctuary" while Hazleton, Pennsylvania, or Norcross, Georgia, gets to run every bilingual or dark-complexioned person out of town after sundown. Indeed, even contemplating a redeployment of the type Kobach endorses[146] begs the question of how redeployment and MOU parallel enforcement will inevitably strain the quality of both local policing and national immigration enforcement. They are not fungible, and combining the two would certainly weaken both functions. In the checkerboard jurisdictions of major metropolitan land areas such as Los Angeles, Phoenix, and Houston, how could a national policy be overlaid on such complex and disparate jurisdictions? Driving across these large metropolitan areas, one crisscrosses dozens of municipalities and jurisdictions. Can each have its own immigration and enforcement policy?

There are additional problems of efficacy, of likely non-uniformity in enforcement, and of a race to the bottom as local law enforcement takes on tasks for which it is not institutionally prepared; these are fundamental constitutional problems finessed by the Kobach proposals. One careful study characterized his proposals as "[t]he [i]nherent [f]laws in the [i]nherent [a]uthority [p]osition,"[147] while another noted the probability that "these measures seem likely to expose local police to liability for wrongful arrest and in some instances for violations of state or local anti-profiling ordinances."[148] Even President Bush has acknowledged

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[136] *See* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U. L. Rev. 965 (2004); Pham, *supra* note 133; Wishnie, *supra* note 133.
[137] Kobach, *supra* note 36.
[138] *Id*.
[139] INA §274(c).
[140] INA §105.
[141] IIRAIRA §133, *supra* note 17.
[142] Kobach, *supra* note 36.
[143] Spiro, *supra* note 1.
[144] Kobach, *supra* note 36.
[145] Spiro, *supra* note 1.
[146] Kobach, *supra* note 36.
[147] Pham, *supra* note 136, at 965.
[148] Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1115 (2004).

that if undocumented communities "are victimized by crime, they are afraid to call the police, or [to] seek recourse in the legal system."[149] Doing as Professor Kobach suggests may well be popular politics, but the result is sure to be worse than the current situation and, in all probability, will make police-community relations worse.

IV. Conclusion

When I consider the hydraulics of preemption, on which I have thought for a long time, and the likely downsides of the "inherent authority" issue, and when I count the rise of immigration-related proposals at the local and state level, I am convinced that no good can come of them. Some of the inefficiencies in the current system are incontestably dysfunctional, but the result of increased overlap in immigration enforcement would be the same. Most importantly, state and local immigration-related proposals would not appreciably improve the current system, which already has coordinating provisions built in, if not widely adopted.

The blowback in affected communities and the resultant prejudice sure to follow from, among many examples,[150] enforcing English-only signs,[151] requiring Spanish language preachers not to proselytize in their congregants' language,[152] and necessitating landlords in Hazleton, Pennsylvania, to check the immigration status of renters[153] will be utterly negative. These "policies"[154] are all sure signs of an ethnic and national-origin "tax" that will be levied only upon certain groups: certainly upon Mexicans in particular, and equally as likely upon Mexican-Americans. These more-than-petty nuisances, reminiscent of our inglorious immigration history of racial exclusion, are the pigtail ordinances in modern guise.[155] Despite their surface attractiveness and thin veneer, they should be resisted as fixes.

Fighting terrorism, of the homegrown or international variety, is not ground cover for discarding our traditional allocation of immigration and enforcement powers. Congress, stalled in partisan tactics and elections, has tried to enact several measures that could pass because, in the anti-immigrant climate, no elected official wants to be painted as "soft on immigration crime."[156] Were I in office, I would not want to be perceived as weak on such a fundamental issue. But I hope that I would find common ground with others to enact legislation that genuinely guards our borders, while not trading off our longstanding internal safeguards.

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[149] *Id.*

[150] *See, e.g.*, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952 (C.D. Cal. 2006) (striking down local loitering ordinance aimed at day laborers), *appeal docketed*, No. 06-55750 (9th Cir. May 30, 2006). I am a board member of MALDEF, the group that agreed to undertake this litigation and challenged the ordinance. For a sampler of the effects and unintended consequences of attempting to regulate immigration issues, see Nina Bernstein, *U.S. Court Orders City to Ensure Aid for Battered Immigrants*, N.Y. Times, Aug. 30, 2006, at B1; Arian Campo-Flores & T. Trent Gegax, *A New Spice in the Gumbo*, Newsweek, Dec. 5, 2005, at 46; Jill P. Capuzzo, *Town Fighting Illegal Immigration Is Emptier Now*, N.Y. Times, July 28, 2006, at B1; Barbara Ferry, *'Out of the Shadows,'* Santa Fe New Mexican, June 12, 2006, at A1; Katie Kelley, *A Deal in Colorado on Benefits for Illegal Immigrants*, N.Y. Times, July 12, 2006, at A18; Alex Kotlowitz, *The Smugglers' Due*, N.Y. Times, June 11, 2006, §6 (Magazine), at 71; Julia Preston, *U.S. Puts Onus on Employers of Immigrants*, N.Y. Times, July 31, 2006, at A1. Not as frequently noted is the transnational effect of immigration, including effects upon the sending regions. *See, e.g.*, Fernanda Santos, *A Brazilian Outpost in Westchester*, N.Y. Times, June 26, 2006, at B1.

[151] Guevara v. City of Norcross, 2002 U.S. App. LEXIS 26611 (11th Cir. 2002) (unpublished table decision), *aff'g* No. 00-00190-CV-CAP-1 (N.D. Ga. 2001) (dismissing criminal charges against minister for posting signs that announced religious services in Spanish in violation of city ordinance that restricted the use of non-English languages for any displayed sign serving a nonresidential purpose).

[152] *Id.* A Spanish-language Christian minister was the first person arrested in Georgia when a township enacted a comprehensive immigration ban in 1999. The township prosecuted him under English-only provisions for posting signs that announced church services in his congregation's language. *Id.* While this was a MALDEF case, I was not a board member at the time MALDEF undertook this action.

[153] Lozano v. City of Hazleton, 459 F. Supp. 2d 332 (M.D. Penn. 2006), *argued*, No. 3:06-cv-1586 (M.D. Penn. Mar. 12-22, 2007); Gaiutra Bahadur, *Latinos Lead Rally Opposing Ordinance*, Philadelphia Inquirer, Sept. 4, 2006, at B1 (concerning local immigration ordinance and the case challenging it).

[154] An entire industry has sprung up as these issues arise at the local level. *See generally* Bernstein, *supra* note 150; Ferry, *supra* note 150; Kelley, *supra* note 150; Peter Wallsten, *Parties Battle Over New Voter ID Laws*, L.A. Times, Sept. 12, 2006, at A1. As these pieces show, the ordinances cut deeply into civic life and widely into a variety of local functions and benefits.

[155] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down anti-Chinese ordinances); *see also* Bill Ong Hing, Making and remaking Asian America through immigration policy, 1850-1990 (Stan. Univ. Press 1993).

[156] *See, e.g.*, the National Immigration Law Center website, http://www.nilc.org (last visited June 26, 2007).