

# ARTICLES

## State Immigration Laws and Federal Supremacy

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Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. . . . State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.<sup>1</sup>

### Introduction

State and local governments have no constitutional power to regulate foreign affairs. It is not merely that such power is specifically denied to them by the Constitution,<sup>2</sup> they would be impotent even without such proscriptions. Power over foreign affairs is a concomitant of national sovereignty,<sup>3</sup> a feature never possessed by the individual states. Accordingly, federalism, and all of its attendant implications for reserved powers in the states,<sup>4</sup> is simply an inapposite construct when it comes to the external affairs of the nation.<sup>5</sup> "Power

1. *United States v. Belmont*, 301 U.S. 324, 331 (1937) (citation omitted).

2. *See* U.S. CONST. art. I, § 10, cl. 1 ("No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal . . ."); cl. 3 ("No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.").

3. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This power does not "depend upon affirmative grants of the Constitution." *Id.* "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." *Id.* In short, the Constitution is not the sole source of authority "in matters requiring national action, [for such powers] must belong to and somewhere reside in every civilized government." *Missouri v. Holland*, 252 U.S. 416 (1920).

4. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

5. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1940) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting

over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>6</sup>

Despite this long-standing and consistent understanding, states and their political subdivisions often act in ways that implicate the nation’s foreign relations. Much of this has been benign, such as sister-city arrangements,<sup>7</sup> initiatives in trade and trans-border cooperation,<sup>8</sup> and precatory policy statements.<sup>9</sup> But, states have also endeavored to engage directly in foreign relations, such as through extradition agreements,<sup>10</sup> foreign trade restrictions,<sup>11</sup> setting military policy,<sup>12</sup> and by encouraging defection from communist countries.<sup>13</sup>

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foreign relations be left entirely free from local interference.”); *Curtiss-Wright Export Corp.*, 299 U.S. at 316 (“That [the doctrine of enumerated powers] applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.”). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 5 (1972) [hereinafter *FOREIGN AFFAIRS*] (“Federalism . . . rarely raises its head in foreign relations since for these purposes the United States is virtually a unitary state.”).

6. *United States v. Pink*, 315 U.S. 203, 233 (1942).

7. See Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821, 822 (1989) [hereinafter *Foreign Relations*] (“Over 830 cities and other municipal governments have established official ‘sister city’ relationships with over 1270 cities and communities in 90 other countries.”).

8. *Id.* (“Over 40 states have established trade or investment offices in foreign countries.”).

9. See, e.g. *AFL-CIO v. Eu*, 686 P.2d 609, 626 (Cal. 1984) (discussing California Proposition 12 (1982) which endorsed a bilateral freeze on the construction of nuclear weapons and required the governor to transmit that endorsement to the President and other federal officials); *Farley v. Healey*, 431 P.2d 650 (Cal. 1967) (San Francisco city initiative declaring city policy favoring an immediate cease fire in Vietnam and withdrawal of American troops from that country). These initiatives are often “nothing more than a non-binding expression of public opinion,” without the force of law. See *Nebraska ex rel. Brant v. Beermann*, 350 N.W.2d 18, 22-23 (Neb. 1984).

10. See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

11. See generally Howard N. Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 J. INTL. L. BUS. 563 (1993); Eduardo E. Neret, Marcio W. Valladares, *The Florida International Affairs Act: A Model for State Activism in Foreign Affairs*, 1 J. TRANSNAT’L L. & POL’Y 197 (1992) [hereinafter *State Activism*].

12. See, e.g., *Perpich v. United States Dep’t of Defense*, 880 F.2d 11 (8th Cir. 1989); *aff’d*, 496 U.S. 334 (1990) (invalidating effort by governor to prevent state national guard troops from participating in military exercises in Central America); *Dukakis v. United States Dep’t of Defense*, 859 F.2d 1066 (1st Cir. 1988) (same); *Fossella v. Dinkins*, 110 A.D.2d 227 (N.Y. 1985) (invalidating ballot initiative prohibiting the sale or use of municipal property for “the development of any military facility, any component of which is designed to carry or store nuclear weapons”), *aff’d on other grounds*, 488 N.E.2d 117 (N.Y. 1985); *Arthur D. Little, Inc. v. Comm’r of Health & Hosp. of Cambridge*, 481 N.E.2d 441 (Mass. 1985) (upholding municipal ban on production of chemical warfare). See generally Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40

"Municipal foreign policy" is so much a part of the landscape, there is even a magazine by that name.<sup>14</sup>

One recurring manifestation of state involvement in foreign affairs is the regulation of aliens and immigration. Outsiders by definition, aliens are often viewed as threatening a state's cultural and political identity, undermining its communitarian values, and taxing its public resources. In times of social and economic stress, aliens become prime targets of reaction. This is a persistent phenomenon which has once again emerged prominent on the national scene.<sup>15</sup> Historically, some state immigration laws have been fairly explicit, such as alien registration requirements,<sup>16</sup> and exclusion of aliens from entry.<sup>17</sup> Others have been less direct, but no less forceful, as where civil disabilities are imposed on aliens regarding employment,<sup>18</sup> succession,<sup>19</sup> education,<sup>20</sup> and state benefits.<sup>21</sup>

Some early cases suggested that states could regulate immigration, at least that of "undesirable" aliens.<sup>22</sup> The Supreme Court's first approach to the issue was to treat immigration as a species of commerce.<sup>23</sup> Thus, developing doctrines on the relative powers of state

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BUFF. L. REV. 321 (1992); Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, 65 FOREIGN POLICY 154, 157 (Winter 1986-87).

13. See Florida Territorial Waters Act, FLA. STAT. ANN. § 370.21(9) (1963), discussed in John N. Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 311-17 [hereinafter *Federalism and Foreign Relations*].

14. The quarterly Bulletin of Municipal Foreign Policy was published until 1991 by the Center for Innovative Diplomacy. See 5 BULL. MUN. FOREIGN POL'Y, No. 2 (Spring 1991).

15. For an early history of state immigration laws, see chapter on "State Immigration Legislation" in Volume 39, 1911 REPORT OF THE DILLINGHAM COMMISSION, S. DOC. NO. 758, 61st Cong., 3d Sess. 9 (1911) [hereinafter DILLINGHAM REPORT].

16. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941).

17. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1875). See generally GERALD NEUMAN, *THE LOST CENTURY OF AMERICAN IMMIGRATION LAW (1776-1875)* 1833 (1993) [hereinafter *LOST CENTURY*]. Antebellum state laws prohibiting the entry of slaves and free blacks, although "immigration laws" in every sense, will not be discussed here because of their unique character and detachment from foreign affairs. For a thorough analysis of such laws, see *id.* at 1865-80.

18. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973) (Connecticut's exclusion of resident aliens from law practice was unconstitutional); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (alien exclusion from civil service positions was unconstitutional).

19. See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968); *Clark v. Allen*, 331 U.S. 503 (1947).

20. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (excluding undocumented immigrant children from public schools); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M., 1980) (excluding Iranian students from state university).

21. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (states could not deny welfare benefits to aliens). For further discussion of this line of cases, see *infra* Section V.

22. See *infra* note 113.

23. See *infra* note 207.

and federal governments were applied to both commerce in goods and commerce in people.<sup>24</sup> The most profound example of this was the states' unabridgable constitutional power to regulate the importation of slaves until 1808.<sup>25</sup>

However, by 1875, the Supreme Court came to see immigration control as an implicit federal power, inextricably related to the power over foreign affairs.<sup>26</sup> Since then, the Court has developed two doctrinal approaches to state power over immigration and aliens: equal protection and preemption. State laws that discriminate against aliens are nominally subject to strict scrutiny under the Equal Protection Clause.<sup>27</sup> The theory here is that aliens bear at least some of the indicia of a suspect class, including a history of discrimination and political powerlessness.<sup>28</sup> However, two important exceptions have emerged where the Court relaxes its equal protection scrutiny. The first is

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24. People were treated as commerce in Supreme Court decisions as late as *Edwards v. California*, 314 U.S. 160 (1941). See *infra* note 207 and accompanying text.

25. See U.S. CONST. art. I, § 9, cl. 1 ("The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."); Art. V ("no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article"). See also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842) (states had power to "arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example.").

26. See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259 (1875). This is also the modern view. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (federal power in the general field of foreign affairs, including power over immigration, naturalization, and deportation, is supreme). This doctrinal development occurred at about the same time as Congress took an active interest in regulating immigration. Federal immigration laws briefly appeared early in our history (Naturalization Act of 1798, ch. 54, 1 Stat. 566, repealed by Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155), but the first permanent law was passed in 1875. See Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding immigrant felons).

27. See *infra* note 73.

28. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. at 372 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)). See generally Note, *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1408 (1983) [hereinafter *Immigration Policy*]. But see *Sugarman v. Douglass*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) (There "is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the 'status' of [alienage].").

where the state discriminates with respect to state employment in policy-making or policy-implementing positions—so called “political function” jobs.<sup>29</sup> The other is where the discrimination is against aliens present in the state in violation of federal law—so called “illegal” or “undocumented” aliens.<sup>30</sup>

The Court’s equal protection approach to alienage discrimination is problematic. Aliens are no less a “suspect class,” in terms of the classical indicia, when the disadvantage relates to government jobs or where they lack immigration papers.<sup>31</sup> The state may have a greater interest in these contexts, or there may be lesser conflict with federal policies. However, contorting equal protection doctrine to permit greater state authority in these instances seems an unsatisfactory way to recognize that the respective state and federal interests are now different.<sup>32</sup>

The second principal doctrine for analyzing state immigration laws is preemption. Under the Supremacy Clause,<sup>33</sup> state laws that conflict with federal law, or obstruct federal policy, are preempted.<sup>34</sup> The usual tests for express and implied preemption are implicated whenever Congress, the President, or a federal agency act in the area of immigration.<sup>35</sup> Treaties are also the “supreme law of the land,”<sup>36</sup>

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29. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

30. Another exception to strict equal protection scrutiny is where Congress, rather than the states, is discriminating. See *infra* note 501 and accompanying text.

31. Indeed, one could argue that undocumented aliens have a greater history of discrimination and less political power than resident aliens. Their status is also more immutable than lawfully present aliens who, some day, may qualify for citizenship. On these grounds, they would have a stronger claim to “suspect class” status, not a weaker one. See *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 559 (S.D. Tex. 1980), *aff’d sub nom. Plyler v. Doe*, 457 U.S. 202, 209-10 (1982), (“The rights of man are not a function of immigration status”). But see *id.* at 565 n.40 (“undocumented status is not a characteristic which an individual cannot control . . . undocumented *adults* have control and individual responsibility for their present status.”).

32. These problems are more fully explored in Section V, *infra*.

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

34. It has long been the rule that state interference with federal policies and agencies “is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created.” *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896).

35. Federal law may preempt state or local law in different ways. Congress may preempt state law by expressly stating its intention to do so. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Absent express preemption, a court may infer a congress-

and may protect foreign nationals in the United States from state action.<sup>37</sup> But federal dominance and exclusivity do not require the existence of positive law in order to find that states are ousted from regulation. Even in the absence of specific federal enactments, states may not usurp Congress' latent—but plenary—power over immigration.<sup>38</sup>

This theory of supremacy lies somewhere between standard preemption doctrine and explicit constitutional restraint. If Congress affirmatively legislates, or if the Constitution prohibits,<sup>39</sup> then state laws may not contravene. But, even where Congress and the Constitution are both silent, states may still be forbidden to act. This results from a

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sional intent to preempt from a scheme of federal regulation sufficiently comprehensive to occupy a given field or to make clear that Congress left no room for supplementary state legislation. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, even if Congress has not completely preempted state regulation in a particular area, state law is preempted to the extent that it actually conflicts with federal law. "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility' . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County, Fla. v. Auto. Med. Labs. Inc.*, 471 U.S. 707, 713 (1985) (citations omitted). For a general review of preemption doctrine, see *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987).

36. U.S. CONST. art. VI, § 1.

37. Rights of foreign nationals are the frequent subject of treaties. *See, e.g.*, Treaty with Japan of Feb. 21, 1911, 37 Stat. 1504 (securing to the citizens of Japan the right to "enter, travel and reside" in the United States and "to carry on trade, wholesale and retail . . . and generally to do anything incident to or necessary for trade"); Treaty between the United States and Italy of 1871, 17 Stat. 845-46 ("The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives"). Many treaties contain a similar "most favored nation clause," "providing that the citizens of such countries shall enjoy all the privileges, rights and immunities which the citizens of countries most favored in any existing treaty with the United States enjoy." *Heim v. McCall*, 239 U.S. 175, 180-81 (1915). *See also* *Ohio v. Deckerbach*, 274 U.S. 392 (1927).

38. In *De Canas v. Bica*, 424 U.S. 351 (1976), the Supreme Court considered whether a state law prohibiting the employment of undocumented alien workers violated the Supremacy Clause. The Court divided the inquiry into three components. The first was whether the state law intruded into an area of exclusive federal concern, i.e., immigration control. *Id.* at 355. The second inquiry was whether states were ousted from regulation by federal occupation of the field. *Id.* at 357. The third was whether the state law under challenge conflicted with federal law or burdened federal policy objectives. *Id.* at 358. This article principally concerns the first of these supremacy doctrines, what is referred to here as "constitutional preclusion." The remaining preemption doctrines require ad hoc examination of particular state laws in light of specific federal law and policy.

39. The Constitution does prohibit state action in the realm of foreign affairs (*see supra* note 2), but is not explicit regarding state power over immigration.

lack of state power over immigration in the first place, and a restriction on any power they may possess if its exercise intrudes on a federal domain. This is one of the "great silences of the Constitution":<sup>40</sup> states may not usurp or obstruct federal power, even when that power remains unexercised.

The notion that a state cannot regulate foreign affairs resembles the "dormant Commerce Clause," where state laws which directly regulate or burden interstate commerce are invalid under a theory of "negative preemption."<sup>41</sup> Since exclusive and plenary power is reposed in Congress, states are ousted from the field.<sup>42</sup> State entry into an exclusively federal domain usurps congressional authority and undermines our federalistic scheme.<sup>43</sup> This is even truer in the area of foreign affairs and immigration than it is with interstate commerce, both as a matter of constitutional theory,<sup>44</sup> and as a matter of precedent.<sup>45</sup> For instance, actions by a single state, offensive to a foreign power, could require resolution or redress by the entire nation.<sup>46</sup> Preclusion of state laws touching foreign affairs avoids this potential for conflict. Thus, even when Congress' power to regulate foreign affairs lies "dormant" (i.e., unused), the states may be judicially precluded

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40. *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

41. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) (describing the "negative implications" of the Commerce Clause).

42. For an application of this doctrine to both commerce and foreign affairs, see *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840) ("[W]here an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive; and the same power cannot be constitutionally exercised by the states.").

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

44. It may be said, with respect to power over commerce, that the states possessed such power prior to the Constitution. Therefore, any relinquishment to Congress (per the Commerce Clause) must be read in light of the Tenth Amendment and retained state powers. The same is not true, however, with respect to foreign affairs, since federal power in this area is not dependent upon any grant from the states, nor limited by any reservation of power. *Cf. Passenger Cases*, 48 U.S. (7 How.) 283, 420 (1849) (separate opinion by Wayne, J.)

45. *See Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979) (state actions affecting foreign commerce would be given closer scrutiny than those affecting interstate commerce).

46. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("If [our] government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?").



from entering the area. "If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."<sup>47</sup>

This rule too can be overstated. There indeed may be an "inherent danger of state action [in] all matters relating to foreign affairs,"<sup>48</sup> yet state action that "merely has foreign resonances, but does not implicate foreign affairs,"<sup>49</sup> is not per se invalid. Legitimate matters of local concern are often caught up with international issues. This is readily apparent in such areas as health and safety regulation and state taxation which, while locally directed, can and do have some impact on foreign affairs. For instance, a municipal noise ordinance might result in a ban on flights of the British-French Concorde.<sup>50</sup> State efforts to tax the local business of international entities may affect their international structure and bookkeeping.<sup>51</sup> Without intending to disturb international relations, local police power enactments can still do just that. Furthermore, state and local enactments often conflict with principles of civil and political rights embodied in international agreements.<sup>52</sup> Thus, expansive application of a preclusion doctrine could negate much of the states' police powers. Accordingly, some accommodation is needed in these cases.

Nominally, the key question is whether the state is deemed to be regulating foreign affairs, which it cannot do, or regulating local affairs, such as health and welfare, which it can do pursuant to its police powers.<sup>53</sup> As Justice Field described it in the *Chinese Exclusion Case*:<sup>54</sup>

The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our rela-

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47. *Id.*

48. *Hines v. Davidowitz*, 312 U.S. 52, 62 n.9 (1940).

49. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

50. *See British Airways Bd. v. Port Auth. of New York*, 558 F.2d 75 (2d Cir. 1977); "[F]or purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County, Fla. v. Auto. Med. Labs.*, 471 U.S. 707, 713 (1985).

51. *See Barclays Bank v. Franchise Tax Bd. of California*, 114 S.Ct. 2268 (1994). *See also Wardair Canada, Inc. v. Florida Dep't. of Revenue*, 477 U.S. 1 (1986).

52. *See Sei Fujii v. State*, 217 P.2d 481 (Cal. Ct. App. 1950), *aff'd on other grounds*, 242 P.2d 617 (Cal. 1952), (Alien Land Law restricting ownership of land by aliens ineligible for citizenship was preempted by the United Nations Charter).

53. This difference between regulation of foreign and domestic matters is not always obvious, but it is often determinative. *See infra* Section II D.

54. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

tions with foreign nations, we are but one people, one nation, one power.<sup>55</sup>

The trouble with this distinction lies in its application; there is often no bright line of demarcation between “local” and “national” matters, or between domestic and foreign regulation.<sup>56</sup> Instead, courts have endeavored to distinguish between state laws with an “incidental” effect on foreign affairs and those that “directly” affect the external relations of the United States.<sup>57</sup> Laws of the former type are valid so long as the effect on national interests is not too great relative to the local interests served. Laws in the latter category are virtually *per se* invalid.

The same distinction applies to state laws affecting immigration. States have a valid interest in regulating persons within their borders, including aliens. However, they are often insensitive to the delicate international and immigration policy issues at stake in alien regulation.<sup>58</sup> As a result, they may overreact to social problems perceived caused by the presence of aliens, often with repercussions on national interests. Federal supremacy is protected both by normal preemption doctrines and by constitutional preclusion. Under the latter, state laws with only an incidental effect on immigration policy will stand unless they impose a substantial burden on foreign policy or federal interests. However, state laws enacted for the purpose of regulating aliens or controlling immigration are invalid since neither is a proper concern of state or local legislatures.<sup>59</sup>

This Article explores these themes and endeavors to create a rule for evaluating state immigration laws and their compatibility with the Supremacy Clause. It concludes that states seldom have a legitimate

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55. *Id.* at 605-06.

56. *See Federalism and Foreign Relations*, *supra* note 13, at 297 (“In theory, [the] distinction between foreign and domestic affairs is plain, but in practice the distinction is often extremely subtle and elusive.”).

57. *See, e.g., Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (“if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer [invalidity], [a]bsent some explicit directive from Congress. . .”).

58. *See generally Immigration Policy*, *supra* note 28, at 1447-48.

59. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice Marshall explained the difference between regulation of an object and regulations affecting that object. States may have no power to regulate a particular object (in *Gibbons*, interstate commerce) because its governance is entrusted to Congress. However, states do have power to regulate other objects (e.g., health and safety) and may employ means which operate on objects of federal control, yet without objection. “If a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted [to Congress], but from some other, which remains with the state, and may be executed by the same means.” *Id.* at 204.

interest in regulating immigration. Laws penalizing aliens, including undocumented ones, can stand only where there is some affirmative congressional acceptance of state involvement. Where Congress is silent and, of course, where it speaks to the contrary, state laws having substantial effect on immigration or aliens are likely unconstitutional. On the other hand, state laws aimed at local concerns are not invalid simply because aliens "feel the pinch."<sup>60</sup> Here the question is one of degree: whether the local benefits justify the incidental effect on national immigration and foreign policies.

Some cases and commentators have drawn a sharp distinction between "legal" immigrants, i.e., those lawfully admitted by Congress for temporary or permanent residence, and so-called "illegal" aliens—those who entered the country unlawfully or who have overstayed a lawful entry.<sup>61</sup> This distinction can be found in both equal protection and preemption cases, but it is more apparent than real. The state has no greater power or interest, under either doctrine, in regulating the admission of illegal entrants than legal ones.<sup>62</sup> Therefore, direct regulation of "illegal," as well as "legal," aliens is prohibited. But, a different result may be obtained where the local law is aimed at legitimate state concerns and its regulatory impact on immigration is only incidental.<sup>63</sup> Laws having an indirect impact on undocumented aliens, even when that impact is substantial, may be less in conflict with fed-

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60. *Cf. United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949) (describing judicial invalidation under the dormant Commerce Clause of state laws affecting commerce).

61. The term "illegal alien" is both unknown to federal immigration law and a misnomer. Mere presence in the United States without permission is not a crime, although it may subject the individual to a civil proceeding—deportation. *See infra* note 324. However, the term is typically used in the vernacular to include all persons lacking official immigration papers, most of whom have committed only civil offenses. The categories mentioned in the text are not exhaustive since the complexities of immigration law do not admit simple definitions. At the very least, one would want to distinguish between aliens who entered or remain without proper documentation, who nonetheless have a claim to stay in the country (e.g., pending application for asylum or adjustment of status), and those who entered illegally. *See* 8 U.S.C. § 1325 (1952); *Gonzales v. City of Peoria*, 722 F.2d 468, 474-76 (9th Cir. 1983); *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 583 nn.103-04 (S.D. Tex. 1980).

62. *See United States v. Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring) ("This problem [illegal immigration] essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch.").

63. *See Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("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.").

eral policy, and on that basis may survive scrutiny.<sup>64</sup> Still, the constitutional doctrine itself does not distinguish between the two classes of aliens.

This Article briefly traces the development of immigration regulation in the United States. It then describes the nature of federal supremacy in immigration matters. Next, it explores a variety of state immigration laws, both those which may be considered “direct” regulation and those which are “incidental,” and the interests they purportedly advance. Lastly, the Article examines the present equal protection model for handling alien discrimination laws, and whether preemption is a superior analytical tool for such cases.

## I. The Development of Alien and Immigration Laws in the United States

### A. Give Me Your Tired and Poor, Your Huddled Masses Yearning to Breathe Free

The Constitution draws few distinctions between citizens and non-citizens.<sup>65</sup> Except for the qualifications for high political office, “in looking at the text, one is struck initially by the lack of importance of citizenship.”<sup>66</sup> This seems to reflect early acceptance of aliens amongst us<sup>67</sup> (with the exception perhaps of the British during the revolutionary period<sup>68</sup> and poor aliens at any time<sup>69</sup>) and hostility to

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64. See *id.* at 219 n.19 (“[I]f the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.”).

65. See *Fong Yue Ting v. United States*, 149 U.S. 698, 739 (1893) (Brewer, J., dissenting) (“It is worthy of notice that in [the first 10 amendments] the word ‘citizen’ is not found.”). Of course the original text draws distinctions in three places between citizens and African slaves.

66. R. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1508 (1986) [hereinafter *Search for National Identity*].

67. See William B. Wong, Comment, *Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. REV. 643, 645 (1985) [hereinafter *Iron Curtain Statutes*]; *The Passenger Cases*, 48 U.S. (7 How.) 283, 401 (1849) (“To encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted.”). Indeed, the country had mostly open borders, both literally and figuratively, for much of our first century. See generally LOST CENTURY, *supra* note 17; 1 CHARLES GORDON & STANLEY MAILMAN, *IMMIGRATION LAW AND PROCEDURE* 2-5 (rev. ed. 1993); PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY*, 116-40 (Yale, 1985) [hereinafter *CITIZENSHIP WITHOUT CONSENT*].

68. See *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 619, 622 (1813) (confiscation of land devised to British heirs); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (banishment of British loyalists). Laws regulating the slave trade might also be considered restrictions on immigration, although of a wholly different kind. See generally LOST CENTURY, *supra* note 17, at 1836 n.18.

laws imposing unique burdens on them.<sup>70</sup> The question of immigration was frequently discussed at the Constitutional Convention; yet, little restriction was imposed. Madison explained why: "He wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity."<sup>71</sup> Aliens had similar recognition and rights in colonial state charters.<sup>72</sup>

Eventually, rights embodied in the Bill of Rights and the Civil War Amendments were extended to all "persons," citizen and non-citizen alike,<sup>73</sup> including persons in the country without official permission.<sup>74</sup> National symbols, such as the Declaration of Indepen-

69. See generally *LOST CENTURY*, *supra* note 17, at 1846-59.

70. The Alien Acts of 1798 (Act of June 18, 1798, ch. 54, 1 Stat. 566 (Naturalization Act); Act of June 25, 1798, ch. 58, 1 Stat. 570 (Alien Friends Act); Act of July 6, 1798, ch. 66, 1 Stat. 577 (Alien Enemies Act)) were then, and still are, in high disrepute. See ELKINS & MCKITRICK, *THE AGE OF FEDERALISM* 591-92 (Oxford 1993) [hereinafter *AGE OF FEDERALISM*] (the Alien Act "was a dead letter from the first. [President] Adams, determined upon the strictest interpretations, never invoked it, and the Alien Act expired in June 1800 without a single alien having been deported under its provisions"). See also *Hines v. Davidowitz*, 312 U.S. 52, 70-71 (1941) ("So violent was the reaction to the 1798 laws that almost a century elapsed before a second registration act was passed"); *Fong Yue Ting v. United States*, 149 U.S. 698, 747 (1893) (Field, J., dissenting) ("The passage of this act produced great excitement throughout the country, and was severely denounced by many of its ablest statesmen and jurists as unconstitutional and barbarous, and among them may be mentioned the great names of Jefferson and Madison.").

71. 5 *ELLIOT'S DEBATES OF THE FEDERAL CONVENTION* 411 (Aug. 1787) (2d ed. 1896).

72. As early as 1641, the Massachusetts "Body of Liberties" stated that "Every person within this Jurisdiction, whether Inhabitant or forreiner, shall enjoy the same justice and law that is generall for the plantation . . ." (cited in *Hines v. Davidowitz*, 312 U.S. 52, 70 n.27 (1941)). See also Connecticut Justice Act of 1672, *CONN. GEN. STAT.* tit. 1, § 3 (rev. 1808) (guaranteeing equal justice to all free persons, whether or not residents of Connecticut, and to foreigners while in the colony).

73. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See also *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen"); *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (The Japanese Immigrant Case) (Fifth Amendment due process); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (same); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (Equal Protection Clause applies "to all persons within the territorial jurisdiction" of the United States); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (habeas corpus); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (search and seizure). One notable exception is the Citizenship Clause in the Fourteenth Amendment, meant to overrule *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Another exception is the right of franchise in the Fifteenth, Nineteenth, and Twenty-sixth Amendments. See generally *Search for National Identity*, *supra* note 66, at 1508-09.

74. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or

dence,<sup>75</sup> the Statue of Liberty,<sup>76</sup> and Ellis Island<sup>77</sup> embody and memorialize these attitudes. President Bush summarized this history of American hospitality toward immigrants in honoring its "Golden Door."

[W]hatever their place of origin or point of entry, each generation of immigrants has bettered America . . . immigration has been one of the largest single factors in our Nation's social, cultural, and economic development . . . the other continents arrive as contributions . . . for immigrants have enriched the United States beyond measure, bringing many contributions to our society along with the unique customs and traditions of their ancestral homeland. Most important, they have shared eagerly in the hard work of freedom, helping to defend the ideals of liberty and self-government and helping to build our churches, schools, factories, farms, and railroads. . . . America's history has long been a story of immigrants.<sup>78</sup>

## B. Closing the Golden Door

The United States did not restrict immigration for most of its first century. Congress stated at one point that immigration was "a natural and inherent right of all people."<sup>79</sup> What little control existed was

property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.").

75. The Declaration of Independence ¶ 9 (U.S. 1776) (condemning King George: "He has endeavored to prevent the population of these States; for that purpose obstructing the laws of naturalization of the foreigners, refusing to pass others to encourage their migration hither, raising the conditions of new appropriations of land.").

76. See Emma Lazarus, "The New Colossus" (1883) ("Give me your tired and poor, your huddled masses yearning to breathe free, your wretched refuse of teeming shores, Send these, the homeless, tempest-tossed to me: I lift my lamp beside the golden door."). The poem appears on a tablet placed on the Statue's pedestal in 1903. See *LOST CENTURY*, *supra* note 17, at 1834.

77. Ellis Island in New York harbor was the immigration inspection station for 17 million immigrants arriving from Eastern and Southern Europe in the late-19th and early-20th centuries. It is now part of the Statue of Liberty National Monument. Congress declared January 1, 1992, the station's 100th anniversary, National Ellis Island Day. Pub. L. No. 102-177. Commemorating that occasion, President George Bush proclaimed the monument to be "[o]ne of the greatest symbols of American hospitality . . . [an] evocative symbol of so much of our Nation's heritage." Proclamation No. 6398, 56 Fed. Reg. 66,951 (1991). "100 million Americans, some 40 percent of our population, can trace their ancestry through Ellis Island." *Id.*

78. Proclamation No. 6398, 56 Fed. Reg. 66,951 (Dec. 23, 1991) (commemorating 100th anniversary of Ellis Island).

79. See An Act concerning the Rights of American Citizens in foreign States, ch. 249, 15 Stat. 223 (1868), discussed in Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 855 (1987) [hereinafter *United States Sovereignty*]. See also *Exodus* 12:49 ("There shall be but one law for the native and for the stranger who sojourns among you.").

pursuant to state law. With some notable exceptions,<sup>80</sup> states initially shared the welcoming attitude toward aliens. Some state anti-immigrant laws and political movements emerged in the 1830's, but these were often bound up with religious hostilities directed at Irish Catholics.<sup>81</sup> The "Nativist," "Native American," and "Know Nothing" parties were in the vanguard of these movements and were gaining strength until the Civil War diverted the nation's attention. Although Congress was lobbied for restrictive legislation, it thought itself powerless in the matter and referred the issue to state legislatures.<sup>82</sup>

The high casualty rate during the Civil War created an extraordinary demand for new labor.<sup>83</sup> Congress passed laws encouraging immigration, which succeeded not only in their goal, but in rekindling the xenophobia of the pre-war era. Within a few years, economic depression hit the nation, which exacerbated animosity toward immigrants. Faced with an uncooperative Congress, nativists turned to their state legislatures for remedial legislation. A major test of state power reached the Supreme Court in 1875, which held that states could not regulate immigration.<sup>84</sup>

Congress responded to the Court's denial of state authority by passing its first restrictive immigration law.<sup>85</sup> The law, however, was limited in scope and immigration continued unabated, particularly during the rapid industrialization of the late nineteenth century. Undeterred by the Supreme Court, and responding to increasing nativism, state legislatures persisted in their efforts to regulate immigration and aliens.<sup>86</sup> Some states passed overt exclusion and deportation laws.<sup>87</sup> Others denied land rights to aliens.<sup>88</sup> Many of these state

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80. The most obvious were attempts by some states to prevent entry of slaves and free blacks. See generally *LOST CENTURY*, *supra* note 17, at 1865-80. Another exception was the effort to prevent banishment to America as punishment for crime. See *id.* at 1841-45.

81. See *DILLINGHAM REPORT*, *supra* note 15. "Wild Irish" were also the target of the Alien Act of 1798, although the Act was never invoked. See *AGE OF FEDERALISM*, *supra* note 70, at 591, 694.

82. *DILLINGHAM REPORT*, *supra* note 15, at 16.

83. During the war, President Lincoln at first tried to coordinate immigration policy with the settlement of emancipated slaves. *Id.* at 19-20.

84. *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

85. See *An Act Supplementary to the Acts in Relation to Immigration*, ch. 141, 18 Stat. 477 (1875).

86. *Iron Curtain Statutes*, *supra* note 67, at 645.

87. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (California alien exclusion law). Gerald Neuman describes five categories of early state exclusion laws: "regulation of the movement of criminals; public health regulation; regulation of the movement of the poor;

laws, particularly on the West Coast, were aimed at excluding Chinese workers, partly to protect "free white labor" from competition and partly to promote white racial identity.<sup>89</sup> Congress followed suit with the Chinese Exclusion Act in 1882.<sup>90</sup>

A further "period of extreme nativism . . . followed the end of the First World War"<sup>91</sup> when another wave of immigrants sought entry. Strong sentiments, and state reaction, have recurred periodically since then.<sup>92</sup> State laws have excluded aliens from state natural resources,<sup>93</sup> public works contracts,<sup>94</sup> hunting game,<sup>95</sup> certain trades,<sup>96</sup> and private employment.<sup>97</sup> More recent examples of discrimination include denial of welfare,<sup>98</sup> medical benefits,<sup>99</sup> and education,<sup>100</sup> and employment as

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regulation of slavery; and other policies of racial subordination." *See generally* LOST CENTURY, *supra* note 17, at 1841. Some early state exclusion laws did not distinguish between aliens and citizens of other states, purporting to deny entry to categories of both. *Id.* at 1836 (describing a 1901 Missouri statute prohibiting the importation into the state of "afflicted, indigent, or vicious children").

88. *E.g.*, *Blythe v. Hinckley*, 180 U.S. 333 (1901); *Hauenstein v. Lynham*, 100 U.S. 483 (1880). Denial of alien land rights became more common following World War II. *See, e.g.*, *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

89. *See* LOST CENTURY, *supra* note 17, at 1872.

90. Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882). The Supreme Court upheld the law in the Chinese Exclusion Case, 130 U.S. 581 (1889).

91. *Loving v. Virginia*, 388 U.S. 1, 5 (1967).

92. Nativism can take forms other than the regulation of immigrants and aliens discussed here. For instance, early in this century some states restricted the teaching and use of foreign languages. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (the Supreme Court invalidated the laws on due process grounds). A modern variant of this Nativist sentiment is continued in laws that proclaim English to be a state's official language and that official business (including work-place speech) must occur in English. A recent Arizona law of this sort was held to violate the First Amendment in *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1995), *reh'g pending*, \_\_\_ F.3d \_\_\_.

93. *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633, 649 (1948); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *McCready v. Virginia*, 94 U.S. 391 (1877).

94. *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915).

95. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). *See also* *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927) (prohibiting aliens from maintaining an inherently dangerous enterprise).

96. *Asakura v. Seattle*, 265 U.S. 332 (1924) (invalidating municipal ordinance prohibiting the granting of pawnbrokers' licenses to noncitizens).

97. *Truax v. Raich*, 239 U.S. 33 (1915).

98. *Graham v. Richardson*, 403 U.S. 365 (1971).

99. *Monmouth Medical Ctr. v. Hau Kwok*, 444 A.2d 610 (N.J. Super. Ct. App. Div. 1982).

100. *Plyler v. Doe*, 457 U.S. 202 (1982); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (invalidating a citizenship requirement for state scholarships).



lawyers,<sup>101</sup> notaries public,<sup>102</sup> civil engineers,<sup>103</sup> teachers,<sup>104</sup> police officers,<sup>105</sup> and civil servants.<sup>106</sup> And, of course, aliens usually cannot vote<sup>107</sup> or hold public office.<sup>108</sup> Such laws proliferate as the volume of immigration, both legal and illegal, increases.<sup>109</sup>

The modern nativistic renewal is perhaps best exemplified by California's Proposition 187, passed as an initiative statute in November, 1994.<sup>110</sup> It sought to deter illegal immigration into the state by a comprehensive scheme of classification, reporting, document control, denial of public benefits, and functional deportation.<sup>111</sup> Other states have threatened to pass similar measures. Yet, states are not alone in their renewed desire to curtail both legal and illegal immigration. Included within the congressional "revolution" of 1994 were proposals to withdraw public benefits from legal aliens and strengthen efforts to protect our borders from illegal entries. There have even been calls for a constitutional amendment to deny citizenship to persons born on American soil to undocumented parents.<sup>112</sup> Whether these measures are sound public policy is beyond the scope of this Article. Its sole purpose is to explore the extent to which such policies can be adopted

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101. *In re Griffiths*, 413 U.S. 717 (1973).

102. *Bernal v. Fainter*, 467 U.S. 216 (1984).

103. *Examining Bd. of Engrs., Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

104. *Ambach v. Norwick*, 441 U.S. 68 (1979).

105. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Foley v. Connelie*, 435 U.S. 291 (1978).

106. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Nelson v. Miranda*, 413 U.S. 902 (1973), *aff'g without opinion* 351 F. Supp. 735 (D.C. Ariz. 1972) (social service worker and teacher).

107. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 ("The Constitution protects the . . . right to vote only of citizens.").

108. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

109. More than 8½ million immigrants entered the United States in the 1980s. See Penny Loeb, Dorian Friedman & Mary C. Lord, *To Make a Nation*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 47. See also Steven Holmes, *A Surge in Immigration Surprises Experts and Intensifies a Debate*, N.Y. TIMES, Aug. 30, 1995, at A1 (reporting that the number of foreign born persons in the United States has doubled in the past 15 years, igniting public debate on immigration issues).

110. Proposition 187 was enacted at the November 8, 1994 general election and codified in various California Codes. See CAL. PENAL CODE §§ 113, 114, 834b (Deering Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (Deering Supp. 1995); CAL. HEALTH & SAFETY CODE § 130 (Deering Supp. 1995); CAL. EDUC. CODE §§ 48215, 66010.8 (Deering Supp. 1995); CAL. GOV'T CODE § 53069.65 (Deering Supp. 1995). The author of this article is a pro bono counsel for plaintiffs in *Gregorio T. v. Wilson*, Case No. 94-7652 MRF (C.D. Cal. 1994), one of the cases challenging the constitutionality of Proposition 187.

111. See *infra* Section III B.

112. See generally Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994) [hereinafter *Birthright Citizenship*].

or enforced at the local level. As noted, states have regulated aliens and immigration throughout American history. Yet, in doing so, they have usurped exclusive federal power.

### C. Taking Aim at Federalism

The Supreme Court's early decisions on state power over immigration drew a distinction between laws designed to exclude "paupers, vagabonds, and fugitives," and those which denied entry to foreigners in general.<sup>113</sup> The former were specifically excepted under the Articles of Confederation from the states' obligation to permit "ingress and regress" for "free inhabitants" of other states.<sup>114</sup> A similar distinction was found under the constitution on two theories. First, early cases that restricted state power over immigration did so on the ground it interfered with Congress' commerce power; yet these categories of immigrants were not seen as "commerce."<sup>115</sup> Second, such persons were generally not made "subjects of admission into the United States" by Congress; hence state regulation did not undermine federal laws or objectives.<sup>116</sup> But states did not confine their inspection and entry laws to poor immigrants. They purported to determine for themselves which aliens were suitable for admission and which were not, often with inconclusive response from the Court.<sup>117</sup>

It took nearly a century for the Supreme Court to appreciate that immigration and foreign relations were intimately related. Looking

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113. See *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (upholding state power to deny entry to "paupers, vagabonds, and fugitives"); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1853) (state could rightfully prevent the immigration of persons "unacceptable" to it). Indeed, under the Articles of Confederation, Congress requested that states do so. See 13 J. of Cong. 105-06 (Sept. 16, 1788) ("Resolved, That it be, and it is hereby recommended to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States."). Also, an 1855 bill preventing the immigration of criminals and paupers failed in the Senate due to objections by states' rights advocates claiming that to be a state prerogative. See *LOST CENTURY*, *supra* note 17, at 1859.

114. Articles of Confederation (1781), art. IV, ¶ 1.

115. *The Passenger Cases*, 48 U.S. (7 How.) 283, 426 (1849) ("such persons are not within the regulating power which the United States have over commerce. Paupers, vagabonds, and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them.") (separate opinion of Wayne, J.). See *New York v. Miln*, 36 U.S. (11 Pet.) 102; *The Head Money Cases*, 112 U.S. 580 (1884).

116. *The Passenger Cases*, 48 U.S. (7 How.) at 426-27.

117. Responding to the argument that "the State can remove all persons who are thought dangerous to its welfare . . . [and has] the right to determine who shall enter the State," Justice Wayne stated: "the discretion of a State of this Union to determine what persons may come to and reside in it, and what persons may be removed from it, remains unproved." *Id.*

back on the history of state regulation, that nexus now seems inescapable. For instance, nineteenth century attempts by southern states to exclude black seamen on foreign vessels not only drew loud protests and litigation from Britain, but Washington's inability to abate the state immigration laws necessitated the Crown having to undertake diplomatic negotiations with the states directly.<sup>118</sup> California's exclusion of Chinese immigrants at the turn of the century created diplomatic difficulties with the Emperor and led to overseas boycotts of American goods.<sup>119</sup> Similarly, California's nativist laws directed at persons of Japanese ancestry required the personal intervention of Theodore Roosevelt to avoid endangering friendly relations with Japan. This mediation was only briefly successful, as California shortly renewed its animosity towards Japanese aliens. This revived the international crisis and became a specific topic of negotiations at the Versailles Peace Conference that concluded World War I.<sup>120</sup> Yet, California persisted in its persecution of Japanese aliens, poisoning relations between the United States and Japan for years. According to George Kennan and other historians, the California laws were a contributing factor in Japan's entry into World War II.<sup>121</sup>

The history of state immigration laws is a history of intrusion into the exclusively federal domain of foreign policy. Although states have strong interests in protecting community resources and communitarian values, they have no enforceable interest in regulating immigration or aliens. Because immigration policy is inextricably tied to the conduct of foreign relations, it is a matter of exclusive federal control.

This is not to suggest that states are powerless to affect immigration policy. They fully participate in the national deliberative process through their representation in Congress and in the public debate.<sup>122</sup> They may even use legislative and judicial means to "send a message to Congress." For instance, two states have recently sued the federal government, demanding more effective enforcement of federal immigration laws.<sup>123</sup> Although these suits were unsuccessful, they were

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118. See *LOST CENTURY*, *supra* note 17, at 1876.

119. See Declaration of Prof. Gordon Chang (Stanford Univ.) in *Gregorio T. v. Wilson*, CV 94-7652 MRP (C.D. Cal, 1994), on file with the author.

120. *Id.*

121. *Id.*; Declaration of Prof. Yuji Ichicka (UCLA) in *Gregorio T.*, on file with the author.

122. *Cf. Garcia v. San Antonio Mun. Transit Auth.*, 469 U.S. 528 (1985).

123. See *Chiles v. United States*, 94-C676-CIV-Davis (S.D. Fla, 1994), dismissed Dec. 20, 1994; *State of California v. United States*, 94-0674 K (S.D. Cal. 1994), dismissed \_\_\_\_.

correct in asserting that the responsibility over immigration lies with the federal government, not the states.<sup>124</sup>

## II. The "Dormant Immigration Clause"

### A. Plenary Federal Power

The Constitution vests in the federal government the power to make "an uniform Rule of Naturalization,"<sup>125</sup> and, by extension, the power to regulate immigration.<sup>126</sup> Because "this whole subject has been confided to Congress by the Constitution,"<sup>127</sup> immigration "is unquestionably exclusively a federal power."<sup>128</sup> A like result would obtain even without so clear a constitutional grant, since the right to control immigration inheres in national sovereignty.<sup>129</sup> As a result, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."<sup>130</sup>

The corollary of this plenary and exclusive federal power is that states are powerless to regulate immigration. Control over immigration is neither a retained power, nor one recognized in the states by

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124. See also *Plyler v. Doe*, 457 U.S. 202, 242 (1982) ("A state has no power to prevent unlawful immigration, and no power to deport illegal aliens, those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly charged with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here.") (Burger, C.J., dissenting). See also Note, *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 HARV. L. REV. 1643 (1995).

125. U.S. CONST. art. 1, § 8, cl. 4.

126. See *Chy Lung v. Freeman*, 92 U.S. 275 (1876). Federal power to regulate immigration is also derived from the Commerce Clause and its several foreign affairs powers.

127. *Henderson v. Mayor of New York*, 92 U.S. 259 (1875). See also *The Passenger Cases*, 48 U.S. (7 How.) at 427 ("the constitutional obligations of the States of this Union to the United States, in respect to commerce and navigation and naturalization, have qualified the original discretion of the States as to who shall come and live in the United States.") (separate opinion by Wayne, J.).

128. *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

129. "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Ekiu v. United States*, 142 U.S. 651, 659 (1892). Control over immigration is "inherent in national sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). See also *Fiallo v. Bell*, 430 U.S. 787, 795 (1977) ("We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests."); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Professor Henkin criticizes the Court's embrace of so strong an inherent power. See *United States Sovereignty*, *supra* note 79, at 858.

130. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

the Constitution. Accordingly, any entry by states into this realm necessarily invades federal power, whether it is affirmatively exercised or not. Since immigration is plainly "a matter of national moment,"<sup>131</sup> state interference is not tolerated.<sup>132</sup>

This proposition is sometimes viewed as an extension of standard preemption doctrine. Ordinarily, positive federal law preempts states only where Congress explicitly declares or where some incompatibility is found between state and federal enactments or objectives. However, if Congress fully occupies the field, supplemental (even harmonious) state law is forbidden.<sup>133</sup> Where federal power is not only plenary but also exclusive, it may be said that Congress "occupies the field" whether or not it exercises that power.<sup>134</sup> Thus, even when congressional power lies "dormant,"<sup>135</sup> states may not regulate in that exclusive area. Judicial enforcement of that exclusion "safeguards Congress' latent power from encroachment by the several States."<sup>136</sup>

Thus, there are two closely-related constitutional bases for a dormant immigration clause doctrine:<sup>137</sup> states have no power over immigration, and the exercise of any power they might possess interferes with federal power. The first is a sort of "negative preemption" as found with the dormant Commerce Clause. No affirmative congressional enactment is necessary in order for state law to violate the Supremacy Clause. The second is an extension of regular preemption

131. *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941) ("[T]he treatment of aliens, in whatever state they may be located, [is] a matter of national moment.").

132. *See, e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

133. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963).

134. *See American Trucking Assn. v. Smith*, 496 U.S. 167, 202 (1990) (Scalia, J., concurring) ("When we prohibit a certain form of state regulation that does not conflict with any federal statute, we are saying, in effect, that we presume from Congress' silence that, in the exercise of its commerce-regulating function, it means to prohibit state regulation.") (citation omitted); *Guss v. Utah Labor Bd.*, 353 U.S. 1, 10-11 (1957) ("where federal power has been delegated but lies dormant and unexercised, the States' power to act with respect to matters of local concern is not necessarily superseded. But in each case the question is one of congressional intent.") (citations omitted).

135. The notion of "dormant" constitutional power was first used in *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (state action was not "repugnant to [Congress'] power to regulate commerce in its dormant state").

136. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) (explaining theory of dormant Commerce Clause). *See also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (failure of the National Labor Relations Board to assert jurisdiction did not leave the states power over activities they otherwise would be preempted from regulating).

137. Other commentators have used the same or similar terms to describe preclusion of state laws in foreign affairs. *See, e.g., State Activism, supra* note 11, at 14; Luis Li, *State Sovereignty and Nuclear Free Zones*, 79 CAL. L. REV. 1169, 1174 (1991).

doctrine. Starting with the Immigration and Nationality Act of 1952 (INA),<sup>138</sup> Congress has so completely occupied the field of immigration that there is no room for supplemental state regulation.<sup>139</sup>

Ordinarily "we start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."<sup>140</sup> However, where the matter is one of traditional federal (instead of state) control, that assumption does not apply. These are areas "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>141</sup> This includes immigration, where the Court has "recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."<sup>142</sup> Accordingly, in matters of immigration, the presumption is reversed and any overlap between federal and state laws may result in preemption of the latter.<sup>143</sup> At the very least, courts "may rely upon the logic of the constitutional structure to resolve matters of national-state conflict in foreign affairs. Neither actual interference with national decision making nor direct conflict with existing national policy need be demonstrated."<sup>144</sup>

138. 8 U.S.C. § 1101 (1988).

139. See *De Canas v. Bica*, 424 U.S. 351, 356 (1976) ("there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause"); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) ("[w]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

140. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In these circumstances there must be compelling evidence of congressional intent to preempt. *San Diego Bldg. Trades*, 359 U.S. at 244. See also *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) ("preemption is not lightly presumed").

141. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (quoting *Rice*, 331 U.S. at 230 (1947)). See also *Pennsylvania v. Nelson*, 350 U.S. 497, 501-02 (1956); cf. *North Dakota v. United States*, 460 U.S. 300 (1983).

142. *Toll v. Moreno*, 458 U.S. 1, 10 (1982). See also *Hines*, 312 U.S. at 68 (preemption may be inferred from the nature of the subject matter).

143. "[I]t is of importance that this [alien registration] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax." *Hines*, 312 U.S. at 68. See also Benke, *The Doctrine of Preemption and the Illegal Alien: A Case for State Regulation and a Uniform Preemption Theory*, 13 SAN DIEGO L. REV. 166, 168 (1975) [hereinafter *Preemption and the Illegal Alien*]. But see *De Canas*, 424 U.S. at 356-62 (declining to presume preemption of state law prohibiting employment of illegal aliens).

144. Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 836 (1989) [hereinafter *Recommended Analysis*].

## B. Preserving a Role for the States — Accommodation and Balance

Despite the strength of federal supremacy over immigration, its breadth is less certain. In our federal system, states have legitimate local concerns which ought not to be easily foreclosed by judicial intervention. The role and separate identity of states requires that their interests be respected, even in some instances where their laws have demonstrable impact on federal interests. Thus, state laws may be valid even though “involving matters of significant concern to foreign relations.”<sup>145</sup> Similarly, some latitude must be afforded states respecting aliens lest they find themselves ousted from broad areas of regulation. Otherwise, for instance, states could not apply generally applicable civil and criminal law to aliens within the jurisdiction because of potential external effects.<sup>146</sup> Therefore, “standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”<sup>147</sup>

The Supreme Court has recognized the need to accommodate local and national power over aliens. But its efforts to mediate the power struggle with doctrinal rules have been only partly successful. At the threshold, the Court has drawn a distinction between state laws that “impinge on foreign relations only ‘incidentally or indirectly’ and those that do so directly or purposefully.”<sup>148</sup> A similar dichotomy applies to state regulations affecting aliens. If “local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration.”<sup>149</sup>

Were that all there was to the analysis—whether a state law affecting immigration was labeled “direct” or “indirect”—then the doctrine would be simple, but principled application would prove elusive as it has in other areas relying on that dichotomy.<sup>150</sup> In Justice Frank-

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145. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 2 cmt. d (1965).

146. Local legislation inevitably has some incidental effect on international law. See *In re Alien Children's Educ. Litig.*, 501 F. Supp. 544, 596 (S.D. Tex. 1980) (“International law traditionally comprehends a nation’s treatment of aliens. Every act which adversely affects an alien, however, does not contravene customary international law.”).

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

148. FOREIGN AFFAIRS, *supra* note 5, at 241.

149. *De Canas*, 424 U.S. at 355-56.

150. Courts in dormant Commerce Clause cases have been accused of making the distinction “simply as a matter of intuition;” *South Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 102 (1984) (Rehnquist, J., dissenting). Although the distinction requires that a “line [must] be drawn” somewhere (*South Carolina v. United States*, 199 U.S. 437, 456 (1905)), the Court cannot always tell where. Indeed, it was just this problem that invited

furter's words, such federalistic distinctions "are of a Delphic nature."<sup>151</sup> They mask more subtle analyses of respective state and federal interests. The distinction is an important one, to be sure, in reviewing state immigration laws, yet it is incomplete. Not only are direct state regulations of immigration forbidden, but also state laws purportedly aimed at local concerns which, nonetheless, burden the federal interest in, or control over, aliens and immigration. Laws imposing special burdens on aliens may be disguised attempts to affect a forbidden regulation of entry and presence.<sup>152</sup> Accordingly, state alienage laws must be carefully scrutinized for their "indirect" effect on immigration and foreign policy. For instance, state laws which are offensive to foreign governments may bind the nation diplomatically.<sup>153</sup> This is not to suggest that foreign governments can determine the outcome of constitutional analysis, even when they undertake retaliatory measures against state actions they find offensive.<sup>154</sup> But it does mean that courts need to consider whether a state alienage or immigration law might complicate the nation's diplomatic or trade relations.

Respect for legitimate local interests does not mean that states can escape the preclusive effect of dominant federal power merely by avoiding direct regulation of immigration. It would exalt form over substance to suggest that states have a free hand in regulating persons because of their alienage or immigration status, so long as they avoid measures that literally deny them entry or repatriate them.

### C. Borrowing an Illusive Model

The Court has announced what appears to be a straightforward test for determining the preclusion of state law: a direct regulation of immigration "is essentially a determination of who should or should

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early state immigration laws. See *LOST CENTURY*, *supra* note 17, at 1893 ("The nineteenth-century search for the mysterious line between the exercise of the police power and the regulation of commerce left indeterminate room for state control of immigration.").

151. *Int'l Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

152. See *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode").

153. *E.g.*, *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 969 (N.Y. 1977) (invalidating ordinance prohibiting advertisements of employment opportunities in South Africa because it involved "inquir[ies] that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation's foreign policy.").

154. See *Barclay's Bank v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2283 n.22 (1994) (upholding California unitary tax despite the fact that "[t]he governments of many of our trading partners have expressed their strong disapproval of California's method.").



not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>155</sup> The test is easily stated, but it does not cover the full range of proscribed state laws. Nor does it acknowledge the balancing of state and local interests that takes place in many of the cases. Instead, the Supreme Court seems to use a more complex (albeit unarticulated) test not dissimilar to the one developed for the dormant Commerce Clause.<sup>156</sup> Under that doctrine, states may not either 1) regulate interstate commerce purposefully or directly; 2) unduly burden the national interest in promoting free trade; or 3) discriminate against interstate commerce.<sup>157</sup> A similar analytical approach has emerged in this field.<sup>158</sup>

The symmetry between the dormant Commerce Clause and the “dormant immigration clause” is due in part to the involvement of foreign commerce in both.<sup>159</sup> It is also due to the “national” nature of the subjects.<sup>160</sup> Originalism provides an additional significant nexus—the purpose in forming a “more perfect union” was to divest states of obstructionist power, both over commerce and affairs of state, including immigration.<sup>161</sup> Reposing these powers in the central government

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

156. *Cf. Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720, 744 n.50 (Md. 1989) (“The question of whether state legislation intrudes upon the dormant foreign relations power is closely related to the question of whether such laws violate the negative implications of Congress’s [sic] power to regulate foreign commerce.”).

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

158. *See Federalism and Foreign Relations, supra* note 13, at 299-300 (preemption by the dormant Commerce Clause “in areas thought to require federal uniformity and responsibility [provides] a parallel solution in the at least equally sensitive foreign relations area”). *See also Recommended Analysis, supra* note 144, at 834 (advocating a similar 3-part test).

159. Indeed, early cases on state power to regulate immigration relied on Congress’ commerce power for doctrinal analysis. *See, e.g., Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875) (“the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders”); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

160. *See Henderson*, 92 U.S. at 273 (regulation of “commerce with foreign nations must of necessity be national in its character”). *See also Bd. of Trustees*, 562 A.2d at 752 (“the concerns which underlie the foreign Commerce Clause are closely related to the concerns underlying the limits on a state’s authority to affect foreign policy. The purpose behind both limitations is to prevent individual states from adversely affecting relations with foreign countries that are properly coordinated on a national level”); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (“[Subjects which] admit of only one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”).

161. *See THE FEDERALIST NO. 42* (James Madison) (“By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under

was necessary for us to coalesce into a nation, rather than remain a confederation of states.<sup>162</sup> The federal interest in these areas is so strong that states are denied power to act, even where Congress remains silent. "We need not await for an instance of actual conflict to strike down a state law which purports to regulate a subject matter which Congress simultaneously aims to control. The opportunity for potential conflict is too great to permit the operation of the state law."<sup>163</sup>

This theory of constitutional preclusion of state immigration laws was gaining strength until the mid-1970s. Although the Court had never formally announced such a principle,<sup>164</sup> Louis Henkin echoed a widely-shared view that it had "become part of the Constitution."<sup>165</sup> However, doctrinal development suffered a setback in 1976 in *De Canas v. Bica*.<sup>166</sup> In upholding a California law forbidding the employment of undocumented aliens, the Supreme Court stated that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [Congress'] constitutional power, whether latent or exercised."<sup>167</sup> Many commentators viewed *De Canas* as redirecting the supremacy inquiry away from a theory of "dormant" immigration powers and toward standard preemption by positive law.<sup>168</sup>

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interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. . . . Whatever the legal consequences might have been, other consequences would probably have resulted, of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.").

162. "[O]ne of the principal reasons for summoning the Constitutional Convention of 1787 was to deal with the problems created by the degree of autonomy conferred on the states in both domestic and foreign matters by the Articles." *Recommended Analysis*, *supra* note 144, at 832.

163. *Bethlehem Steel v. Board of Comm'rs*, 80 Cal. Rptr. 800, 804 (Cal. Ct. App. 1969) (quoting *Purdy and Fitzpatrick v. State*, 456 P.2d 645, 652 (Cal. 1969)).

164. The doctrine did have its advocates on the Court, however. *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring) (relying on "the basic allocation of power between the states and the nation" in finding a state foreign-beneficiary escheat law unconstitutional).

165. FOREIGN AFFAIRS, *supra* note 5, at 238.

166. 424 U.S. 351, 355 (1976).

167. 424 U.S. at 355.

168. *See, e.g., Robert S. Catz & Howard B. Lenard, The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295, 306 (1977) [hereinafter *Demise of Implied Preemption*]. *See also Toll v. Moreno*, 458 U.S. 1, 26 (1982) (Rehnquist, J., dissenting) ("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 [state] regulations") (citation omitted).

Reports of the doctrine's demise were premature.<sup>169</sup> First, although not finding preclusion in that case, *De Canas* reaffirmed the rule that states are powerless to directly regulate immigration.<sup>170</sup> Second, the Court's holding is not necessarily incompatible with a "dormant immigration clause" theory. If for no other reason, Congress apparently authorized state action of the sort taken by California. Congressional delegation of power to the states will bypass a dormant powers claim.<sup>171</sup> Third, hints of constitutional preclusion can be found in subsequent cases. To the extent the Court has substituted other doctrines (e.g., equal protection), it has found the going rough, and often resorts to federal supremacy as a backup theory.<sup>172</sup> Finally, the Court has preserved the distinction between direct and indirect state regulation and has maintained federal exclusivity over the former.<sup>173</sup> Consequently, a "dormant powers" theory remains a useful model for analyzing state laws which have significant effect on federal immigration and foreign policy.<sup>174</sup> Unfortunately, as with the dormant Commerce Clause, the doctrine can be elusive and its outcomes unpredictable.<sup>175</sup>

#### D. The Direct-Indirect Dichotomy

No matter what doctrinal permutations and refinements are allowed, state laws regulating or uniquely burdening aliens generally receive close scrutiny. The first task in each case is to characterize the nature of the state law: i.e., whether the state is predominantly regulating national or local affairs.<sup>176</sup> If the latter, the question then becomes one of degree; whether the state's locally-directed law is

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169. See Paul Wolfson, *Preemption And Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 75 n.32 (1988).

170. 424 U.S. at 354-55.

171. Congress has, in the past, delegated immigration authority to state officials. See, e.g., *Ex parte Siebold*, 100 U.S. 371 (1879) (state judges had power under the naturalization laws to admit aliens to citizenship).

172. See *infra* Section V.

173. See *Toll*, 458 U.S. at 1; *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980).

174. None of this is to suggest that normal preemption doctrine should be ignored. If Congress legislates on a matter also covered by state law, then Congress' active powers, not merely its dormant ones, invoke the Supremacy Clause.

175. See *American Trucking Ass'n v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring) ("no body of our decisional law has changed as regularly as our 'negative' Commerce Clause jurisprudence. Change is almost its natural state").

176. A law aimed at local concerns (e.g., health and safety) would at most have an "indirect" or "incidental" effect on immigration. However, if the object of the state law were one entrusted to the national government (e.g., admission of aliens), then it would be virtually *per se* invalid as a "direct" regulation of immigration.

nonetheless burdensome on national interests.<sup>177</sup> Some cases are easy, as where the state has an avowed purpose to regulate immigration,<sup>178</sup> or where it cannot identify valid local interests. Others are more difficult, as where both local and national interests are affected. Here, the Court may examine the breadth of federal legislation in the area, both to uncover preemptive federal law and to gauge the scope of the federal interests affected. The more pervasive federal law is, or the greater its incompatibility with state law, the less likely the latter will survive. At this point, ordinary preemption doctrine and the theory of preclusion by dormant federal power merge. Even where opinions endeavor to distinguish these two theories of supremacy, it is clear that both play a role in the decision.<sup>179</sup>

A state law which avowedly regulates immigration is invalid *per se*.<sup>180</sup> Thus, the first question for any inquiry is whether a state law directly regulates immigration or merely has an incidental effect on it. The problem in distinguishing between direct and indirect regulation of foreign affairs is illustrated by the conflicting decisions in *Bethlehem Steel Corp. v. Board of Commissioners*,<sup>181</sup> and *K.S.B. Technical Sales Corp. v. North Jersey Water Supply Commission*.<sup>182</sup> In the former, the court found California's "Buy-American" statute unconstitutional because it "usurp[ed] . . . the power of the federal government to conduct foreign trade policy" and "ha[d] a direct impact upon foreign relations."<sup>183</sup> In contrast, the court in *K.S.B.* found a similar New

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177. Justice Rehnquist has stated: "neither Congress' unexercised constitutional power over immigration and naturalization nor its exercise of that power in passing the INA precludes the States from enforcing laws and regulations that prove burdensome to aliens." *Toll v. Moreno*, 458 U.S. 1, 27 (1982) (Rehnquist, J., dissenting). But it is not the burden on aliens that matters, rather the burden on federal interests.

178. Where the state's purpose is the same as Congress' as manifested in federal legislation, the state law may be preempted quite apart from any theory of constitutional preclusion. See *Scheneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-09 (1988) (Michigan law governing natural gas rates preempted because an existing federal scheme was "directed at" the identical problem and was enacted for the same "central purpose"); *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941) (state law preempted where the "basic subject of the state and federal laws is identical").

179. See, e.g., *Hines*, 312 U.S. at 64-66.

180. *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

181. 80 Cal. Rptr. 800 (Cal. Ct. App. 1969).

182. 381 A.2d 774 (N.J. 1977), *appeal dismissed*, 435 U.S. 982 (1978).

183. *Bethlehem Steel*, 80 Cal. Rptr. at 803, 805. It should be noted that California's "Buy-American" statute, invalidated in *Bethlehem Steel*, was modeled after similar federal legislation. See *Buy American Act*, 41 U.S.C. § 10a (1965), 63 Stat. 1024; Exec. Order No. 10,582, 19 Fed. Reg. 8723 (1954). Its harmony with federal law was insufficient to save it because the state had still intruded upon an area of exclusive federal concern.

Jersey statute valid because it did not have “a significant and direct impact upon foreign affairs.”<sup>184</sup> Since the directness of impact can be dispositive, yet often difficult to ascertain, it is not surprising that different results obtain in similar cases.

One way to tell whether a state law is a direct or indirect regulation of immigration is by looking at its purpose. Where the legislature candidly acknowledges an objective to control the influx of aliens, or to regulate their residency within the state, then “direct” regulation is found.<sup>185</sup> In contrast, where a plausible local objective is convincingly stated, such as health and safety or conservation of state resources, then any impact on aliens would be considered “indirect” or incidental.<sup>186</sup> The latter does not provide talismanic state immunity, for almost any law can be couched in terms of legitimate local concern. Indirect immigration laws are also invalid where the local interest is illusory or poorly served, or where the impact on federal interests is substantial.

Other indicators of direct regulation are a statute’s “history and operation.”<sup>187</sup> For instance, a law passed in response to policies of the federal government or foreign nations, with which the state disagrees, is an usurpation of national prerogative.<sup>188</sup> Similarly invalid are laws designed to “cure” defects in federal policy or enforcement.<sup>189</sup> If state law directly regulates immigration, it is invalid no matter how great the state’s interests. Power does not spring from interest or need, even great interest or great need.<sup>190</sup>

184. 381 A.2d at 784. The court also found that the state was acting as a market participant and was therefore immune from constitutional preclusion. *Id.* at 788.

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

186. *Compare* *Buck v. Kuykendall*, 267 U.S. 307 (1925), *with* *Bradley v. Pub. Utilities Comm’n*, 289 U.S. 92 (1933). In the former, the denial of a common carrier license was declared violative of the dormant Commerce Clause because the state’s purpose was to regulate interstate competition. In the latter, a similar denial was upheld because the state’s purpose was to prevent overuse of congested highways.

187. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968); *See also* *Board of Trustees v. Mayor of Baltimore*, 562 A.2d 720, 745 (Md. 1989) (quoting *Zschernig*, 389 U.S. at 432).

188. In *Zschernig*, Oregon amended its succession laws to prevent inheritance by nationals of Nazi Germany and communist countries. *Zschernig*, 389 U.S. at 429. The Supreme Court stated the Oregon statute “seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.” *Id.*

189. *See* *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980) (invalidating exclusion of Iranian students from state university in response to taking of American hostages).

190. *See* *Henderson v. New York*, 92 U.S. 259, 271 (1875) (“whatever may be the nature and extent of [states’ police] power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution”).

### III. Direct Regulation of Immigration

#### A. Alien Registration and Exclusion Laws

States no longer have their own immigration officers, although they once did.<sup>191</sup> They also no longer have their own alien exclusion and registration laws. These are clear examples of direct regulation of immigration forbidden to the states. This issue was first considered in *Mayor of New York v. Miln*.<sup>192</sup> State law required the master of a ship carrying aliens into the state, and the aliens themselves, to report their presence and give bond as security against their becoming a public charge. The Supreme Court upheld the law on a Commerce Clause challenge. Justice Story<sup>193</sup> vigorously dissented, stating that the law was a direct regulation of commerce.<sup>194</sup> Subsequently, the law came before the Court on at least three other occasions. The reporting requirement was again upheld in the *Passenger Cases*,<sup>195</sup> but taxes imposed on the passengers were held an invalid regulation of foreign commerce. Both that case and *Miln* were re-examined in *Henderson v. Mayor of New York*,<sup>196</sup> which found all aspects of the state immigration law unconstitutional. Quoting language from dormant Commerce Clause cases, the Court found that immigration required "a uniform system or plan" of regulation beyond the power of any state.<sup>197</sup> Since that included alien registration, states could not act even if Congress were silent. The Court reaffirmed its holding a few years later in *New York v. Compagnie Generale Transatlantique*, invalidating a state alien inspection law.<sup>198</sup>

State alien registration laws re-emerged during and after both World Wars.<sup>199</sup> A modern version was reviewed by the Supreme

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191. See *Henderson*, 92 U.S. at 260; *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1875). Apparently, some state immigration officers were under contract with the United States. See *Ekiu v. United States*, 142 U.S. 651, 656, 661 (1892) (describing authority of Secretary of the Treasury to contract with commissioner of immigration for the State of California).

192. 36 U.S. (11 Pet.) 102 (1837).

193. And Justice Marshall posthumously; he died between the first and second arguments in the case, but had made his views known to Justice Story.

194. *Miln*, 36 U.S. at 161. *Miln* was later attacked as not having commanded a majority of the Court. See *The Passenger Cases*, 48 U.S. (7 How.) 283, 429 (1849) (separate opinion of Wayne, J.).

195. 48 U.S. at 283. The *Passenger Cases* was a consolidation of an action involving the New York registration law (*Smith v. Turner*) and a similar action involving Massachusetts law (*Norris v. City of Boston*).

196. 92 U.S. 259 (1875).

197. *Id.* at 273.

198. 107 U.S. 59 (1883).

199. E.g., CONN. GEN. STAT. tit. 59 (1930), § 6042; FLA. COMP. GEN. LAWS § 2078 (1927); IOWA CODE (1939) § 503; LA. GEN. STAT. tit. 3, § 282 (Dart, 1939), 1917 La. Acts

Court in *Hines v. Davidowitz*.<sup>200</sup> The Pennsylvania Alien Registration Act required every alien within the state to carry a state identification card. After its enactment, but prior to consideration by the Supreme Court, Congress adopted its own systematic regime of alien registration.<sup>201</sup> Broadly describing the breadth of federal power, the Court held the state law preempted. Yet, it expressly did not decide whether Pennsylvania's law would have been invalid in the absence of federal legislation.<sup>202</sup>

*Hines* is best known for its vast expansion of field preemption, that branch of preemption doctrine that denies state authority whenever Congress has legislated in the area.<sup>203</sup> It appears that preemption was a convenient but not necessary basis for the decision. The federal alien registration law did not expressly preempt nor conflict with the Pennsylvania law. Nor did the Court undertake an examination of congressional intent or legislative history to find implied preemption. Rather, because the state law regulated a matter entrusted to paramount federal power, preemption was presumed.<sup>204</sup>

The Court should have taken the preclusion issue head on in *Hines*, and ruled that state registration and exclusion laws are unconstitutional whether or not Congress acts. At the very least, since states are powerless to regulate interstate migration, it would be curious that they had such power over international migration. In *Edwards v. California*,<sup>205</sup> the Supreme Court invalidated a California law that proscribed "bringing into the state any indigent person who is not a resident of the state."<sup>206</sup> On its face, the law applied to aliens as well as to residents of other states, although it was only in the latter con-

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20. Ex. Sess.; ME. REV. STAT. ch. 34, § 3 (1930); N.H. PUB. LAWS ch. 154 (1926); N.Y. [EXEC. LAW] § 10 (Consol.). Other states passed registration laws sometime later. See e.g., 1940 S.C. Acts No. 1014, § 9, p. 1939; N.C. Code §§ 193(a) to 193(h) (1939). Some municipalities did as well. See *Hines v. Davidowitz*, 312 U.S. 52, 61 (1940).

200. *Hines*, 312 U.S. at 62.

201. Act of May 31, 1870, ch. 114, 16 Stat. 140, 144 (current version at 42 U.S.C. § 1981 (1988)).

202. *Hines*, 312 U.S. at 62.

203. See S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 739-40 (1991).

204. *Id.* at 741. ("The Court emphasized that the state statute implicated the foreign affairs power, thus producing the consequence that Congress merely had to act on the subject for its statute to be deemed generously preemptive.")

205. 314 U.S. 160 (1941).

206. *Id.* at 161. Such laws had earlier been upheld in *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1853) ("a State has a right to make it a penal offence to introduce paupers, criminals, or fugitive slaves, within their borders, and punish those who thwart this policy by harboring, concealing, or secreting such persons").

text in which the case was decided. The Court held the law to be “an unconstitutional barrier to interstate commerce.”<sup>207</sup> Yet, California could no more bar non-resident aliens, including indigent aliens,<sup>208</sup> than it could non-resident citizens.<sup>209</sup> Just as our constitutional structure prohibits states from restricting domestic immigration,<sup>210</sup> it similarly denies state power over immigration from abroad.<sup>211</sup> Not only are states preempted from the field,<sup>212</sup> they are constitutionally precluded. States may not decide who shall live within their borders because the exercise of such a power is a core manifestation of sovereignty not available to them under the Constitution.

## B. State Deportation Laws

States have also had their own deportation laws. In *Chy Lung v. Freeman*,<sup>213</sup> the Court considered “a most extraordinary statute,”<sup>214</sup> under which the California Supreme Court ordered several Chinese immigrant women deported because they were “lewd and de-

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207. *Edwards*, 314 U.S. at 173. Four members of the Court would have invalidated the law as a violation of the Privileges and Immunities Clause of Art. IV. For instance, Justice Jackson was reluctant to treat human beings as commerce. *Id.* at 182. See also *New York v. Compagnie Generale Transatlantique*, 107 U.S. 59, 62 (1883) (“We conclude that free human beings are not imports or exports, within the meaning of the Constitution”).

208. Although the Supreme Court left this question open in *Henderson*, because indigent aliens were seen as a danger to the community, later cases have clarified the lack of state power. In a similar vein, states cannot bar entry of dangerous commerce any more than they can of beneficial commerce. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

209. See *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). See also *Mathews v. Diaz*, 426 U.S. 67, 85 (1986) (“there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country”); *Truax v. Raich*, 239 U.S. 33 (1915); *United States v. Hanigan*, 681 F.2d 1127, 1131 (9th Cir. 1982) (movement of aliens across border constitutes “commerce” within the meaning of the Hobbs Act, 18 U.S.C. § 1951 (1976)).

210. *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35 (1867). A right to interstate migration devolves from several constitutional provisions: the Commerce Clause, the Privileges and Immunities Clause, and the basic federal structure.

211. *De Canas v. Bica*, 424 U.S. 351 (1976). If the California law in *Edwards* was invalid under the dormant Commerce Clause because it intruded on federal power over interstate commerce, it would not be saved if that commerce had been international, rather than interstate. Indeed, Congress’ plenary power over foreign commerce tolerates lesser state interference than does its power over interstate commerce. *Barclay’s Bank v. Franchise Tax Bd.*, 114 S.Ct. 2268 (1994).

212. States “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.” *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).

213. 92 U.S. 275 (1875).

214. *Id.* at 277.



bauched.”<sup>215</sup> The Court, justly concerned about the foreign policy ramifications,<sup>216</sup> found the law unconstitutional.

Modern state deportation laws are more subtle and sophisticated than their nineteenth century antecedents. Rather than affect a deportation directly, they might induce “voluntary departure” or pressure federal authorities to do the job. An example of this is provided by the 1994 California initiative, Proposition 187. Among its provisions is a requirement that whenever any law enforcement officer or other state or local employee encounters a “suspected illegal alien,” they must “notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States.”<sup>217</sup>

This is not meant as friendly advice. Rather, it puts an entire state apparatus behind a directive to depart the country. Official written notification is coupled with the denial or withdrawal of a panoply of benefits, from education to health care. This badge and display of state authority has the avowed purpose and obvious practical impact on an order of deportation.<sup>218</sup> Persons unschooled in the intricacies of immigration law may be induced to leave the country, rather than pursue available opportunities for residency or other legal rights.<sup>219</sup> In practice, the state’s directive to “leave the United States” is similar to

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215. *Id.* at 276. The state had so little confidence that its law would survive that it did not defend it before the Supreme Court. “We regret very much, that, while the Attorney-General of the United States has deemed the matter of such importance as to argue it in person, there has been no argument in behalf of the State of California, the Commissioner of Immigration, or the Sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner; nor have we been furnished even with a brief in support of the statute of that State.” *Id.* at 277.

216. “[I]f citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress . . . can any one doubt that this matter would have been the subject of international inquiry . . . ?” *Id.* at 279.

217. CAL. WELF. & INST. CODE § 10001.5(c)(2) (Deering Supp. 1995) (requiring investigation and notification by “any public entity in this state” providing public social services). See also CAL. HEALTH & SAFETY CODE § 130(c)(2) (Deering Supp. 1995) (same for publicly-funded health care); CAL. PENAL CODE § 834b(b)(2) (Deering Supp. 1995) (same for “every law enforcement agency in California”).

218. California Governor Pete Wilson, a proponent of the initiative, expressed his hope that the measure would induce aliens to “self-deport.” G. Raine, *Wilson Leads Brown in 2nd Straight Poll in a Tight Race*, S.F. EXAMINER, Sept. 23, 1994, at A4. “Self-deportation” is in fact common among immigrants arrested by the INS, over 97.5% of whom agree to voluntary departure. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

219. A lawyer might understand that a state social worker and an INS agent have different constitutional powers, but most lay persons are unlikely to appreciate the distinction.

the archaic and discredited practices of banishment and conditional pardon.<sup>220</sup> Two centuries ago, Rhode Island adopted a similar policy of coercing undesirable (i.e., poor) immigrants to leave. Rather than deport them directly, the state merely ordered them whipped if they failed to leave voluntarily.<sup>221</sup> California's solution may be less barbaric, but no less a regulation of immigration.<sup>222</sup>

Moreover, "suspicion" is simply insufficient grounds for any order of deportation, let alone one from a state.<sup>223</sup> The vagueness inherent in such a term is magnified because of the complexity of federal immigration law. Deportability is not a simple matter, nor one that can be determined in a ministerial fashion.<sup>224</sup> There are even a variety of situations where the United States restricts departure of aliens.<sup>225</sup> Accordingly, commands to leave the country can only come from the Immigration and Naturalization Service (INS) after a "special inquiry officer [conducts] proceedings . . . to determine the deportability of an[ ] alien"<sup>226</sup> and after the alien has exhausted all available remedies, including an application for discretionary suspension of deportation.<sup>227</sup> Yet, under California law, the formalities of the INA and INS

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220. See generally *LOST CENTURY*, *supra* note 17, at 1844-45. A conditional pardon is functionally similar to banishment; persons convicted of crimes are pardoned on the condition that they leave the state or the country. *Id.*

221. See *LOST CENTURY*, *supra* note 17, at 1857.

222. Such a departure would break the continuity of residence in the country needed for various forms of relief. See, e.g., 8 U.S.C. §§ 1254 (suspension of deportation requires 7 years continuous physical presence); 1182(c) (1988) (same).

223. Cf. *Gutierrez v. City of Wenatchee*, 662 F. Supp. 821 (E.D. Wash. 1987) (local police cannot detain individual solely on basis of suspicion of violation of immigration law).

224. See *Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("[a]n illegal entrant might be granted federal permission to continue to reside in this country . . . [and because of] the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed").

225. See, e.g., 8 U.S.C. § 1185 (1988) (war or national emergency); 8 C.F.R. §§ 215.2 (1994) (departure prejudicial to interests of United States); 215.3(e) (military service); 215.3(f) (fugitive from justice); 215.3(g) (witness to a criminal case); 215.3(h) (investigations by public officials); 215.3(j) (1994) (humanitarian restrictions). These policies, when implicated, are undermined by state commands to depart the country.

226. 8 U.S.C. § 1252(b) (1988). The section further states that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." See also 8 U.S.C. § 1357(a)(1) (1988) and 8 C.F.R. § 287.1(c) (1994) which vest authority in federal immigration officers to interrogate and detain individuals reasonably believed to be in the country unlawfully.

227. See 8 U.S.C. § 1255 (1988). Applications for relief from deportation often take months or years to adjudicate. During this time, applicants are permitted to remain in the country, and may even be granted temporary employment authorization. See, e.g., 8 C.F.R. §§ 208.7, 274a.12(d) (1994).

regulations are cumbersome irrelevancies that can be dispensed with in favor of summary determinations by state employees.<sup>228</sup> If a state cannot encourage naturalization, because that is exclusively a federal prerogative,<sup>229</sup> it also cannot induce deportation.<sup>230</sup>

Another section of Proposition 187 requires public school officials to investigate the citizenship and immigration status of all pupils and their parents.<sup>231</sup> In the case of students unable to establish legal residency, the school is to "accomplish an orderly transition to a school in the child's country of origin."<sup>232</sup> State-mandated transfer of an alien child to a school in her home country is a form of deportation.

Justice Holmes once defined deportation as "simply a refusal by the government to harbor persons whom it does not want."<sup>233</sup> That seems to well describe the sentiment of the foregoing laws and puts them beyond the state's police power. They stand in contrast to state requests for federal assistance. For instance, under recent agreements between the federal government and the States of Florida and New York, the INS has begun to deport alien felons in state prisons.<sup>234</sup> Legislation was introduced in the 103rd Congress to codify federal au-

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228. Under 8 C.F.R. § 242.1(a) (1994), "[e]very proceeding to determine the deportability of an alien in the United States is commenced by the filing of an Order to Show Cause with the Office of the Immigration Judge." The alien is given written notice advising her of: (1) the nature of the proceedings; (2) the legal authority for the proceeding; (3) the acts alleged to have given rise to deportability; and (4) the charges and statutory provisions claimed to have been violated. INA § 242B, 8 U.S.C. § 1252b (1988). Every allegedly deportable alien is entitled under the Fifth Amendment to a fair proceeding before being instructed to depart the country. *See* *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (aliens "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"); *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903); *Ramirez v. INS*, 550 F.2d 560, 563 (9th Cir. 1977) (deportation proceeding must include a "full and fair hearing").

229. *See* *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (encouraging naturalization was an impermissible purpose for a state since Congress had plenary authority in such matters). A state cannot naturalize or denaturalize persons. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817).

230. *See* *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring) (finding constitutional infirmity in "any attempt to . . . involve the State in the administration of the immigration laws"); *id.* at 242 n.1 (Burger, C.J., dissenting) ("A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive").

231. CAL. EDUC. CODE § 48215(b)-(d) (Deering Supp. 1995).

232. CAL. EDUC. CODE § 48215(f) (Deering Supp. 1995).

233. *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

234. *See Florida Will Deport Illegal Aliens Jailed for Nonviolent Crimes*, N.Y. TIMES, June 9, 1994, at A20; Ian Fisher, *Pataki Announces Aliens' Expulsion*, N.Y. TIMES, Aug. 29, 1995, at A1.

thority into law.<sup>235</sup> Also, as part of Immigration Reform and Control Act (IRCA),<sup>236</sup> Congress authorized payments to states to help with the cost of incarcerating aliens.<sup>237</sup> The State Criminal Alien Assistance Program (SCAAP)<sup>238</sup> provides fiscal relief to states affected by large populations of criminal aliens in state correctional facilities. These examples of “cooperative federalism” are one thing; state assumption of federal immigration power is quite another. States may neither deport aliens, nor effectuate their departure through unilateral means.

In striking California’s deportation law in *Chy Lung*, Justice Miller asked, “If the [United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?”<sup>239</sup> Justice Douglas answered that question in *United States v. Pink*.<sup>240</sup> “The nation as a whole would be held to answer if a State created difficulties with a foreign power.”<sup>241</sup> Deportation is a serious matter, often involving sensitive issues of foreign policy and diplomacy.<sup>242</sup> No state has the power to regulate or bind the nation in such matters.

### C. Enforcement of Federal Immigration Law

In contrast to implementing their own immigration policies, states may support federal policy by enforcing federal laws. This might occur in the spirit of “cooperative federalism,” as in the administration

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235. See Criminal Aliens Federal Responsibility Act of 1994, 8 U.S.C. § 1365 (U.S.C.A. 1995). The bill would require the federal government to accept its responsibility for incarcerated aliens, either by putting them in federal prisons or by reimbursing states for the costs of state and local incarceration. See also H.R. 3355 (1994) Violent Crime Control and Law Enforcement Act of 1994, 140 CONG. REC. S6018-02, § 2403, which would allow the Attorney General to (A) “provide . . . compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of . . . undocumented criminal alien[s]” or (B) “take the undocumented criminal alien into the custody of the Federal Government and incarcerate such alien.”

236. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

237. 8 U.S.C. § 1365(a) (1988) (“Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for the costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State”).

238. 8 U.S.C. § 1365 (1988).

239. *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875).

240. 315 U.S. 203 (1942).

241. *Id.* at 232.

242. Deportation can also implicate international law. See, e.g., United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (prohibiting the return or *refoulement* of refugees).

of joint federal-state benefits programs,<sup>243</sup> or informally through the sharing of information between state and federal authorities.<sup>244</sup> State law enforcement agencies also cooperate with INS through joint operations and by releasing persons in state custody to INS for deportation proceedings.<sup>245</sup> These cooperative ventures raise few if any federalism concerns. The problem arises when states embark on unilateral programs of immigration enforcement. This appears in state enforcement of federal law and state criminalization of federal immigration offenses.

### 1. *Enforcement of Civil Immigration Laws*

In *Gonzales v. City of Peoria*,<sup>246</sup> the Ninth Circuit held that states could not enforce the civil provisions of federal immigration law.<sup>247</sup> It based its reasoning on preemption grounds—the pervasive federal regulatory scheme relating to civil enforcement had occupied the field to the exclusion of state authority.<sup>248</sup> But preclusion of state power goes beyond standard preemption doctrine; states cannot enforce immigration law because they have no power to do so. Enforcement actions would impermissibly “involve the State in the administration of the immigration laws.”<sup>249</sup>

State enforcement of federal immigration laws also presupposes that local officials are competent to determine immigration status. Whether an alien is “legal” or “illegal” depends upon a variety of factors beyond mere definitions contained in the INA. For instance,

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243. See *infra* note 351.

244. See generally Maryellen Fullerton, Noah Kingstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 AM. CRIM. L. REV. 425, 426 (1986); 2 CHARLES GORDON AND STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE 2, § 44.04(3)(c) (1991). The INS also cooperates with states in the verification of eligibility for benefits program. See, e.g., the SAVE program (“System of Alien Verification for Eligibility”), IRCA, § 121, 100 Stat. 3359, 3384-86 (1986).

245. See *supra* note 234. INS officials may put an “immigration hold” on persons in state custody, thereby preventing their release until a transfer to INS custody can be arranged.

246. 722 F.2d 468 (9th Cir. 1983).

247. *Id.* at 474-75. The court found that the civil enforcement provisions of the INA were so comprehensive as to imply congressional occupation of the field and ouster of state action. In contrast, the criminal enforcement scheme was not so pervasive as to exclude state participation. See *infra* note 279 and accompanying text.

248. *Gonzales*, 722 F.2d at 475.

249. *Plyler v. Doe*, 427 U.S. 202, 236 (1982) (Blackmun, J., concurring). The policy was revised in 1983 by Attorney General William French Smith to permit joint federal-state law enforcement operations, and to encourage assistance by state officials where they were permitted to enforce federal law. *Id.*

many persons without standard immigration documents may nonetheless have a claim of right to residency, or may be in the process of applying for asylum,<sup>250</sup> adjustment of status,<sup>251</sup> or relief from deportation.<sup>252</sup> In addition to these statutory routes for changed status, INS may simply use its discretion not to act against an otherwise deportable alien.<sup>253</sup> Thus, "establishing [whether an individual] is not a resident or otherwise lawfully present in this country . . . could entail a herculean task of reviewing voluminous documentation of separate distinct governmental entities to determine whether a defendant has received a visa, temporary or permanent resident alien status, etc."<sup>254</sup> The problem is complicated by the intricacies of the INA, which is recognized as "second only to the Internal Revenue Code in complexity,"<sup>255</sup> and bears a "striking resemblance" to "Minos' Labyrinth in ancient Crete."<sup>256</sup>

As noted above, states may not adopt inspection, registration, or deportation laws in the pursuit of their own immigration policies. State investigation of immigration status raises similar problems. For instance, under Proposition 187, local elementary and secondary school officials are required to investigate the residency status of parents,<sup>257</sup> a fact which has no bearing on the education rights of chil-

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250. See, e.g., INS Form I-589 P 4 (Request for Asylum in the United States). The INS generally does not commence departure proceedings until after an application is denied. 8 C.F.R. § 208.8(f)(4) (1985) (giving the district director discretion to grant voluntary departure or to commence deportation proceedings upon the denial of the applicant's request for asylum).

251. 8 U.S.C. § 1255 (1988).

252. See, e.g., 8 U.S.C. §§ 1251(c) (waiver of grounds for deportation), 1253(h) (withholding of deportation to prevent persecution), 1254 (suspension of deportation), 1259 (1988) (revised record of admission). Under 8 C.F.R. § 242.17(a)(1994), immigration judges are required to inform immigrants of "apparent eligibility" for relief from deportation where the record indicates a reasonable possibility of eligibility.

253. See, e.g., *Antillon v. Dept. of Employment Sec.*, 688 P.2d 455 (Utah 1984) (deportable alien's "residence was . . . under color of law because the INS knew of it and acquiesced in it by exercising its discretion not to enforce the law"); *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978) (INS issued an official letter to undocumented alien that, for humanitarian reasons, the agency did not contemplate enforcing her departure).

254. *People v. Adolfo*, 275 Cal. Rptr. 619, 623 (Cal. Ct. App. 1990). *Adolfo* held that because verification would so burden law enforcement agencies, the burden of establishing legal status could be placed on the individual.

255. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (citing *E. HULL, WITHOUT JUSTICE FOR ALL* 107 (1985)).

256. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

257. See CAL. EDUC. CODE § 48215(d) [Proposition 187, Section 7].

dren.<sup>258</sup> Children may be citizens, even if their parents are “illegal.”<sup>259</sup> Also, under Proposition 187, investigation of immigration status is required of persons providing public social services,<sup>260</sup> public health care services,<sup>261</sup> elementary and secondary education,<sup>262</sup> and higher education.<sup>263</sup> Nearly every public employee in the state has been turned into an immigration officer with power to investigate, provide immigration advice,<sup>264</sup> report to the Attorney General and INS, and “provide any additional information that may be requested.”<sup>265</sup> It is not uncommon for state authorities to notify immigration authorities of aliens in their custody,<sup>266</sup> but this law goes much further than that. It requires state officers to undertake that investigation.<sup>267</sup> In essence, California will have a hundred thousand junior immigration officers,<sup>268</sup> each one of them required to be fluent in immigration law and policy. Yet, “the structure of [federal] immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.”<sup>269</sup> Thus, under the guise of inviting cooperation with federal policies,

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258. *Plyler v. Doe*, 457 U.S. 202 (1982); *Darces v. Woods*, 679 P.2d 458 (Cal. 1984). See also *Oyama v. California*, 332 U.S. 633, 647 (1948) (invalidating a law classifying a citizen child on the basis of his father’s alien status); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (unfairness of penalizing illegitimate children for conduct of parents).

259. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States . . .”). See *Birthright Citizenship*, *supra* note 112.

260. CAL. WELF. & INST. CODE § 10001.5 (Section 5) (Deering Supp. 1995).

261. CAL. HEALTH & SAFETY CODE § 130 (Section 6) (Deering Supp. 1995).

262. CAL. EDUC. CODE § 48215 (Section 7) (Deering Supp. 1995).

263. CAL. EDUC. CODE § 66010.8 (Section 8) (Deering Supp. 1995).

264. See, e.g., CAL. WELF. & INST. CODE § 10001.5(c)(2) (“notify the person of his or her apparent illegal immigration status, and that the person must either obtain legal status or leave the United States”).

265. CAL. GOV’T CODE § 53069.65 (Deering Supp. 1995).

266. See *American G.I. Forum v. Miller*, 267 Cal. Rptr. 371 (Cal. Ct. App. 1990), upholding CAL. HEALTH AND SAFETY CODE § 11369 (“When there is reason to believe that any person arrested for violation of [certain narcotics offenses] may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters”); *Gates v. Superior Court*, 238 Cal. Rptr. 592, 600 (Cal. Ct. App. 1987).

267. Under federal Medicaid and AFDC programs, states are required to verify the immigration status of all noncitizens seeking benefits. 42 U.S.C. § 1320b-7(a). But Congress has established a verification process far different from that required under Proposition 187. See *supra* note 244.

268. See generally Maurice A. Roberts, *Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act*, 21 INT’L LAW. 1013 (1987).

269. *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring).

state enforcement of the INA would invite errors and inevitably disserve federal law.<sup>270</sup>

“Demanding documentation to indicate . . . legal status”<sup>271</sup> could also frustrate the confidentiality provisions of the IRCA.<sup>272</sup> Interrogation by local officials could also discourage lawful attempts by aliens to obtain residency, asylum, and assert other legal rights. For instance, under Proposition 187, this interrogation must be done by “every law enforcement agency in California,” including personnel untrained for such tasks.<sup>273</sup> The city dog catcher of National City, California has already taken it upon himself to detain persons he believes are undocumented.<sup>274</sup> Yet, investigation of immigration status by local police is often inaccurate and can have serious unintended consequences.<sup>275</sup>

Does interrogation of aliens by local police (and other civil servants) promote or at least have no effect on federal immigration and foreign policies? Or does it substantially interfere with those policies? The Supreme Court has answered these questions, stating that state documentation laws “would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands.”<sup>276</sup> The demand that persons produce immigration documenta-

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270. As has been justly observed, “[S]tate and local arrests for immigration violations hinder the federal interest in uniform immigration enforcement.” Cecilia Renn, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1024 (1987) [hereinafter *Criminal Immigration Statutes*].

271. CAL. PEN. CODE § 834b(b)(1) (Deering Supp. 1995) [Proposition 187].

272. 8 U.S.C. § 1255a(c)(5). These provisions provide that information submitted in applications for legalization is confidential and is not available to any division of the Department of Justice without the consent of the alien.

273. In contrast, “[INS] agents receive intensive instruction in immigration and naturalization law; are trained in the service operational tactics, and receive extensive field training. Those agents who will be operating near the United States-Mexican border are required to be fluent in Spanish and are trained to be sensitive to the Mexican culture.” *People v. Barajas*, 147 Cal. Rptr. 195, 205 (Cal. Ct. App. 1978) (Reynoso, J., dissenting).

274. *City Sanctuary Resolutions and the Preemption Doctrine: Much Ado About Nothing*, 20 LOY. L.A. L. REV. 513, 558 n.225 (1987) [hereinafter *City Sanctuary Resolutions*].

275. “Police regularly ask about immigration status and check off the ‘undocumented person’ box based on the arrestee’s Hispanic appearance, command of English, and accent. . . . [Yet,] it is often impossible for police to determine the immigration status or citizenship of many persons, either by soliciting such information, inspecting identification, or by observation. This collection of information can result in a false record that an arrestee is an undocumented person. Due to entry into a national computer system, this information can follow the arrestee throughout his life.” *American G.I. Forum v. Miller*, 267 Cal. Rptr. 371, 373 (Cal. Ct. App. 1988). However, at least in California, these problems are apparently outweighed by countervailing governmental interests. *Loder v. Municipal Court*, 553 P.2d 624, 630-37 (Cal. 1976).

276. *Hines v. Davidowitz*, 312 U.S. 52, 71 (1941).



tion to state officials "is thought to be a feature that best lends itself to tyranny and intimidation."<sup>277</sup> For this reason, if no other, treatment of foreign nationals is "one of the most important and delicate of all international relationships."<sup>278</sup>

## 2. Enforcement of Federal Criminal Laws

Although state enforcement of the civil provisions of federal law was held preempted in *Gonzales*, the court upheld state power to enforce the criminal provisions of the INA.<sup>279</sup> This authority means that local police may arrest and detain (but not prosecute) persons suspected of violating the criminal provisions of federal immigration law; e.g., illegal entry or re-entry after deportation.<sup>280</sup> The court employed standard preemption doctrine in reaching this result, finding no congressional intent to limit enforcement to federal officers.<sup>281</sup> The court noted an identity of purpose between state and federal enforcement, but did not consider whether state enforcement might nonetheless obstruct federal policies.<sup>282</sup>

As a general proposition, state and local police may,<sup>283</sup> but need not,<sup>284</sup> enforce federal criminal law. This is usually accomplished in

277. *Id.* n.32.

278. *Id.* at 64. "State and local law enforcement officials should not have the authority to stop, detain, interrogate, or arrest individuals solely on suspicion of an immigration violation. Unlike state and local enforcement of other federal criminal statutes, local arrests for immigration violations do not necessarily effectuate federal policy." *Criminal Immigration Statutes*, *supra* note 270, at 1024.

279. 722 F.2d 468, 474-75 (9th Cir. 1983). The court found the criminal enforcement scheme in the INA was not so pervasive as to exclude state participation. The same result was reached in *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984), and *People v. Barajas*, 147 Cal. Rptr. 195 (Cal. Ct. App. 1978). But other federal courts have reached opposite conclusions. *Velasquez v. Ackerman*, Civ. No. C-84-20723 (N.D. Cal. 1992) (consent decree) (described in Ignatius Bau, *Comments by Ignatius Bau*, 7 LA RAZA L.J. 115 (1994) [hereinafter *Comments of Bau*]); *Vivanco-Zepeda v. Fish*, No. C82-1199C (W.D. Wash. Jan. 13, 1984) (consent decree) (described in *Criminal Immigration Statutes*, *supra* note 270, at 1003 n.21); *Nunez v. Sanders*, No. PB-C-82-228 (E.D. Ark. Dec. 18, 1983) (consent decree) (described in *Criminal Immigration Statutes*, *supra* note 270, at 1003 n.21).

280. Persons overstaying visas, etc., are at most civilly deportable. Local police may not enforce immigration laws against them.

281. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983).

282. *Id.* at 474.

283. *Ker v. California*, 374 U.S. 23, 31 (1963); *Miller v. United States*, 357 U.S. 301, 305 (1958); *United States v. Di Re*, 332 U.S. 581, 589 (1948).

284. Enforcement of other jurisdiction's criminal laws is not required either as a matter of international law or federalism. See *Testa v. Katt*, 330 U.S. 386 (1947).

joint state-federal police actions.<sup>285</sup> It is rare for local police to undertake such enforcement without federal participation, but it is presumed valid when it occurs. Is there anything about federal immigration laws that counsel a different result? For one thing, criminal enforcement is direct regulation; its sole object is to implement immigration statutes. Unlike narcotics trafficking, for instance, immigration is not an area where state and federal governments have concurrent interests and power.<sup>286</sup> Congress could, of course, delegate enforcement powers to the states. Where it has done so, it is usually pursuant to strict guidelines.<sup>287</sup> But it has not done so regarding the enforcement of federal immigration law.<sup>288</sup> Indeed, in 1978 the Attorney General requested state law enforcement agencies not to arrest persons for immigration offenses.<sup>289</sup> Absent delegation and guidance, state enforcement of federal law impedes federal control.

Formulation of public policy occurs not only in the enactment of legislation, but in its enforcement as well.<sup>290</sup> The procedures for arrests and detention by local police, and their validity, are a function of

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285. See *Elkins v. United States*, 364 U.S. 206, 211 (1960) (describing the "entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity").

286. There is a distinction between arrests for immigration offenses and arrests for other criminal activity where immigration status is a relevant concern. Persons arrested for ordinary criminal violations may be ineligible for bail, parole, or other considerations if they are not likely to remain in the country. See *Van Atta v. Scott*, 613 P.2d 210, 216 (Cal. 1980); *People v. Sanchez*, 235 Cal. Rptr. 264, 266 (Cal. Ct. App. 1987). The state has a legitimate interest here. Other than for a bootstrapping argument, the state does not have a similar interest in making arrests for immigration violations.

287. See generally Harold Krent, *Legal Theory: Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U.L. REV. 62, 81-82 (1990). See also 8 U.S.C. § 1255(a) (1988) (delegation of limited authority to states regarding adjustment of alien status).

288. *Doe v. Plyler*, 458 F. Supp. 569, 592 (E.D. Tex. 1978), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982).

289. 60 Interpreter Releases 172, 172-73 (Mar. 4, 1983).

"Attorney General [Griffin Bell] stated that the Department would continue to urge state and local police forces to observe the following guidelines:

1. Do not stop and question, detain, arrest or place 'an immigration hold' on any persons not suspected of crimes, solely on the grounds that they may be deportable aliens;

2. Upon arresting an individual for a non-immigration criminal violation notify the Service immediately if it is suspected that the person may be an undocumented alien so that the Service may respond appropriately.

INS officials will continue to work with state and local law enforcement officials to carry out this policy."

*Id.*

290. See *Criminal Immigration Statutes*, *supra* note 270, at 1014-15 ("The police officer on the street has considerable discretion and makes federal immigration policy every time he stops, arrests, or ignores people who appear to be undocumented aliens").

state law, even when enforcing federal criminal statutes.<sup>291</sup> Police authority and practices vary from state to state,<sup>292</sup> and certainly from federal operations.<sup>293</sup> Criminal enforcement can also attract foreign protest.<sup>294</sup> Thus, unsupervised enforcement by local police not only undermines the constitutional and pragmatic requirements for “uniform” immigration laws,<sup>295</sup> it runs the risk of complicating the nation’s diplomatic relations.<sup>296</sup> “Effectuation of federal immigration policy is not a matter that can be left to the vagaries of state arrest and detention law nor to the discretion of the local police officer.”<sup>297</sup>

The perils of state enforcement of immigration laws is illustrated by *Gates v. Superior Court*.<sup>298</sup> Officers of the Los Angeles Police Department (LAPD) detained a permanent legal resident for jaywalking. After issuing a citation, the officers arrested and booked him on suspicion of using a false alien registration receipt (green card), a federal felony.<sup>299</sup> They held the suspect without bail and turned him over to INS officials two days later. An INS agent examined the suspect’s green card, found it to be valid, and ordered him released. Still, the arresting officer testified that his inspections were to the contrary and “would again arrest an individual presenting the card as genuine.”<sup>300</sup> The court noted that LAPD arrest and detention procedures differed from those of the INS. Yet, the court stated, “there is no reason why the LAPD should provide a suspected illegal alien the same statutory

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291. *Miller v. United States*, 357 U.S. 301, 305 (1958); *Ker v. California*, 374 U.S. 23, 37 (1963); *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983); *Criminal Immigration Statutes*, *supra* note 270, at 1004 n.22.

292. *Criminal Immigration Statutes*, *supra* note 270, at 1002-03 n.20. Some states prohibit their police from enforcing immigration statutes. *See, e.g.*, OR. REV. STAT. § 181.850 (1) (1987 c.467 § 1) (“No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship residing in the United States in violation of federal immigration laws”); Executive Order No. 257, Commonwealth of Massachusetts, Executive Department (Oct. 4, 1985) (gubernatorial order prohibiting state agencies from investigating citizenship or residency status of any person) (cited in Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219, 239 n.141 (1991) [hereinafter *Public Benefits*]).

293. *See Criminal Immigration Statutes*, *supra* note 270.

294. *See supra* notes 118-124.

295. *Cf.* U.S. CONST. art. I, § 8, ¶ 4.

296. *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) (treatment of foreign nationals is “one of the most important and delicate of all international relationships”).

297. *People v. Barajas*, 147 Cal. Rptr. 195, 212 (Cal. Ct. App. 1978) (Reynoso, J., dissenting).

298. 238 Cal. Rptr. 592 (Cal. Ct. App. 1987).

299. 18 U.S.C. § 1426(b) (1994).

300. 238 Cal. Rptr. at 602.

due process rights the INS must provide before deporting or excluding such a person.”<sup>301</sup>

Rather than facilitate cooperation with federal officers and policies, state enforcement of immigration laws virtually assures obstruction of federal policies. For instance, alienage and lack of identification alone are not enough to create a reasonable suspicion of illegal entry under federal law.<sup>302</sup> But it is not clear when such reasonable suspicion arises under state law.<sup>303</sup> A loose state “probable cause” standard would seem to invite harassment of ethnic minorities and other persons who “look foreign.”<sup>304</sup> Using state standards is also problematic since “probable cause to suspect criminal immigration violations is difficult to distinguish from probable cause to suspect civil violations.”<sup>305</sup> Under federal law the two are closely related and may overlap.<sup>306</sup> Yet states cannot enforce civil immigration laws.<sup>307</sup> The dichotomy drawn in *Gonzales* between civil and criminal provisions is supported neither by constitutional theory nor by the reality of the INA.

Interrogation of suspected aliens by local police for immigration violations could hamper federal investigations: by tainting evidence

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301. 238 Cal. Rptr. at 599. *See also* 238 Cal. Rptr. at 600 (“it makes no sense to require the LAPD, which concededly neither is nor should be involved in the admission, exclusion or deportation of aliens, to abide by the same regulations applicable to INS agents in the administration of these civil functions of the INA”).

302. *Gonzales v. City of Peoria*, 722 F.2d 468, 476-77 (9th Cir. 1983).

303. Federal immigration officials are empowered to arrest aliens without a warrant (8 U.S.C. § 1357(a)(2) (1994)), but local police need probable cause. *Gates v. Superior Court*, 238 Cal. Rptr. 592, 597 (Cal. Ct. App. 1987). A warrantless arrest by local police could easily jeopardize an otherwise valid prosecution. Moreover, “an INS agent must make two determinations before taking an alien into custody for an immigration violation: alienage and deportability” (*Criminal Immigration Statutes, supra* note 270, at 1006 n.26), but a state officer need only have a suspicion of illegal entry.

304. This is apparently a common practice in areas that permit local immigration enforcement. For instance, in *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973), an Oceanside police officer “testified that he made it a practice to stop ‘all cars with Mexicans in them that appear to be sitting and packed in.’” *Id.* at 860. Yet, the court observed, “[i]t is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers.” *Id.* The stopped suspect was not even of Mexican origin, but a naturalized citizen born in Iraq. *Id.* n.1. The court sharply criticized the practice of stopping dark-skinned persons, in the search for “illegal aliens,” on the mere basis that they looked suspicious. “The ‘furtive gesture’ syndrome has been overextended.” *Id.* at 861 n.4.

305. *Criminal Immigration Statutes, supra* note 270, at 1005-06.

306. An alien who is “illegally present” in the country is committing a civil violation of the immigration laws. 8 U.S.C. § 1357(a) (1994). An alien who illegally enters the country commits a misdemeanor. 8 U.S.C. § 1325 (1994).

307. *See Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983).

obtained or arrests made, by warning suspects,<sup>308</sup> by maintaining physical custody,<sup>309</sup> by sequestering documents,<sup>310</sup> by communicating with foreign governments,<sup>311</sup> and by straining relations with them.<sup>312</sup> Indeed, state laws of this sort have a penchant for heightening tensions with foreign governments.<sup>313</sup> The relation of local enforcement of immigration measures to foreign affairs is underscored when heads of foreign states lodge official protests with the United States government regarding the treatment of their nationals. Such protests have been filed from time to time by foreign governments. A particularly volatile situation erupted when federal authorities turned Cuban emigres over to Florida for prosecution under the Florida Territorial Waters Act.<sup>314</sup> The lack of federal immigration laws for most of our history illustrates the sensitivity of the issue and our national reluctance to so encumber foreign relations.<sup>315</sup>

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308. Proposition 187, § 834b(b)(2) requires state authorities to “notify [a suspected] person of his or apparent status as an [unlawfully present] . . . alien [and that] he or she must either obtain legal status or leave the United States.” This notification could alert persons to potential problems with INS, thus thwarting their enforcement efforts. In *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982), the Fifth Circuit ruled that merely warning an alien of the presence of immigration officers and thereby aiding his escape is within the scope of activity prohibited by the INA under 8 U.S.C. § 1324(a)(3). *Id.* at 1072.

309. *Gates v. Superior Court*, 238 Cal. Rptr. 592 (Cal. Ct. App. 1987).

310. Section 9 of Proposition 187 (adding CAL. GOV'T CODE § 53069.65), which requires the California Attorney General to “maintain[] on-going and accurate records of . . . reports.” Those reports consist of information obtained during investigation. This could hamper the record keeping requirements of federal law.

311. The verification requirements of state law may require local law enforcement to communicate with foreign governments, perhaps frustrating federal efforts to do so. Does this communication require emissaries, agreements, technological arrangements? All are constitutionally prohibited. U.S. CONST. art. I, § 10. It “was one of the main objects of the Constitution . . . to cut off all communications between foreign governments, and the several state authorities.” *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840).

312. *See New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 969 (N.Y. 1977) (municipal ban on employment advertising for South Africa-based companies was invalid because it “might have been considered offensive by the Republic of South Africa and . . . an embarrassment to those charged with the conduct of our Nation's foreign policy”). *See also Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875) (“can any one doubt that [disrespectful treatment of foreign nationals] would . . . [be] the subject of international inquiry, if not of a direct claim for redress? . . . If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government?”).

313. *See Federalism and Foreign Relations*, *supra* note 13, at 251 n.17.

314. *See Federalism and Foreign Relations*, *supra* note 13, at 312-14 (describing the Act as leading to reprisals by Fidel Castro and an investigation by the United Nations Security Council).

315. *See Hines v. Davidowitz*, 312 U.S. 52, 70-72 (1941).

### 3. *State Criminal Immigration Laws*

Even accepting the validity of state arrests for federal immigration offenses, it is another matter when states make immigration violations a separate state offense. For instance, Proposition 187 penalizes the manufacture or use of false citizenship and immigration documents.<sup>316</sup> First, as a matter of ordinary preemption, these provisions duplicate comprehensive federal law which does not admit of supplementary state regulation.<sup>317</sup> Second, the state sanctions were designed to augment federal immigration laws. This creates a possible conflict with federal jurisdiction and substantive law. Because the California initiative creates new state offenses, persons may be held in custody for state trial. Yet, a "person arrested [for immigration violations] shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States."<sup>318</sup>

False citizenship and immigration papers may be used to gain entry, or the fruits of entry, into the country. They include passports, work permits, alien registration cards, and other federal documents which are heavily regulated by Congress and federal agencies.<sup>319</sup> Under Proposition 187, the same activity prohibited by Congress is now also a state offense.<sup>320</sup> Persons entering the United States through California without proper documentation necessarily violate state law.<sup>321</sup> However, a state cannot criminalize immigration offenses.<sup>322</sup> Moreover, the state offense is a felony,<sup>323</sup> while obtaining entry by false or misleading representations is typically only a misdemeanor under federal law.<sup>324</sup>

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316. CAL. PEN. CODE §§ 113 and 114 (Deering Supp. 1995) [Prop. 187, Sections 2 and 3].

317. See 8 U.S.C. § 1324c (1994) (use of false documents to obtain benefits); 18 U.S.C. ch. 75, ("Passports and Visas") commencing with § 1541; § 1542 (False statement in application and use of passport); § 1543 (Forgery or false use of passport); § 1544 (Misuse of passport) (1994).

318. 8 U.S.C. § 1357(a)(4) (1994).

319. See 18 U.S.C. § 1426 (using a false or forged alien registration receipt card (green card) is conduct subject to fines not more than \$5000, or imprisonment not more than five years, or both.).

320. Penal Code section 113 would make it a felony to manufacture, distribute or sell documents concealing citizenship or alien status; section 114 would make it a felony to use such documents. CAL. PEN. CODE §§ 113-114 (Deering Supp. 1995).

321. CAL. PEN. CODE § 114 (Deering Supp. 1995),

322. *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941).

323. CAL. PEN. CODE § 114 (Deering Supp. 1995).

324. 8 U.S.C. § 1325(3) (1994). Aliens who enter the country illegally are both civilly deportable under 8 U.S.C. § 1251 and subject to criminal charges under 8 U.S.C. § 1325.

Such an overlap and inconsistency with federal authority is problematic at best. For which offense (federal or state) shall the individual be tried first? Does double jeopardy attach? If transactional immunities are conferred, do they bind the other jurisdiction? What rights does the apprehended suspect have? Due process constraints on federal authorities enforcing national immigration laws may be considerably different from those applicable to state criminal laws.<sup>325</sup> These problems demonstrate that it is intolerable to have a state use its criminal laws to regulate behavior subject to exclusive federal control, particularly in the area of immigration where uniformity is quintessential.<sup>326</sup> Misapplication of federal immigration law might also injure relations with foreign countries.<sup>327</sup>

Laws making it a state offense to violate federal immigration statutes are the modern version of state registration and exclusion laws. The only reasons to do so are either dissatisfaction with the federal government's enforcement of its own laws or to further burden immigration. Neither is a legitimate local interest. In essence, because the federal government isn't doing its job,<sup>328</sup> states must step into the breach. This is basically direct immigration regulation.<sup>329</sup> "Measures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government."<sup>330</sup> While states can and

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Reentry after deportation is a felony. 8 U.S.C. § 1326 (1994). Use of false immigration documents to obtain benefits is a deportable felony. See 8 U.S.C. § 1324(c)(d)(3) (1994).

325. This cuts both ways. On the one hand, the Supreme Court has stated a rule allowing Congress discretion in granting due process for admission of aliens in contrast to that applicable for government conduct generally. *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972); *Galvan v. Press*, 347 U.S. 522 (1954). Yet, at least one state court has indicated that state enforcement of federal law would require even less due process. See *Gates v. Superior Court*, 238 Cal. Rptr. 592, 600 (Cal. Ct. App. 1987).

326. See Immigration Reform and Control Act (IRCA) § 115 P.L. 99-603; 100 Stat. 3384 (1986) ("It is the sense of Congress that the immigration laws of the United States should be enforced vigorously and uniformly.").

327. *New York Times Co. v. City of N.Y. Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977).

328. See, e.g., *Diaz v. Kay-Dix Ranch*, 88 Cal. Rptr. 443, 449 (Cal. Ct. App. 1970) ("There are at least two prime areas of federal misfeasance. One is the apparent inadequacy of enforcement budgets for the border patrol of the Immigration and Naturalization Service. . . . [Second], the Social Security Administration has been furnishing multitudes of illegal entrants with a ticket of admissibility to American jobs—a social security card").

329. See *id.* at 451 ("Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment.").

330. *In re Alien Children Educ. Litig.*, 501 F.Supp. 544, 578 (S.D. Tex. 1980).

sometimes do enforce federal immigration laws,<sup>331</sup> they cannot duplicate federal laws with their own.

#### D. Deterring Illegal Immigration

States may not regulate immigration directly by controlling entry. Nor may they do so indirectly by imposing burdens on resident aliens, for that would interfere with exclusive federal power over admission to the country.<sup>332</sup> State-imposed burdens on undocumented aliens, however, would seemingly complement federal policy and provide a supplemental means to deter illegal immigration. Is this a permissible state objective?

If a state imposes burdens and penalties with the sole objective of deterring illegal immigration, it adopts a purpose entrusted solely to the national government. Federal policies might be ambiguous, as in the case of immigrant workers.<sup>333</sup> Or the means chosen by Congress to control illegal immigration may be sensitive to other policies as well, such as international obligations, humanitarian concerns, and labor policy. For states to supplement federal law, even with the same goal in mind, could easily complicate national goals. Accordingly, deterring illegal immigration, for its own sake, is not a legitimate state interest.

This is not to suggest that states are precluded from adopting federal classifications in the pursuit of independent state objectives. A state may endeavor to deter illegal immigration, not as an end of its own, but as a means toward protecting traditional state concerns.<sup>334</sup> Thus a state may exclude undocumented aliens from state programs so long as interests within local purview are rationally promoted thereby.<sup>335</sup> To borrow a phrase, if aliens "constitute a peculiar source of the evil at which [a state law] is aimed,"<sup>336</sup> it may legislate against

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331. See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983); *People v. Barajas*, 147 Cal. Rptr. 195 (Cal. Ct. App. 1978). See generally *Criminal Immigration Statutes*, *supra* note 270.

332. *Truax v. Raich*, 239 U.S. 33, 42 (1915).

333. See *infra* notes 409, 430 and accompanying text.

334. *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) (citing *De Canas v. Bica*, 424 U.S. 351, 354-56 (1976)).

335. *Plyler*, 457 U.S. at 226.

336. *United Bldg. & Constr. Trades v. Camden*, 465 U.S. 208, 222 (1984) (discussing test under the Privileges and Immunities Clause of Article IV of the United States Constitution).



them, not to deter immigration per se, but to ameliorate the impact they cause.<sup>337</sup>

Additionally, states may follow federal direction in the treatment of aliens, thus assisting Congress in its efforts to control illegal immigration.<sup>338</sup> “[U]ndocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens.”<sup>339</sup> Still, the objective of controlling illegal immigration is one for Congress alone. States may aid in its pursuit, under federal guidance, but may not select their own means to protect the nation’s borders.

#### IV. Alienage Laws as Indirect Regulation of Immigration and Foreign Policy

State laws may affect immigration and foreign policy even though the purpose and object of regulation is entirely local. Protection of local resources, health and welfare, and economic interests, although traditionally within a state’s police power, may be contained in parochial legislation that cause significant, albeit indirect, external effects. This is a common occurrence with state economic regulation—one that is often scrutinized under the dormant Commerce Clause. When local legislation has transcendent effects implicating the nation’s foreign relations or immigration policy, that, too, requires careful examination.<sup>340</sup> This is particularly true of laws imposing unique burdens or civil disabilities on aliens. “Laws imposing such burdens, . . . even though they may be immediately associated with the accomplishment of a local purpose, . . . provoke questions in the field of international affairs.”<sup>341</sup>

Nonetheless, not all state laws with “foreign resonances” are invalid. A law which merely has “some incidental or indirect effect in foreign countries”<sup>342</sup> and whose effect on foreign relations “is slight in

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337. *Accord, Plyler*, 457 U.S. at 228 (“a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population” caused by “an influx of illegal immigrants”).

338. *Id.* at 219 (“if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.”) (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).

339. *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

340. *See Recommended Analysis, supra* note 144, at 837 (“decisions in cases involving possible state intrusion into foreign affairs must continue to strike an appropriate balance between preservation of the values of local self-government and the need for national uniformity in matters of international affairs”).

341. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

342. *Clark v. Allen*, 331 U.S. 503, 517 (1947); *De Canas v. Bica*, 424 U.S. 351 (1976).

relation to the domestic purpose served”<sup>343</sup> is valid unless preempted by positive law. Still, courts should be mindful of even indirect effects because foreign governments may not appreciate the subtle doctrinal distinctions involved when their nationals are adversely affected by state laws.<sup>344</sup> “Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.”<sup>345</sup>

This strand of the dormant immigration clause requires an assessment of the state and federal interests affected and a balancing of the two.<sup>346</sup> Where the purpose and effect of a state law is to reach a matter within its police power, and it does not seriously implicate the nation’s need to speak with a single voice,<sup>347</sup> the state law should be upheld. In contrast, if any adverse effects from the state law might fall on the nation as a whole,<sup>348</sup> the need for national uniformity is great. States should not have the opportunity to control national policy in this manner.

Equally important is that states not indirectly regulate immigration under the guise of internal regulation. If a state is unable to articulate and defend some legitimate state interest as the object of its laws, then even an incidental effect on immigration policy will be too great. As with the dormant Commerce Clause, illusory or poorly served state objectives may disguise an intent to usurp federal superintendence of immigration policy. Thus, in evaluating state regulation of aliens, it becomes necessary to identify the state’s interests, whether the means employed are likely to actually promote them, and their probable impact on federal interests. This inquiry is usually not as rigorous as that employed under the Court’s equal protection

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343. *Federalism and Foreign Relations*, *supra* note 13, at 300.

344. *Cf.* Comments by Senator Coffee regarding state registration laws, 84 CONG. REC. 9536 (“Are we not guilty of deliberately insulting nations with whom we maintain friendly diplomatic relations? Are we not humiliating their nationals? Are we not violating the traditions and experiences of a century and a half?”) (cited in *Hines*, 312 U.S. at 64 n.12).

345. *Hines*, 312 U.S. at 64.

346. “[I]t would seem that with respect to foreign affairs the Constitution at least says to the states: You may incidentally affect foreign relations in effectuating a domestic interest so long as the adverse effect of your action on foreign relations is not very serious in relation to the strength of your domestic interest, but you may not under any circumstances take independent action designed to affect foreign relations.” *Federalism and Foreign Relations*, *supra* note 12, at 307.

347. *Cf.* *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (state law offends the Commerce Clause if it frustrates the federal government’s ability to “speak with one voice when regulating commercial relations with foreign governments”).

348. *Cf. Recommended Analysis*, *supra* note 144, at 838-39.

model,<sup>349</sup> but it does have teeth. “[S]tate laws should at least be scrutinized with care in order to insure that our national interest is not being needlessly jeopardized.”<sup>350</sup>

### A. Identifying and Evaluating Legitimate State Interests

States frequently deny aliens rights and benefits available to citizens. When they do so pursuant to federal directives, as under some medical and welfare assistance programs,<sup>351</sup> the denials are hard to assail on supremacy grounds. However, states may elect to go beyond the restrictions in federal law, or may impose burdens on state programs or on aliens’ economic opportunity. Here they must assert a valid independent state interest. Ultimately, it is these articulated interests that must prove the local nature of the regulation and justify any impact it may have on the federal immigration power.

However, mere recitation of a valid state interest is inadequate.<sup>352</sup> When a state law touches foreign affairs, there will be a careful inquiry as to whether the articulated purpose or some forbidden objective in fact lies behind the law.<sup>353</sup> For instance, both a state’s economic interests and concern for physical safety were rejected as illusory in *Tayyari v. New Mexico State University*.<sup>354</sup> In that case, the state attempted to bar Iranian students from state universities after Iranian radicals seized American hostages in Tehran. The district court found that the state’s “true purpose in enacting the [exclusion

349. See *Examining Bd. of Engrs., Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 605 (1976) (“the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn”). The equal protection analysis is limited to discrimination against resident aliens in non-political function positions. See *infra* Section V.

350. *Federalism and Foreign Relations*, *supra* note 13, at 251.

351. Indigent aliens unlawfully present in the United States are entitled to restricted Medicaid coverage for emergency medical conditions. 42 U.S.C. § 602(a)(33) (1995). Other state aid to undocumented aliens is not reimbursed by the federal government. See generally 42 U.S.C. § 1396(b) (1995) [Medicaid], 42 C.F.R. §§ 435.406, 435.408 (1990); and 42 U.S.C. § 202 (1994) [AFDC], 45 C.F.R. § 233.50-233.52 (1988).

352. See *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“it will not be disputed that [the legitimate interests of the state] cannot be so broadly conceived as to bring them into hostility to exclusive Federal power”).

353. *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986). The Illinois Legislature had created an exemption from state occupation and use taxes for coins and currency issued by the United States and any foreign country except South Africa. The Supreme Court of Illinois held that the exclusion of South African coins was not “motivated by a legitimate, permissible State purpose . . . the exclusion’s sole motivation [was] disapproval of a nation’s policies” and this “create[d] a risk of conflict between nations, and possible retaliatory measures.” *Id.* at 307.

354. 495 F. Supp. 1365 (D.N.M. 1980).

law] was to make a political statement . . . to 'do something' about the Iranian students on campus."<sup>355</sup> Although the state's response to the Iranian hostage crisis was "understandable," its politically-motivated action "entered the arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government."<sup>356</sup>

As evident from *Tayyari*, courts in state alienage cases may be hesitant to accept proffered state interests at face value. Because the purpose behind a state law can determine whether it is a regulation of immigration or of local affairs, that purpose requires close examination. Even legitimate purposes become suspect if they are poorly served by a state's alienage law. For instance, the lower courts in *Plyler* rejected Texas' claim that excluding undocumented children from public education improved the educational environment for lawful residents. The state was unable to establish the necessary link.<sup>357</sup>

A similar problem arises where a state bases a denial of benefits to aliens on the ground that ineligibility discourages illegal immigration. First, that object is not within the states' police power. Second, most social science and economic analyses agree that social benefits have very little impact on an alien's decision to enter the United States, whether lawfully or unlawfully. Nor do they enter the country to seek education for their children.<sup>358</sup> The biggest draws are employment opportunities and wages better than those in their native countries.<sup>359</sup>

States can be clever and convincing in supplying legitimate state interests. A California law prohibiting employment of undocumented aliens passed muster partly because the ban depended on ad hoc showings of adverse impact on the domestic labor force.<sup>360</sup> Without

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355. *Id.* at 1376.

356. *Id.*

357. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 574 (S.D. Tex. 1980), *aff'd sub nom.* *Plyler v. Doe*, 457 U.S. 202 (1982).

358. "Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits." *In re Alien Children Education Litigation*, 501 F. Supp. at 578. *See also Plyler*, 457 U.S. at 228.

359. "Undocumented persons do not come to Texas with a vision of America as an endemic welfare state; they come here to work." *In re Alien Children Educ. Litig.*, 501 F. Supp. at 578. *See also United States v. Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring) (traditional responses to illegal immigration "at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country").

360. In *De Canas*, the Court held that the employer sanctions involved "appear[ ] to be designed to protect the opportunities of lawfully admitted aliens for obtaining and holding jobs, rather than to add to their burdens." But, "[t]he question whether § 2805(a) never-

such a contingency, the ban might have been viewed as an attempt to deter illegal immigration, obstructing both federal immigration and labor policies.<sup>361</sup> Conversely, state laws can be patently aimed at impermissible objectives, perhaps as the result of overzealous drafting. For instance, California's Proposition 187 prohibits all health care facilities receiving public funds from providing non-emergency medical services to undocumented aliens.<sup>362</sup> Since virtually all facilities, including private providers, receive some public funds, the prohibition is a complete one. While the denial of state-paid care might be supported as preserving public resources, the ban on private, patient-paid, insured, and eleemosynary care cannot be. Thus, the restriction reveals an ulterior and forbidden purpose—to drive aliens out of the state. Even if limited to publicly-funded care, the ban would be irrational. Since the initiative denies preventive and early intervention medical services, but permits emergency care (as required by federal law), it ultimately increases the state's costs, again belying a purpose to preserve public funds.<sup>363</sup> The initiative thus "go[es] beyond the stated intent of its proponents."<sup>364</sup>

States surely have strong and legitimate interests in protecting the health, safety, and general welfare of their residents and businesses. Where immigrants are seen as threatening these concerns, they are the proper subject of state regulation. But because these interests are so pervasive and underlie a vast range of state legislation, their mere invocation can overwhelm a principled effort to protect federal supremacy over immigration. Accordingly, courts must be cautious in reviewing any purported nexus between state welfare and alienage legislation.

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theless in fact imposes burdens bringing it into conflict with the INA is open for inquiry on remand." *De Canas v. Bica*, 424 U.S. 351, 358 (1976).

361. The Court engaged such an inquiry in *De Canas*, upholding the law because it "focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." 424 U.S. at 357. It did so again in *Plyler*, this time finding that none of the asserted state interests was furthered by the statute. 457 U.S. 202, 228-29 (1982).

362. CAL. HEALTH & SAFETY CODE § 130 (Deering Supp. 1995) [Proposition 187, Section 6].

363. See REBECCA LAVALLY, CALIFORNIA SENATE OFFICE OF RESEARCH, ADDRESSING IMMIGRATION ISSUES IN CALIFORNIA (March 1994) [hereinafter SENATE OFFICE OF RESEARCH]. This analysis suggests that potential savings could be offset by the loss of federal funds. *Id.* at 11. Moreover, most economic analyses of the effects of illegal immigration tend to show that it adds to, not drains, the domestic economy. See *Immigration Policy*, *supra* note 26, at 1441-42, and nn.45-48.

364. See CALIFORNIA SENATE OFFICE OF RESEARCH, *supra* note 363, at 2.

## B. Alienage Legislation

### 1. Restricting Property Acquisition

One of the earliest forms of civil disability imposed by states on non-citizens were “alien land laws.” Some of these laws were cleverly disguised to be neutral, such as the California Alien Land Law,<sup>365</sup> which applied only to aliens ineligible to become U.S. citizens (coincidentally, Japanese). Others were explicit in their prohibition of land ownership by particular nationalities, typically British, Chinese, and Japanese.<sup>366</sup> These early laws were upheld by the Supreme Court against equal protection and due process attack,<sup>367</sup> but later variants were declared unconstitutional.<sup>368</sup>

A similar form of property discrimination is found in state inheritance laws. These would often permit non-resident aliens to acquire personal property through probate only if certain conditions were met. One, known as the reciprocity rule, was that a nonresident alien could inherit property only if, under the laws of the alien’s nation, American citizens had a “reciprocal right” to inherit personal property on the same terms and conditions as the alien’s fellow citizens.<sup>369</sup> Another, and more controversial, condition was that the legatee’s home country must grant her the right to retain the inherited property.<sup>370</sup> This latter condition was designed to prevent Nazi and communist countries from confiscating devised property.<sup>371</sup> If the foreign beneficiary could not prove satisfaction of the applicable condition, the property would go to eligible legatees, if any, or escheat to the state.

The proliferation of state inheritance rules affecting aliens resulted in two somewhat conflicting Supreme Court decisions. In *Clark v. Allen*, the Court upheld California’s reciprocity statute.<sup>372</sup> The Court noted that succession was usually a matter of state concern, and that the law conflicted with neither a treaty nor federal policy.<sup>373</sup> Be-

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365. 1921 Cal. Stat. lxxxiii.

366. Over a dozen states had such laws. See *Iron Curtain Statutes*, *supra* note 67, at 645-46.

367. See *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O’Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923).

368. See *Oyama v. California*, 332 U.S. 633 (1948); *Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952).

369. See *Clark v. Allen*, 331 U.S. 503, 516 (1947).

370. See *Zschemnig v. Miller*, 389 U.S. 429 (1968).

371. See *Iron Curtain Statutes*, *supra* note 67, at 646.

372. See CAL. PROB. CODE § 259 (1942), cited in *Clark*, 331 U.S. at 506.

373. 331 U.S. at 516.

cause there was little discernible impact on foreign affairs, no overriding federal interest was impeded.

However, in *Zschernig v. Miller*, the Supreme Court struck down Oregon's "Iron Curtain Statute,"<sup>374</sup> which permitted the descent of local property to foreign nationals only if their countries guaranteed the "benefit, use or control of [it] without confiscation."<sup>375</sup> As Justice Douglas noted, influencing the "cold war" was the "real desiderata" of the law.<sup>376</sup> In essence, the condition required state judges to conduct their own foreign policy review and to assess other regimes by American standards. The Court explained the difference between that case and *Clark* as one of degree, both in terms of the respective state interests and their impact on foreign affairs. The California law in *Clark* involved a somewhat perfunctory determination of inheritance laws of other nations. In this regard, it was not materially different from other inquiries into foreign law, such as occur in choice of law problems.<sup>377</sup> The Oregon law in *Zschernig*, however, required multifarious and "minute inquiries concerning the actual administration of foreign law, [and] into the credibility of foreign diplomatic statements."<sup>378</sup> The Court held that, because of "its great potential for disruption or embarrassment," the Oregon law had "more than 'some incidental or indirect effect in foreign countries.'"<sup>379</sup> In the Court's view, the Oregon statute, "affect[ed] international relations in a persistent and subtle way."<sup>380</sup>

In addition to their differential impact on foreign relations, the laws in *Clark* and *Zschernig* differed in the local interests served. Reciprocity statutes, as in *Clark*, may promote inheritance rights for state residents. In contrast, it is hard to see how the confiscation statute in *Zschernig* could inure to the benefit of state residents; its only purpose seems to have been to criticize foreign governments.<sup>381</sup> The law, even though couched as a police power regulation of local property, lacked

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374. 389 U.S. 429 (1968); see *Iron Curtain Statutes*, *supra* note 67.

375. *Zschernig*, 389 U.S. at 430 n.1. Oregon was not alone in enacting such laws. See, e.g., *In re Estate of Kish*, 246 A.2d 1 (N.J. 1968).

376. *Zschernig*, 389 U.S. at 437.

377. 389 U.S. at 433 n.5; *id.* at 461-62 (Harlan, J., concurring).

378. *Id.* at 435.

379. *Id.* at 434-35.

380. *Id.* at 440. "Iron Curtain" statutes in other states have also been invalidated on this basis. See, e.g., *Goldstein v. Cox*, 391 F.2d 586 (2d Cir. 1968). See also *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977), invalidating prohibition on advertising employment opportunities in South Africa.

381. Cf. *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 305 (Ill. 1986) (invalidating exception for South African Krugers to sales tax exemption because the exclusion was not "motivated by a legitimate, permissible State purpose").

a legitimate local interest and had too great an effect on federal interests.

## 2. *Prohibiting Employment*

Restrictions on employment of aliens have an indirect but profound effect on immigration. Most courts and commentators agree that employment is the principal magnet for both legal and illegal immigration.<sup>382</sup> Thus, state laws that restrict employment opportunities for aliens can discourage entry or deprive it of its purpose. However, states are not without a legitimate concern here. In an economy such as ours that treats labor as a commodity, an influx of foreign workers tends to depress wages. The problem is more acute when the workers are "undocumented," since their numbers are not well controlled and they are easily victimized by employers. Accordingly, the domestic workforce is often on the front line against illegal immigration.<sup>383</sup>

When a state prohibits the employment of lawfully admitted aliens, it frustrates Congress' purpose in granting them entry.<sup>384</sup> State laws that only partially restrict employment, such as by excluding resident aliens from selected professions or government positions, may have less of an impact on immigration, but nonetheless undermine federal policies. For that reason, laws regulating employment of resident aliens are generally suspect and seldom survive. While these

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382. See *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578-79 (S.D. Tex. 1980) (noting that overwhelming evidence indicates unimportance of social services such as public education in decision to immigrate), *aff'd mem.*, (5th Cir. Feb. 23, 1981) (No. 80-1934), *aff'd and discussed*, *Plyler v. Doe*, 457 U.S. 202 (1982). See also *Immigration Policy*, *supra* note 28, at 1438; R. Blum, *Labor Standards Enforcement and the Results of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1342 (1988); *Public Benefits*, *supra* note 292, at 221 ("Unauthorized aliens often forego both necessary medical care and other public assistance because they fear INS detection or falling into heavy debt to cover expenses"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (Burger, C.J., concurring); *Plyler v. Doe*, 457 U.S. 202, 228 (1982); Commission for the Study of International Migration and Cooperative Economic Development, *Unauthorized Migration: An Economic Development Response* 13, 107 (1990); *Economic Report of the President* 233 (1986); Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest, Final Report* 36 (1981).

383. It is interesting to note that cases such as *De Canas* are often prosecuted by resident migrant workers. See also *Dias v. Kay-Dix Ranch*, 88 Cal. Rptr. 443, 444 (Cal. Ct. App. 1970); *Demise of Implied Preemption*, *supra* note 168, at 296 n.7 (describing opposition to "illegal workers" by Cesar Chavez of the United Farmworkers Union).

384. See *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to an assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.").



laws are often reviewed under equal protection, preemption provides an alternative and perhaps superior analytical approach.<sup>385</sup>

State restrictions on the employment of undocumented aliens presents a different issue. These restrictions are arguably coincident with federal immigration policy. Thus, state laws regulating employment of aliens without federal work authorization ordinarily survive conflict preemption.<sup>386</sup> However, supremacy theory (at least that which is explored here) goes beyond ordinary preemption. Since the nexus between employment and entry is so strong, state laws in this area are properly examined as indirect regulations of immigration. Moreover, it is not merely federal immigration policy that is affected by state employment laws; federal labor policies and general economic interests must also be considered.

States usually advance two interests for restricting the private employment of aliens: to preserve employment opportunities for the state's own citizens; and to discourage illegal immigration. The former has been found to be a legitimate state interest; the latter's validity is less clear.<sup>387</sup> The presence of undocumented workers is said by some to adversely affect employment opportunities for the domestic labor force, suppressing wages and increasing unemployment.<sup>388</sup> It is a legitimate exercise of a state's police power to improve employment and general economic conditions. Moreover, that objective is arguably consistent with federal immigration policy. A second labor-related problem, associated with illegal immigration in particular, is the victimization of employees. Undocumented workers are less likely to complain about workplace safety and labor violations due to their fear of deportation. As a result, unscrupulous employers not only exploit those fears, but often prefer undocumented workers over citizens and aliens with work permits for that very reason.<sup>389</sup>

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385. See *infra* Section V.

386. See *De Canas v. Bica*, 424 U.S. 351, 356-60 (1976).

387. See *supra* Section III D.

388. "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *De Canas*, 424 U.S. at 356-57. See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *Larez v. Oberti*, 100 Cal. Rptr. 57, 58 (Cal. Ct. App. 1972) ("It is stated that at least 20 percent of the work force in the [California counties] consists of such workers, which has resulted in the depression of domestic farm workers' wages and working conditions, the creation of excessive unemployment among farm workers and farm workers being unnecessarily dependent upon welfare.").

389. See *Demise of Implied Preemption*, *supra* note 168, at 298.

States' traditional regulatory concern over business and employment practices easily evolves into a concern over employment of undocumented workers. Thus, controlling the influx of undocumented aliens is a legitimate state interest if geared to employment issues. However, it is often used as a pretext for less benign attempts to control immigration.

In *De Canas v. Bica*, the Supreme Court found a California law prohibiting the employment of undocumented aliens promoted the strong and traditional state objective of "protect[ing] workers within the State."<sup>390</sup> Because the state law adopted federal standards in imposing employer sanctions, the Court found it did not conflict either with the operation or purpose of federal law.<sup>391</sup> Indeed, there is some suggestion that state action was not only harmonious with, but also authorized by, federal law.<sup>392</sup> The case for a delegation of power to the states may have been weak, but coupled with tacit congressional approval it sufficed to avoid problems under the dormant immigration clause.<sup>393</sup> Indeed, later cases confirm that this congressional approval was critical to upholding the California law.<sup>394</sup>

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390. 424 U.S. at 356.

391. "Both arguments put forth by the Court in *De Canas* are suspect. California's statute did in fact regulate immigration, because it could not have achieved its purpose of preserving employment opportunities for citizens without adding a more effective enforcement mechanism to the federal immigration law. Furthermore, courts generally do not and should not find in a single narrow statute the congressional intent to renounce exclusive authority over such a thoroughly 'national issue.'" *Immigration Policy, supra* note 28, at 1448-49.

392. The Court stated: "there is evidence in the form of the 1974 amendments to the Farm Labor Contractor Registration Act, 88 Stat. 1652, 7 U.S.C. § 2041 (1970 ed., Supp. IV), that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens." *De Canas v. Bica*, 424 U.S. 351, 361 (1976). Additional evidence might be gleaned from 1965 amendments to INA. See *Preemption and the Illegal Alien, supra* note 143, at 173. The Court may also have felt that federal authorities were not effectively enforcing employer sanctions in U.S. immigration laws. See *Immigration Policy, supra* note 28, at 1441.

393. In *Barclays Bank v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2282-83 (1994), referring to state burdens on foreign commerce, the Court stated that while "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential,' it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce." (citing *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)). Indeed, in *Barclays*, the Court drew inferences of congressional approval, or at least tolerance, of state actions bearing on foreign relations from its failure to preempt state laws despite considering several bills to that effect. 114 S. Ct. at 2283-84.

394. *Toll v. Moreno*, 458 U.S. 1, 13 n.18 (1982) (stating that preemption claim was rejected in *De Canas* "not because of an absence of congressional intent to preempt, but because Congress [intended] that the States be allowed, 'to the extent consistent with federal law, [to] regulate the employment of illegal aliens'" (quoting *De Canas*, 424 U.S. at

While the specific holding of *De Canas* has been superseded by later-enacted preemptive federal legislation,<sup>395</sup> the Court's approach remains: a state may prohibit employment of undocumented aliens if its purpose is to improve economic conditions rather than to obstruct immigration or intrude on federal policies.<sup>396</sup> This result seems a reasonable accommodation of competing state and federal interests. But a closer examination of the California law in *De Canas* reveals that its purpose may in fact have been to usurp federal prerogatives and displace federal choices.

A few years prior to *De Canas*, the California Court of Appeal ruled that resident workers had no cause of action against employers who hired undocumented aliens in violation of federal law.<sup>397</sup> The court stated that "expropriation of the farm job market by illegal entrants represents an abject failure of national [immigration] policy."<sup>398</sup> The court went on to describe the "self-imposed impotence of our national government" and the "two prime areas of federal misfeasance": inadequate border patrols and tacit encouragement of illegal employment.<sup>399</sup> It then counseled Congress on how best to stem the tide of illegal immigration by providing a mini-treatise on its causes and effects. Nonetheless, an injunction against employment of undocumented workers was denied because "[i]t is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment" to controlling immigration.<sup>400</sup> Also, despite ostensibly leaving the question open, the court seemed concerned that an "injunction would invade the sphere of immigration regulation exclusively reserved to the federal government."<sup>401</sup>

The state legislature responded to *Diaz* with the law ultimately considered in *De Canas*.<sup>402</sup> Regulations adopted under the statute required employers to ascertain the citizenship and immigration status

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361). See also *Plyler v. Doe*, 457 U.S. 202, 241 n.6 (1982) (Powell, J., concurring) ("In *De Canas* . . . [t]he Court found evidence that Congress intended state regulation in this area").

395. See *infra* note 418.

396. *De Canas*, 424 U.S. at 363. "[T]o the extent [prior cases finding state laws precluded] were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems . . ."

397. *Diaz v. Kay-Dix Ranch*, 88 Cal. Rptr. 443, 451 (Cal. Ct. App. 1970).

398. *Id.* at 449.

399. *Id.*

400. *Id.* at 451.

401. *Id.*

402. CAL. LAB. CODE § 2083 (Deering 1991).

of all job applicants.<sup>403</sup> By necessity, employers would need to be familiar with federal immigration documents, federal labor conditions, and carry the burden of ferreting out undocumented workers.<sup>404</sup> State cases construing the statute and implementing regulations found them to be a regulation of immigration and, as such, preempted and unconstitutional.<sup>405</sup> They reasoned that Congress had fully occupied the field; even if it had not, the state law interfered with Congress' exclusive power.<sup>406</sup> In reversing these state decisions, the Supreme Court found the state's objective to be legitimate (promoting employment) rather than forbidden (immigration control). This disagreement between California courts, which ordinarily are in a superior position to discover the purpose of state law, and the Supreme Court again indicates the elusive distinction between direct and indirect state immigration laws.

The state courts had the better of the argument. "California's statute did in fact regulate immigration, because it could not have achieved its purpose of preserving employment opportunities for citizens without adding a more effective enforcement mechanism to the federal immigration law."<sup>407</sup> Surely Congress may enlist state assistance in the enforcement of immigration policy. But in the absence of affirmative expressions to this effect, state self-help may complicate

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403. CAL. ADMIN. CODE, tit. 8, pt. 1, ch. 8, art. 1, Obligation of Employer, §§ 16209-16209.6 (Cal. Admin. Reg. 72, No. 23-A) (1972).

404. See CAL. ADMIN. CODE, §§ 16209 (employer must check each applicant for INS Form I-151 "or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work"); 16209.3 ("An employer who knowingly employs an alien not entitled to lawful residence shall not be exonerated from prosecution for violation of Labor Code Section 2805 notwithstanding his having obtained a signed declaration of citizenship from the alien"); 16209.6 ("Employment [proscribed] in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 C.F.R. § 60.7") (Cal. Admin. Reg. 72, No. 23-A) (1972).

405. *Dolores Canning v. Howard*, 115 Cal. Rptr. 435, 444 (Cal. Ct. App. 1974) (based on both preemption and dormant immigration power grounds); *De Canas v. Bica*, 115 Cal. Rptr. 444, 446 (Cal. Ct. App. 1974), *rev'd sub nom.* *De Canas v. Bica*, 424 U.S. 351 (1976). Another decision of the California Court of Appeal, *Larez v. Oberti*, 100 Cal. Rptr. 57, 59-60 (Cal. Ct. App. 1972), found that the statute did not provide grounds for injunctive relief against employers of undocumented workers. See also *Purdy & Fitzpatrick v. State of California*, 456 P.2d 645, 651 (Cal. 1969) (declaring a predecessor statute violative of federal supremacy); *Nozewski Polish Style Meat Prods. v. Meskill*, 376 F. Supp. 610, 611 (D. Conn. 1974).

406. "The fact that Congress has intentionally refused to act in an area of exclusive federal cognizance does not constitutionally authorize the states to do so." *Dolores Canning*, 115 Cal. Rptr. 435 at 441-42.

407. *Immigration Policy*, *supra* note 28, at 1448.

national efforts.<sup>408</sup> It ought not be left to each state to determine how best to effectuate federal policies. This is especially true since federal policies are sometimes ambiguous, as when Congress elects to permit employment of undocumented workers, extends labor law protection to them,<sup>409</sup> and provides them with free medical care,<sup>410</sup> despite efforts to prohibit their entry. As a result, state laws, even if viewed as only incidental regulation of immigration, can have a profound impact on federal immigration and labor policy. California's disagreement with that policy gives it no license to challenge it or force the federal government's hand, which is ultimately what happened.<sup>411</sup>

The flip side of *De Canas* is that states may not only permit employment of undocumented aliens without intruding on federal prerogatives, but can order them employed. In *Arizona Farmworkers Union v. Phoenix Vegetable Distributors*,<sup>412</sup> a state court ordered reinstatement of six undocumented workers who had been discharged in violation of Arizona labor law. The court held that the reinstatement order was preempted neither by federal labor law nor by the INA.<sup>413</sup> The court further held that ordering an employer to reinstate persons working in violation of federal law did not obstruct federal immigra-

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408. "In fact, several courts have recognized in recent years that the denial of rights to undocumented aliens sometimes has the ironic result of subverting the INA's related aims of deterring illegal immigration and protecting the nation's low-skilled laborers, because aliens who have no right to attack unfair labor practices may constitute an attractive workforce for unscrupulous employers." *Immigration Policy, supra* note 28, at 1453 n.106.

409. *Sure-Tan v. NLRB*, 467 U.S. 883 (1984); *NLRB v. International Longshoremens' Ass'n Local 1581*, 489 F.2d 635, 637-38 (5th Cir. 1974) (job preferences based on citizenship constituted an unfair labor practice).

410. States are required to pay for care and services received by an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the U.S. under color of law and who is otherwise eligible for Medicaid under the state's plan, if the care and services are necessary for the treatment of an emergency medical condition. Historically, federal matching payments to the states for these emergency services have been made at each state's regular matching rate. Federal matching was raised to 100% of expenditures in the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 (1993).

411. On May 3, 1973, the House of Representatives passed H.R. No. 982, amending 8 U.S.C. § 1324(a) to provide a penalty for knowingly employing any alien not lawfully admitted to the United States for permanent residence. (H.R. No. 982, 93d Cong., 1st Sess., pp. 3-5 (1973)).

412. 747 P.2d 574, 578 (Ariz. Ct. App. 1986).

413. "Under the INA, employers are not prohibited from employing undocumented aliens, even those subject to a final order of deportation or awaiting voluntary departure. Thus, an employer can reinstate an illegal alien worker without violating the INA." *Id.* at 577.

tion policy.<sup>414</sup> This result is dubious, even in light of *De Canas*, since employment of aliens is functionally related to immigration.

The major shift in policy toward employment of undocumented workers, evidenced in *De Canas* and in state legislation,<sup>415</sup> resulted in the enactment of the Immigration Reform and Control Act of 1986 (IRCA).<sup>416</sup> For the first time federal law imposed criminal sanctions on employers for knowingly hiring undocumented workers.<sup>417</sup> IRCA now preempts state laws with a similar purpose.<sup>418</sup> But it should not have taken positive law to reach this result. Immigration and labor relations are among Congress' most expansive powers. State usurpation or interference negates that supremacy.

For instance, in the area of labor policy, the preemptive force of federal law is so strong that states are displaced not only by legislation and administrative regulations, but also by federal common law created by the Supreme Court.<sup>419</sup> That common law is itself so strong that it provides private rights of action for damages against states who improperly enter the preempted realm.<sup>420</sup> Supreme Court decisions regarding immigration policy are also common law. It cannot be said that the Court has less power to enforce paramount federal concerns

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414. Quoting *De Canas*, the court held "an order of reinstatement would have no more than 'some purely speculative and indirect impact upon immigration.'" 747 P.2d at 578. "We hold, therefore, that a state order of reinstatement does not in fact stand as an obstacle to the accomplishment of INA's goal of deterring illegal immigration." *Id.*

415. Several states responded to *De Canas* with laws similar to California's, prohibiting employment of undocumented aliens. See generally SASHA G. LEWIS, *SLAVE TRADE TODAY* 168-69 (1979). As in *De Canas*, these laws were commonly upheld. See, e.g., *Garcia v. Department of Labor*, 521 So.2d 608 (La. 1988) (Louisiana law prohibiting employment of undocumented workers not preempted by INA).

416. Pub. L. No. 99-603, 100 Stat. 3359 (1986). IRCA also provided for the legalization of aliens under an "amnesty" program. See generally James Marx, *Legalization Under the Immigration Reform and Control Act of 1986: Scope of Confidentiality Provisions and Problems in Proving Residence*, 41 U. MIAMI L. REV. 1077 (1987). Other recent federal enactments include the Immigration Marriage Fraud Amendments of 1986 (P.L. 99-639) and the Immigration and Nationality Act Amendments of 1986 (P.L. 99-653).

417. See 8 U.S.C. § 1324a(a)(1) (1994) ("It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment") (added by P.L. 99-603, 100 Stat. 3359).

418. See 8 U.S.C. § 1324a(h)(2) (1994) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens").

419. See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Machinists Union v. Gonzales*, 356 U.S. 617 (1958).

420. See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108-15 (1989) (Golden State II).

here than with labor law,<sup>421</sup> and it has done so in other areas of foreign affairs (for example, the act of state doctrine<sup>422</sup>). There is even a stronger reason to do so here. Considerations of separation of powers augment federalism concerns. Foreign policy and immigration issues are peculiarly the province of the political branches.<sup>423</sup> The Supreme Court often defers to them in immigration matters, even when fundamental constitutional rights are asserted.<sup>424</sup>

The Court's reluctance to do so, when it comes to undocumented aliens, might reflect a concern for states' rights or simply agreement with underlying state law. Or perhaps, unlike other forms of state immigration law, employment restrictions are seen as compatible with federal policy.<sup>425</sup> Nonetheless, state limitations on the employment of aliens, both documented and undocumented, can severely burden federal policies. For that reason, in the absence of explicit preemption, they need to be carefully scrutinized under the dormant immigration clause. Restrictions can also exacerbate internal tensions in neighboring countries which may thereby complicate American foreign policy.<sup>426</sup> Accordingly, our neighbors may view such laws as "the product

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421. The Supreme Court has derived its authority to create an entire body of labor law from a jurisdictional statute, Section 301(a) of the Labor Management Relations Act ("Taft-Hartley Act"), 29 U.S.C. § 185(a) (1988). See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

422. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964) (finding act of state doctrine was a doctrine of federal common law binding upon the states). While *Sabbatino* was premised on separation of powers principles, rather than federalism, it is an example of the Court deriving authority to create binding law from the structure of the Constitution relating to foreign affairs. See *Recommended Analysis, supra* note 144, at 836 (the importance of *Sabbatino* "is the Court's clear recognition that the federal common law powers of the judiciary may rely upon the logic of the constitutional structure to resolve matters of national-state conflict in foreign affairs").

423. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (finding "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary").

424. See, e.g., *Mathews*, 426 U.S. at 81-82 ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding denial of visa based on government disagreement with alien's political views).

425. See *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

426. See *Immigration Policy, supra* note 28, at 1459 n.132 ("The complex political and economic ties that now exist between the United States and Mexico require that Mexico's interests in maintaining employment opportunities for its citizens be accommodated as well. Should Mexico's current economic crisis further destabilize that nation politically, the

of selfish provincialism, rather than an instrument of justifiable policy."<sup>427</sup> Employment of undocumented workers is as much an economic issue as a legal or political one.<sup>428</sup> Undocumented workers are encouraged during boom times and the first to feel the pinch during recession.<sup>429</sup> Even when the law plainly prohibits their employment, enforcement is often lax because of powerful forces within the economy which benefit from their presence in the labor market "as a source of cheap labor."<sup>430</sup> In other words, lax enforcement of immigration laws may be a conscious decision by the federal government, rather than the result of neglect or incompetence.

### 3. *Exclusion of Aliens from Civil Institutions*

Exclusion of aliens from the community, either literally or economically, can be more than simply a manifestation of xenophobia or nativism. Defining the polity itself requires some distinction between members ("citizens") and strangers.<sup>431</sup> According to some political theorists, "exclusion at the border is necessary for membership or political citizenship to flourish under liberal democracy. This is due to existential or psychological factors—establishing a 'we' in contrast to

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United States might lose the longstanding security of having a reliable political ally on its border, as well as access to that nation's oil market") (citations omitted).

427. *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 805 (Cal. Ct. App. 1969).

428. "[H]istory shows that funding for rigid enforcement will last only as long as does the nation's concern with high unemployment; indeed, the ineffectiveness of the immigration barriers instituted by Congress is itself largely a function of economic conditions." *Immigration Policy*, *supra* note 28, at 1440. *See also id.* at 1442-43.

429. *See Immigration Policy*, *supra* note 28, at 1440 n.36 ("Public pressure for enforcement has been cyclical since the original institution of immigration restrictions. It has peaked in economic hard times and isolationist periods, and waned during times of economic growth and labor shortages").

430. *Plyler v. Doe*, 457 U.S. 202, 219 (1982). *See also Immigration Policy*, *supra* note 28, at 1440 n.37 ("Labor market considerations have played a critical role in shaping the immigration law since its inception. Indeed, Congress has often treated immigration legislation as an element of labor policy"). Undocumented workers are considered "employees" under the National Labor Relations Act. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) ("Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee'").

431. "The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." *Ambach v. Norwick*, 441 U.S. 68, 75 (1979). *See also Foley v. Connelie*, 435 U.S. 291, 296 (1978) (noting the state's duty "to preserve the basic conception of a political community") (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)); *Sugarman*, 413 U.S. at 648 (recognizing a "State's historical power to exclude aliens from participation in its democratic political institutions").



'them' is 'the essence of a consensual political identity.'<sup>432</sup> Thus, unless some fruits of the community are reserved to its members, it quickly loses its identity;<sup>433</sup> it would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship."<sup>434</sup>

Drawing on this political theory, states have occasionally enacted alienage laws in an effort to preserve what they see as the community's identity. These laws view immigrants, particularly those of racial and ethnic diversity, as threatening social cohesion and cultural uniformity.<sup>435</sup> Aliens may be accused of bringing incompatible customs, language, and values to our communities, thus undermining America's cultural hegemony and social welfare.<sup>436</sup> But is preserving a static vision of community truly a permissible state objective; and, if so, what forms of alienage laws would it justify?

The Supreme Court has never accepted a cultural preservation theory as a legitimate state interest. In *Plyler*, the Court rejected the notion that undocumented children imposed unique burdens on public schools, either economically or in the educational mission to inculcate civic virtue.<sup>437</sup> In a similar vein, the Court has held that states have no legitimate interest in promoting naturalization.<sup>438</sup> States can neither augment nor detract from the meaning of citizenship by withholding or conferring benefits for that purpose alone.<sup>439</sup> Nor can they preserve their civil institutions for citizens. State laws denying aliens access to courts or judicial remedies are seldom upheld.<sup>440</sup>

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432. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. REV. 955, 963 (1988).

433. See *Search for National Identity*, *supra* note 66, at 1512-13.

434. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (quoting *Foley*, 435 U.S. at 295).

435. *Birthright Citizenship*, *supra* note 112, at 1026.

436. See *Public Benefits*, *supra* note 292, at 242 (describing argument that aliens' "non-conforming culture will erode the national language and lifestyle").

437. 457 U.S. 202, 229 (1982).

438. See *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977).

439. *Immigration Policy*, *supra* note 28, at 1413.

440. See *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779, 784-85 (E.D. Pa. 1975) (finding that in personal injury action, status as undocumented alien would not justify jury's reduction of damage award for loss of future earnings); *Peterson v. Neme*, 281 S.E.2d 869, 872 (Va. 1981) (finding that in negligence action, status as undocumented alien irrelevant and immaterial to right to recover damages for lost wages); *Feldman v. Murray*, 12 N.Y.S.2d 533 (N.Y. Sup. Ct. 1939) (holding that undocumented status does not preclude suit for personal injuries); *Montoya v. Gateway Ins. Co.*, 401 A.2d 1102, 1104 (N.J. Super. Ct. App. Div. 1979) (upholding undocumented alien's right to pursue contract claim against insurance company); *Catalanotto v. Palazzolo*, 259 N.Y.S.2d 473, 476-77 (N.Y. Sup. Ct. 1965) (undocumented aliens entitled to compensation from uninsured motorists fund); *Cabral v. State Bd. of Control*, 169 Cal. Rptr. 604, 606-07 (Cal. Ct. App. 1980) (finding

Still, the Court is not insensitive to a state's need for political identity and some meaningful way to distinguish between those who belong and those who do not. Thus, while the Court disallows most distinctions between newcomers and tenured residents,<sup>441</sup> and among different categories of residents,<sup>442</sup> it uniformly rejects voting rights claims by outsiders.<sup>443</sup> Yet, it appears, political and economic exclusion are entirely different matters; the latter not being justified by the need for state identity or to preserve its separate existence in our federalistic structure.

#### 4. Denial of State Benefits

States may seek to deny a panoply of social service benefits to aliens, such as education, public health care, and public assistance. A variety of justifications are advanced for these restrictions. One is that cultural differences present unique problems in integrating aliens into the community, such as in educational settings.<sup>444</sup> It is also asserted that denying undocumented aliens state benefits deters their illegal entry or presence in the country,<sup>445</sup> and that no one should profit from their own illegal conduct.<sup>446</sup> However, the principal justi-

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undocumented alien entitled to recovery from crime victim's compensation fund); *Ayala v. California Unemployment Ins. Appeals Bd.*, 126 Cal. Rptr. 210, 213 (Cal. Ct. App. 1976) (holding that undocumented status does not preclude recovery of disability benefits).

441. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (striking durational residency requirements for welfare benefits).

442. *E.g.*, *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982) (striking differential state surplus payments to residents based on length of residency).

443. *Cf.* *Perkins v. Smith*, 370 F. Supp. 134 (Md. 1974), *summarily aff'd*, 426 U.S. 913 (1976) (finding exclusion of aliens from service on jury panel did not deny equal protection). *But see* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993).

444. *See supra* subsection 3.

445. *See, e.g.*, *Alonso v. State*, 123 Cal. Rptr. 536, 543-44 (Cal. Ct. App. 1975) (finding denial of unemployment insurance will make undocumented aliens less likely to maintain presence in this country), *cert. denied*, 425 U.S. 903 (1976). *See also* Section III D, *supra*.

446. *See, e.g.*, *Alonso*, 123 Cal. Rptr. at 544 (providing unemployment insurance to undocumented aliens would allow them to profit from their illegal entry into the country). *But see* *Nizamuddowlah v. Bengal Cabaret, Inc.*, 415 N.Y.S.2d 685, 686 (N.Y. App. Div. 1979) (finding little merit in the argument that an alien's "unclean hands" should bar recovery of benefits, because that result would unjustly enrich the employer); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 636-37 (Tex. Civ. App. 1972) (undocumented status does not bar workers' compensation when contract of employment did not aid in illegal entry). A related justification is that, by entering or remaining in the country illegally, aliens have "waived" their rights. *See Public Benefits, supra* note 292, at 242 n.156.

fication given, for both legal and illegal immigrants, is that denying them benefits preserves state resources for citizens.<sup>447</sup>

A state may validly assert an interest in the disposition of state resources.<sup>448</sup> Moreover, the Court is sensitive to a state's sovereign interest in the distribution of its largess. To the extent that a community's resources can be seen as collectively owned by citizens,<sup>449</sup> their property-like ownership encompasses the right to exclude others.<sup>450</sup> Nonetheless, while a state may assert a sovereign interest in the disposition of its resources in some contexts,<sup>451</sup> such immunity does not extend when the superior sovereignty of federal supremacy is implicated.

The federal government's plenary power over the admission of aliens includes the authority to prescribe conditions for their livelihood and residency. Accordingly, unsanctioned state efforts to deny public social service benefits to aliens may tread upon federal power and policies. States cannot deny benefits to resident aliens without negating, at least in part, the federal decision to admit them to resi-

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447. See *People v. Crane*, 108 N.E. 427, 429-30 (N.Y. 1915), *aff'd.*, 239 U.S. 195 (1915) (Cardozo, J.) ("To disqualify aliens is discrimination indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful. . . . The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens"). See generally *Immigration Policy*, *supra* note 28, at 1452-54.

448. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (suggesting in dicta that an illegal entrant cannot "advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and [some] of its guests"); *Hernandez v. Houston Indep. School Dist.*, 558 S.W.2d 121, 125 (Tex. Civ. App. 1977) (holding that the state's need to conserve public resources is a legitimate reason to deny undocumented alien children an education).

449. *Heim v. McCall*, 239 U.S. 175, 194 (1915) (affirming "the power of the state over its wild game which might be preserved for its own citizens"); *Geer v. Connecticut*, 161 U.S. 519, 533-34 (1896) (wild game considered state property), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

450. See *Truax v. Raich*, 239 U.S. 33, 39-40 (1915). See also *McCarter v. Hudson County Water Co.*, 65 A. 489, 492 (N.J. 1906), *aff'd.*, 209 U.S. 349 (1908) ("the government established in this state by and for the people thereof has complete dominion (subject only to constitutional limitations) over all things within the borders of the state . . . The regulation of the use and disposal of such waters, therefore, if it be within the powers of the state, is among the most important objects of government.").

451. See, e.g., *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976) (describing "market participant" immunity to dormant Commerce Clause.) See generally Karl Manheim, *New Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L. J. 559, 568-69 (1990) [hereinafter *New Age Federalism*].

dency.<sup>452</sup> Although the Supreme Court often views this in equal protection terms, it is equally a matter of federal supremacy. Just as states cannot unilaterally deny certain benefits to newcomers<sup>453</sup> and out-of-staters,<sup>454</sup> without disrupting our federalistic scheme, they may also lack power to deny those benefits to non-citizens.<sup>455</sup> Thus, a state's interest in preserving the public fisc, as strong as it is, does not justify differential treatment of resident aliens regarding state benefits,<sup>456</sup> state resources,<sup>457</sup> or taxation.<sup>458</sup> "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."<sup>459</sup> In other words, "[i]t is not sufficient justification that a law saves money."<sup>460</sup>

A state's ability to deny state benefits to "illegal" aliens is less certain and requires close examination of both state and federal policies. Where a state pursues legitimate objectives in its benefit denial,<sup>461</sup> and that objective is compatible with federal policy, it is likely to survive. Thus, "undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens."<sup>462</sup> On the other hand, where denial conflicts with federal objectives, states will be required to extend benefits. For instance, while many federal entitlement programs deny

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452. *Graham v. Richardson*, 403 U.S. 365, 380 (1971) ("State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.") (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)).

453. *E.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 269 (1974) (relying on the right to travel strand of equal protection).

454. *E.g.*, *Toomer v. Witsell*, 334 U.S. 385, 396-403 (1948) (relying on the fundamental rights doctrine in the Privileges and Immunities Clause).

455. *Mathews v. Diaz*, 426 U.S. 67, 85 (1976) ("Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned").

456. *See Graham v. Richardson*, 403 U.S. 365 (1971) (welfare benefits); *Toll v. Moreno*, 458 U.S. 1 (1982) (higher education); *Plyler v. Doe*, 457 U.S. 202 (1982) (primary and secondary education); *See In re Alien Children Educ. Litig.*, 501 F. Supp. 544 (S.D. Tex. 1980).

457. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (rejecting the "special public interest" doctrine).

458. *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971) (mandating tax exempt status of foreign owned property).

459. *Plyler*, 457 U.S. at 227.

460. *Doe v. Plyler*, 458 F. Supp. 569, 586 (E.D. Tex. 1978), *aff'd*, 457 U.S. 202 (1982).

461. *Sudomir v. McMahon*, 767 F.2d 1456, 1465 (9th Cir. 1985) ("state laws discriminating against illegal aliens must be shown to further at least a substantial interest of the state") (citing *Plyler*, 457 U.S. at 217-18).

462. *Plyler*, 457 U.S. at 226.

benefits to undocumented immigrants,<sup>463</sup> others specifically require benefits be made available to them.<sup>464</sup> Preemption can also be inferred from federal law.<sup>465</sup> Thus, state laws that mandate blanket denial of benefits to "illegal aliens" may fall under standard preemption principles.<sup>466</sup>

Discrimination against undocumented immigrants in state benefit programs may also be constitutionally precluded. While not a direct regulation of immigration, these laws may nonetheless burden national policies without sufficient offsetting state benefit. The best known example of this balancing process occurred in *Plyler v. Doe*. While principally an equal protection case, the Court relied heavily on supremacy theory to support its use of heightened review.<sup>467</sup> A state may not simply adopt federal distinctions between legal and illegal immigration and write the discrimination into state law. This is most obvious when it comes to discriminating among classes or nationalities of aliens. The federal government protects a range of interests that are unavailable to the states.<sup>468</sup> Many of its criteria have foreign policy overtones. Others are integral to immigration control. Still others

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463. For instance, undocumented alien children are ineligible for AFDC (45 C.F.R. § 233.50 (1988)). AFDC, a cooperative federal-state program financed with federal and state funds, is one of four categorical public assistance programs established by the Social Security Act of 1935. 42 U.S.C. § 601 (1995). See *King v. Smith*, 392 U.S. 309, 316-17 (1968) (discussing requirements of Social Security Act); See generally, Jenifer M. Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71 (1994).

464. Undocumented aliens are generally eligible under federal law for emergency medical services (see 42 U.S.C. § 1396b(v)(3) (Supp. 1991) [Medicaid]; 42 U.S.C. § 291c(e) (1988) [Hill-Burton Act]), the Women, Infants and Children Program (WIC) (see 42 U.S.C. § 1786 (1988 & Supp. IV 1992) (originally enacted as § 17 of the Child Nutrition Act of 1966, Pub. L. No. 89-642, § 17, 80 Stat.)), Headstart and school-related programs (see 42 U.S.C. § 17751 (1988) [School Lunch Program]; 42 U.S.C. § 1766 (Supp. IV 1991) [Child and Adult Care Food Program]; 42 U.S.C. § 1761 (1988 & Supp. IV 1991) [Summer Food Service Programs]).

465. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 587-88 (S.D. Tex. 1980).

466. See, e.g., *Papadopoulos v. Shang*, 414 N.Y.S.2d 152, 154-55 (N.Y. App. Div. 1979) (alien found entitled to Medicaid benefits during pendency of her application for change of status); *St. Francis Hosp. v. D'Elia*, 422 N.Y.S.2d 104, 110 (N.Y. App. Div. 1979) (alien whose nonimmigrant visa had expired and whose application for an immigrant visa was pending found entitled to medical assistance), *aff'd*, 422 N.E.2d 830 (N.Y. 1981). See also *Velasquez v. Secretary of the Dep't of Health & Human Servs.*, 581 F. Supp. 16, 17 (E.D.N.Y. 1984) (requiring the Secretary to come forward with some explanation for the INS's inaction regarding an alien claimant's deportation before concluding that the alien was not "permanently residing in the United States under color of law" and therefore ineligible for SSI benefits); *Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985) (denying AFDC benefits to asylum applicant pending action by INS).

467. *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

468. Cf. *Graham v. Richardson*, 403 U.S. 365 (1971).

are “based on distinctions of ‘color and race,’” which states cannot make.<sup>469</sup> Thus, as a rule, states may not rely on federal classifications unless they have independent grounds for doing so.<sup>470</sup>

That independent ground legitimately may be protection of state resources. But it may not be hostility to immigration, legal or illegal. For instance, a state’s denial of resident tuition subsidies to undocumented students at state colleges may be justified on fiscal grounds.<sup>471</sup> But a total exclusion of such students, whether or not they pay tuition or have scholarships,<sup>472</sup> may not be. Similarly, the investigation and reporting of immigration status unconnected to any fiscal need fails to advance a legitimate state interest. The more likely impetus for these programs is hostility to the presence of aliens and frustration with federal efforts to enforce immigration laws.<sup>473</sup> Neither of these purposes are lawful bases for state regulation. “Measures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government.”<sup>474</sup>

Yet, immigration status is not irrelevant to lawful state objectives. For instance, courts have upheld the denial of state unemployment insurance benefits on the theory that if an alien is undocumented, he is “not available for work,” and therefore not entitled to benefits.<sup>475</sup>

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469. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 412 (1948) (citing *Hidemitsu Toyota v. United States*, 268 U.S. 402, 411-12 (1925)). In *Takahashi*, California employed federal immigration classifications to deny commercial fishing licenses to Japanese. The Court held that California did not have the same interests as the federal government, and could not rely on the same classifications.

470. “The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to ‘[the purposes for which the state desires to use it.]’” *Plyler*, 457 U.S. at 226 (quoting *Oyama v. California*, 332 U.S. 633, 664-65 (1948) (Murphy, J., concurring)); *Barannikova v. Town of Greenwich*, 643 A.2d 251, 262-63 (Conn. 1994) (finding that to permit discrimination against aliens, “it would not necessarily suffice for the provisions of state law to parallel those contained in federal law, if federal law has not authorized or required such state legislation”). See also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-94 (1989) (finding state may not borrow federal classifications in creating affirmative action plan).

471. See, e.g., *Regents of the University of California v. Superior Court*, 276 Cal. Rptr. 197, 201 (1991).

472. See CAL. EDUC. CODE § 66010.8 (Deering Supp. 1995) [Proposition 187, Section 8]; *Am. Ass’n of Women v. Board of Trustees*, 38 Cal. Rptr. 15, 20 (1995)

473. “Every applicable provision of the Constitution refutes the notion that the states can act independently for the purpose of affecting foreign relations.” *Federalism and Foreign Relations*, *supra* note 13, at 307.

474. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578 (S.D. Tex. 1980).

475. *Gutierrez v. Employment Dev. Dept.*, 18 Cal. Rptr. 2d 705, 710 (Cal. Ct. App. 1993), and cases cited therein at 18 Cal. Rptr. 2d at 709; *Bastas v. Board of Review*, 382 A.2d 923 (N.J. Super. Ct. App. Div. 1978); *Alonso v. State of California*, 123 Cal. Rptr. 536, 541 (Cal. Ct. App. 1975). See also *Sure-Tan v. NLRB*, 467 U.S. 883, 903 (1984) (in

A similar result has obtained with workers' compensation, on the theory that undocumented workers are unable to return to work through no fault of the employer.<sup>476</sup> Here the state's interests are arguably strong<sup>477</sup> and the interference with federal immigration power weak.<sup>478</sup> The question of an applicant's immigration status is not for the purpose of enforcing or subjugating the federal immigration laws.<sup>479</sup> Indeed, denial of state unemployment benefits may be consistent both with federal labor policy<sup>480</sup> and federal immigration policy. A state law with incidental impact on immigration will be valid if it is compatible with "some articulable federal policy."<sup>481</sup>

Aliens lawfully admitted as permanent or temporary residents must establish their means of support,<sup>482</sup> and are therefore unlikely to pose a strain on a state's economy. Undocumented aliens, on the other hand, make no such showing. Some claim that "illegal aliens" cause economic hardship, personal injury and damage to a state's lawful residents.<sup>483</sup> Still others may claim that these immigrants are a

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computing backpay award under NLRA, undocumented workers "must be deemed 'unavailable' for work"); *Melendres v. Soales*, 306 N.W.2d 399, 402 (Mich. Ct. App. 1981) (personal injury plaintiff's immigration status not relevant for determining liability but material to measure of damages for lost future earnings insofar as he was deportable); *Metalworking Machinery, Inc. v. Superior Court*, 138 Cal. Rptr. 369 (Cal. Ct. App. 1977) (same).

476. See, e.g., *Manis Constr. Co. v. Arellano*, 411 S.E.2d 233 (Va. Ct. App. 1991) (undocumented alien unable to establish his residual work capacity for purposes of entitlement to compensation for partial disability).

477. The state has an interest in the economic effects of placing aliens in the labor market. See *Goldstein v. California*, 412 U.S. 546 (1973) (regarding state economic interests and the concept of federalism).

478. See 26 U.S.C. § 3304(a)(14)(c) (1976 & Supp. V 1981) (Secretary of Labor to deny certification to state programs that make unemployment compensation available to undocumented aliens); Note, *Illegal Aliens and Workers' Compensation: The Aftermath of Sure-Tan and IRCA*, 7 HOFSTRA LAB. L. J. 393, 412-13 (1990) [hereinafter *Workers' Compensation*] (arguing that compensation benefits to undocumented workers is preempted by IRCA).

479. See *Diaz v. Kay-Dix Ranch*, 88 Cal. Rptr. 443 (Cal. Ct. App. 1970).

480. See *Wagner-Peyser Act*, 29 U.S.C. §§ 49-49k (1994), stating the national policy to establish employment offices for persons "legally qualified to engage in gainful occupations."

481. *Plyler v. Doe*, 457 U.S. 202, 226 (1982). While *Plyler* was based on equal protection grounds rather than preemption, the Court still seemed to require the state to show compatibility between state laws affecting immigrants and federal immigration policy. This indicates a different standard than used in *De Canas*, where the Court seemed to put the burden on the challengers to show incompatibility. *De Canas v. Bica*, 424 U.S. 351, 357-58 (1976).

482. It is grounds for exclusion if an applicant is likely to become a public charge. 8 U.S.C. 1182(a)(15) (1995). See *De La Garza Perales v. Casillas*, 950 F.2d 1066, 1068 (5th Cir. 1992).

483. See Proposition 187, Section 1, Findings and Declarations (uncodified). These claims are reminiscent of arguments supplied by states during the nineteenth century as

drain on state social services, depriving lawful residents of state and local programs. Whether undocumented aliens are a net gain or net loss on state revenues is a matter of intense economic and political debate.<sup>484</sup> But, states cannot simply assume a conclusion as justification for its laws.<sup>485</sup> Alienage discrimination can easily become indirect regulation of immigration. State ends and means need to be scrutinized to prevent that from occurring.

## V. Equal Protection Analysis of Alienage Laws

Because non-residents lack any political voice in the community's decisionmaking, discrimination against them can be suspect.<sup>486</sup> Non-residents might be singled out for disadvantaged treatment because they have no direct political recourse. If this is the perceived motivation for discriminatory treatment, the Supreme Court is likely to take a harder look at the law. This is true for out-of-state commerce,<sup>487</sup> and out-of-state residents.<sup>488</sup> It is also true for discrimination against aliens.

The Court has emphatically declared that undocumented alien adults are not a suspect class because their membership in the class is wholly volitional and illegal.<sup>489</sup> Undocumented children, however, are viewed differently since they "can affect neither their parents' conduct nor their own status."<sup>490</sup> Still, they do not fit comfortably into the Court's "suspect" or "quasi-suspect" jurisprudence. Thus, instead of applying strict or mid-level scrutiny to state laws denying public

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justification for the alien inspection laws "to protect the State against the consequences of the flood of pauperism immigrating from Europe". See *Henderson v. Mayor of New York*, 92 U.S. 259, 268 (1875) (reviewing state's claim that it was a proper exercise of the police power "to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries").

484. There are many who argue that undocumented aliens contribute more in taxes than they receive in program benefits. However, as the Urban Institute recently reported, "the distribution of costs and revenues within the intergovernmental system can be viewed as being in imbalance. Immigrant tax payments flow to Washington while most of the costs of providing services fall to state and local government." Testimony of Michael Fix and Jeffrey S. Passel before the House Ways and Means Comm., Federal Doc. Clearing House Cong. Testimony, June 15, 1994.

485. *Plyler*, 457 U.S. at 228.

486. J. ELY, *DEMOCRACY AND DISTRUST*, 161-62 (1980).

487. See anti-discrimination principle under the dormant Commerce Clause.

488. Similar judicial scrutiny applies to discrimination against non-residents under the Privileges and Immunities Clause.

489. *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982); *id.* at 220 ("Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.").

490. *Plyler*, 457 U.S. at 220 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).



schooling to undocumented children, the Court in *Plyler* ostensibly invalidated the laws on the force of rational basis review. To do so, the Court implicitly created a new, albeit unarticulated, standard of review—rational basis with bite.<sup>491</sup> This standard, however, applies only to state laws; federal laws of this character still receive highly deferential review. Accordingly, the Court's equal protection doctrine, as applied to alienage classifications, is always "attentive to congressional policy,"<sup>492</sup> suggesting a synthesis of equality and supremacy theories.

The Supreme Court has also erected an elaborate structure for handling discrimination against resident aliens, who are nominally a suspect class.<sup>493</sup> Most state discrimination against them can only be justified upon showing a compelling state interest and necessary means.<sup>494</sup> However, where the discrimination relates to jobs implicating the state's sovereign identity, e.g., public officials and school teachers,<sup>495</sup> rather than its pecuniary interest in the public fisc or its *patria* interest in the general welfare, the degree of scrutiny drops precipitously to rational basis. This is the "political function" sub-doctrine.<sup>496</sup>

This structure makes little sense in equal protection terms. Why would the nature of a state's interest change the scope of review? A

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491. See generally Gayle Pettings, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L. J. 779 (1987).

492. *Plyler*, 457 U.S. at 224.

493. They were not always so. See *Patson v. Pennsylvania* 232 U.S. 138 (1914); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Cockrill v. California*, 268 U.S. 258 (1925); *Ohio v. Deckebach*, 274 U.S. 392 (1927), applying lesser standards of review in upholding state alien discrimination laws.

494. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (the "Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular minority' for whom such heightened judicial solicitude is appropriate").

495. Public school teaching "constitutes a governmental function . . . [and] public school teachers may be regarded as performing a task 'that goes to the heart of representative government.'" *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

496. The political function exception allows states to discriminate against aliens only with respect to "state elective or important nonelective executive, legislative, and judicial positions," i.e., those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go right to the heart of representative government." *Bernal v. Fainter*, 467 U.S. 216, 222 (1984). The exception is narrowly construed. *Id.* at 222 n.7. See also *Ambach*, 441 U.S. at 73-74 ("some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government").

state's interest may be strong enough to survive whatever standard was set (e.g., "compelling" or "important"), but in no other doctrinal area of equal protection does it modify the standard itself. Aliens are no less (or more) suspect when they apply for a job as a school teacher than when the job title is civil engineer. Yet, a dramatically different standard of review is used supposedly because the state's sovereign interests are implicated in the first instance, but not the second.<sup>497</sup> As one commentator put it, "our theories of equal protection [in alienage cases] have become a Humpty Dumpty; when pushed they do not simply bruise, they crumble."<sup>498</sup>

The Supreme Court has conceded that "many of [its] decisions concerning alienage classifications . . . are better explained in preemption than in equal protection terms."<sup>499</sup> Many commentators agree.<sup>500</sup> This is perhaps best indicated by *Mathews v. Diaz*,<sup>501</sup> where the Court applied relaxed scrutiny to a federal law discriminating against aliens.<sup>502</sup> The Court emphasized that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the states.<sup>503</sup> It is not

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497. States validly "may determine eligibility for the key position in discharging [political functions] on the assumption that generally persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens." *Ambach*, 441 U.S. at 81.

498. Tom Geraty, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379, 379 (1983).

499. *Toll v. Moreno*, 458 U.S. 1, 11 (1982).

500. See, e.g., Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060-65 (1979); Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980); G. GUNTHER, CONSTITUTIONAL LAW 685 (12th ed. 1991) [hereinafter GUNTHER]; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1550-51 n.57 (2d ed. 1988). See also *Toll v. Moreno*, 458 U.S. 1, 11 n.16 (1982).

501. 426 U.S. 67 (1976).

502. But see *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (striking down an undifferentiated exclusion of aliens from the federal civil service). The discrimination in *Hampton* was ordered not by Congress, but by a federal administrative agency—the Civil Service Commission. This suggests that Congress' plenary power over immigration is not shared by other organs of the federal government. Thus, judicial deference to federally created distinctions involving aliens is due in part to the political character of the federal immigration power. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

503. *Mathews*, 426 U.S. at 84-87. See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990) [hereinafter *Century of Plenary Power*] (discussing plenary power doctrine which results in great judicial deference to immigration decisions of the national political branches). There is also some suggestion that the equal protection component of the Fifth Amendment's Due Process Clause (see *Bolling v. Sharpe*, 347 U.S. 497 (1954)) is not as strong as the Fourteenth Amendment's Equal Protection Clause, at least

merely that the governmental interest may be stronger, the equal protection doctrine itself assumes a different posture.<sup>504</sup> Coupled with the other mutations in doctrine, one gets the feeling that something more is going on.<sup>505</sup>

There is evidence that the Court has never fully relied on equal protection doctrine in state alien discrimination cases. In *Graham*, Justice Blackmun offered a significant “additional” reason for invalidating state restrictions on aliens—the “area of federal-state relations.”<sup>506</sup> “State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.”<sup>507</sup> And in *Plyler*, Justice Brennan noted: “alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power.”<sup>508</sup>

Preemption also better explains why the Court drops its equal protection scrutiny in “political function” cases; i.e., where the state discriminates against aliens in positions involving state public policy. First, the state can claim a genuine interest in reserving for citizens jobs reflecting the state’s quasi-sovereignty.<sup>509</sup> Second, there is lesser conflict with federal immigration policy when the state denies full

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where important national interests are involved. See *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 567 n.43 (S.D. Tex. 1980); Note, 11 ST. MARY’S L.J. 549, 562-63 (1979). But see *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995) (applying strict scrutiny to federal affirmative action program).

504. *Mathews*, 426 U.S. at 84-85 (“The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government”).

505. “A kind of schizophrenia pervades equal protection theory” when applied to aliens. Judith Lichtenberg, *Within the Pale: Aliens, Illegal Aliens, and Equal Protection*, 44 U. PITT. L. REV. 351, 352 (1983).

506. *Graham v. Richardson*, 403 U.S. 365, 377 (1971).

507. *Id.* at 378.

508. *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982). See also *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (“State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”) (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

509. The Court respects similar state interests under the dormant Commerce Clause and the Privileges and Immunities Clause when the state limits hiring to residents. See *White v. Massachusetts Council of Constr. Emplrs.*, 460 U.S. 204 (1983) (upholding residency requirement for employees on public works contracts under “market participant doctrine”); *United Building & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221 (1984) (state’s interest in hiring employees was “certainly a factor—perhaps the crucial

political status to aliens than when it denies them economic survival in the community.<sup>510</sup> Thus, unlike other asserted interests behind state immigration laws, which are often illusory, this one may actually prevail when balanced against federal interests.

Even while it was developing its alien-as-sometimes-suspect-class theory, the Court occasionally relied on preemption doctrine to review state immigration laws. In *Toll v. Moreno*,<sup>511</sup> the Court invalidated a Maryland law denying preferential tuition rates to resident aliens. "In light of Congress' explicit decision not to bar . . . aliens from acquiring domicile, [the state restriction] surely amounts to an ancillary 'burden not contemplated by Congress' in admitting these aliens to the United States."<sup>512</sup> Therefore, "the University's policy violates the Supremacy Clause."<sup>513</sup>

The Equal Protection Clause is not indispensable to justify a rule prohibiting state discrimination against aliens.<sup>514</sup> Just such an anti-discrimination principal has evolved from the dormant Commerce Clause and other areas of exclusive federal power. Discrimination against interstate commerce destroys our "economic union" and invites retaliatory parochialism by sister states.<sup>515</sup> Discrimination by states against the federal government is also prohibited by the Supremacy Clause.<sup>516</sup>

Moreover, state discrimination against aliens, whether lawfully admitted or not, may be contrary to international law<sup>517</sup> and U.S.

factor—to be considered in evaluating whether the state's discrimination violates the Privileges and Immunities Clause." See also *New Age Federalism*, *supra* note 451, at 620-21.

510. Professor Gunther describes this theory: "the federal government, through the immigration scheme, 'invites' resident aliens to enter the country as permanent residents free of restriction—'on an equality of legal privileges with all citizens'—it is not for the states to alter the terms of immigration with new burdens. Yet the Court appears to reason that since the federal government does not admit resident aliens to the political community—admission does not confer citizenship—the states may exclude resident aliens from state political offices and functions without offending federal power." GUNTHER, *supra* note 500, at 685.

511. 458 U.S. 1 (1982).

512. *Id.* at 14.

513. *Id.* at 17.

514. For an example of an alien employment discrimination case relying on preemption rather than equal protection, see *Purdy & Fitzpatrick v. State of California*, 456 P.2d 645 (Cal. 1969) (declaring residency requirement for state public works employment violative of federal supremacy).

515. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L.REV. 1689, 1692-93 (1984).

516. See *Davis v. Michigan Dept. of the Treasury*, 489 U.S. 803 (1989).

517. "In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien . . . must be afforded protection for his person and prop-

treaty obligations.<sup>518</sup> Accordingly, states which discriminate against aliens can seriously erode, perhaps unwittingly, the nation's standing in the community of nations. Thus, the effect on federal interests must be carefully examined in each case. In some cases, discriminatory state laws will be found to promote or be authorized by federal law.<sup>519</sup> In other cases, they will be found to jeopardize federal policy or destroy the national uniformity that is so essential to effective foreign relations.

This supremacy-based anti-discrimination principal is not restricted to state laws that conflict with federal immigration policy; it applies even where state classifications are modeled after federal law. For instance, in *Oyama v. California*,<sup>520</sup> the Court invalidated California's Alien Land Law which forbade aliens ineligible for citizenship from owning agricultural land in the state. Shortly thereafter, the Court invalidated a California law denying commercial fishing licenses to aliens not eligible for citizenship.<sup>521</sup> "[T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."<sup>522</sup> In both cases, the Court found these discriminatory state laws obstructed federal policy,<sup>523</sup> notwithstanding their supposed conformity to federal law, thus demonstrating an anti-discrimination component to the supremacy analysis.<sup>524</sup>

The burden that state alien discrimination laws impose on federal interests is well-illustrated by Proposition 187. The initiative not only discriminates against aliens, it does so in a way likely to frustrate federal objectives.<sup>525</sup> State investigatory and regulatory measures are

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erty. . . . [E]very State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned." 1 L. LASSA OPPENHEIM, *INTERNATIONAL LAW* 627-28 (6th ed. 1947). See also *Hines v. Davidowitz*, 312 U.S. 52, 65 (1941) ("In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens."); *Todok v. Union State Bank of Harvard*, 281 U.S. 449, 454-55 (1930).

518. "Numerous treaties, in return for reciprocal promises from other governments, have pledged the solemn obligation of this nation to the end that aliens residing in our territory shall not be singled out for the imposition of discriminatory burdens." *Hines*, 312 U.S. at 69.

519. See *De Canas v. Bica*, 424 U.S. 351, 354 (1976), discussed *infra* at 166.

520. 332 U.S. 633 (1948).

521. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

522. *Id.* at 420.

523. *Oyama*, 332 U.S. at 640-41; *Takahashi*, 334 U.S. at 418-20.

524. See also *Doe v. Plyler*, 458 F.Supp. 569, 591 (E.D. Tex. 1978) ("[t]he question [ ] of [the state law's] consistency with congressional intent and of its validity under the equal protection clause are intimately related.").

525. "The virtual prohibition of state discrimination is based on the assumptions that states are institutionally incompetent to take adequate account of the sensitive interna-

triggered whenever a state employee “suspects” a recipient of state benefits is undocumented.<sup>526</sup> This even extends to parents of public school students, each of whom must be investigated for residency status.<sup>527</sup> Thus, the initiative does not limit its wrath to undocumented aliens, although they are the ultimate target of the law. In operation, many of the burdens of the initiative also fall on lawful aliens and citizens who are merely “suspected” of being present illegally.<sup>528</sup> This facilitates harassment of and discrimination against particular ethnic groups. “Immigration law consequently becomes a tool in the hands of untrained local law enforcement officials to treat minorities in a discriminatory and nonuniform fashion.”<sup>529</sup>

Just such a concern motivated an anti-discrimination provision in the IRCA.<sup>530</sup> “[P]eople of “foreign” appearance might be made more vulnerable by the imposition of [employer] sanctions’ due to the fact that ‘some employers may decide not to hire “foreign” appearing individuals to avoid sanctions.’”<sup>531</sup> IRCA responds by prohibiting these forms of discrimination.<sup>532</sup> Proposition 187 flouts this federal concern by encouraging discrimination against aliens and persons of foreign appearance.<sup>533</sup> Since courts must “consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written,”<sup>534</sup> there is a strong likelihood that Proposition 187 will frustrate federal anti-discrimination policy embodied in its immigration laws.

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tional and immigration policy issues implicated by discriminatory laws affecting legally present aliens.” *Immigration Policy*, *supra* note 28, at 1448.

526. *See supra* note 217.

527. CAL. EDUC. CODE § 48215 (d) (Deering Supp. 1995). Notwithstanding, burdens may not be imposed on children otherwise entitled to state benefits solely on the basis of their parents’ immigration status. *Darces v. Woods*, 679 P.2d 458 (Cal. 1984). *Cf. Plyler v. Doe* 457 U.S. 202 (1982).

528. *See People v. Barajas*, 147 Cal. Rptr. 195, 204 (Cal. Ct. App. 1978) (“attempts by local police officers to enforce immigration laws pose an inherent danger to United States citizens and resident aliens mistaken for illegal entrants.”) (Reynoso, J., dissenting).

529. *Criminal Immigration Statutes*, *supra* note 270, at 1006.

530. IRCA § 274b(a) (1995); 8 U.S.C. § 1324b (1994).

531. *See Mark Johnson Boulris, Judicial Deference to the Chief Executive’s Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision*, 41 U. MIAMI L. REV. 1057, 1057 (1987).

532. *See Justice Unveils Proposed Anti-Bias Rules Implementing Immigration Reform and Control Act*, DAILY REPORT FOR EXECUTIVES, March 23, 1987, p. A-5

533. “[L]ocal police officers have no training or expertise in the complexities in enforcing immigration and naturalization laws. Their awkward attempts to enforce such laws has resulted in numerous complaints of harassment from citizens and resident aliens mistaken for illegal entrants.” *People v. Barajas*, 147 Cal. Rptr. 195, 206 (Cal. Ct. App. 1978) (Reynoso, J., dissenting). *See also United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973).

534. *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

Proposition 187 also destroys the required national uniformity of action in dealing with immigration. Either other states will follow California's lead and adopt their own supplemental immigration laws,<sup>535</sup> or they will likely experience a disproportionate burden of illegal entrants. If they do the former, then federal immigration laws become mostly irrelevant as each state does its utmost to encumber immigration. If they do nothing, they may wind up with California's discards. California may act to *attract* aliens, even those there illegally,<sup>536</sup> but it cannot shift its burdens onto sister states.<sup>537</sup> Doing so violates the Commerce Clause,<sup>538</sup> the right to travel,<sup>539</sup> and federal supremacy. In the area of immigration, if in no other area, the nation must act in unison.<sup>540</sup>

## VI. Conclusion

The struggle between state and federal governments over immigration policy, while perhaps not as volatile as the struggle for control over commerce, has nonetheless been a lesson in the meaning of federalism. Throughout our history, states have reacted when they felt the federal government incompetent or unwilling to properly regulate immigration. These reactions are often simplistic in form, yet devastating in consequence. The history of state immigration laws demonstrates that the matter cannot be properly regulated at the local level,

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535. Indeed, that is the hope of the initiative's sponsors. They state: "California can strike a blow for the taxpayer that will be heard across America; in Arizona, in Texas and in Florida in the same way Proposition 13 was heard across the land." Argument in Favor of Prop. 187, official ballot pamphlet, p. 54-55 (1994).

536. See *Public Benefits*, *supra* note 292.

537. See *Dolores Canning Co. v. Howard*, 115 Cal. Rptr. 435, 443 (Cal. Ct. App. 1974) (invalidating California law prohibiting employment of undocumented aliens because, *inter alia*, "[t]hose not entitled to lawful residence in California might consider it easier and safer to seek employment in other states without a similar law—particularly border states. . . . Even though the aliens shifting across state lines are illegally in the United States, it is a recognized problem. However laudable the purpose of section 2805, it clearly affects immigration in areas of federal concern."). See also *Truax v. Raich*, 239 U.S. 33 (1915).

538. *Kassell v. Consol. Freightways Corp.*, 450 U.S. 662 (1981).

539. Proposition 187 is apparently designed to disrupt patterns of illegal immigration by, *inter alia*, redirecting aliens to other states. Just as durational residency requirements with a similar intent violate the right to travel (*Shapiro v. Thompson*, 394 U.S. 618 (1969)), so too do laws denying benefits to aliens. *Mathews v. Diaz*, 426 U.S. 67, 85 (1976).

540. "Each locality in each State may not adopt its own foreign policy. This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced by pragmatic local considerations which are not necessarily controlling or even relevant to national policy as determined by the Federal Government at Washington." *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 969 (N.Y. 1977).

embracing, as it does, a wide array of social, political, and economic factors. Most importantly, "state regulation with respect to aliens can significantly affect our foreign relations, often without implementing any justifiable domestic interest."<sup>541</sup>

States may be unable to regulate immigration, sometimes even in pursuit of valid state interests, but they are hardly irrelevant to the debate. The federalistic structure of our nation that protects the states and their interests through political means, works in this field as well. Although perhaps not as sensitive as states would sometimes like, Congress does respect state concerns and responds to their complaints. Still, that is where the power and the responsibility lay. When one examines the plenary and exclusive power of Congress over immigration, she will find "there is not merely a page of history, but a whole volume."<sup>542</sup>

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541. *Federalism and Foreign Relations*, *supra* note 13, at 300-01.

542. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (citation omitted).