Taking Immigration Federalism Seriously

Peter H. Schuck

Peter.Schuck@chicagounbound.edu

Follow this and additional works at: <http://chicagounbound.uchicago.edu/uclf>

Recommended Citation

Schuck, Peter H. () "Taking Immigration Federalism Seriously," *University of Chicago Legal Forum*: Vol. 2007: Iss. 1, Article 4.
Available at: <http://chicagounbound.uchicago.edu/uclf/vol2007/iss1/4>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Taking Immigration Federalism Seriously

Peter H. Schuck[†]

Probably no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration.¹ Equally canonical is the corollary notion, analogous to the dormant power doctrine in Commerce Clause jurisprudence, that this federal power is indivisible and therefore the states may not exercise any part of it without an express or implied delegation from Washington.

Despite the plenary power doctrine's authority, it has been assailed over the years by many academics and defended, I think, by none. Questioning its source in the Constitution, fit with other bodies of law, institutional implications, internal coherence, specific applications, and policy merits, critics have called for abandoning or significantly limiting it.² Its detractors have also criticized the doctrine's failure to clarify how power is allocated between Congress and the President in situations where they disagree.

An interesting feature of these critiques of the plenary power doctrine is that the critics seem to have no difficulty accepting its

[†] Simeon E. Baldwin Professor of Law, Yale University. The author wishes to acknowledge the contributions of Krishanti Vignarajah, Yale Law School class of 2008, who provided excellent research assistance, and the participants in a faculty workshop at Fordham Law School.

¹ *Chae Chan Ping v United States* (The Chinese Exclusion Case), 130 US 581, 603 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."); *Fong Yue Ting v United States*, 149 US 698, 722 (1893) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one."), quoting *Chae Chan Ping*, 130 US at 609.

² See, for example, Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum L Rev 1 (1984); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 S Ct Rev 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L J 545 (1990); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const L Q 1087 (1995); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to 'Is There a Plenary Power Doctrine?'*, 14 Georgetown Imm L J 289 (2000).

corollary—the principle that federal authority over immigration preempts the states from playing any independent role in the development and administration of immigration law and policy. Indeed, they enthusiastically affirm and defend it. This conjunction of positions, which might otherwise seem illogical or at least awkward, is probably best explained by ideology and politics. As I have explained elsewhere, the immigration law professoriate occupies a position at the extreme left in the national debate over immigration.³

³ In a polity in which only 7 percent of the public think that immigration levels should be higher while 55 percent think they should be lower, see <<http://www.galluppoll.com/content/default.aspx?ci=1660>> (last visited June 9, 2007) (poll taken in mid-January 2007), one would expect that at least *some* legal scholars who write about immigration issues would favor restriction. But one would be wrong. In over two decades of immersion in immigration scholarship, I have not encountered a single academic specialist on immigration law who favors reducing the number of legal immigrants admitted each year. (I myself favor higher admissions, albeit with a greater emphasis on skills than in the existing system.) This virtual unanimity among academics in favor of expanded immigration is a striking element of the political disconnect that I have discussed elsewhere. See Peter H. Schuck, *The Disconnect between Public Attitudes and Policy Outcomes in Immigration*, in Carol M. Swain, ed., *The Politics of Immigration Reform* 41 (Cambridge 2007).

In earlier works, I defined restrictionism and expansionism in terms not only of attitudes about legal admissions but also of attitudes about how rigorous enforcement against the undocumented should be. Here too, immigration law scholars tend to be expansionist. While they acknowledge the large and steadily growing number of undocumented aliens in the U.S. (after all, only willful blindness could miss this elephant in the room), few if any favor either an intensive campaign to apprehend and remove the undocumented or an enhancement of ICE's effective power to do so. (This is not a question of legal authority, which is already ample.)

With very few exceptions who are footnoted in *The Disconnect between Public Attitudes and Policy Outcomes in Immigration*, I cannot recall any immigration law scholar expressing support recently for increasing workplace raids, beefing up the Border Patrol, building a wall on the border, encouraging public officials or private individuals to identify illegal immigrants to ICE, penalizing those who provide sanctuary to them, using state and local police to augment ICE, limiting the procedural rights available to asylum claimants at the border or immigrants in enforcement proceedings, increasing penalties for illegal entry or visa violations, sanctioning lawyers who seek to delay proceedings to remove their clients, extending the period during which aliens can be detained either before or after a final removal order is issued, denying amnesty to undocumented workers, or limiting automatic birthright citizenship for their children.

Many immigration law scholars, of course, do favor using ICE's existing authority and resources more effectively to reduce illegal migration. They correctly note, for example, that the agency seldom imposes serious penalties on employers who rely on facially valid but frequently forged identification documents in hiring foreign workers, that ICE's actual follow-up on final removal orders is notoriously haphazard and feckless, that its management and information systems remain obsolete and chaotic, and that it exhibits many other chronic deficiencies and injustices.

This is not the place to debate the merits of expansion, much less of the numerous specific reform measures about which reasonable people can and do differ. Rather, my point here is simply that in sharp contrast to the American public generally, virtually all immigration law scholars, like all immigrant advocacy groups and all lawyers who represent immigrants, strongly support an immigration policy that is expansive in almost every sense. That is, they favor high and higher levels of legal admissions, generous am-

In this article, I make the case for a more robust role for the states in certain areas of immigration policy. In Part I, I controvert the assumption, almost universal among immigration law scholars, that the states are more hostile to immigrants, both documented and undocumented, than is Congress. Part II considers how Congress might delegate greater responsibility to the states, specifically in the areas of employment-based admissions, immigration enforcement, and employer sanctions, to strengthen federal immigration policy. Part III considers the validity of recently enacted state laws that directly affect immigrants but that Congress has not expressly authorized. I maintain that such laws should be upheld by the courts so long as they reflect a legitimate state interest and do not interfere with the goals of federal immigration policy, properly and conventionally understood.

I. THE MYTH OF GREATER STATE HOSTILITY TO IMMIGRANTS

Academic opponents of a state role in immigration, being ardently pro-immigration (as am I; I consider myself a moderate expansionist), fear that to the extent that state authority is recognized in this field either by Congress or by the courts, the states (or their localities, if authorized) will adopt restrictive policies designed to harm the interests of legal aliens and especially of undocumented ones. The latter group is one for which these academics, despite their firm professional dedication to the rule of law, exhibit a remarkable, if understandable, solicitude.⁴

But the situation becomes considerably more complex if one considers the now-conventional distinction between *immigration* law and policy (concerned with admission, administration of fed-

nesties for undocumented workers, reduced detention of the undocumented, more liberal grants of asylum, and more extensive procedural rights for the undocumented that make it harder for the government to remove them. I cannot recall a single academic presenter at any program in the more than twenty years of the Immigration Law Section of the American Association of Law Schools who did not take these positions. More speculatively, but based on my participation in many academic conversations and conferences, I imagine that the vast majority of immigration law scholars also support substantive entitlements (economic and welfare rights and even some voting rights) to equalize the status of citizens and noncitizens. It is here, presumably, that the political disconnect over immigration policy becomes most stark. See *id.*

⁴ See, for example, Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 Va J Intl L 179, 186 n25 (1994) (emphasis in original); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L Rev 1575 (2002); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 Va J Intl L 217 (1994); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 NYU Ann Surv Am L 295 (2002). For one exception, see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 Alb L Rev 179 (2005).

eral immigration benefits, and enforcement, including removal) and *immigrant* law and policy (concerned with how immigrants are treated once they are admitted or, in the case of the undocumented, otherwise enter the U.S.).⁵ Yet it is far from clear that states not constrained by the plenary power doctrine and its preemption corollary would treat legal immigrants more harshly than the federal government does (or would), or more harshly than reasonable (that is, non-xenophobic) voters might think wise or fair. Some states (or more likely, localities) might do so,⁶ of course, but the evidence strongly suggests that the largest immigrant-receiving states, as well as some states, are in fact consistently more generous to immigrants, even including undocumented ones, than is Congress.⁷ Whether the 2006 congressional election results will alter this suggestion remains to be seen.⁸

The post-1996 behavior of the states confirms this point. Anxieties over whether states would follow the federal government's lead in restricting public benefits for immigrants after its 1996 immigration reforms were assuaged when many states enacted new welfare programs to address the needs of illegal immigrants residing within their borders. One concern, for example, stemmed from the fact that the 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")⁹ permitted states to deny most general welfare benefits to immigrants. As of 1999, however, many states had not exercised this option to make immigrants ineligible, and an Urban Institute paper as-

⁵ Bosniak, 35 Va J Intl L at 186 n 25 (cited in note 4).

⁶ See note 86.

⁷ George J. Borjas, *The Impact of Welfare Reform on Immigrant Welfare Use* (Center for Immigration Studies Mar 2002), available at <<http://www.cis.org/articles/2002/borjas2.htm>> (last visited Feb 26, 2007) ("The Urban Institute's index of 'welfare generosity' classifies states into four categories according to the availability of the state safety net. The states where such aid was 'most available' included California and Illinois; the states where the aid was 'somewhat available' included New York and Florida; the states where the aid was 'less available' included Arizona and Michigan; and the states where the aid was 'least available' included Ohio and Texas. It is worth noting that five of the six states with the largest immigrant populations tended to provide above-average levels of state-funded assistance to immigrants (the exception being Texas).").

⁸ See, for example, Randal C. Archibold, *Democratic Victory Raises Spirits of Those Favoring Citizenship for Illegal Aliens*, NY Times A27 (Nov 10, 2006) (noting that according to the Federation for American Immigration Reform, six state ballot initiatives, including four in Arizona, were approved that would make "life harder on illegal immigrants"); Ralph Blumenthal, *Texas Lawmakers Put New Focus on Illegal Immigration*, NY Times A22 (Nov 16, 2006) (discussing bills filed in Texas to "deny public assistance and other benefits to the children of illegal immigrants").

⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L No 104-193, 110 Stat 2105 (1996), codified in scattered sections of 8, 26, and 42 USC.

sessing state immigration reform concluded: "Despite fears of a race to the bottom with states providing as few benefits as possible, nearly every state has opted to maintain TANF [Temporary Assistance for Needy Families] and Medicaid eligibility for immigrants who were already in the United States when the federal welfare law passed."¹⁰ Indeed, a survey of state welfare programs in areas ranging from food stamps to health care insurance found that the majority of states had passed at least one new state welfare program including immigrants after the 1996 Act.¹¹ In January 2007, newly re-elected Governor Arnold Schwarzenegger proposed to extend state-subsidized health insurance to the 6.5 million uninsured in California, including the millions of undocumented immigrants in the state.¹²

The situation with driver's licenses and in-state tuition benefits also supports my claim that many states are more generous than Congress toward both legal and undocumented immigrants. Despite the REAL ID Act of 2005, which bars states from issuing driver's licenses or identification cards to most undocumented workers,¹³ eight states continue to issue driver's licenses to residents regardless of their immigration status. Forty-seven states require a Social Security number of those immigrants who have been assigned one or are eligible for one before issuing identification. Many of these states, however, do require legal residence as well, and a growing number of states are calling for

¹⁰ Wendy Zimmermann and Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform 3* (The Urban Institute 1999), available at <<http://www.urban.org/UploadedPDF/occ24.pdf>> (last visited Feb 27, 2007). Their study showed that two years after the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") went into effect in 1996, every state except Alabama continued to provide Temporary Assistance for Needy Families benefits to immigrants who entered pre-PRWORA. *Id.* at 22. See also *Welfare Reform: Many States Continue Some Federal or State Benefits for Immigrants* (United States General Accounting Office ("GAO") 1998), available at <<http://www.gao.gov/archive/1998/he98132.pdf>> (last visited Dec 5, 2006). For an argument, and prediction, similar to mine, see Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 167 *Intl Social Sciences J* 67, 71–72 (2001) (noting that most states responded to PRWORA "with generous eligibility criteria for aliens"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 *Conn L Rev* 1627, 1628, 1640–46 (1997) ("[T]he prospect of a race to the bottom is slight.").

¹¹ Zimmermann and Tumlin, *Patchwork Policies* at 22–23 ("Regarding four key benefits—(1) a food stamp substitute for immigrants losing food stamps, (2) an SSI substitute for immigrants losing SSI eligibility, (3) TANF to post-enactment immigrants during the five-year bar, and (4) Medicaid to the same group—28 states have opted to use their own funds to provide at least one, 15 at least two, 10 at least three, and two (California and Maine) all four.").

¹² Editorial, *Family Values*, *St. Louis Post-Dispatch* B8 (Jan 16, 2007). For a general discussion of the plan, see Jerry Geisel, *California Mulls Universal Health Care*, *Business Insurance* 1 (Jan 15, 2007).

¹³ Pub L 109-13, 119 Stat 231, codified at 49 USC § 30301 (2005).

the REAL ID Act's repeal.¹⁴ Admittedly, however, in some states like California, initial successes in relaxing the Act's documentation requirements ultimately suffered serious setbacks.¹⁵

States' willingness to provide even costly public benefits for immigrants, including undocumented ones, has grown. As of late 2006, ten states—Texas, California, Utah, Washington, New York, Oklahoma, Illinois, Kansas, Nebraska, and New Mexico—had passed laws permitting certain undocumented students who have attended and graduated from their primary and secondary schools to pay the same tuition as their classmates at public institutions of higher education.¹⁶ This statistic is even more remarkable because these are the states in which most undocumented immigrants live.¹⁷ An article published in 2005 found

¹⁴ *Overview of States' Driver's License Requirements* (National Immigration Law Center Jan 2007), available at <http://www.nilc.org/immspbs/DLs/state_dl_qrmts_ovrvw_2007-01-31.pdf> (last visited Feb 26, 2007). Telephone conversation with Tyler Moran, Employment Policy Director, National Immigration Law Center (Jan 30, 2007). See Eric Lipton, *Rebellion Growing as States Challenge a Federal Law to Standardize Driver's Licenses*, NY Times A16 (Feb 5, 2007) ("Opposition among state officials is turning into an open revolt" against the law). The Maine legislature, the first to call for the repeal of the Act and also to refuse to implement it, claims that it will cost the state \$185 million to administer and create other problems. *Maine: Repeal of Federal ID Law is Sought*, NY Times A19 (Jan 26, 2007).

¹⁵ On September 5, 2003, California Governor Gray Davis signed a bill allowing illegal immigrants to obtain driver's licenses. Peter Nicholas and Jennifer Mena, *Bill Allowing Illegal Immigrants to Get Driver's Licenses Is Signed*, LA Times B1 (Sept 6, 2003). But Governor Schwarzenegger subsequently repealed the driver's license law after taking office. Erin Kragh, *Forging a Common Culture: Integrating California's Illegal Immigrant Population*, 24 BC Third World L J 373, 387–88 (2004).

¹⁶ See Kathleen A. Connolly, *In Search of the American Dream: An Examination of Undocumented Students, In-State Tuition, and the Dream Act*, 55 Cath U L Rev 193, 208 (2005); Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J Coll & Univ L 435, 456 (2004) (citing California, Illinois, New York, Oklahoma, Texas, Utah, and Washington as states allowing undocumented students to pay resident tuition fees); *Basic Facts about In-State Tuition for Undocumented Immigrant Students* 1 (National Immigration Law Center Apr 2006), available at <http://www.nilc.org/immlawpolicy/DREAM/in-state_tuition_basicfacts_041706.pdf> (last visited Feb 26, 2007). New Mexico, for example, entitled immigrants to in-state tuition benefits: "Any tuition rate or state-funded financial aid that is granted to residents of New Mexico shall also be granted on the same terms to all persons, regardless of immigration status, who have attended a secondary educational institution in New Mexico for at least one year and who have either graduated from a New Mexico high school or received a general educational development certificate in New Mexico." NM Stat Ann § 21-1-4.6 (Michie 2005). As of August 2007, Congress was actively considering a federal Dream Act, which would create a path to citizenship for undocumented high school graduates under certain conditions. See Julia Preston, *In Increments, Senate Revisits Its Immigration Bill*, NY Times A1 (Aug 3, 2007).

¹⁷ Connolly, 55 Cath U L Rev at 209 (cited in note 16). In fact, in 2000, about 4.5 million of the 7.0 million unauthorized residents in the United States lived in California, Texas, New York, Illinois, and Florida (the only state among the five that did not enact legislation to provide in-state tuition for undocumented immigrants). *Id.* at 209 n 115.

that many other states, including Colorado, Connecticut, Florida, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Oregon, South Carolina, and Tennessee, were considering similar legislation.¹⁸ (The question of the constitutionality of these laws remains uncertain.)¹⁹

Many of the leading immigration destination cities in the U.S. have expressly affirmed their solidarity with immigrants, including undocumented ones, by adopting policies instructing their officials to refrain from assisting or cooperating with federal immigration officials²⁰—this, in the face of a federal statutory provision prohibiting any official from restricting information exchange with federal officials concerning an individual's immigration status.²¹ State attorneys general have aggressively sought to protect immigrant workers, even when it has put them at odds with federal immigration policy. Some attorneys general have gone beyond quietly flouting that policy as well. Massachusetts Attorney General Thomas Reilly, for example, has sought to protect illegal aliens who are especially vulnerable to employer abuse even while the INS actively sought to prosecute them.²²

¹⁸ Id at 209 n 117.

¹⁹ This question is under active litigation in California. *Robert Martinez, et al v Regents of the University of California, et al*, CV05-2064, pending before the Third District Court of Appeals for the State of California (lower court decision by Yolo County Court Judge Thomas Warriner, 2006). The legal issue is whether these state tuition policies comply with § 505 of the Illegal Immigration Reform and Immigrant Reconciliation Act of 1996 ("IIRIRA"), which provides that an unlawfully present alien "shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." Compare Michael A. Olivas, *A Rebuttal to FAIR*, Univ Bus 72 (June 2002) (arguing that the *non-monetary* "benefit actually being conferred by residency statutes is the right to be considered for in-state resident status" which is outside of IIRIRA), with Dan Stein, *Why Illegal Immigrants Should Not Receive In-State Tuition Subsidies*, Univ Bus 64 (Apr 2002) ("Preferential treatment for illegal immigrants in public education is unlawful."). Consider also Michael A. Olivas, 30 J Coll & Univ L at 452-57 (2004) (cited in note 15) (concluding that IIRIRA, "however badly written, allows states to confer (or not to confer) a residency benefit upon the undocumented in their public postsecondary institutions").

²⁰ See, for example, John M. Morganelli, *Sanctuary City Ordinances Make Nation Less Safe*, The Morning Call (Allentown, PA) A15 (Dec 8, 2006) ("Cities such as Los Angeles, New York, Chicago, Austin, San Diego and Houston are a few examples of cities which prevent police officers from inquiring as to immigration violations of suspected illegal aliens."); *California: City Won't Aid Immigration Officials*, NY Times A23 (Apr 24, 2007).

²¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub L No 104-208, 110 Stat 3009 (1996), Section 642, codified at 8 USC § 1373(a) (2000).

²² *Immigrant Workers' Civil Rights a Challenge for Attorney General*, The Standard-Times A6 (New Bedford, MA) (Apr 21, 2001). ("Jeremy Banks, a representative of Attorney General Thomas Reilly, has made dozens of appearances across the state – one in Freetown this week – trying to encourage illegal aliens to report abuse they suffer at the

New York Governor Eliot Spitzer, while state Attorney General, did much the same.²³ In June 2007, the city of New Haven, Connecticut apparently became the first city in the nation to issue municipal identification cards to undocumented immigrants in order to give them better access to city services and help the police protect them from crime.²⁴ These actions bespeak a remarkable solicitude by public officials for both legal and undocumented immigrants in many receiving states and communities. Recent reports suggest that the same is true of the private sector and community groups.²⁵

But even if this solicitude were less robust than it is, an immigration policy that allocates regulatory power over immigration and immigrants between the federal government and the states on the basis of general, politically acceptable principles would be more desirable than a policy that simply favors whichever power allocation one or another commentator thinks might yield the most social services and welfare benefits for immigrants. In the discussion that follows, I invoke one such broader principle, functional rationality, to argue that the legitimate goals of federal immigration policy might be better served by recognizing state authority in certain areas. In Part II, I shall focus on three specific policy areas: employment-based admissions, integration with state and local criminal justice systems, and employer sanctions. I shall assume that state authority would be rooted in an express delegation of authority by Congress or, absent such an express delegation, would nevertheless be affirmed by the courts against a challenge based on federal exclusivity or preemption.

hands of employers. . . . [T]he attorney general wants to know about it and he wants to help stop it.”).

²³ Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 Colum J L & Soc Probs 495, 540–41 (2006) (describing Spitzer’s intervention where state courts “had held that federal immigration law preempts undocumented workers from receiving lost earning recoveries based on wages earned domestically in common-law tort and state statutory worker-safety actions”).

²⁴ Jennifer Medina, *New Haven Approves Program To Issue Illegal Immigrants IDs*, NY Times B6 (June 5, 2007).

²⁵ See, e.g., Robin Sidel, *Big Banks’ Loan Push: Illegal Immigrants*, Wall St J C1 (May 3, 2007); Miriam Jordan, *Illegal Residents Get Legal Route to Car Coverage*, Wall St J A1 (May 1, 2007); James Barron, *Churches To Offer Sanctuary*, NY Times B1 (May 9, 2007). See also Julia Preston, *Immigration Is at Center Of New Laws Around U.S.*, NY Times A12 (Aug 6, 2007) (discussing National Conference of State Legislatures report on 170 new statutes, some of which seek to help the undocumented by protecting them from exploitation and extending education and health care to their children).

The questions I address are, first, what would be the consequences of such an express delegation, and second, under what conditions would and should the courts affirm state authority in these three policy areas absent such a delegation.

To my knowledge, only one scholar, Peter Spiro, has advanced an extended defense of a larger role for the states in the immigration context.²⁶ In an intriguing 1994 article, Spiro noted that immigration had become a prominent political issue in some high-impact states, and that “[a]s a practical matter, immigration is now largely a state-level concern.”²⁷ Audaciously, Spiro argued that “existing constraints on state measures relating to undocumented aliens can be justified only by way of foreign affairs preemption,” and that this preemption should be abandoned in light of the growing and often independent role of the states (“demi-sovereigns,” in Spiro’s terminology) in “a post-national world order.”²⁸ If Congress wishes to preempt or constrain state measures, he maintained, it should do so expressly; absent that, the courts should not do it for them.

In the course of developing his argument, Spiro criticizes the two other doctrines that courts have used to limit state policies that affect immigrants: the prohibition against state laws that in effect deny legally-admitted immigrants “entrance and abode,” and the application of equal protection doctrine to bar state laws that discriminate against aliens but that do not offend other constitutional provisions. To the extent that such state laws do not violate international law standards, Spiro would uphold them unless Congress expressly provides otherwise.

My legal argument is narrower and less ambitious than Spiro’s, but my functional analysis may actually have broader policy implications. It is important to recall an essential but often overlooked fact about American public policy and governmental structure: the “federalist default” arrangement is for federal programs to rely, often heavily, on state and local involvement, including in the enforcement of federally-promulgated rules. In-

²⁶ See also Cristina Rodriguez, *Immigration Reform Has to Start on the Street*, Newsday A44 (Long Island, NY) (July 23, 2006) (op-ed urging more attention to the state and local role in managing effects of immigration).

²⁷ Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 Va J Intl L 121 (1994). See also Peter J. Spiro, 29 Conn L Rev 1627 (cited in note 10).

²⁸ Spiro, 35 Va J Intl L at 123 (cited in note 27). I agree with the position of both Michael Olivas and Hiroshi Motomura that generally speaking, and contrary to Spiro, sound arguments exist for federal preemption unrelated to the foreign affairs power. Michael A. Olivas, 35 Va J Intl L at 234–36 (cited in note 4); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 Va J Intl L 201 (1994).

deed, it is hard to think of a national program (other than Social Security) that is run *entirely* by the federal government without any state involvement. Even national defense incorporates the state national guards. This enforcement-sharing default is all the more significant when one considers that in the vast majority of these policy domains where Congress delegates federal authority downward, Congress could if it wished exercise plenary federal authority without any constitutional impediment.

For present purposes, then, the fundamental question that this federalist default raises is this: why should immigration be different? My answer, supported in the analysis that follows, is that in principle immigration should *not* be different, though the precise mix of federal and state authority and responsibility is and must always be domain-specific.²⁹

Before proceeding, I briefly defend my use of the term “immigration federalism.” Some federalist arrangements are based on the sovereignty of the states. That is, state authority inheres in the constitutional settlement among the states and the people, whereby only limited powers (later vastly expanded) were delegated to the national government while all other powers were reserved to the states and the people. This is *not* the species of federalism that I have in mind here. Although contemporary federalism and the jurisprudence that surrounds it are certainly influenced by such notions of constitutional state sovereignty, many if not most of the powers exercised by the states today are undertaken pursuant to a bewilderingly complex system of federal-state relationships in which the states participate in programs enacted and largely funded by Washington.³⁰ This state participation can take many different forms: administration and/or enforcement of federally-established rules and policies; policy development and implementation within parameters (more or less constraining) set by federal policymakers; federal funding of states to develop their own policies; and many other collaborative (though inevitably conflicting) arrangements. What I refer to as immigration federalism, then, consists of arrange-

²⁹ In the importance of domain-specificity and case-by-case application of preemption doctrine, I agree with Michael Olivas, 35 Va J Intl L 217 (cited in note 4), but we disagree on whether the doctrine precludes states from acting in the ways I support below.

³⁰ See generally, Martha Derthick, *America's Federalism*, in Peter H. Schuck and James Q. Wilson, eds, *Understanding America: The Institutions and Policies that Shape America and the World* (forthcoming 2008).

ments, such as these, in which the states operate under, and are obliged to respect, federal immigration policies and supervision.³¹

II. DELEGATING MORE IMMIGRATION POLICY DEVELOPMENT AND IMPLEMENTATION AUTHORITY TO THE STATES

A federal system allocates public authority between the national government and sub-national entities, but this allocation differs according to the nature of the allocation and the specific policy domain. In the U.S., as noted earlier, the plenary power doctrine and its dormant power corollary leave immigration policy as the sole responsibility of the federal government, subject only to such delegations of immigration authority to the states as Congress may choose to make. Spiro insists that this federal monopoly over immigration is rooted entirely in the exclusive federal authority over foreign relations, captured in the (anachronistic, in Spiro's view) "one voice" metaphor.³² Surely that is the chief rationale for the doctrine, but it is not the only one. For example, appeals to tradition and the sunk costs of the status quo may also militate in favor of federal authority over immigration. But advocates of exclusive federal power almost always have other, more functional arguments to make against decentralization: a desire for uniformity, increasing returns to regulatory scale, administrative expertise and competence, fear of "races to the bottom," and others. (There are, of course, important, often decisive, *political* arguments for decentralization.)

It is all the more striking, then, that some major immigrant-receiving nations delegate (or reserve) substantial authority over certain significant aspects of immigration policy to their states (Germany (*Länder*) and Australia), provinces (Canada), and cantons (Switzerland).³³ In contrast, the U.S. remains a firm centralizer in immigration policy despite its robust tradition and structure—the federalist default—of state authority and administration in health care, education, national elections, taxation, and many other policy areas that in other countries are almost en-

³¹ This conforms to what Peter Spiro, distinguishing three models of immigration federalism, calls "cooperative federalism." 167 *Intl Social Sciences J* at 67–68 (cited in note 10).

³² Spiro, 35 *Va J Intl L* at 158 (cited in note 27).

³³ In another example, China has delegated to Hong Kong significant immigration policy autonomy. Benjamin L. Liebman, *Autonomy through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 *Harv Intl L J* 231, 236 (1998). On decentralized citizenship decisionmaking, see Peter H. Schuck, *Citizenship in Federal Systems*, 48 *Am J Comp L* 195 (2000).

tirely the responsibility of national governments. Why, other than by virtue of immigration's relation to foreign affairs, should this exception to the federalist default exist and, more to the point, why should it be maintained? I explore this question by focusing on three distinct immigration policy problems where the states might play an effective role in better achieving national goals.

A. Employment-Based Admissions

Authority to determine the number of and criteria for admissions is at the very core of immigration policy. Indeed, in cases challenging the extent of the plenary power doctrine, the Supreme Court has emphasized that whatever constitutional limits might exist on that power, they do not apply to decisions and criteria concerning initial admission and entry.³⁴ Under the immigration statute, the formulation and implementation of admissions policy are entirely matters for Congress, the Department of Homeland Security, the State Department, the Department of Labor, and the Department of Health and Human Services; the states have no significant role.³⁵

Yet there is much to be said for exploiting the diversity among states with respect to one important immigration stream: employment-based admissions. Under my supervision, a Yale Law School student, Davon Collins, has developed a proposal for what he calls decentralized employment-based immigration ("DEBI").³⁶ The essential premise of the proposal is that employment-based admissions primarily implicate local economic interests, particularly local labor markets, and that a decentralized system for deciding which petitioners should receive the federally-allotted visas—subject to federally-determined quotas and

³⁴ See, for example, *Shaughnessy v Mezei*, 345 US 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.") (quoting *Knauff v Shaughnessy*, 338 US 537, 544 (1950)); *Harisiades v Shaughnessy*, 342 US 580, 590 (1952) ("We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake."); *Hines v Davidowitz*, 312 US 52, 66 (1941) (concluding that the federal government has broad constitutional powers to determine admissions and naturalization).

³⁵ State employment services do play a role in labor certification decisions, and state law is the basis for some federal immigration decisions, such as those involving family law. See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn L Rev 1625 (2007).

³⁶ Davon M. Collins, *Towards A More Federalist Employment-Based Immigration System*, 25 Yale L & Pol Rev 349 (2007).

criteria—would ameliorate many problems that have long plagued the existing centralized system. Collins analogizes this approach to the 1996 welfare reform (PRWORA), in which Congress made block grants to the states for use in cash transfers, job training and support, child welfare, and other services for the eligible poor. Under DEBI, he says, the federal government would distribute blocks of visas to the states, not blocks of money.

In the proposed system, Congress would set the eligibility standards for employment-based immigrants, the annual national quotas for as many employment-based subcategories as it wished to specify, and criteria for state participation, which would be voluntary. Congress would then distribute visa allotments to participating states in proportion to some index, such as the state's share of the national working-age population. Within the overall quotas, and subject to federal rules, states could buy and sell visa allotments among themselves.³⁷ If this market proved too thin, the price could be set by federal law. Thereafter, each state would decide, in whatever manner it thought best, which individual petitioners would receive its allotment of visas. Within parameters set by federal law, the states would be free to regulate visa portability and other aspects of the immigrant employment relationship. As the trading scheme suggests, a state's power under this system would include the power to decline to accept any employment-based immigrants at all. Congress's standards for state participation in the system would prescribe minimum labor standards, while mitigating race-to-the-bottom or other spillover effects.

A reform like DEBI would increase the responsiveness of employment-based admissions to local economic conditions and priorities. The existing labor certification system, centralized in the Department of Labor, is notoriously slow, cumbersome, inflexible, politicized, manipulable, and ill-suited to a heterogeneous, rapidly changing labor market.³⁸

³⁷ See, for example, analogous schemes in other areas: Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 *Yale J Intl L* 243 (1997); James S. Shortle and Richard D. Horan, *Water Quality Trading*, 14 *Penn St Envir L Rev* 231, 236–39 (2006) (discussing “the development of water quality trading policy frameworks at state and regional levels”).

³⁸ See, for example, Demetrios G. Papademetriou and Stephen Yale-Loehr, *Balancing Interests: Rethinking the U.S. Selection of Skilled Immigrants* (Carnegie Endowment for International Peace 1996); Ruth Ellen Wasem, *Labor Certification for Permanent Immigrant Admissions* (Congressional Research Service 2003), available at <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=crs>> (last vis-

As an example of how DEBI might improve the situation, Collins notes that even at the end of the high-tech boom in 2001, when Congress wanted to reduce the number of H-1B visas, this surely was not the best solution for all states or regions. While many states favored a cap, others might have eagerly sought more of these foreign workers. Still others may have seen the decline in wages as an opportunity for attracting more technological investment in their states. Although a state's employment-based admissions process might simply replicate the pathologies of the current federal labor certification system, it seems more likely that the relatively few states with low unemployment rates and a high demand for foreign workers would be more keenly aware of these needs, more eager to fix the problem, and more nimble in finding ways to do so than the federal government would.³⁹ Moreover, the burdens imposed by immigrants—such as increased demand for public benefits and services, and downward pressure on wage rates—are disproportionately felt at the state and local level, which suggests that states are in the best position to assess and manage the tradeoffs among conflicting public goals peculiar to their polities. The federal government, however, must try somehow to integrate 50 different situations into a single one-size-fits-all national policy. Finally, a less centralized system would let states experiment with different approaches to these problems without implicating the national economy or immigration policy.

Recall that this kind of system would be limited to employment-based visas, would be voluntary on the part of the states, and would be subject to whatever level of controls Congress might wish to maintain. Under these circumstances, any disadvantages of the system are likely to be isolated, readily monitored, and easily remedied.⁴⁰

ited Feb 27, 2007); Research and Policy Committee of the Committee for Economic Development, *Reforming Immigration: Helping Meet America's Need for a Skilled Workforce* 21 (Committee for Economic Development 2001). For a critique of a new program, see Labor Certification: PERM – Program Electronic Review Management (Dornbaum & Peregoy), available at <http://www.immigrationlawyersnj.com/content/services/perm_res_employ/1.aspx> (last visited Feb 26, 2007).

³⁹ Peter Spiro notes that Australia and Canada have adopted programs under which states or provinces are eligible for higher quotas of skilled immigrants under formal agreements between the central and subnational governments. 167 *Intl Social Sciences J* at 70 (cited in note 10).

⁴⁰ For a very different approach to reforming the admissions system, see Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan L Rev* 809 (2007), which compares *ex ante* (pre-entry characteristics) and *ex post* (post-entry conduct) selection processes. It is not clear whether this approach would be possible or

B. State and Local Enforcement

Whether federal immigration law is under-enforced or over-enforced depends on one's perspective. Lawyers who represent immigrants, and others who advocate on their behalf, predictably view Immigrations and Customs Enforcement ("ICE") officials as all-powerful. They claim that enforcement is too harsh and indiscriminate, arousing in the immigrant community unwanted fear, family breakup, and other forms of individual and communal dislocation. In support of this claim, they will cite workplace raids, excessive detention, unwarranted denial of asylum claims, neighborhood sweeps, Border Patrol abuses, deaths of desperate border-crossers on the highways and in the desert, removals of resident aliens for minor and long-ago crimes, and other aggressive enforcement tactics and immigrant hardships.

On the other hand, those favoring more effective enforcement view the immigration agency as feckless, listless, and toothless, despite its impressive arsenal of legal authority. In support of this view, they cite the low percentage of illegal aliens actually removed, their repeated crossings after they are apprehended and returned by the Border Patrol, the ease of acquiring fraudulent documents and unauthorized employment, the high absconding rates of those not detained pending removal hearings and of those removable aliens who receive "run letters" from the agency, the notorious failure to enforce sanctions against employers who (with a wink and a nod or studied inadvertence) hire unauthorized workers, the ability of some cities to frustrate federal enforcement, the reluctance of federal prosecutors to bring criminal cases against immigrants and even smugglers, the strong political and economic interests that countenance, protect, and even promote illegal migration, the long delays that hobble enforcement proceedings, and many other impediments.⁴¹

I believe that both critiques are accurate: immigration laws are simultaneously both under- and over-enforced (perhaps most laws are). I say this even though, as I have argued elsewhere, some fraction of what we loosely call under-enforcement may in fact be justified as a matter of policy:

practicable in a decentralized system like DEBI.

⁴¹ The publications of the Federation for American Immigration Reform (FAIR) and its research arm Center for Immigration Studies are replete with such criticisms of the existing enforcement system.

Illegal immigration, after all, confers significant benefits on almost all concerned, while the costs of eliminating it (in terms of enforcement resources, opportunity costs, civil liberties, foreign-policy interests, and so on) would be manifestly prohibitive. This means that the socially optimal level of illegal migration policy that balances its social benefits and costs is far greater than zero. Indeed, in a nation of almost 300 million people, the optimal level of illegal immigration may even exceed today's estimated level of approximately 11–12 million undocumented residents, with 250,000 more added each year to the more or less permanent population.⁴²

But once the government has settled on an appropriate enforcement level, society has a compelling interest in seeing that the enforcement is carried out effectively at that level. For better and for worse, effective federal immigration enforcement often depends upon the extensive participation of state and local officials. This is particularly true regarding enforcement against immigrants who have been convicted of crimes in this country. The reason is that identifying, apprehending, arraigning, detaining, processing, and removing these immigrants usually requires that federal officials look to state and local criminal justice systems. Specifically, they must rely, often heavily, on state and local officials, data networks, detention facilities, initiatives, and tactics. Indeed, it is no exaggeration to say that where enforcement against criminal aliens is concerned—unquestionably one of the highest policy priorities—federal immigration officials are practically impotent without the substantial help of the state and local criminal justice systems.

In an article published in 2000, a co-author and I described this dependence in detail and summarized it as follows:

Two important constraints necessitate this reliance. First, the INS does not determine in the first instance which aliens are criminals; that is the job of local police and of prosecutors and judges at all levels of government. Second, the INS controls only a tiny fraction of the resources dedicated nationally to criminal law enforcement.⁴³

⁴² Peter H. Schuck, *Law and the Study of Migration*, in Caroline Brettell and James Hollifield, eds, *Migration Theory: Talking Across Disciplines* 249 (Routledge, 2d ed 2007).

⁴³ Peter H. Schuck and John Williams, *Removing Criminal Aliens: The Pitfalls and*

After reviewing this relationship, we proposed a “federalist solution” to the problem of removing criminal aliens, a solution that would seek to exploit the respective competences and institutions of the federal, state, and local systems. Drawing on data for 1998, we showed that the federal government removed fewer than twenty percent of the criminal aliens who were then *under law enforcement supervision*.⁴⁴ We pointed out that its performance was even worse than the twenty percent figure suggested, considering that the vast majority of removable criminal aliens were at large in the community, either on probation or parole or free from criminal justice supervision altogether, and that new immigration flows were constantly replenishing and augmenting the stock of such aliens.⁴⁵

The federal government has steadily increased the number of criminal alien removals, from 56,000 in fiscal year 1998 to almost 89,000 in 2004.⁴⁶ Although this may seem like an encouraging trend, one must keep it in perspective.⁴⁷ Even the most recent number almost certainly remains but a small fraction of the total criminal aliens under criminal justice supervision. (I have not updated our analysis, particularly the denominator, in order to determine the precise fraction today, but my guess is that it is not much higher, and perhaps even lower, than it was in 1998.) This, despite the fact that, as we demonstrated, these should be “slam dunk” cases, as these things go. After all, the federal government knows who and where most of these criminal aliens are, and—because few of them have any valid legal defenses or political support—it possesses all the legal authority it needs to remove them.⁴⁸ Whether it is prepared to allocate the necessary administrative resources to these removals is a separate ques-

Promises of Federalism, 22 Harv J L & Pub Pol 367, 398 (2000).

⁴⁴ Id at 384–85.

⁴⁵ Id at 385.

⁴⁶ Mary Dougherty, Denise Wilson, and Amy Wu, *Immigration Enforcement Actions: 2004* 6, available at <<http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf>> (last visited Mar 3, 2007).

⁴⁷ The persistent shortcomings in federal immigration enforcement, which any new legalization programs will certainly exacerbate, are well-documented. A report published by the Office of the Inspector General in the Department of Homeland Security, for example, documents the serious obstacles the U.S. Citizenship and Immigration Services currently faces and will continue to confront in executing federal immigration policy. See Office of Inspector General, Department of Homeland Security, *U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology* 16 (2006) (“[T]hese preliminary USCIS assessments and plans have determined that the bureau currently lacks the processing capacity, systems integration, and project management resources needed to manage a potential increase in workloads.”).

⁴⁸ Schuck and Williams, 22 Harv J L & Pub Pol at 396–98 (cited in note 43).

tion, of course, but it is hard to imagine a higher law enforcement priority than this or one that is easier to implement.

We were hardly original in laying out the case for both improving coordination between federal immigration enforcement and state and local criminal justice systems, and increasing the authority of the latter to assist in the former. Several years earlier, Congress had endorsed this approach in the 1996 reforms, authorizing the Attorney General, under § 287(g) of the amended Immigration and Nationality Act (“INA”), to enter into agreements with qualified state and local officials allowing them (at their own expense) to carry out investigation, apprehension, and detention functions for the federal agency.⁴⁹ In 2005, Kris Kobach, a former aide to Attorney General John Ashcroft specializing in immigration issues, summarized the experience under this new § 287(g) authority, calling it “the quintessential force multiplier.”⁵⁰ Kobach, now a law professor, was primarily concerned with establishing the legal authority of local police to make immigration arrests. Kobach showed that this local arrest authority—contrary to the claims of Michael Wishnie, Huyen Pham, and some other commentators—antedated § 287(g), was reinforced by it, and is legally valid. But the arrest authority, as Kobach explained, is only one part of this state and local government force multiplier.

The policy wisdom of § 287(g) and, more importantly, of the memoranda of understanding entered into with states under its authority, and of the immigration enforcement-related activities of state and local officials more generally, are of course separate questions.⁵¹ Gladstein and colleagues have presented the most thoroughgoing case against a more extensive enforcement role for state and local officials. In a paper published by the Migration Policy Institute in December 2005, they identify six grounds that critics have for opposing such a role: (1) it will damage immigrants’ safety and civil liberties; (2) it will distract police from their primary crime-fighting responsibilities; (3) police lack the necessary training; (4) it will encourage racial profiling; (5) the National Crime Information Center (“NCIC”) database contains much incorrect information; and (6) immigrants, fearing deporta-

⁴⁹ 8 USC § 1357(g) (2000).

⁵⁰ Kobach, 69 Albany L Rev at 179 (cited in note 4).

⁵¹ For additional discussion of this provision, see Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 Vand L Rev (forthcoming 2008).

tion, will be reluctant to cooperate with the police and report information about crimes.⁵²

Each of these claims is plausible and must be taken seriously. In particular, reliable empirical data are needed to determine their accuracy and, if accurate, their policy implications. I am agnostic about what the data would show. Even absent such data, however, certain straightforward considerations seem pertinent to thinking clearly about any such assessment, and suggest that categorical opposition to the policy presented by Gladstein, et al, may go much too far.

First, as just noted, these grounds make factual assertions about harms that may or may not be true, and whose significance, in any event, depends not on the mere possibility of those harms but on their probability and magnitude at the margin. Second, the supposed conflict between the crime-fighting responsibilities of state and local police and their work on immigration cases may be more apparent than real. Where the criminals whom the police target are also aliens—an all-too common situation⁵³—there is no diversion of effort. Quite the contrary: a vast number of convicted criminal aliens are at large because ICE has failed to remove them, and many other aliens commit crimes that may warrant state and local policing and prosecution followed by federal removal.

Third, several of the grounds for objection cite conditions—lack of adequate training (which would violate § 287(g)(2)), the possibility of improper profiling, and a flawed database—that do not imply a rejection of enhanced state and local participation; rather, they imply the need to rectify those conditions directly through policy or administrative changes. Fourth, the Gladstein paper reports an analysis of NCIC immigration hits that found, among other things, 42 percent false positives overall (where DHS was unable to confirm that the individual was an immigra-

⁵² 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* (Migration Policy Institute 2005).

⁵³ This is obviously true, even though immigrants are no more likely than citizens to commit crimes. See, for example, Peter H. Schuck, *Immigrants' Political and Legal Incorporation in the United States after 9/11: Two Steps Forward, One Step Back*, in Jennifer Hochschild and John Mollenkopf, eds, *Immigrant Political Incorporation in the United States and Europe* (Cornell forthcoming) (citing data); Kristin F. Butcher and Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration*, 51 *Indus Labor Rel Rev* 654, 677 (1998) ("Whatever drives the differences in the institutionalization rates, if natives had the same institutionalization probabilities as immigrants, our jails and prisons would have one-third fewer inmates.").

tion violator), with the rate of false positives varying considerably from state to state and with a large majority of the hits being of people from Latin America, particularly Mexico.⁵⁴

Again, this very useful analysis raises some important questions that only further research could answer. Is 42 percent an unacceptably high error rate, as Gladstein, et al, suggest, given that it is only a necessarily crude, first-step screening technique, not a decision to prosecute or even to investigate particular individuals? If unacceptable, what would it take, and at what cost, to reduce the false positive rate to an acceptable level? To what extent are the false positives an unavoidable consequence of three facts of life: the confusion that often surrounds Hispanic surnames (order of names, retention of maternal surname, and high frequency of certain name combinations), the heavy use of false names among criminal aliens, and the inevitable time lags between getting data (including corrections of inaccurate data) and entering it into a database? What safeguards against false positives can be built into the system, without making the level of false *negatives* unacceptably high? Perhaps most important, to what extent is use of the database merely the first step in a sequence of screens or investigations, each step more focused and accurate than the previous one, such that inaccuracies that arise in early steps are weeded out in later ones?

Fifth, there is the question of immigrant cooperation with state and local law enforcement officials. Such cooperation is obviously essential to the safety of society in general and of the communities in which immigrants live and work in particular. Here, a sound policy assessment would seek answers to questions like the following: how does greater state and local involvement affect immigrants' cooperation *at the margin*—that is, above and beyond their *existing* concerns about deportation, which presumably are already significant? How much of a stake do immigrants have in increasing the effectiveness of law enforcement in the overlapping domains of crime and immigration, given that they are likely to be the principal victims of that crime? Can state and local officials build on that stake in order to gain the benefits of their cooperation with the authorities without discouraging that cooperation? What proportion of officials in communities with large immigrant concentrations in fact oppose greater state and local participation? Among those officials, how much of their opposition could be mollified if the programs were

⁵⁴ Gladstein, et al, *Blurring the Lines* at 3–4 (cited in note 52).

improved, how much is unchangeable, and how much simply reflects the predictable reluctance of officials asked to shoulder additional responsibilities or to change their familiar routines? Since § 287(g)(9) states that participation by states and localities is wholly optional, and since one would expect different communities to feel differently about it, why is opposition by some of them an argument against the voluntary participation by others?

Sixth, even the irreducible difficulties associated with enhanced state and local participation must still be balanced against whatever benefits to immigrant communities and to society at large that such participation generates. These benefits are surely greater than zero—Kobach cites many examples⁵⁵—but whether they are large enough to justify the costs is ultimately the pivotal question. In making this assessment, an important—perhaps even decisive—question, given the incomplete data and other uncertainties surrounding the analysis, is who should bear the burden of proof—the proponents of greater state and local participation authorized by § 287(g) and other programs, or the opponents of such programs? The fact that Congress and a growing number of state and local governments have in fact authorized these programs⁵⁶ might justify shifting this burden of proof to the opponents—although some will insist that the government still bears it because, in their view, the risks associated with such cooperation are simply unacceptable.

Lacking answers to the empirical questions that I have posed, I cannot be certain what result a policy assessment of these federal-state programs would reach. I think it unlikely, however, that it would condemn them categorically, as distinguished from concluding, consistent with the federalism default discussed in Part I, that the programs should be improved in order to minimize any problems that the critics have correctly identified.⁵⁷

⁵⁵ Kobach, 69 Albany L Rev at 183–99 (cited in note 4).

⁵⁶ Arizona recently announced that it will implement such a program. Matthew Benson, et al, *Police to Enforce Immigration Laws*, Arizona Republic 1 (Feb 28, 2007). In December 2006, Massachusetts—surely among the most liberal, pro-immigrant states—became the ninth state to enter into such an agreement, only to have the Governor-elect announce several weeks later that he would reverse that policy. Katie Zezima, *New Governor To Drop Pact On Immigrants*, NY Times A29 (Dec 22, 2006).

⁵⁷ For an example of possible improvements, see Robert Block, *Fighting Terrorism By Sharing Data*, Wall St J A6 (Oct 16, 2006) (detailing the DHS response to state and local police complaints by improving data-sharing systems).

C. Employer Sanctions

No commentator on immigration policy—not academics, not immigrant advocates, not the Bush administration, not the enforcement-only enthusiasts who engineered the draconian bill, HR 4437,⁵⁸ adopted by the House in December 2005, and certainly not FAIR and the other restrictionists—claims that employer sanctions have been effective. There is also widespread agreement on the reasons for its ineffectiveness: rampant and low-cost document fraud,⁵⁹ egregiously lax enforcement by ICE including only rare inspections and low and infrequent prosecutions and penalties⁶⁰ the inevitable consequence of which is to weaken employer incentives to reject documents that appear facially valid, even if sham⁶¹), a political economy of immigration at the federal level that countenances high levels of unauthorized employment,⁶² and a frequent public insouciance about conduct that many consider a victimless offense that strengthens the economy.⁶³ One is tempted to compare this enforcement failure to

⁵⁸ Border Protection, Antiterrorism, and Illegal Immigration Control Act, HR 4437 (Dec 16, 2005).

⁵⁹ For example, Richard W. Stevenson, *Jobs Being Filled by Illegal Aliens Despite Sanctions*, NY Times A1 (Oct 9, 1989) (“By all accounts, the law is being undermined primarily by the spread of fraudulent Social Security cards, ‘green cards’ signifying alien residency status and other documents widely accepted by employers as proof of the right to work.”).

⁶⁰ Fernanda Santos, *Day Laborers’ Lawsuit Casts Spotlight on a Nationwide Conflict*, NY Times § 1 at 38 (Sept 17, 2006) (noting that local officials blame the proliferation of day workers on “the federal government’s inconsistent enforcement of immigration policies”); Alwyn Scott, *Get-Tough Policy on Employers Has Had Limited Effect*, The Seattle Times (Sept 18, 2006), available at <<http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=imfederal18&date=20060918>> (last visited Feb 26, 2007) (noting that “despite some big fines and a few jail terms for employers, the government’s get-tough effort appears limited.”). Recently, however, the number of criminal prosecutions has increased. DHS: CBP, ICE, USCIS, Migration News (Oct 2006), available at <http://migration.ucdavis.edu/mn/more.php?id=3222_0_2_0> (last visited Apr 27, 2007) (445 criminal charges against employers in first ten months of FY 06, compared to 25 in FY 02); Rachel L. Swarns, *Illegal Immigrants at Center of New ID Theft Crackdown*, NY Times A38 (Dec 14, 2006) (discussing massive raids on Swift & Company plants in six states, which resulted in nearly 1300 arrests, as example of new strategy employed by DHS).

⁶¹ Given the low probability of enforcement, the increased penalties provided in HR 4437 would likely have little marginal effect on employers’ incentives to comply.

⁶² American Bar Association Commission on Immigration, *Report to the House of Delegates*, Vol 11, No 8 (Apr 15, 2006). See also Andrew Sum, Neeta Fogg, Ishwar Khatiwada, and Sheila Palma, *Foreign Immigration and the Labor Force of the U.S.: The Contribution of New Foreign Immigration to the Growth of the Nation’s Labor Force and its Employed Population, 2000 to 2004* 2, 7 (Center for Labor Market Studies July 2004).

⁶³ On the victimless offense aspect, see Schuck, *Law and the Study of Migration*, in Brettell and Hollifield, eds, *Migration Theory* (cited in note 42).

Prohibition, with the difference that the arguments favoring the underlying employer sanctions policy are far stronger than the policy of Prohibition.⁶⁴

Professor Wishnie, a leading advocate for immigrant workers, makes an interesting, counterintuitive proposal to eliminate employer sanctions. He argues that these sanctions, together with the government's policy—upheld by the Supreme Court in *Hoffman Plastic Compounds, Inc v NLRB*⁶⁵—to bar undocumented workers' access to many workplace protections, operate to increase employers' incentives to hire and exploit the undocumented, thus reducing the independence and welfare of all of their employees, including those who are documented.⁶⁶ Wishnie's diagnosis of the problem of workplace exploitation is surely correct to some extent, as the dissenting justices in *Hoffman Plastic* warned, but whether his proposed repeal of sanctions is justified is far less clear. Even weakly enforced sanctions are likely to have some deterrent effect (since many if not most employers presumably want to comply with the law), and there are a number of ways to strengthen sanctions—for example, a system of bounties for private enforcement, and a more secure identity document.⁶⁷

Suppose that some states—particularly those on the border and elsewhere that are under political pressure to weaken the jobs “magnet” that attracts so many undocumented workers—were to enact employer sanctions laws and then to enforce them with the vigor so evidently lacking in ICE. These states might have much stronger reasons to make employer sanctions effective than the federal immigration authorities do. The concentration of the undocumented in a small number of states, a condition emphasized by Spiro and probably not diminished today,⁶⁸

⁶⁴ See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 Wm & Mary L Rev 1 (2006).

⁶⁵ 535 US 137, 151 (2002) (holding that to allow the NLRB to “award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy”).

⁶⁶ Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U Chi Legal F 193.

⁶⁷ Labor economist Philip Martin points out, for example, that in the UK, “[t]here is a common perception that laws against hiring unauthorized foreign workers are routinely ignored,” while Sweden, because of “widespread use of personal identification numbers” and a labor market “well controlled by both private and public organizations,” has had “few problems.” Philip Martin, *Bordering on Control: Combating Irregular Migration in North America and Europe* 72, 75 (International Organization for Migration 2003).

⁶⁸ The share of legal immigrants in the six traditional immigrant-receiving states has declined somewhat, Doris Meissner, et al, *Immigration and America's Future: A New*

means that the adverse political and fiscal effects of these concentrations are disproportionate in these states. This is most evident in the fiscal mismatch under which most tax revenues generated by immigrants, both legal and illegal, flow to Washington, and many other benefits of immigration (say, lower consumer prices) are also enjoyed nationally, while almost all of the costs (say, burdens on locally-funded social services, adverse effects on low-skilled Americans, and immigrant crime) are borne locally.⁶⁹ In light of this fiscal mismatch, ICE's lassitude—the immense gap between enforcement rhetoric and actual performance—becomes that much less surprising.

What can be said against allowing states to impose employer sanctions that track federal law and might actually be enforced, thus augmenting these meager federal efforts? For the many private lawyers who represent employers or out-of-status immigrants and whose success depends in part on their ability to stymie enforcement, the answer is clear: the best employer sanctions regime is one that is weak and ineffective. From a public interest, rule-of-law perspective, however, there is only one argument against state employer sanctions that mimic the federal law: they somehow undermine federal policy. If the plenary power over immigration means anything, it means that the states may not adopt policies that are inconsistent with federal policy. But it is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it—unless we take ineffective enforcement to be the “real” federal policy from which state law must not deviate.

As suggested by my earlier discussion of the point that optimal enforcement does not necessarily mean full enforcement (whatever “full” means in this context),⁷⁰ there is a sense in which this claim might be true under certain circumstances. Conceivably, someone might have the temerity and political courage to argue that the optimal level of enforcement is as close to zero as ICE's actual enforcement has been, and that this goal explains and justifies ICE's passivity. But I know of no federal official who has been willing to take this position with respect to

Chapter 25 (Migration Policy Institute 2006), but not necessarily in the case of the undocumented. See *Don't Fence Us In*, *The Economist* 31, 32 (Oct 21, 2006) (map showing distribution of unauthorized population).

⁶⁹ Meissner, et al, *Immigration and America's Future* at 25 (cited in note 68).

⁷⁰ Schuck, *Law and the Study of Migration*, in Brettell and Hollifield, eds, *Migration Theory* (cited in note 42).

employer sanctions, nor do I think such a position could be defended. More provocatively, one might argue that, regardless of optimality, the low level of current ICE enforcement is the “real” federal policy, and that state enforcement more vigorous than ICE’s would be, in that more realistic sense, inconsistent with federal policy, and thus must be preempted.⁷¹

These arguments, however, are too clever by half. With respect to optimality, the federal government, beginning with the President of the United States, routinely insists that the level of unauthorized workers is intolerably high, that something must be done about it, and that the key to any solution is to turn off the existing magnet of illegal employment, which can only be done by strengthening employer sanctions. Judging from the enormous increases in funding for the Border Patrol over the last decade, Congress is also convinced of this and has put its money where its mouth is. The legislation that failed in Congress in June 2007 also evinced this conviction. Far from favoring federal preemption, then, this situation cries out for state augmentation of employer sanctions as a matter of federal policy, not just state policy.

As for the “real policy” argument, no court is likely to—nor should it—second-guess a clearly-stated Congressional policy based solely on the court’s suspicion, which would be difficult if not impossible to verify, that Congress does not really mean what (the court must concede) it says and is hypocritically pretending otherwise.⁷²

There can be no doubt, then, that state employer sanctions laws consistent with federal policy are legally valid. Indeed, the Supreme Court’s decision in *De Canas v Bica*⁷³ confirms this validity. There, the Court rejected a federal preemption defense and upheld a California statute that imposed sanctions on employers of undocumented immigrant workers. Although the employer in *De Canas* argued that certain provisions of the state law made it inconsistent with federal policy, the Court held that

⁷¹ This interpretation resembles one of the implications of the Supreme Court majority in *Plyler v Doe*, 457 US 202, 226 (1982) (substantiality of state goal undermined by fact that not all undocumented children are actually deported).

⁷² To my knowledge, the closest the Supreme Court has come to doing this—and it did not go this far—was its claim in *Plyler*, 457 US at 225, that there was no “identifiable congressional policy” to bar undocumented children from public schools, when in fact Congress’s policy to bar undocumented families logically implied such a policy toward their children, though not stating it in so many words.

⁷³ 424 US 351 (1976).

the law was consistent and furthered the federal purpose of reducing illegal employment of aliens.

For present purposes, the most salient fact about the decision is that it was rendered in 1976, a decade *before* Congress enacted employer sanctions in the Immigration Reform and Control Act of 1986 ("IRCA").⁷⁴ In 1976, the "Texas Proviso," which since 1952 had immunized employers of unauthorized workers from liability for "harboring,"⁷⁵ was still on the books, making it plausible for the employer to argue that the federal policy against undocumented immigrant employment was so ineffective, if not hypocritical, that the California law should be deemed inconsistent with that policy.

Today, of course, a facially strong federal policy against such employment is in place, with enforcement provisions that Congress has enhanced over time (albeit without much effect).⁷⁶ So long as the state law tracks the IRCA provisions and merely adds state sanctions for the federally-proscribed conduct, one can no longer plausibly argue, unlike in 1976, that the state law would be inconsistent with, and thus preempted by, this federal policy.⁷⁷ *De Canas*, then, would seem to support my argument *a fortiori*.

IRCA's own preemption provision, however, presents a stronger argument for preemption. Enacted a decade after *De Canas*, INA § 274A(h)(2) preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens." This provision may supersede *De Canas* and bar state employer sanctions taking the form of fines. But its plain text indicates that IRCA would not preempt (and might even be interpreted to authorize) sanctions that allow the suspension of business licenses for employers of the undocumented—one form that recent state and local laws (perhaps mindful of this provision) tend to

⁷⁴ Pub L 99-603, 100 Stat 3359 (1986). IRCA amended the Immigration and Nationality Act, codified as amended at 8 USC § 1101 et seq (2000).

⁷⁵ Immigration and Nationality Act ("INA"), 8 USC § 1324(a)(4) (1982) (establishing that "for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring"). This harboring provision has deleted for approximately twenty years and the harboring language has been shifted to a different section.

⁷⁶ INA § 274A, codified at 8 USC § 1324(a) (1982).

⁷⁷ For a somewhat analogous analysis of IRCA's bearing on the continuing validity of the pre-IRCA decision by the Supreme Court in *Plyler v Doe*, see Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* 152 (Westview Press 1998).

take.⁷⁸ Moreover, of the few challenges to state laws on the basis of IRCA's preemption clause, all of which have sought to invalidate parts of state workers compensation schemes, none has been successful.

For instance, in *Farmers Brothers Coffee v Workers' Compensation Appeals Board*,⁷⁹ an employer argued that federal law preempted a California provision making an employee's immigration status, even for illegally-employed aliens, irrelevant to whether the employer could be liable under the state's labor and employment laws. The California state court upheld the state law, concluding that it had not been the "clear [or] manifest purpose of Congress" to preempt state workers' compensation laws.⁸⁰ Moreover, the court suggested that California's law was entirely consistent with federal goals since, *without the state law*, "unscrupulous employers would be encouraged to hire aliens unauthorized to work in the United States" knowing that if an undocumented worker were injured, the employer might be able to escape liability upon a good faith showing that the employer had relied on ostensibly genuine immigration and work authorization documents.⁸¹ The court also favorably cited *Dowling v Slotnik*,⁸² a similar case in which the Supreme Court of Connecticut addressed whether IRCA preempted a state workers' compensation plan that included undocumented aliens. Like the California court, the Connecticut court upheld the state scheme on the ground that if undocumented aliens were excluded, employers would not have to obtain workers' compensation coverage for these employees, thereby "creating a financial incentive for unscrupulous employers to hire undocumented workers."⁸³

The Second Circuit Court of Appeals—the only *federal* court to consider a challenge under IRCA's express preemption provision—has reached the same conclusion, validating New York's workers' compensation law on the ground that it presents no obstacle to the goals of the federal immigration laws.⁸⁴ Hence, the

⁷⁸ See, for example, City of Hazleton (Pennsylvania), Ordinance 2006-10, City of Hazleton Illegal Immigration Relief Act Ordinance (July 13, 2006), discussed in Part III.

⁷⁹ 133 Cal App 4th 533 (Cal Ct App 2005).

⁸⁰ *Id.* at 540 (quotation and citation omitted).

⁸¹ *Id.*

⁸² 244 Conn 781 (1998).

⁸³ *Id.* at 796.

⁸⁴ *Madeira v Affordable Housing Foundation, Inc.*, 469 F3d 219, 239 (2d Cir 2006) ("No provision in IRCA expressly preempts state law providing for injured undocumented workers to recover compensatory damages, including lost earnings. . . . Compensatory damages for personal injury do not reasonably equate to sanctions.").

text of INA § 274A(h)(2), and the case law interpreting the provision, support a narrow interpretation of IRCA's preemption clause. But even if § 274A(h)(2) were somehow interpreted to preempt licensing sanctions as well, the analysis that I have presented here would justify repealing, or at least clarifying, that provision to permit state enforcement of the federal policy or of its own law mimicking that policy.

The dispositive question, then, is what the courts (and what I) mean by "mimicking" the federal policy in situations where Congress has not expressly delegated regulatory or enforcement authority to the states. (Other judicial formulations include being "consistent with," "tracking," "mirroring," "reinforcing.") I address this question below.

III. CONSISTENCY WITH FEDERAL POLICY

According to a 2006 report, hundreds of immigration bills were considered by more than half the states that year.⁸⁵ In addition,

[a] set of disparate policies is emerging. Georgia has authorized employer enforcement to combat illegal hiring. Arizona and Colorado have voted to deny state benefits, including non-emergency health care, to anyone who cannot prove legal residence. The governors of Arizona and New Mexico declared states of emergency to tap special funds that would buttress inadequate border enforcement. Ten states are allowing high school graduates who do not have legal status to attend state colleges and universities at in-state resident tuition rates.⁸⁶

As noted earlier, some state and local laws and policies adopted in recent years are intended to promote the interests of immigrants, including undocumented ones, and to shield them from

⁸⁵ Meissner, et al, *Immigration and America's Future* at 2-7 (cited in note 68). Of the approximately 300 bills introduced in 2005, 37 became law.

⁸⁶ Id at 24. See also Laura Parker, Court Tests Await Cities' Laws on Immigrants, *USA Today* 3A (Oct 9, 2006) ("More than 30 city councils have passed or are considering local measures aimed at curbing illegal immigrants' access to housing, voting and jobs. At the state level, lawmakers in 33 states have passed 78 bills, most of them imposing restrictions similar to the city measures, the National Conference of State Legislatures says."); Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides to Solve It*, *NY Times*, A34 (Dec 7, 2006) (discussing an Altoona, PA, ordinance which "threatens to withdraw the business licenses of employers and rental licenses of landlords who hire or rent to illegal immigrants").

federal enforcement.⁸⁷ Others seek to exclude them. An example of the latter, which received national media attention, is an ordinance recently adopted by the community of Hazleton, Pennsylvania, that would deny licenses to businesses that employ illegal aliens, fine landlords \$1000 for renting to them, and declare English the city's official language.⁸⁸

Although the wisdom of many, if not most, of these new laws is doubtful (or worse),⁸⁹ my purpose here is not to assess their underlying policies, but rather to consider the general legal principles that should apply in determining whether or not they are preempted by the federal government's plenary power over immigration. As just noted, the decisive principle is that they be consistent with, track, mirror, or reinforce the federal law and policy. This principle would seem clearly to condemn provisions like the city of Hazleton's \$1000 rental fine that goes beyond employer sanctions to penalize vendors like landlords. Just as clearly, it is permissible for states to collaborate with the federal government in advancing federal immigration objectives. For example, although the federal government traditionally distributed food stamps for eligible immigrants, at least 17 states now supplement the federally-funded benefits by purchasing food stamps to distribute to some people, including some immigrants, who are not eligible under federal law.⁹⁰ Immigration is no different than other fields in which cooperative federalism arrangements of this kind exist.

The DEBI proposal discussed earlier exemplifies a mirroring initiative in which the state would, pursuant to federally-established standards, actively collaborate with the administration of federal immigration law. Similarly, as also discussed earlier, enlisting state officials to aid federal enforcement officials in the apprehension of undocumented aliens—again, pursuant to federal standards—illustrates another form of collaboration. Federal preemption simply does not apply in these situations.

⁸⁷ See text accompanying notes 21–22.

⁸⁸ City of Hazleton Illegal Immigration Relief Act Ordinance (cited in note 72). A temporary restraining order was granted against enforcement, *Lozano v City of Hazleton*, 459 F Supp 2d 332 (MD Pa 2006), and the court later held, among other things, that the landlord/tenant provision violated the due process rights of tenants and landlords, *Lozano v City of Hazleton*, 2007 WL 2163093 (MD Pa July 26, 2007). See also Julia Preston, *Judge Voids Ordinances On Illegal Immigrants*, NY Times A14 (July 27, 2007).

⁸⁹ See generally Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U Chi Legal F 27 (discussing local laws and preemption).

⁹⁰ See Zimmermann and Tumlin, *Patchwork Policies* at 22 (cited in note 10).

Other state laws may raise more difficult preemption issues. Neither the Supreme Court nor the lower federal courts have precisely defined when a state law bearing on immigration is consistent with, tracks, mirrors, or reinforces federal policy. If these terms mean anything, however, they must, absent express preemption, apply to protect state laws that do more than merely duplicate federal laws by employing their identical language. They must also—again, absent express preemption—protect state laws that are consistent with, but less punitive or restrictive than, the federal counterpart.⁹¹

Although the Supreme Court has not precisely defined the location of these preemption boundaries, it has provided some guidance. Two cases are most relevant. *De Canas v Bica*,⁹² discussed earlier, upheld a California law that penalized employers of undocumented immigrant workers even at a time when federal law did not impose such penalties. Six years later, in *Plyler v Doe*, the Court struck down a Texas statute that allowed local school districts to deny enrollment to noncitizen children of undocumented aliens and that withheld state funds for the education of these children.⁹³ From these and other preemption cases, one can discern three basic tests that are satisfied when a state law is found to track, mirror, reinforce, or be consistent with a federal law.

First, the state regulation must accord with congressional intent. This requirement has two aspects. For one thing, the Supreme Court stated in *De Canas* that state regulations must “give way to paramount federal legislation” if Congress intended to effect a “complete ouster of state power including state power to promulgate laws not in conflict with federal laws.”⁹⁴ The Court elaborated on this in *Plyler*, where the Court invalidated a state law that it distinguished from the one upheld in *De Canas*, arguing that the state laws challenged in *De Canas* were upheld because they broadly “reflected Congress’ intention to bar from employment all aliens except those possessing a grant of permission to work in this country.”⁹⁵

⁹¹ See Joshua J. Herndon, *Broken Borders: De Canas v. Bica and the Standards that Govern the Validity of State Measures Designed to Deter Undocumented Immigration*, 12 Tex Hisp J L & Pol 31, 83–84 (2006), quoting *Friendly House*, CV 04-649 TUC DCB, at 10 (D Ariz 2004).

⁹² 424 US 351 (1976).

⁹³ 457 US at 202 (1982).

⁹⁴ *De Canas*, 424 US at 357.

⁹⁵ *Plyler*, 457 US at 225 (citing *De Canas*, 424 US at 361).

If state laws must comport with congressional intent, it follows that states have *greater* latitude to act when Congress, rather than remaining silent, has in fact passed a federal statute evidencing its policy goals and instruments.⁹⁶ Here, a state may enact its own law pursuing the policies that Congress has manifestly promoted.⁹⁷ Conversely, when Congress is silent, it will be harder for a state—or a court evaluating the state’s enactment—to divine Congress’s policy goals.⁹⁸

Second, the Supreme Court emphasized in *De Canas*, and in *Plyler*’s discussion of *De Canas*, the requirement that the state law mirror and promote federal objectives.⁹⁹ This kind of reinforcement of federal policy would defeat a claim of conflict preemption, although this would not suffice to protect the state law in a case of *field* preemption.¹⁰⁰ *De Canas* also made clear, however, that establishing field preemption of state immigration law required an express statement of congressional intent, and that Congress had not voiced its desire to preempt this entire field. The Court declared that it would only presume that Congress

⁹⁶ See Huntington, *The Constitutional Dimension* (cited in note 51).

⁹⁷ See *De Canas*, 424 US at 361 (“[T]here is evidence in the form of the 1974 amendments to the Farm Labor Contractor Registration Act . . . that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens.”).

⁹⁸ Even if one were to posit a constitutional presumption against state action in the field of immigration, the existence of a comprehensive federal immigration statute that nowhere expressly precludes the possibility of state regulation may be thought to signal Congress’ attempt to modify the constitutional default. Commentators have argued that, just as Congress, pursuant to its plenary power over Indian tribes, can empower a state to enact legislation concerning Indian tribes that would otherwise be impermissible, see *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 501 (1979) (upholding against an Equal Protection Clause challenge a Washington law giving it jurisdiction over Indian territory in the state “enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians”), Congress may “similarly authorize the states, pursuant to its plenary power over immigration”, *Development in the Law — Jobs & Borders: V. The Constitutionality of Immigration Federalism*, 118 Harv L Rev 2247, 2262 (2005), to create legislation concerning immigration of their own that they would otherwise be disabled from enacting. See also *Development in the Law* at 2264 (“As in the dormant commerce clause context, specific congressional authorization can modify the constitutional default rule that disables the states from acting.”).

⁹⁹ See *Plyler*, 457 US at 225 (“As we recognized in *De Canas*, the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”).

¹⁰⁰ See, for example, *United States v Locke*, 529 US 89, 115 (2000) (“It is not always a sufficient answer to a claim of [field] pre-emption to say that state rules supplement, or even mirror, federal requirements. . . . ‘When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.’”) (quoting *Charleston & Western Carolina R Co v Varnville Furniture Co*, 237 US 597, 604 (1915)).

“intended to oust state authority” upon a demonstration through the wording or legislative history of a statute that this was “the clear and manifest purpose of Congress.”¹⁰¹ In his dissent in *Toll v Moreno*,¹⁰² Justice Rehnquist stated:

Unquestionably, federal power over immigration and naturalization is plenary and exclusive. Our decision in *De Canas v. Bica*, however, unambiguously forecloses any argument that this power, either unexercised or as manifested in the Immigration and Nationality Act, preempts the field of regulations affecting aliens once federal authorities have admitted them into this country.¹⁰³

Finally, a state law, in order to survive a preemption challenge, must not interfere or conflict with federal policies. This principle, like those already discussed, is also mentioned in *De Canas* and *Plyler*. The Supreme Court in *Plyler*, in striking down the law in question, stressed that the state classification did not “operate harmoniously within the federal program,”¹⁰⁴ while the *De Canas* Court emphasized that Congress had given no indication that it intended to preclude “even harmonious state regulation.”¹⁰⁵ State employer sanction laws that operate in the same manner as the federal law satisfy this test of harmoniousness. They are like the state labor laws upheld in *De Canas*, which “reflected Congress’ intention to bar from employment all aliens except those possessing a grant of permission to work in this country.”¹⁰⁶ Such laws only reinforce and further the federal objective, rather than undermine it. Moreover, the fact that the federal immigration agency has not objected to state employer sanction laws (a factor Justice Breyer has identified as relevant to the preemption issue in a different programmatic context)¹⁰⁷

¹⁰¹ *De Canas*, 424 US at 357–58 (quotation and citations omitted).

¹⁰² 458 US 1 (1982). In *Toll*, students of parents who held nonimmigrant alien visas brought a class action challenging the state-operated University of Maryland admission and fees policy denying them in-state tuition status. The Court held the policy violated the Supremacy Clause.

¹⁰³ *Id* at 26 (internal citation omitted) (Rehnquist dissenting). See also Huntington, *Constitutional Dimensions* (cited in note 51) (interpreting *Toll* in the same way).

¹⁰⁴ *Plyler*, 457 US at 226.

¹⁰⁵ *De Canas*, 424 US at 358.

¹⁰⁶ *Plyler*, 457 US at 225 (citing *De Canas*, 424 US at 361).

¹⁰⁷ *Bates v Dow Agrosciences*, 544 US 431, 455 (2005) (“[T]he federal agency charged with administering the statute is often better able than our courts to determine the extent to which state liability rules mirror or distort federal requirements.”) (Breyer concurring).

confirms that such laws do in fact “operate harmoniously within the federal program.”¹⁰⁸

This final requirement, that the state immigration law not undercut federal goals, is easy enough to state, but it can be difficult to apply. In *Buckman Company v Plaintiffs’ Legal Committee*,¹⁰⁹ for example, the Supreme Court considered whether state law claims of fraud against the FDA conflicted with, and were therefore impliedly preempted by, federal law. In ruling that the state claims were indeed preempted, the Court held that “state-law fraud-on-the-FDA claims inevitably conflict with the FDA’s responsibility to police fraud consistently with the Administration’s judgment and objectives,” and that, “[a]s a practical matter, complying with the FDA’s detailed regulatory regime in the shadow of 50 States’ tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the [federal statutes].”¹¹⁰ The Court reasoned that the federal regulatory requirements could be undermined not just by state laws that *relaxed* those requirements, but also by state claims that functionally imposed *additional* requirements beyond those established by the federal agency.

Buckman stands for the proposition, then, that states can sometimes interfere with federal goals by imposing additional requirements or sanctions pursuant to those goals. In the Court’s view, the FDA’s regulatory requirements had struck a federally-desired balance between encouraging the development and marketing of new medical devices, on the one hand, and protecting public safety, on the other—a balance that state law fraud-on-the-FDA remedies altered in favor of public safety at the expense of FDA’s streamlined regulatory process.¹¹¹ Opponents of state employer sanctions laws, citing *Buckman*, could argue that IRCA struck a careful congressional balance between deterring illegal immigration and accommodating the demand for undocumented workers by calibrating the penalties to which employers of such workers are subject. Congress, in this view, could have treated such employers either more generously or more punitively, but for policy reasons settled on the precise balance of federal goals found in IRCA.

¹⁰⁸ *Plyler*, 457 US at 226.

¹⁰⁹ 531 US 341 (2001).

¹¹⁰ *Buckman*, 531 US at 350.

¹¹¹ But see *Desiano v Warner-Lambert Co*, 467 F3d 85 (2d Cir 2006) (interpreting *Buckman* as not preempting state statute’s fraud exception to regulatory compliance defense).

The relation between federal and state interests in these two situations, however, is quite different. In *Buckman*, no state could plausibly show that it was not sufficiently protected by the FDA's requirements. In the immigration context, as we saw earlier, some states do in fact shoulder a disproportionate share of the burdens imposed by undocumented immigrants due to a combination of large concentrations of this group within those states, the fiscal mismatch discussed earlier, and patently inadequate federal enforcement. Just as state law penalties for illegal gun-running may be imposed by states that seek additional deterrence because, say, gun-running is especially profitable there, so may some states have a legitimate interest in calibrating their balance of benefits and penalties to reflect their assessments of the local effects, both positive and negative, of undocumented immigration.¹¹²

Indeed, Congress has explicitly signaled its recognition that different states may assess these local effects differently by allowing states to award undocumented aliens public benefits beyond those otherwise permitted by federal law,¹¹³ and to use state law enforcement officials to enforce immigration laws.¹¹⁴ In these ways, Congress has enabled states to define optimal deterrence levels in state-specific ways. To be sure, Congress has not (yet) *expressly* authorized state employer sanctions laws meeting federal standards as it has done in the areas of state-funded public benefits and state law enforcement officials. And this fact can certainly be used to argue that Congress's policy is to bar state employer sanctions laws, even those that mirror, reinforce, and are consistent with the federal scheme. As explained earlier, however, there is no evidence that Congress endorses such a policy, and the field preemption case law indicates that the policy should not be inferred from its silence.

¹¹² Olivas, 35 Va J Intl L at 227 (cited in note 4), is correct that undocumented immigrants benefit communities as well as burden them, but my argument that preemption doctrine should not bar states from playing the roles that I have advocated here does not depend on an assessment of whether such immigrants on balance benefit or burden those states.

¹¹³ See 8 USC § 1621(d) (2000) ("State authority to provide for eligibility of illegal aliens for State and local public benefits. A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this Section only through the enactment of a State law after the date of the enactment of this Act [enacted Aug. 22, 1996] which affirmatively provides for such eligibility").

¹¹⁴ See discussion of § 287(g) agreements in text accompanying note 49–57.

Congress's tortured failure to enact comprehensive immigration reform legislation in June 2007 adds one more complexity to this analysis.¹¹⁵ Since the legislation would have strengthened the federal employer sanctions in a variety of ways, one might argue that the failure to enact the bill should be taken as evidence that Congress was sufficiently content with the status quo to maintain it, and that new state employer sanction laws should not be allowed to disturb it. The better and more politically realistic view of the situation, however, is that this development has no bearing on the validity of new state laws that are consistent with and reinforce existing federal law. Indeed, such state laws are likely to proliferate in the enforcement void left by the death of comprehensive federal legislation.¹¹⁶

This analysis explains why state employer sanction laws that are consistent with federal employer sanctions policy should be upheld while the vendor portions of the Hazleton landlord ordinance and their ilk should be preempted. Congress has not deployed sanctions against landlords and other vendors as an instrument of federal immigration enforcement during IRCA's more than twenty years. Although vendor sanctions might well increase the deterrence of undocumented migration, Congress has provided that even the undocumented, barred from employment, must not be deprived by states from enjoying the bare necessities of survival, specifically access to emergency health care and short-term non-cash disaster relief.¹¹⁷ Having a roof over one's head seems like such a necessity, whereas employment is different—or so Congress has decreed.¹¹⁸

¹¹⁵ See Robert Pear and Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, NY Times A1 (June 29, 2007).

¹¹⁶ Randolph C. Archibold, *Arizona Governor Signs Tough Bill on Hiring Illegal Immigrants*, NY Times A10 (July 3, 2007).

¹¹⁷ 42 USC § 5121 (2000) (Stafford Disaster and Relief Act) provides the necessary statutory authority. FEMA permits this type of relief. FEMA, *Disaster Assistance Available for Non-Citizens* (Nov 12, 2005), available at <<http://www.fema.gov/news/newsrelease.fema?id=20541>> (last visited May 8, 2007). See also National Immigration Law Center, *Disaster Assistance* (revised Sept 2005), excerpted in *Guide to Immigrant Eligibility for Federal Programs* (4th ed 2002) (providing overview of programs), available at <http://www.nilc.org/disaster_assistance/Disaster_Relief.pdf> (last visited May 8, 2007).

¹¹⁸ In late May 2007, a federal district court enjoined enforcement of a Dallas suburb's ordinance preventing apartment rentals to most illegal immigrants. *Texas: Judge Clears Renting to Illegal Immigrants*, NY Times A16 (May 22, 2007).

CONCLUSION

In the administration and enforcement of immigration policy, the federal government needs all the help it can get. The plenary power doctrine clearly authorizes Congress to control the contours and implementation of this policy, just as is true of analogous principles in other fields—such as the regulation of interstate commerce—in which the Constitution has been interpreted to delegate broad (and if Congress wishes, exclusive) legislative power to Congress.

As a matter of sound policy, however, Congress should allow the states, which have in some respects an even greater stake in the effective administration and enforcement of immigration law than the federal government does, to play a discrete, carefully tailored role without jeopardizing legitimate federal interests, properly understood. My analysis suggests that the states, working under federal standards, could make important contributions to the advancement of federal immigration policy in at least three areas: employment-based admissions, state and local enforcement, and employer sanctions. There may well be others. It is time to take the possibilities of immigration federalism more seriously.