Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement

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

Peter Spiro's thoughtful Article offers the tempting thesis: what if immigration policy were regulated by the individual states rather than being preempted by federal powers? What would U.S. immigration policies be if they could be determined at the state level, in 50 "laboratories," instead of the stale, preclusionary logic mindlessly applied to the implementation of federal immigration and nationality law? Could such a scheme work, and would it lead to better results? Has the doctrine of federal preemption run its course, leading to hidebound practices, state-level frustration, and a moribund jurisprudence? Professor Spiro certainly believes that the traditional reasons advanced for preemption in the immigration and nationality context have not kept pace with developments in the modern federalism that is the United States.

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He contrasts the “extreme skepticism” with which state immigration measures are received by courts with the “federal discretion [that is] so unfettered by judicial constraint.” He then critiques a three part equation: that immigration is an aspect of foreign policy and is therefore intrinsically federal; admissions decisions are in the federal domain and cannot be undermined by state level plans to discriminate against aliens; and the equal protection doctrine extends to resident and undocumented aliens. This trilogy of reasons underpinning the preemption doctrine is a weak foundation for Spiro, and he gives short shrift to the second and third justifications. Because of the abject failure of the government to control the flow of undocumented (and to a lesser, and different extent, resident) aliens, “[t]he near-complete disabling of the states on immigration matters . . . can ultimately hang only by the foreign relations thread. If this premise unravels, the existing imbalance in the institutional allocation of power must also fall.”

This is a tantalizing premise, one that has surface appeal both to the political left and right: while progressive immigration advocates could see the possibility of safe havens, local exceptions to a harsh federal scheme, and decentralized opportunities for relaxed enforcement, conservatives or immigration restrictionists can be attracted by the tightening up of alien benefits, more vigorous state border enforcement, and by the possibility of improved local control of political communities. Moreover, there is a surface plausibility, an intuitive sense that Professor Spiro is onto an ineffable and subtle truth. It is almost foolish to dispute the rise of unauthorized immigration, to ignore the deep recession in California [in 1993–94], to be unconcerned with the growth of the welfare state, or to ignore a relationship among these observations: there are data to show that people of color—those most likely to be in direct contact and competition with undocumented worker populations—are increasingly restrictionist in their attitudes towards immigration. There is even some preliminary evidence that Latinos are increasingly concerned with undocumented immigration.

Given this backdrop, including, most notably, California’s overwhelming passage of Proposition 187, an avowedly
anti-alien ballot measure, the preemption doctrine seems, to Professor Spiro, to be ineffectual and antiquated: If in fact immigration no longer involves foreign relations or foreign relations no longer remains an exclusive federal responsibility, then the states are not properly excluded from acting in certain ways that affect immigration and the treatment of aliens. The problem with this particular reasoning, indeed, this entire line of reasoning, is that there is no compelling reason to discard the preemption power, as it retains its common law and statutory vitality; the premises behind the state preclusion/state rights equation are not as one-sided as Spiro (or restrictionists, generally) would have us believe; and the momentum of “demi-sovereignties” runs in the opposite direction, that is, it is not the individual 50 states that are shedding their traditional place in federalism’s constitutional arrangement, rather it is the nation-state repositioning itself in regional, transnational, multilateral compacts and arrangements between and among nations that is evident in the world polity. If anything, preemption may be on the rise in the immigration context, as it is in other complex arenas, due to the internationalization of the United States and world economies. Professor Spiro may be misreading the clear signposts of a postmodern economy, one in which federalism further subsumes its members’ sub-federal ties deeper into a national or regional domicile. Those who wish to see preemption’s raw political capability or enforcement power decline may be overlooking the clear and unmistakable signs of its resurgence and longevity. Reports of its demise are premature.¹

I do not want to re-argue these points here, but I do wish to unpack the first premise of Spiro’s argument, what I dubbed the “Hydraulic Doctrine of Preemption,” as it is this feature that I believe most accurately describes the current landscape.

My argument follows the first of the three strands of Professor Spiro’s argumentation. First, I review his treatment of the doctrine of preemption: he sees preemption as an essentially unprincipled abrogation of states’ rights, one that has led to a mori-

bund, formulaic refusal to deal meaningfully with immigration realities. The various states are forced to act not because of any preference for state action, but out of sheer necessity, due to a failure of the federal government to patrol U.S. borders. In contrast,

[I] see preemption as an hydraulic principle, one that symmetrically flows between states and the federal government: there is a constant tug between the two levels, in an almost-hydraulic relationship. As the federal piston pulls, state powers are accordingly diminished; as the state powers increase, the federal piston correspondingly decreases. This equipoise relationship more accurately reflects current preemption doctrine than does Professor Spiro's more all-or-nothing approach.\(^2\)

Inherent in Spiro's approach is a clear calculus: "If in fact immigration no longer involves foreign relations or foreign relations no longer remains an exclusive federal responsibility, then the states are not properly excluded from acting in certain ways that affect immigration and the treatment of aliens."\(^3\) I questioned Spiro's reading of Gerald Neuman's characterization of nascent nineteenth century U.S. immigration policy,\(^4\) and employed several examples where the preemption doctrine was alive and well, or even "firmly-rooted and on the rise."\(^5\) Here, I also skip over the other two legs of his tripod, the assertions about system failure ("impacts and responses")\(^6\) and international law norms (foreign relations power and what he "labels a 'sort of medieval construct in which multifarious sources of authority find their place on a vertical chain of hierarchy, one that tolerates gross inequalities, but at the same time acknowledges all powers'").\(^7\) I concluded then, and still believe, that "[p]reemption, for all its detriments and foolish inconsistencies, is the devil we know. A postmodern state cannot coexist with medieval constructs."\(^8\)

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\(^2\) Olivas, 35 Va J Intl L at 219–20 (cited in note 1).
\(^3\) Id at 219.
\(^4\) See id at 221.
\(^5\) Id at 225 (using the history of federal preemption of state immigration enforcement as an example).
\(^6\) Olivas, 35 Va J Intl L at 227 (cited in note 1).
\(^7\) Id at 235–36, citing Spiro, 35 Va J Intl L at 178 (cited in note 1).
\(^8\) Olivas, 35 Va J Intl L at 236 (cited in note 1).
And then 1996 occurred, dialing back gains from the Immigration Reform and Control Act ("IRCA")\(^9\) by the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA")\(^10\) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").\(^11\) I had not known, as I wrote that piece in 1994, that that time was the high water mark of immigrant rights legislation, and that virtually every bit of slack in the system would be removed and all the holes plugged. It did not seem like a golden age at the time for me, for my clients, and for the undocumented community, but it surely was. In fact, if I were pressed, I would identify 1982's *Plyler v Doe*\(^12\) as the real high water mark.

All this said, things today are decidedly worse, at least on my side of the bar. In fairness, my many students who work and litigate for Immigration and Customs Enforcement ("ICE"), Citizenship and Immigration Services ("CIS"), and various immigration-related agencies are in clover. It is true that there are occasional spectacular victories for immigrant rights groups, sometimes even in the unexpected quarter of the Seventh Circuit, where judges seem to revel in beating up on hapless BIA members or government lawyers—reminding me of the Seinfeld joke, "not that there's anything wrong with that."\(^13\)

With a torrent of state legislation related to immigration, it is clear that the polity is more concerned with localized conditions than with foreign relations or demi-sovereignty. One indicator of this trend can be seen in the work of the National Conference of State Legislatures ("NCSL"). The NCSL tracks immigration legislation, and noted that from January through June, 2006, almost 500 immigration-related bills had been introduced in state legislatures, and 44 had been enacted, in 19 states.\(^14\)

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\(^9\) Immigration Reform and Control Act ("IRCA"), Pub L No 99-603, 100 Stat 3359 (Nov 6, 1986).


\(^12\) 457 US 202 (1982).

\(^13\) See, for example, *Sepulveda v Gonzales*, 464 F3d 770, 772 (7th Cir 2006) ("[A]dministrative agencies can change their minds. But they are required to give reasons for doing so. In the cases we've cited—as in this case—the Board had failed to explain how its rejection of the claimed social group squared with the test the Board had adopted in Acosta.") (citations omitted).

Table 1

Enacted Bill Count (January 1–October 31, 2006)\(^{15}\)

<table>
<thead>
<tr>
<th>Main Topics</th>
<th>Enacted Bills</th>
<th>States</th>
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<tbody>
<tr>
<td>Education</td>
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<tr>
<td>Employment</td>
<td>14</td>
<td>9</td>
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<tr>
<td>Identification/Driver’s License</td>
<td>6</td>
<td>5</td>
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<tr>
<td>Law Enforcement</td>
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<td>6</td>
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<tr>
<td>Public Benefits</td>
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</tr>
<tr>
<td>Trafficking</td>
<td>13</td>
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<tr>
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<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>

These recent changes run the gamut, from enacting two pro-immigrant state programs for college tuition (one of which, in Nebraska, even extends to the undocumented)\(^{16}\) to a number of blatantly restrictionist statutes, including one in Georgia that covers the entire waterfront: work authorization, human trafficking, enforcement provisions, regulation of immigration assistance services, penalties and deductions for business expenses and tax withholding, and overall benefit eligibility.\(^{17}\) The Georgia state statute even exceeds California’s Proposition 187, virtually all of which was struck down in court.\(^{18}\) These state statutes are mir-

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16 The Nebraska Legislature revised the statute in 2006 over the governor’s veto; the statute now allows unauthorized immigrant students to qualify for in-state tuition upon proof of Nebraska residency of at least 180 days. See Neb Rev Stat § 85-502 (1943). The Virginia Legislature established eligibility for in-state tuition for those holding an immigration visa or classified as a political refugee in the same manner as any other resident student. Students with temporary or student visa status are ineligible for Virginia resident status and in-state tuition. See Va Code Ann § 23-7.4(C) (Michie 2006).


18 See LULAC v Wilson, 908 F Supp 755, 786–87 (C D Cal 1995) (striking down a state referendum prohibiting social services and benefits to undocumented residents in a scheme to deter immigration).
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rored by an increasing array of city, county, and regional laws and regulations also reaching immigration regulation, while a variety of long-existing or dormant codes are being dusted off, redeployed, and applied to aliens. For example, a Maricopa County (Phoenix, Arizona) prosecutor reinterpreted a state statute to deem undocumented presence as violative of smuggling law,19 while in New Hampshire, longstanding trespass ordinances were used to conduct alien sweeps.20 The Hazleton, Pennsylvania City Council enacted a comprehensive “Illegal Immigration Relief Act” in July, 2006, with harsh provisions aimed at alien renters, English-only documents, and provision of municipal services. A federal judge has enjoined the Hazleton ordinance (and its successors), and the matter is pending as of Summer 2007.21 Other commercial, technical, and tax issues are also implicated by such statutes.22

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20 See State of New Hampshire v Barros-Batistele, 05-CV-1474, 1475, slip op at 5 (Cheshire-Hillsborough Cty, Jaffrey-Peterborough Dist Ct, Nashua Dist Ct NH 2005) (“The import of the analysis the court has conducted [ ] is that even if the police departments have applied the [state] statute in a manner not otherwise unlawful, its application in that manner violates the Supremacy Clause of the United States Constitution, and is thus barred by federal preemption.”). See also Pam Belluck, Towns Lose Tool Against Illegal Immigrants, NY Times A7 (Aug 13, 2005) (discussing town police chiefs in several New Hampshire towns who unsuccessfully filed trespassing charges against undocumented immigrants in an attempt to combat illegal immigration); Paul Vitello, Path to Deportation Can Start With a Traffic Stop, NY Times A1 (April 14, 2006) (discussing county police department’s attempts to enforce immigration law after arresting undocumented immigrants for violating minor state laws); Julia Preston, Sheriff Defies Transgressors By Billboard and by Blog, NY Times A15 (July 31, 2006) (discussing attempt by county sheriff to apply state labor and tax laws to combat the underground economy that uses undocumented immigrants). Sometimes, a local regulation is just a regulation, as in liberal Santa Fe, New Mexico, where the aim was not to harass immigrants, but to keep peddlers and nuisances off the historic Santa Fe Plaza; Erica Cordoza, Buskers Claim They’re Bullied: City to Revisit Soliciting Rules, Albuquerque J A1 (Aug 8, 2006).

As Table 1 indicates, the subject matters addressed by states have included education, employment, identification, driver's licenses, law enforcement, legal services, omnibus immigration matters, public benefits, housing and rental, trafficking, voting, and miscellaneous issues such as alcohol and tobacco purchase identification, gun and firearms permits, residency/domicile determinations, and juvenile reporting requirements. This extraordinary rise in such legislative interests is undoubtedly due to overburdened locales, well publicized and highly polarized federal failures in immigration enforcement, a sharp rise in conservative media and advocates flogging the issue, and a decline in President Bush's popularity, all of which have led to a leadership vacuum in the field. In some ways, it has been a "perfect storm" of anti-alien factors.

It is my thesis that state, county, and local ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers. If purely state, county, or local interests are governed and if federal preemptory powers are not triggered, such ordinances could be properly enacted, provided they are not subterfuges for replacing or substituting for federal authority. As one example, purely state benefits can be extended to or withheld from undocumented college students, for tuition benefits and state residency determinations are properly designated as state classifications, which reference but do not determine immigration status. And the

Cases, Two Reactions, Same Lingering Problem: Farmingville and Bay Shore Evictions, and Levy’s Responses, Show Class Distinctions are Still a Large Issue, Newsday A49 (Sept 25, 2005) (arguing that condemnation of housing by Suffolk County, NY officials was motivated not by health and safety concerns but by inhabitants' status as undocumented aliens); Jenny Jarvis, Georgia Law Chills Its Latino Housing Market: A Measure Meant to Deny Jobs and Services to Illegal Immigrants Has Even Legal Residents Rethinking Their Future in the State, LA Times A4 (June 19, 2006) (noting that Georgia’s recently passed immigration law requires companies with state contracts to verify employees’ immigration status, penalizes employers who knowingly hire unauthorized immigrants, curtails government benefits to ineligible immigrants, and requires jailers to check the immigration status of anyone charged with a felony).


federal government has enacted statutes and promulgated regulations that subcontract or designate state or sub-federal immigration enforcement; many examples include assorted Memoranda of Understanding ("MOU") that calibrate and regulate a proper role for effectuating federal obligations. But a number of Supreme Court decisions mirror common law tradition in not reserving or allowing a substantive role for local, county, state, or multi-state authorities in immigration enforcement absent such delegation and carefully controlled, designated purposes.24

In my earlier reply to Professor Spiro, I laid out this argument at the higher end, that of preemption theory in accord with his philosophy of demi-sovereigns and the foreign relations power.25 Here, I ground my assertion that such statutes implementing immigration functions must be struck down, in the other end of the spectrum. I posit not that the federal government's failure to enforce its immigration laws requires that the fifty states step in to do so (and by extension, counties and municipalities), but the opposite: that shifting immigration enforcement powers to sub-federal levels will more likely lead to weaker federal enforcement and even less effective national security resources aimed at immigration enforcement and administration. In my view, not only is shifting immigration authority downward contrary to constitutional law and theory, it is bad policy and will lead to bad results both with immigration enforcement and local enforcement. Restrictionist proposals must of necessity meet a very high burden of persuasion to enact major changes to the established order of things. We do not want fifty Border Patrols any more than we want fifty foreign policies in the immigration context, and such a shift would leave the U.S.


worse off in every respect. For starters, there is no excess slack in the system at present, and the high fiscal and political cost of decentralizing immigration enforcement will be predictably ruinous and prejudicial.

In the remaining section of this analysis, I demonstrate this hypothesis by three interlocking points. First, I examine one well-established area in detail, noting how *Plyler v Doe* has morphed beyond its K–12 public school tuition moorings. This attestation to an important feature of immigrant life and the U.S. polity demonstrates that even 25 years of immigrant children’s rights have not been fully resolved and have required additional litigation and additional vigilance to secure the Supreme Court’s narrow ruling. Second, I review the assertions by a leading restrictionist scholar, Professor Kris Kobach, one who has litigated benefits issues and who has advanced a theory of “inherent authority” to justify extending immigration apprehensions and enforcement to local levels by using a “quintessential force multiplier” rationale. Finally, I refer back to my hydraulic metaphor to recalibrate general immigration provisions, post 9/11.

I. LIFE AFTER *PLYLER v DOE*

To restate my thesis, I believe there is no good or legitimate reason to extend immigration enforcement to non-federal authorities any more than current law already allocates. In the next Section, I take this on straight ahead by contesting Professor Kobach’s world-view and prescriptions. However, I believe this thesis can also be advanced by thick descriptions of a case where more of an equilibrium has been reached, the case of undocumented school children, where the record reveals substantial and longstanding accommodation to the 1982 development of *Plyler v Doe*.

Even this settled case has been contested regularly in school board meetings and classroom buildings, and as

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this record will show, the group that successfully litigated this case has never been able to rest, litigating it as recently as Spring, 2006.28 Thus, it has stretched more than thirty years, since Texas enacted a state law in 1975 that enabled its public school districts to charge tuition to undocumented school children.29 Although the underlying legislative history is unclear, and although no public hearings were ever held on the provision, certain superintendents of schools on the Texas border had encouraged the legislation, which was enacted without controversy as a small piece of a larger, routine education statute.30 In 1982, the Mexican American Legal Defense and Educational Fund (“MALDEF”) attorneys prevailed in the U.S. Supreme Court, in a 5–4 opinion authored by Justice William Brennan.31

Justice Brennan struck down the Texas statute, finding the state’s theory to be “nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools.”32 He determined that Texas could not enact legislation “merely by defining a disfavored group as nonresident.”33 He did not reach the issue of preemption, as he was able to strike down the statute’s provisions on more narrow, Equal Protection grounds.34 He dismissed the three arguments that Texas had advanced: that it was preserving “limited resources,”35 that it had narrowly tailored the legislation “to stem the tide of illegal immigration,”36 and that they had singled out these children because their undocumented presence meant that they might not be allowed to remain in the state once the educational benefit had been consumed.37 In all, he held that the children had not violated immi-

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28 Consider Michael A. Olivas, Plyler v. Doe, the Education of Undocumented Children, and the Polity, in David A. Martin and Peter H. Schuck, eds, Immigration Stories 197 (Foundation 2006); Amy Miller, APS Safe for Migrant Students: Informal Policy is Now Official, Albuquerque J Al (June 2, 2006) (reporting that school district agrees to end policy of turning students over to immigration authorities).


32 Plyler, 457 US at 227 n 22.

33 Id.

34 See id at 230.

35 Id at 227.

36 Plyler, 457 US at 228 (citation omitted).

37 See id at 229–30.
migration law and that the provision did "not comport with fundamental conceptions of justice." In addition, in a footnote, he indicated that, "illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State."

Texas appealed the case, but the Supreme Court denied rehearing. Subsequent news stories about the alien children from Tyler, Texas revealed that most of them had graduated from the public schools and that they all had regularized their legal status. In 1983, in *Martinez v Bynum*, a corollary issue was litigated involving a U.S. citizen child of undocumented Mexican parents who had left the child in the care of his adult sister in a Texas town. This time, the Court determined that his domicile was not in Texas. The case turned on a precept of traditional family law, which holds that the domicile of unemancipated children is that of their parents. In this instance he was not a legal charge of his sister, hence could not be considered a "resident" of the Texas school district. *Martinez v Bynum* did not limit the earlier holding in *Plyler*, and no other K–12 residency-related immigration case has been decided by the U.S. Supreme Court since 1983. *Toll v Moreno*, a postsecondary residency case involving non-immigrant visa holders, was decided in 1982 for the

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38 Id at 220.
39 Id at 227 n 22 (citation omitted).
43 See id at 322.
44 Id at 323. This is a legal infirmity that could be remedied by several means. For instance, the sister could have become his legal guardian, a routine process, as long as she was residing in the school district, or a family member could adopt the child. Immigration laws interact with family law and comparative law for determining such status. See, for example, *Kaho v Ilchert*, 765 F2d 877, 885 (9th Cir 1985) (holding that adoptions "need not conform to the BIA's or Anglo-American notions of adoption; [such an] adoption need only be recognized under the law of the country where the adoption occurred"). For a general discussion, see Thronson, 11 Tex Hisp J L & Pol'y at 47 (cited in note 19) (describing the "peculiar and conflicted mix" immigration law and family law form as they come in constant and critical contact).
45 See *Toll*, 458 US at 9–10. *Toll*, decided by the same Supreme Court, was a higher education case concerning residency requirements for long-time non-immigrants, and whether they could be eligible for in-state tuition. The Court found that they were eligible. See also Michael A. Olivas, *Plyler v Doe, Toll v Moreno, and Postsecondary Admissions: Undocumented Adult and "Enduring Disability"*, 15 J L & Educ 18, 55 (1986) (analyzing the issue of undocumented alienage and postsecondary admissions).
alien college students on preemption grounds, and Plyler has remained in force, undisturbed since 1982.47

This is not to say that the case has not been contested or challenged, at a variety of levels, in the twenty five years since it was decided. As it happens, both Chief Justice Roberts and Justice Alito, then in governmental and private practice, went on the record at the time saying that they considered Plyler to have been wrongly decided, and both their earlier views surfaced during their Supreme Court nomination hearings.48 On the more quotidian level, MALDEF lawyers have had to file several dozen actions since the early 1980s to enforce Plyler’s clear holding, including combating school board actions requiring Social Security numbers, school requests for driver’s licenses to identify parents, additional “registration” of immigrant children, “safety notification” for immigrant parents, separate schools for immigrant children, college tuition policies, and other policies and practices designed to identify immigration status or single out undocumented children.49

In 1994, his popularity sagging, California Republican Governor Pete Wilson backed a popular state referendum, Proposition 187, which would have denied virtually all state-funded benefits (including public education) to undocumented Californians.50 Prop. 187 passed by nearly 60 percent, and Wilson was

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48 Chief Justice Roberts was particularly dismissive of the case, referring in his DOJ memo to “illegal amigos,” which he later explained to have been akin to ethnic politicking, such as candidates speaking Spanish to Latino voters, etc. Confirmation Hearings on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Before the Committee of the Judiciary, United States Senate, Sept 12–15, 2005 (US GPO, Serial No J-109-37), 260 (remarks about “illegal amigos” in earlier memo), 390 (same, views about Plyler as precedent), 596 (same), 1042 (MALDEF testimony). See also Confirmation Hearings on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the United States before the Committee on the Judiciary, United States Senate, Jan 9–13, 2006 (US GPO, Serial No J-109-56), 787 (immigration cases and 1986 memo), 1268 (MALDEF testimony).

49 See Pabón López, 35 Seton Hall L Rev at 1395–98 (cited in note 47) (describing both federal and state proposals contravening the mandate of Plyler and the groups that organized to successfully defeat them); Olivas, Plyler v. Doe, The Education of Undocumented Children, and the Polity at 212–13 (cited in note 28).

re-elected. Before Senator Robert Dole won his party's presidential nomination, Wilson also mounted a presidential campaign on a get-tough-on-immigration platform.\textsuperscript{51} MALDEF went into federal court and was able to strike down almost all of Prop. 187's provisions, ultimately reaching an agreement with Wilson's successor, Governor Gray Davis.\textsuperscript{52} The year 1996 saw the re-election of President Clinton,\textsuperscript{53} the enactment of restrictionist federal legislation IIRIRA and PWRORA,\textsuperscript{54} and the efforts of U.S. Representative Elton Gallegly to amend federal law by allowing states to enact the type of legislation that Texas had passed in 1975, leading to \textit{Plyler}.\textsuperscript{55} This "Gallegly Amendment" drew sufficient negative attention to force its withdrawal from the other legislative proposals, a number of which were enacted.\textsuperscript{56} Thus, the political process worked to rebuff challenges to undocumented K—

\textsuperscript{51} See Steven Greenhouse, \textit{About Face; Guess Who's Embracing Immigrants Now}, NY Times D4 (March 5, 2000) (describing how immigrants were an important voting bloc in the election); Pabón López, 35 Seton Hall L Rev at 1395–96 (cited at note 46). For background on the 2000 campaign, consider, Todd S. Pardum, \textit{Former California Governor Rules Out Run for President}, NY Times A19 (Feb 23, 1999).


\textsuperscript{53} For a general discussion see Dick Morris, \textit{Behind the Oval Office: Getting Reelected Against All Odds} (Random House 1997) (describing the author's role as a political consultant to Clinton during his 1996 reelection).


\textsuperscript{56} See Butler, 58 Ohio St L J at 1485 (cited in note 55); Pabón López, 35 Seton Hall L Rev at 1396 (cited in note 47).
12 enrollment at the state and federal levels, even as tightened immigration restrictions were enacted into law.

Although there have been regular end-runs and local school board implementation issues since 1982, two new threats arose in 2006 at the school level, both of which ultimately resolved themselves. In March 2006, the school board in Elmwood Park, Illinois refused to let an undocumented student enroll on the grounds that she and her family had entered on tourist visas, which had long ago expired. Citing Plyler, the State Board of Education threatened to remove funds, and the local board blinked, revising its attendance policies. Even though persons can become undocumented either by surreptitious entry or by violating the terms of legal entry, earlier education decisions had not turned on the means by which unauthorized status or entry were effected but simply on undocumented status itself. In June 2006, a federal suit against the Albuquerque, New Mexico Public Schools was settled, eliminating a practice of arresting students on school property suspected of being out of status and turning them in to the Border Patrol.

57 See Rosalind Rossi, State Strips Schools of $3.5 Million: District Following Law, It Claims, by Refusing to Enroll Immigrant, Chi Sun-Times A8 (Feb 24, 2006) (identifying the student as the dependent of a tourist); Eric Herman, Elmwood Park Schools Reinstated: District Agrees to Stop Barring Students Due to Immigration Status, Chi Sun-Times A3 (Feb 25, 2006) (same). See also Sam Dillon, In Schools Across U.S., the Melting Pot Overflows, NY Times A1 (Aug 27, 2006) (describing that the explosive growth in school enrollment included a diverse mix of people). For further discussion of the effects of Plyler see, generally, Nina Bernstein, On Lucille Avenue, the Immigration Debate, NY Times A1 (June 26, 2006) (describing animosity toward immigrants based on perception they are unfairly draining resources); Jennifer Radcliffe, 1982 Ruling a Catalyst in Immigration Debate: Court Opened Doors for Students but Put a Strain on School Districts, Houston Chron B1 (May 21, 2006) (describing effect of Plyler v Doe on the public school system in Houston).

58 See Colleen Mastony and Diane Rado, Elmwood Park Schools Give In: To Keep State Funds, District Drops Fight On Immigrant Student, Chi Trib C1 (Feb 25, 2006) (observing that school district asked judge to dismiss case); Colleen Mastony and Diane Redo, Barred Teen Pleased as Lawsuit is Dropped: Elmwood Park District Reluctantly Ends Fight, Chi Trib NS1 (Feb 28, 2006) (same). For another example of a non-immigrant visa holder, one a bit less disadvantaged—an E-2, the dependent of a treaty investor—who was precluded from securing a student visa (an F-1), see Kelly Griffith, Immigration Rules Bug Brits: Visa Delays Choke Businesses as “Pervasive” Problems Persist, Orlando Sentinel J1 (Sept 10, 2006). Although the article does not say so, the likely culprit was the requirement that such applicants for student visas not have an “intending immigrant” intent, that is, they must not appear to be wanting to remain in the U.S. after their studies are completed, else the consular official will, with virtually-unreviewable discretion, refuse admission to the country. See Daniel Walfish, Note, Student Visas and the Illogic of the Intent Requirement, 17 Georgetown Immig L J 473 (2003) (describing in more detail the process by which student visas are granted, particularly the intent requirement).

59 Miller, APS Safe for Migrant Students at A1 (cited in note 28); Amy Miller, Migrants Are Safe At APS: School Board Enacts Ban on Taking Part in Investigations of
The issue of undocumented students has not been limited to K–12 public school students, as a number of cases before and since Plyler have dealt with the corollary issue of undocumented college students, and the extent to which state resident tuition and admissions benefits are to be extended to the postsecondary, post-compulsory schooling level. Since 2001, when Texas Governor Rick Perry signed legislation into law granting postsecondary residency for undocumented students, a dozen states have acted, ten allowing residency, and several denying it.\(^6\) Two federal cases were filed, challenging a Kansas statute allowing residency\(^6\) and a Virginia statute denying such status.\(^6\) But the courts upheld the state practice in each instance, Kansas allowing residency and Virginia denying such status. The Kansas case is pending in the Tenth Circuit, in a case brought by a restrictionist group and its lawyer, Professor Kobach.\(^6\) The same case

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\(^{60}\) See Olivas, 30 J Coll & Univ L at 455 n 122 (cited in note 23). The updated versions in Table 2 and Table 3 are taken from available state data, including those available from www.nilc.org, which tracks DREAM Act issues. See also Victor C. Romero, *Postsecondary School Education for Undocumented Immigrants: Promises and Pitfalls*, 27 NC J Intl L & Comm Reg 393, 404–407 (2002) (describing state initiatives to grant undocumented immigrants postsecondary tuition benefits); Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 Georgetown Immigr L J 357, 357 (2003) (describing the atmosphere for noncitizen students post-9/11 in the face of federal legislation such as the PATRIOT Act, the Border Commuter Student Act and the proposed Capital Student Adjustment Act).


\(^{62}\) See *Doe 1 et al v Merten*, 219 FRD 387, 396 (E D Va 2004) (denying plaintiffs’ motion to proceed by fictitious names); *Equal Access Education v Merten*, 305 F Supp 2d 585, 614 (E D Va 2004) (procedural); *Equal Access Education v Merten*, 325 F Supp 2d 655, 673 (E D Va 2004) (holding there is no Supremacy Clause bar to Virginia public postsecondary educational institutions denying admission to undocumented aliens, as long as they use only federal standards in doing so, and do not consistently misapply those standards). See also Olivas, 30 J Coll & Univ L at 455 n 122 (cited in note 23).

\(^{63}\) On appeal to the Tenth Circuit, it became *Day v Bond* (No 05-3309), and oral arguments were heard September 27, 2006. Transcripts are available at <http://
was filed in California state court, where the plaintiffs lost; an appeal is pending in 2006.64 And Congress has under consideration a federal version of the state statutes, the DREAM Act, which if enacted would also accord limited legalization benefits.65


64 Martinez v Regents of the University of California, 2006 WL 2974303, *2-6 (Cal Super Ct, Yolo Cty, 2006) (Order on Demurrers, Motion to Strike, and Motions by Proposed Intervenors) (dismissing challenge to state residency statute). This action, dismissed on October 6, 2006, was the state equivalent of the Day v Sibelius federal case in Kansas, which was argued at the Tenth Circuit in September, 2006.


65 There is a remarkable amount of literature on this small topic. See, for example: Kris W. Kobach, The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare (Heritage Foundation 2006) (putting forth the opinion that the Act would reward those who break the law and encourage states to defy federal law); Congressional Research Service, Jody Feder, RS22500, Unauthorized Alien Students, Higher Education, and In-State Tuition Rates: A Legal Analysis (July 20, 2006); Paz M. Oliverez, et al, eds, The College & Financial Aid Guide for: AB540 Undocumented Immigrant Students, Center for Higher Education Policy Analysis 16–22 (University of Southern California 2006) (explaining the proposed Act); Jeanne Batalova and Michael Fix, New Estimates of Unauthorized Youth Eligible for Legal Status under the DREAM Act (Migration Policy Institute 2006) (discussing the major features of the DREAM Act and providing estimates of the number of young unauthorized persons likely to be eligible for immigration relief if the DREAM Act were to become law). I believe that the MPI report considerably overstates the extent to which students will take advantage of the DREAM Act, which is sure to turn on the details and requirements of the legislation, should it be enacted into law.

Table 2

*States that Allow Undocumented Students to Gain Resident Tuition Status through Statute (Fall 2006)*

<table>
<thead>
<tr>
<th>States</th>
<th>Legislation and Statute</th>
</tr>
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<tbody>
<tr>
<td>Illinois</td>
<td>HB 60, 93d Gen Assemb, Reg Sess (Ill 2003), codified in various sections of 110 Ill Comp Stat Ann (LexisNexis 2007).</td>
</tr>
<tr>
<td>New Mexico</td>
<td>SB 582, 47th Leg, Reg Sess (NM 2005), codified at NM Stat Ann § 21-1-4.6 (LexisNexis 2007).</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>SB 596, 49th Leg, 1st Reg Sess (Okla 2003), codified at Okla Stat Ann tit 70, § 3242 (West 2006).</td>
</tr>
</tbody>
</table>

Table 3

*States Formally Considering Legislation Regarding Undocumented Students and Residency Tuition Status (Fall, 2006)*

<table>
<thead>
<tr>
<th>Legislation Introduced by Fall 2006</th>
<th>Michigan</th>
<th>Mississippi</th>
<th>Missouri</th>
<th>New Jersey</th>
<th>North Carolina</th>
<th>Oregon</th>
<th>Rhode Island</th>
<th>Utah***</th>
<th>Virginia****</th>
<th>Wyoming*****</th>
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<td>Alaska</td>
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<td>(eligibility for state financial aid)*</td>
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<td>North Carolina</td>
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<td>Kansas***</td>
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<td>Maryland*</td>
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<td>Virginia****</td>
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<td>Massachusetts*</td>
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<td>Wyoming*****</td>
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</table>

* Pro-immigrant bill vetoed by governor.
** Public institutions in Delaware have agreed to allow undocumented students to establish residency status, in lieu of legislation that introduced in the Delaware General Assembly.
*** Bill introduced to repeal existing residency statute.
**** Anti-immigrant bill vetoed by governor.
***** Enacted bill limits state scholarships to legal permanent residents and citizens.
In sum, Plyler has proven quite resilient, fending off litigation challenges, as well as federal and state legislative efforts to overturn it, while nurturing efforts to extend its reach to college students who were allowed to stay in school by the original case. IIRIRA and PWRORA, however imperfectly, gave it additional life by choking off the Gallegly Amendment. It has had to be reinforced by vigilant efforts, but it has proven more hardy than it appeared twenty-five years ago. Wide-ranging discussions with many restrictionist advocates have convinced me that the real purpose behind their comprehensive efforts is to reverse Plyler, in the hopes that doing so will deter families from entering the country illegally.

II. "THE QUINTESSENTIAL FORCE MULTIPLIER" EFFECT

The law of political thermodynamics holds that for every academic civil rights action, there is an equal and opposite reaction. So it is with the hydraulic principle of immigrants' rights. The modest successes have been matched by a substantial blowback in the political arena, as evidenced by the NCSL data in Table 1. The essential failure of Prop. 187 required enormous political and legal capital to be expended by immigrants' rights groups, but the constitutional amendment was defeated. The efforts clearly slowed state or local initiatives to enact comprehensive anti-alien legislation. Even the enactment of IIRIRA and PWRORA in 1996, as reactionary as any immigration legislation in the late twentieth century, still occurred at a time when IRCA's legalization program and successes (enacted during the Reagan presidency) were being played out. The terrorist attacks of 2001 stalled any legalization or regularization initiatives

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President Bush might have undertaken, but the changed circumstances in the postsecondary residency area have been instructive of how local and state politics can surprise. Except for the Texas statute, signed by Republican Governor Rick Perry (who assumed office when Governor Bush became President Bush) just before 9/11, all the residency statutes have been signed into law after the terrorist attacks against the United States. Major immigrant-receiving states such as Texas, California, Illinois, New Mexico, and New York have granted residency to undocumented college students, but so have surprising states such as Nebraska, Kansas, Oklahoma, and Utah. Along with other senators, it has been conservative Utah Republican Senator Orrin Hatch who has advocated for the DREAM Act at the federal level. But support for residency tuition classification by some politicians (or even failure to oppose a measure sufficiently) has created controversy in some states, where polarized electorates have resulted on wedge issues.

Notwithstanding the broadly-based support for these Plyler college students, of course there is another side: persons who feel that the students should not benefit from their parents' actions and that the students, in essence, do not have clean hands. One such believer is Professor Kris W. Kobach, who teaches at the University of Missouri–Kansas City Law School. Professor Kobach has undertaken lawsuits (in Kansas and California), advo-

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68 See Mike Allen, Bush to Seek Immigrant Benefit Protection; Plan to Include System Enabling Undocumented Workers to Gain Legal Status, Wash Post A5 (Jan 4, 2004) (stating that the Bush “administration began trying to harden the borders after the terrorist attacks of Sept. 11, 2001”).

69 In a number of these legislative sessions, the discussions and politics have been quite fascinating. For example, on April 14, 2006, Nebraska became the tenth state to provide in-state, resident tuition to undocumented immigrant students who have attended and graduated from its high schools. It did so in dramatic fashion, overriding Governor Dave Heineman's veto. The bill had passed by a 26–19 margin, but needed 30 votes for an override; supporters managed to acquire exactly 4 votes to get the necessary 30. See, Kobach, The Senate Immigration Bill Rewards Lawbreaking at 3 (cited in note 65); Ruth Marcus, Immigration's Scrambled Politics, Wash Post A23 (April 4, 2006).


cated through national organizations to repeal state laws or to
discourage federal legislation, and written articles and reports
against alien benefits generally. He also ran for Congress in
Kansas on an anti-alien campaign, and although he lost, he has
continued his advocacy efforts.

In a long 2005 piece in the Albany Law Review, "The Quint-
essential Force Multiplier: The Inherent Authority of Local Po-
lice to Make Immigration Arrests," Kobach makes a forceful
argument that municipal authorities have all the intrinsic au-
thorization they need to enforce laws, including laws affecting
immigration and immigrants (and non-immigrants, in or out of
proper status). His thesis is straightforward: "This inherent ar-
rest authority has been possessed and exercised by state and lo-
cal police since the earliest days of federal immigration law." And while he may or may not be correct in his analysis, he is
not in doubt. Here is his take on the terrorists, in his first para-
graph:

The terrorist attacks of September 11, 2001 underscored
for all Americans the link between immigration law en-
forcement and terrorism. Nineteen alien terrorists had
been able to enter the country legally and undetected,
overstay their visas or violate their immigration statuses
with impunity, and move freely within the country with-
out significant interference from federal or local law en-
forcement. The abuse of U.S. immigration laws was in-
strumental in the deaths of nearly 3,000 people. More-
over, any suicide attack by an alien terrorist in the future
will likely entail additional violations of U.S. immigration
laws. Either the terrorist will attempt to enter the United
States legally and will violate the terms of his nonimmi-
grant status in the planning and execution of his attack,

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72 See, for example, Kobach, 69 Albany L Rev at 179 (cited in note 25). Consider,
Kobach, The Senate Immigration Bill Rewards Lawbreaking (cited in note 65) (arguing
against enactment of the DREAM Act).
73 See The 2004 Elections: Congress; The Races for the House, NY Times P12 (Nov 4,
2004) (showing results of congressional race in Kansas). Professor Kobach has litigated
both the Day case in Kansas federal court and the Martinez case in California state court.
I assisted state legislative staff in drafting the Kansas statute, was the state's witness in
the Day federal case, and assisted with the defendant discussions and briefwriting for
both the district court and Tenth Circuit matters.
74 Kobach, 69 Albany L Rev at 179 (cited in note 26).
75 Id at 183.
or the alien terrorist will enter without inspection (EWI), which is itself a violation of U.S. immigration law.\textsuperscript{76}

While it is difficult to envision a principled defense of the terrorists' perfidious crimes, it is not at all clear that the lesson to be drawn is that immigration laws were the enablers, at least not in the manner Kobach sketches. He goes on to cite the terrorists' involvement in various transgressions, and he draws terrifying linkages:

Of critical importance is the fact that all four of the hijackers who were stopped by local police prior to 9/11 had violated federal immigration laws and could have been detained by the state or local police officers. Indeed, there were only five hijackers who were clearly in violation of immigration laws while in the United States—and four of the five were encountered by state or local police officers. These were four missed opportunities of tragic dimension. Had information about their immigration violations been disseminated to state and local police through the NCIC system, the four terrorist aliens could have been detained for their violations. Adding even greater poignancy to these missed opportunities is the fact that they involved three of the four terrorist pilots of 9/11. Had the police officers involved been able to detain Atta, Hanjour, and Jarrah, these three pilots would have been out of the picture. It is difficult to imagine the hijackings proceeding without three of the four pilots. The four traffic stops also offered an opportunity to detain the leadership of the 9/11 terrorists. Had the police arrested Atta and Hazmi, the operation leader and his second-in-command would have been out of the picture. Again, it is difficult to imagine the attacks taking place with such essential members of the 9/11 cohort in custody.

Importantly, all of these transgressions were civil, not criminal, violations of the INA. Therefore, according to the view of those who contend that Congress has preempted state and local police from making arrests for civil violations of the INA, no local police officer would have had the authority to arrest any of these hijackers on the

\textsuperscript{76} Id at 179.
basis of his immigration violation(s). In other words, even if the INS had developed a program to detect such violations and report the names of violators to local law enforcement agencies prior to the 9/11 attacks, the hands of local police would have been tied, and they would have been unable to help stop the attacks. Not only is it implausible to assert that Congress would have intended such a consequence as a policy matter, it is difficult to sustain such an assertion as a legal matter. . . .

For want of a nail, or a traffic stop. But as compelling as this saga is, it is not a sufficient justification for additional local or state enforcement of immigration laws. By Kobach's count, four of the terrorists had violated various laws or regulations sufficient to have drawn attention to their murderous intentions. Yet, by his own data, almost 17 million drivers in 2002 were stopped by police, or 8.7 percent of all the licensed drivers in the U.S. (or, more accurately, licensed and unlicensed drivers over 16 years of age). As irksome or even as dangerous as such apprehensions are, it is hardly an argument that the undocumented or non-immigrants are a sizeable proportion of such threats to the highway. Indeed, if they were a sizeable or disproportionate number of stopped drivers, such a condition would plausibly and convincingly argue that this population should be required to obtain, not be prohibited from obtaining, drivers' licenses and the attendant registration, testing, and insuring. Counting these minor violations as likely occasions for intercepting terrorists is chimerical, and obscures the real problems of poor data and the inability of national defense agencies to coordinate with each other. There is plenty of active and passive blame to go around, no matter one's political affiliation.

77 Id at 187–88 (emphasis in original).
78 See Kobach, 69 Albany L Rev at 184 (cited in note 26).
He also argues that the hijackers were in violation of laws by enrolling in flying school classes with B-2 visas, when this is not accurate.\(^8\) Not only were B-2 students allowed to enroll in such short courses, but two of the hijackers' visas were approved in the regular course of 2001 business, six months to the day after the September 11, 2001 actions, causing great embarrassment to the then-INS.\(^8\)

My purpose here is not to rebut each point of Professor Kobach's over-heated version of events, and I certainly do not wish to debate the merits of the Mara Salvatrucha 13 drogeros,\(^8\) but it is essential that these matters be kept in perspective, not linked to every global threat that might harm us. After all, the real laxity, according to the bipartisan 9/11 Commission, was in not linking all the dots due to bureaucratic territoriality, and the failure to take seriously the rise of radical Islam following the earlier bombing of the World Trade Center.\(^8\) Indeed, educational authorities had properly and courageously reported Zacarias Moussaoui when he tried to learn steering but not takeoff or

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\(^8\) For a discussion of post-9/11 actions meant to shore up gaps in immigration regulations posing security risks, see Leonard M. Baynes, *Racial Profiling, September 11 and the Media: A Critical Race Theory Analysis*, 2 Va Sports and Ent L J 1, 29–34 (2002); Diana Jean Schemo, *A Nation Challenged: Foreign Students: College Officials Are Wary on Visa Enforcement*, NY Times B6 (Dec 15, 2001) (recognizing that since 9/11 INS "has been under intense Congressional pressure to close loopholes in issuing visas and tracking foreigners, particularly students"); Robert Pear, *A Nation Challenged: Domestic Security: Senate Passes Bill to Strengthen Border Security*, NY Times A14 (April 19, 2002) (describing Senate bill that would "increase the number of immigration inspectors and investigators, require universities to keep better track of foreign students and heighten scrutiny on visa applications from foreign countries listed as sponsors of terrorism"); Rachel L. Swarns, *Program's Value in Dispute As a Tool to Fight Terrorism*, NY Times A26 (Dec 21, 2004) (describing how many participants in a program registering citizens from Arab and Muslim countries were deported based on immigration status but not charges related to terrorism).


landing measures;\(^{86}\) off-the-shelf aviation training videos were available for instructional purposes.\(^{87}\)

And it is difficult to quarrel with his assertion that various police authorities should cooperate more with each other, although the key is the extent to which this is feasible and efficacious. There are already a number of provisions for local and state law enforcement agencies to enter into Memoranda of Understanding ("MOU"), under the authority of IIRIRA, and these have been in place for over a decade.\(^{88}\) However, these provisions were not taken advantage of until 2002, when Florida entered into a MOU to train 35 state and local officers.\(^{89}\) Since 2002, ICE has entered into MOU with only a handful of states, to train several hundred officers.\(^{90}\) The law enforcement persons most famil-

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89 See Kobach, 69 Albany L Rev at 197 (cited in note 26); Pham, 74 U Cin L Rev at 1374 n5 (cited in note 88).

90 Pham, 74 U Cin L Rev at 1374 n5 (cited in note 88) (stating that ICE has entered into MOU with Florida, Alabama, and Los Angeles County); Kobach, 69 Albany L Rev at 197 (cited in note 26); Fact Sheet: Section 287(g) Immigration and Nationality Act, A Law Enforcement Partnership (Department of Homeland Security 2006) (cited in note 88). Additionally, the Houston Police Department revised its procedures, following the murder of a police officer who had arrested a once-departed criminal felon alien who had entered without inspection a second time. The alien was handcuffed in the back of the police vehicle, but apparently had a gun that had not been evident when he was frisked and patted down by the officer. I watched the television news in horror as this occurred, and then cringed as the issue dominated Houston news and politics for several weeks in the month leading up to the 2006 elections. See Anne Marie Kilday, et al, Shooting Raises Issue of Policing Immigrants, Houston Chron A1 (Sept 23, 2006) (describing the incident); Matt Stiles, HPD Revising Its Immigration Policy, Houston Chron A1 (Oct 1, 2006) (describing the changes in policy the Houston Police Department instituted to allow more cooperation
iar with these issues, and those closest to the ground, have known of the opportunities available to coordinate with federal authorities, and have chosen overwhelmingly not to do so, even after 9/11.

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

There are provisions that reserve to ICE or other federal immigration authorities the exclusive enforcement authority, while Congress has granted authority to share some aspects of enforcement, but in narrow, formal fashion. For example, Subsection (c) of 8 USC § 1324 (“Authority to Arrest”) grants the right to “make any arrest for a violation of [the Harboring provisions to] . . . officers whose duty it is to enforce criminal laws.”92 Provisions for cooperative arrangements to share data and to act as a liaison with internal security officers are spelled out in USC § 1105.93 Another example of such modest law enforcement is the § 287 (g) provisions for non-emergency assistance in the en-


93 See 8 USC § 1105.
forcement of immigration laws.\textsuperscript{94} It is clear that Congress acted in these places, and they are no concession of interest or intrinsic authority, but rather the opposite.

None of these provisions or any other such narrow cooperative arrangement implicates core immigration functions, and neither exemplifies inherent authority. Thus, this limited cooperative assistance is carefully set out by Congress as a modest delegation, and even so, one that very few jurisdictions have undertaken. Clearly, even with its impatience at the underwhelming federal success in undertaking border security and immigration enforcement, Congress has made provisions for only a small scale sub-federal role, one that does not necessitate or create realignment of responsibilities. And local law enforcement and governmental authorities have chosen not to use these modest tools, even those that might arguably help them combat overall crime in their jurisdictions.

Kobach's argument is more grounded than was Spiro's, in the sense that he provides detail of on-the-ground law enforcement, whereas the demi-sovereignty ideal is more ethereal and rooted in the foreign powers.\textsuperscript{95} But the essence of both is the same, whether one tries to stretch preemption by fire or by ice. Congress does not want, and the separation of powers and preemption theory do not allow, a substantial subcontracting of this basic immigration authority to state and local governments. We do not want fifty foreign affairs policies, or fifty immigration policies. We certainly do not want and cannot tolerate hundreds, allowing liberal Santa Fe, New Mexico to carve out a "sanctuary" while Hazleton, Pennsylvania or Norcross, Georgia get to run every bilingual speaker or dark-complexioned person out of town after sundown. Indeed, even contemplating a redeployment of the type Kobach endorses begs the question of how redeployment and MOU's parallel enforcement will inevitably strain the quality of both local policing and national immigration enforcement. These are not fungible, and combining the two would certainly weaken both functions. In a checkerboard of jurisdictions in major metropolitan land areas such as Los Angeles, Phoenix, and Houston, how could a national policy be overlaid on such complex and disparate jurisdictions? Driving across these large metropolitan areas criss-crosses dozens of municipalities and jurisdic-

\textsuperscript{94} See 8 USC § 287(g).

\textsuperscript{95} Consider Kobach, 69 Albany L Rev 179 (cited in note 26).
tions. Can each have its own immigration and enforcement policy?

Additional problems arise when considering the Kobach proposals, problems of efficacy, of likely non-uniformity in enforcement, and of a race to the bottom as law enforcement takes on tasks for which it is not institutionally prepared. One careful study characterized such proposals as “the Inherent Flaw in the Inherent Authority Position,” while another noted the probable result that “these measures seem likely to expose local police to liability for wrongful arrest and in some instances for violations of state or local anti-profiling ordinances.” Even President Bush has acknowledged that if undocumented communities are “victimized by crime, they are afraid to call the police, or [to] seek recourse in the legal system.” A more reasonable position would take its cues from the enforcement community, which has chosen not to use this extreme authority.

CONCLUSION

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

Blowback in affected communities and prejudice are sure to follow from, among many examples, enforcing workplace raids and labor stations, requiring Spanish-language preachers not to

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96 Pham, 31 Fla St U L Rev at 965 (cited in note 91).
98 Id (citation omitted).
99 Comite de Jornaleros de Redondo Beach v City of Redondo Beach, 127 Fed Appx 994, 994 (9th Cir 2005) (affirming preliminary injunction for complaint challenging City Municipal Code that makes it unlawful to stand and solicit employment). I am a board member of MALDEF, the group that challenged this ordinance, and agreed to undertake this litigation. For a sample of the effects and unintended consequences of attempting to regulate immigration/labor issues, see Arian Campo-Flores and T. Trent Gegax, A New Spice in the Gumbo: Will Latino Day Laborers Locating in New Orleans Change its Complexion?, Newsweek 46 (Dec 5, 2005); Alex Kotlowitz, The Smugglers’ Due, NY Times Mag
proselytize in their congregants’ language, or necessitating landlords in Hazleton, Pennsylvania, to check the immigration status of renters. All of these are sure signs of an ethnic and national origin “tax” that will only be levied upon certain groups, certain to be Mexicans in particular, or equally likely, Mexican Americans. These more-than-petty nuisances, reminiscent of our inglorious immigration history of racial exclusion, are the pigtail ordinances in modern guise. Despite their surface attractiveness and thin veneer, they should be resisted as fixes.

Fighting terrorism, of the homegrown or international variety, is not ground cover for discarding our traditional allocation of immigration and enforcement powers. Congress, stalled in partisan tactics and mid-term elections, tried to enact severe measures, which in the anti-immigrant climate, could pass because no elected official wants to be painted as “soft on immigra-

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100 The first person arrested in Georgia when a township enacted a comprehensive immigration ban in 1999 was a Spanish-language Christian minister, who was prosecuted under the English-only provisions for posting signs for church services in the language of his congregation. *Carlos Guevara v City of Norcross*, 52 Fed Appx 486 (11th Cir 2002) (affirming, without opinion, N D Ga, No 00-00190-CV-CAP-1) (involving a city ordinance restricting the use of a language other than English for any displayed sign serving a non-residential purpose; dismissal of criminal charges against Spanish-language minister for posting signs in Spanish announcing religious services). While this was a MALDEF case, I was not on the Board at the time the action was undertaken.

An entire industry has sprung up as these issues have arisen at the local level; a small library would include: Kelley, *A Deal in Colorado on Benefits for Illegal Immigrants*, NY Times at A18 (cited in note 99) (concerning state resources); Ferry, *Out of the Shadows*, Santa Fe New Mexican at A1 (cited in note 99) (describing organizing efforts); Bernstein, *U.S. Court Orders City to Ensure Aid for Battered Immigrants*, NY Times at B1 (cited in note 99) (describing how NYC is required to fund programs); Peter Wallsten, *Parties Battle Over New Voter ID Laws*, LA Times A1 (Sept 12, 2006) (concerning identification requirements). As these pieces show, the ordinances cut deep into civic life, and widely into a variety of local functions and benefits.


102 Consider *Yick Wo v Hopkins*, 118 US 356 (1886) (striking down anti-Chinese ordinances); *Ho Ah Kow v Nunan*, 12 F Cas 252 (S Sawyer 552) (CC D Cal 1879) (striking down local ordinance regulating hair length); Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990* (Stanford 1993).
tion crime." \textsuperscript{103} Were I in office, I would not want to be perceived as weak on such a fundamental issue. But I would hope to be able to find common ground with others to enact legislation that genuinely guards our borders instead of trading off our long-standing internal safeguards.