Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications

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Peter Spiro's thoughtful Article¹ offers the tempting thesis: what if immigration policy were regulated by the individual states rather than being preempted by federal powers? What would U.S. immigration policies be if they could be determined at the state level, in 50 "laboratories," instead of the stale, preclusionary logic mindlessly applied to the implementation of federal immigration and nationality law? Could such a scheme work, and would it lead to better results? Has the doctrine of federal preemption run its course, leading to hidebound practices, state-level frustration, and a moribund jurisprudence? Professor Spiro certainly believes that the traditional reasons advanced for preemption in the immigration and nationality context have not kept pace with developments in the modern federalism that is the United States.

He contrasts the "extreme skepticism"² with which state immigration measures are received by courts with the "federal discretion [that is] so unfettered by judicial constraint."³ He then critiques a three part equation: that immigration is an aspect of foreign policy and is therefore intrinsically federal; admissions decisions are in the federal domain and cannot be undermined by

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² Id. at 134.
³ Id.
state level plans to discriminate against aliens; and the equal protection doctrine extends to resident and undocumented aliens. This trilogy of reasons underpinning the preemption doctrine is a weak foundation for Spiro, and he gives short shrift to the second and third justifications. Because of the abject failure of the government to control the flow of undocumented (and to a lesser, and different extent, resident) aliens, "[t]he near-complete disabling of the states on immigration matters . . . can ultimately hang only by the foreign relations thread. If this premise unravels, the existing imbalance in the institutional allocation of power must also fall."4

This is a tantalizing premise, one that has surface appeal both to the political left and right: while progressive immigration advocates could see the possibility of safe havens, local exceptions to a harsh federal scheme, and decentralized opportunities for relaxed enforcement, conservatives or immigration restrictionists can be attracted by the tightening up of alien benefits, more vigorous state border enforcement, and by the possibility of improved local control of political communities. Moreover, there is a surface plausibility, an intuitive sense that Professor Spiro is onto an ineffable and subtle truth. It is almost foolish to dispute the rise of unauthorized immigration, to ignore the deep recession in California, to be unconcerned with the growth of the welfare state, or to ignore a relationship among these observations: there are data to show that people of color—those most likely to be in direct contact and competition with undocumented worker populations—are increasingly restrictionist in their attitudes towards immigration.5 There is even some preliminary evidence that Latinos are increasingly concerned with undocumented immigration.6

Given this backdrop, including, most notably, California's overwhelming passage of Proposition 187, an avowedly anti-alien ballot

4. Id.


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

My argument follows three strands of Professor Spiro's argumentation. First, I review his treatment of the doctrine of preemption: he sees preemption as an essentially unprincipled abrogation of states' rights, one that has led to a moribund, formulaic refusal to deal meaningfully with immigration realities. The various states are forced to act not because of any preference for state action, but out of sheer necessity, due to a failure of the federal government to patrol U.S. borders. In contrast, I see preemption as an hydraulic principle, one that symmetrically flows between states and the federal government: there is a constant tug between the two levels, in an almost-hydraulic relationship. As the federal piston pulls, state

powers are accordingly diminished; as the state powers increase, the federal piston correspondingly decreases. This equipoise relationship more accurately reflects current preemption doctrine than does Professor Spiro’s more all-or-nothing approach. Second, he and I differ in our conclusions drawn from the available data, cases, and public policy implications. For example, a careful reading of the extensive research on undocumented alien benefits/contributions—which purported deficit drives much of Spiro’s reasoning in apportioning control over undocumented immigrants—shows a very different picture than his apocalyptic drain-on-the-fisc reading of the data. States have sued the federal government to recover the “cost” of undocumented aliens, even as they returned unexpended funds designated for this purpose to the federal government. Third, Professor Spiro grounds the only plausible force for federal control over immigration in the foreign relations power, and calls for international law norms to govern this strand of preemption. The problem here, in my view, is that the foreign relations rationale is not the only plausible grounding for a vibrant preemption doctrine, as there is a variety of other grounds for continuing the primacy of federal preemptory immigration authority. Moreover, the international law available offers less analytic power or actual hope for improving alien rights than Spiro suggests. Thus, paradoxically, he offers both more and less to the appropriate theoretical and political framework for understanding preemption. It is, simultaneously, an elegant yet inadequate approach for explaining federalism or preemption, and it fails to maintain its burden of persuasion.

I. THE HYDRAULIC DOCTRINE OF PREEMPTION

As already noted, Professor Spiro’s thesis rests upon a profoundly simple equation: If in fact immigration no longer involves foreign relations or foreign relations no longer remains an exclusive federal responsibility, then the states are not properly excluded from acting in certain ways that affect immigration and the treatment of aliens. However, the preemption doctrine is not hanging by a few frayed threads, but is, rather, concretely moored in a more complex series of relationships than he allows. In a brief allusion to the important historical work of Professor Gerald

10. Spiro, supra note 1 at 134.
Neuman, Spiro reads Neuman for the proposition that "federal predominance [over states] is 'neither natural nor inevitable in United States federalism or in federalism generally." 11 Yet this reference to Neuman deftly sidesteps Neuman's larger work and sympathies: in the sentence immediately before that quoted by Professor Spiro, Professor Neuman notes:

Perhaps I should add at this point that I will not be arguing in favor of the transfer of power over immigration back to the states, and that I agree that the present functional division is advantageous both for effective regulation and for the protection of aliens' rights. But this division is neither natural nor . . . " 12

For Spiro, this is no mere epigraph for his analysis, as he also uses Neuman's research as evidence for the proposition that "the country could plausibly return to the days in which immigration was more a matter of state than federal control." 13

But as explanatory research to undergird a reversion of immigration law and enforcement to the states, Neuman's narrative will not support the premise. His research sheds fresh light upon the wide array of immigration enforcement and regulation performed by the states in the nineteenth century, but it is clear that in frontier America, the developing immigration regime rested on the necessity of building a nation state from the agricultural frontier and the Civil War-ravaged country. Local control over ports of entry, for one example, made more sense in a time when the country was still adding states and territories to its land mass, through purchase, annexation, war, abrogation of treaty, or land grab. Most importantly, Neuman demonstrates that there was a "complex hybrid" 14 of local, state, and federal immigration regulation, and that when "slavery ceased to divide the nation, national immigration regulation became possible." 15 Therefore, I read Neuman differently than does Spiro, for he appears to interpret Neuman as supportive of the thesis that state rights could be superior to those of the federal immigration power, because historically the states were accorded great deference in regulating immigration, particularly in the enforcement of entry requirements. I read him for the oppo-

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11. Id. (citing Gerald Neuman, The Lost Century of American Immigration Law (1776-1875), 93 Colum. L. Rev. 1833, 1840, n.34 (1993)).
12. See Neuman, supra note 11, at n.34.
13. Spiro, supra note 1, at 172.
15. Id. at 1897.
site thesis; i.e., that once the Civil War was over, slavery was abolished, and borders were more formally established, federal primacy was possible and proper to enact. This federal role coincided with the establishment of exclusion categories, immigration restrictions, and treaty obligations—as in the Chinese Exclusion Case.\textsuperscript{16} There is no turning back of this clock.

Interestingly, for a thesis that so radically rewrites the preemption doctrine, Spiro’s analysis touches quite lightly upon current preemption theory. As best I can tell, his theory of preemption rests not upon a larger sense of preemption powers generally, but solely and narrowly upon the tripod of foreign relations/state-level discrimination obstructs federal enforcement/equal protection for what he terms “federal predominance.”\textsuperscript{17} In addition, in his view, if the federal government fails in its enforcement powers, the states can assume a role-by-default, especially those states that share a border with Mexico, or states such as Florida, which receives a disproportionate share of refugees or asylum seekers from Cuba, Haiti, and other Caribbean nations. This right-by-disadvantage or right-by-proximity reasoning greatly influences Spiro’s formulation.

Within the existing preemption doctrine, he sees two “possibilities for action on the issue at the state level”:

These possibilities fall into one of two broad categories. The first comprises state measures which seek directly to enhance enforcement of federal immigration controls, i.e., those which sanction activities relating to the violation of federal immigration law under state law, or which mandate assistance to federal authorities with respect to their enforcement duties. The second category includes action which legally disadvantages undocumented aliens in terms of social services, employment, and other opportunities. This category may work to reduce state fiscal loads by disqualifying undocumented aliens from public benefits. It may also indirectly reduce these and other expenditures by discouraging the residence of undocumented aliens, as would the enforcement measures. Neither category compromises, at least not inherently, the ultimate

\textsuperscript{16} Chae Chan Ping v. United States, 130 U. S. 581 (1889); see Neuman, supra note 11, at 1897 ("To the extent that immigration regulation today turns on these issues (which is substantial), the equation of immigration with foreign policy is a fiction.").

\textsuperscript{17} Spiro, supra note 1, at 134.
federal bedrock of admission and exclusion decisions: the state does not let in anyone that the federal government would exclude, nor does it keep out anyone that the federal government would admit.  

Yet traditional preemption theory does not turn on efficacy, but rather on the Supremacy Clause (which implicates the treaty power), the Commerce Clause, the Necessary and Proper Clause, and, in the immigration field, the Uniform Rule of Naturalization Clause and the Naturalization Clause. Elsewhere in this issue, Professor Hiroshi Motomura has convincingly argued that the Equal Protection powers provide for a superior federal role in immigration jurisprudence, addressing Professor Spiro’s contention that the “equal protection line [of reasoning] . . . should now be abandoned.” Thus, I will not address the role of equal protection in my line of reasoning.

Even a brief review of current preemption jurisprudence, however, shows that efficacy has no place in the formulation, at least in the area of federal failure to perform. In certain fields, as in current federal labor law, a convincing argument can be made that the Supreme Court has itself contributed to the confusion by its inconsistent whittling away of the federal labor preemption doctrine and its carving out of dozens of exceptions in the National Labor Relations Act (NLRA). This trend has led to what one commentator has called “an ensnared Gulliver,” hog-tying the NLRA by exception and inconsistency. However, this does not accurately describe immigration law, or most applications. If anything, the federal role has, with a few odd exceptions, been strengthened and

18. Id. at 130.
19. U.S. Const. art. VI, cl.2.
23. Id.
25. In addition, I will not address what I believe to be a clearly unconstitutional delegation of the immigration power contemplated by proposals that the 1986 IRCA (the Immigration Reform and Control Act) permits Congress to “subcontract” its preemtory powers to the states. For an excellent analysis of this theory, see Gilbert Carrasco, Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection, 74 B.C.L. Rev. 591 (1994).
enhanced. Both Congress and the Supreme Court have contributed to this trend. Most commentators rue the exasperating deference accorded Congress and the Immigration and Naturalization Service (INS), but this has not led to any doctrinal weakening of the preemption powers, which remain firmly in place.\textsuperscript{28}

The 1984 U.S. Supreme Court case, \textit{Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.},\textsuperscript{29} for example, sets out three ways federal preemption occurs: federal legislation expressly trumps any state activity; state law either directly conflicting with a clear federal intent to preempt, or interfering with federal legislative enforcement of the federal statute; or Congress preempts any state action by fully “occupying the field,” leaving no legitimate room for state activity in the area.\textsuperscript{30} The problem for Spiro is that alienage cases rely substantially upon preemption, and the doctrine seems tailor-made for immigration law, nearing the twenty-first century. Beginning with the 1876 \textit{Chy Lung v. Freeman} case,\textsuperscript{31} the Supreme Court has found that federal immigration enforcement will preempt the states’ little “Commissioners of Immigration,”\textsuperscript{32} or the variety of state-level laws that attempted to regulate immigration or immigrants, both those that were petty nuisances\textsuperscript{33} and those that were more substantive.\textsuperscript{34} Moreover, the Supreme Court has upheld the primary federal role across subjects


\textsuperscript{29} 467 U.S. 461 (1984).


\textsuperscript{31} 92 U.S. 275 (1876).

\textsuperscript{32} In \textit{Chy Lung}, the Supreme Court struck down a California State statute that established a State Commissioner of Immigration, with near-absolute authority, to collect shipmaster bonds upon the arrival of immigrants into California ports. The case is widely regarded as affirming the foreign relations rationale for federal preemption. See, e.g., Spiro, supra note 1, at 135-45; Motomura, supra note 24, at 203.

in all three versions of preemption: with express federal legislation,\(^{35}\) with either directly-conflicting state law or obstacle-conflicting federal enforcement powers,\(^{36}\) and, to a lesser degree, with "occupying the field" authority.\(^{37}\) Under these scenarios, preemption in the immigration context is firmly-rooted and on the rise.

In other contexts, federal preemption is similarly alive and well. In federal question removal powers, the so-called "complete preemption" doctrine has been extended from its traditional well-pleaded complaint rule use to a fresh basis for obtaining federal jurisdiction.\(^{38}\) In particular, linking the pleadings to an omnibus federal statute, as the Employment Retirement Income Security Act (ERISA),\(^{39}\) may provide an otherwise-unavailable federal

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Anti-Chinese animus was particularly virulent in California, where a series of substantive and petty nuisance state ordinances were aimed at the Chinese. These ordinances provided for [arbitrary] inspections of Chinese laundries, special tax levies, inspections and admissions regulations for aliens entering California ports, mandated grooming standards for prisoners that prohibited pigtailed, and a variety of other regulations designed to harass and discriminate against the laborers. Many of these statutes were enacted in defiance of the preemptive role of the federal government in immigration policymaking, and would not have survived the United States—China Burlingame Treaty, adopted in 1868.


34. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889) (Chinese Exclusion Case) (asserting foreign power sovereignty); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding deportation provision requiring "one credible white witness").


39. 29 U.S.C.A. § 1132 (a) (1) (B); see Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1982) (state court actions pleaded under § 502 (a) (1) (B) civil enforcement provision of ERISA can be removed to federal court).
forum. In *Cipollone v. Liggett Group*, a suit against a cigarette manufacturer in which several common law claims were alleged, the Court found that the 1969 Public Health Cigarette Smoking Act expressly preempted the failure-to-warning claims, but could not be read to preclude the state common law claims of breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud. While some commentators have read *Cipollone* as a weakening of the preemption doctrine, at least in the instances of "actual conflict," there have been lower court opinions that have construed federal statutes to retain preemptive power over state common law, to preempt some but not all state claims, and to impliedly preempt the state common law claims. That the Supreme Court has denied certiorari in each of these cases (under "FIFRA," the Federal Insecticide, Fungicide, and Rodenticide Act) suggests that the preemption doctrine is being regularly examined, refined, and reaffirmed, not becoming calcified or moribund, as Spiro believes. Further, in an era of increasingly complex statutory and regulatory regimes in all manners of public concern, there is a healthy tension evident in preemption standards. Examples that come to mind and that have drawn scholarly attention include the siting of hazardous waste disposal, products liability, state regulation of domicile and benefits accorded certain resident aliens, and enforcement of criminal alien regulations by local and

41. Id.
42. Stern, supra note 30, at 1010 ("Taken literally, the express preemption doctrine enunciated by the Court in *Cipollone* requires that in a case of 'actual conflict,' in which a preemption provision is ambiguous, neither express nor implied preemption would occur.").
43. Id.
44. Id.; see, e.g., Papas v. Upjohn, 985 F. 2d 516 (11th Cir. 1993), cert. denied, 114 S. Ct. 300 (1993).
47. Supra notes 44-46.
49. O'Hara, supra note 30.
50. Edell and Walters, supra note 30.
state law authorities. In sum, this concern and field of study are alive and jumping, with dozens of cases and issues reflecting the hydraulic character of the relationship.

II. THE LITERATURE ON ALIEN BENEFITS: LIES, DAMNED LIES, AND ALIEN STATISTICS

Professor Spiro also grounds his findings in his review of "impacts and responses," i.e., that states are, in effect, forced by the high costs associated with undocumented aliens to seek statutory relief or some other form of compensation. However, this line of reasoning is ultimately unpersuasive for two reasons. First, a fair review of all the evidence shows that undocumented aliens are, by the most reliable studies, a net gain for the economy, even if not for the polity; second, even if there were a substantial cost, this factor would not allow states to preempt preemption and take immigration matters into their own hands. Yet careful study in this area often reveals counter-intuitive results, and even in the face of poor, inadequate, and nonexistent data, the situation would not give carte blanche to the states in regulating undocumented immigration.

An ambitious 1992 project, the Impact of Undocumented Persons and Other Immigrants on Costs, Revenues, and Services in Los Angeles County, is one of the more comprehensive governmental analyses of immigration economic costs and benefits. The study concluded that immigrant groups—who constitute 25% of the Los Angeles county population—consumed $947 million of county services, or 30.9% of the total net Los Angeles County costs for 1991-92; it also estimated that they contributed $4.3 billion in all tax revenues, including $139 million to the County. While these figures seem lopsided against the County, this group of immigrants also generate nine times more California State revenue and eighteen times more federal revenue than they did Los Angeles County


These data, which show a net contribution to tax revenues but an inefficient reimbursement/outlay distribution of costs to the county from other tax entities, were seized upon by Governor Pete Wilson and others to fan a campaign of inaccurate anti-alien sentiment generally, to veto legislation aimed at solving the college residency problem, and to introduce restrictionist legislation designed to make aliens ineligible for other public benefits.

The study, even though it documented a substantial net contribution paid by the immigrant groups, was confusing, as it misleadingly lumped together permanent residents since 1980, aliens who legalized their status since the 1986 IRCA amnesty, citizen children of undocumented parents, and the undocumented.

55. Id. at 8. A federal study also concluded that immigrant education programs are underfunded. U.S.G.A.O. Immigrant Education: Federal Funding Has Not Kept Pace With Student Increases (1994).


59. Each of these groups was separated out for measurement purposes, but the data are confusingly reported. For one example, there is no attempt to measure the context of costs, as immigrants with children "cost" more than do immigrants without children, yet no such comparative, contextual data are given. Moreover, the distributional data for several agencies are not explained (e.g., the calculations for property tax estimates), where rental payments are not analyzed fully for their tax payments. For a brief reply to the Los Angeles County study, see the Urban Institute response (Aug. 26, 1992), included in the study's appendix; see also Greg Miller, Report Alleges Misleading Data on Immigrants to
these groups bear little relationship to each other except in a vague, undifferentiated sense of dispossessed immigration shorthand. Permanent residents since 1980 are persons who either came to the United States by family relationships or employment preferences, who adjusted status from non-immigrant visas to become permanent residents, or who employed one of a number of other legal means to remain permanently in the United States.\textsuperscript{60} After five years, permanent residents can, in most instances, become naturalized citizens.\textsuperscript{61} Therefore, this group was "thinned out" by post-1980 permanent residents who chose to become citizens, and who would be statistically indistinguishable from the citizen population.\textsuperscript{62} The legalizing population overlaps with the first group, as

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60. 8 U.S.C.A. § 1427. After permanent residence is obtained, a lawful "residence" is required: "the place of general abode...[which is the alien's] principal, actual dwelling place in fact, without regard to intent." 8 U.S.C.A. § 1101 (a) (33). This requirement is not the "domicile" that undocumented persons can acquire by abandoning their domicile in the native country or some other place that had been their domicile. See generally Plyler v. Doe, 457 U.S. 202, 227 n.22 (1982); Martinez v. Bynum, 461 U.S. 321 (1983).


62. For example, The National Association of Latino Elected and Appointed Officials response to the Los Angeles County Study, reproduced in the Study's appendix, was critical of this point:

The number of non-citizen foreign-born residents in the Los Angeles-Long Beach SMSA as reported in the 1980 Census includes some number of undocumented immigrant residents of the SMSA who responded to the Census. However, it also fails to include some number of residents in the SMSA, the "undercount" of the 1980 Census; additionally, because legal permanent residents share some of the characteristics of those residents most likely to be undercounted (for example, low income and education levels, fear of responding to the Census because of their own or other family members' immigration status, and difficulties completing English-language questionnaires), the number of those undocumented residents includes some number of legal permanent residents. On the national level, according to estimates of demographers such as Warren and Passell, approximately 2.1 million undocumented immigrants were counted in the 1980 Census. However, the total number of undocumented residents of the nation, approximately 2.6 million exceeded the number of undocumented included in that Census. Consequently, we believe that at the very least, the number of undocumented immigrants included in the 1980 Census figure for non-citizen foreign born residents equals the number of legal permanent residents not included in that same figure because of the undercount, and we believe that it is very likely the number not included because of the undercount could even exceed the number of undocumented who were included. Assuming, at the very least, that those two numbers are equal, the 1980 Census figure for non-citizen foreign-born is a reasonable estimate of the legal permanent resident population because
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they have begun adjusting status through the amnesty provisions of IRCA, after a brief classification period of Temporary Resident Status. 63 By 1992-1993, many of the persons had begun to overlap with the citizen population. Third, the true Los Angeles County 1992 undocumented population was estimated to be 140,000 minors and 559,000 persons eighteen or older (or 7.6% of the total County population of 9.187 million persons). 64 This group was estimated to "cost" $308 million in County services, or approximately 10% of the total, 65 even though all children can be assumed to cost more than they generate, whatever their immigration status. This would be equally true of fourth- or fifth-generation citizen children. Finally, citizen children of the undocumented were also included as part of the "immigrant" population, even though as U.S.-born residents they have all the rights accorded other citizens. 66

Thus, the loose definition of "illegal alien" or "immigrant," including long-time permanent residents, intending citizens, and actual citizens, renders the study less helpful in understanding the true costs of the undocumented. For undocumented children, presumably the most needy consumers of services and least-likely tax contributors, the study found only 117,000 in a county population of 2.505 million children under 18. 67 The study's findings are consistent with other studies that showed virtually no participation in welfare programs by the undocumented. For example, in studies of California IRCA amnesty applicants, only 2% of the formerly-undocumented aliens had received welfare services, 1.2% had ever received general assistance, and 4.2% had received food stamps; these data overinflated the undocumented participation rates, as they counted even citizen members of undocumented families as "undocumented." 68 An Urban Institute reanalysis of the same Los Angeles County data found that the 1992 County report overesti-

63. 8 U.S.C.A. § 1255(a) ("Temporary Resident Status").
64. Impact, supra note 53, at 25 (Table 2).
65. Id. at 29.
66. See, e.g., Piatt, supra note 59.
67. Impact, supra note 53, at 25 (Table 1); see Sam Verhovek, Stop Benefits for Aliens? It Wouldn't Be That Easy, N.Y. Times, June 8, 1994, at A1 (noting complexity of groups and regulations). I employ the term "undocumented" as more precise and less pejorative than "illegal alien."
68. Impact, supra note 53, at 33 (citing comprehensive Adult Student Assessment System study; Westat study).
mated costs by $140 million and underestimated tax revenues paid by immigrants by $848 million.\textsuperscript{69}

The Los Angeles County data, whatever the assumptions and data flaws, corroborate virtually all other studies conducted since the 1970's that measure undocumented alien benefit rates and tax contributions.\textsuperscript{70} Julian Simon, one of the leading scholars in this field, estimated in 1985 that the undocumented pay five to ten times greater an amount of taxes than they consume in services.\textsuperscript{71} In his 1989 book, The Economic Consequences of Immigration, he estimated that immigrants' net contribution (tax payments minus benefits received) was over $1300 per person.\textsuperscript{72} A 1986 RAND Corporation study of Mexican immigration in California summarized that the taxes paid by Mexican immigrants were greater than the costs of all benefits received, except those of education.\textsuperscript{73} This was confirmed by a 1985 Urban Institute study, The Fourth Wave.\textsuperscript{74} A similar 1984 study conducted on Texas undocumented aliens showed a substantial net gain of revenues over expenses, as did a

\textsuperscript{69} Miller, supra note 59 (citing Urban Institute study); Vobejda, supra note 59 (same); Jenifer Bosco, Undocumented Immigrants, Economic Justice, and Welfare Reform in California, 8 Geo. Imm. L.J. 71 (1994). The Urban Institute study very carefully set out the variegated groups accurately. Pete Wilson, About Time We Stopped Rewarding Illegals, Hous. Chron., Aug. 29, 1993, at F1 (proposing to eliminate eligibility for all public services to undocumented). This figure vastly overstates the number of undocumented births and misleadingly lumps together the variegated groups. For careful studies of this issue, see the Auditor General report on San Diego County, A Fiscal Impact Analysis of Undocumented Immigrants Residing in San Diego County (Aug., 1992), at 85-107; see also Leo Chavez, Wayne Cornelius, and Oliver Jones, Mexican Immigrants and the Utilization of U.S. Health Services: The Case of San Diego, 21 Soc. Sci. Med. 93 (1985); Janet Calvo, Immigrant Status and Legal Access to Health Care (1993).

\textsuperscript{70} More than most fields of study, this field is susceptible to manipulation by one's assumptions. Every person, whether young or old, documented or citizen, healthy or ill, is a composite of cross-subsidization, tax relief, subsidy, abatement, and social service. I certainly believe that substantial quantitative skills should be brought to bear upon this problem of "economic costs," but I do not believe very many people fully pay for their own "costs." Pay-as-you-go is a high standard for the undocumented to bear, even though most studies show they do so. See, e.g., Larry Rohter, Revisiting Immigration and the Open Door Policy, N.Y. Times, Sept. 19, 1993, at 4E (reviewing competing claims).

\textsuperscript{71} Julian Simon, How Do Immigrants Affect Us Economically? (1985).


\textsuperscript{73} Kevin McCarthy and R. Burciaga Valdez, Current and Future Effects of Mexican Immigration in California (1986).

\textsuperscript{74} Thomas Muller and Thomas Espenshade, The Fourth Wave (1985); see also Miller, supra note 59 (reporting on 1993 Urban Institute Study); Jeffrey Passel, How Much do Immigrants Really Cost? (1994) (reviewing Huddle's work).
California State Department of Finance 1991-92 study and a 1990 U.S. Department of Labor study. Virtually all the thorough and non-partisan studies show the same result.

Careful scholars have even shown how entire markets are created or restructured by immigrants, many of whom bring traditional U.S. values of hard work, beliefs in family and achievement, and a willingness to undertake tasks not considered attractive to U.S. workers. For example, a recent housing study conducted in Houston revealed that during the city’s economic downturn of the early 1980’s, the overbuilt condominium, housing, and rental apartment industry was kept from collapsing entirely by the influx of undocumented immigrant populations who were recruited to the formerly Anglo, middle class tenant markets. The former regimes of strict rules, limits on the number of children, and restrictions on multiple-family housing arrangements were relaxed or ignored in order to accommodate the undocumented and other immigrant communities. In the late 1980’s, once the city rebounded and began to recover from its recession, another market restructuring occurred, ratcheting the rules to be more selective, raising rents to reconstitute the “mix” of the tenants, and attracting more Anglo, higher income tenants. Similarly, the undocumented helped


77. Richard Vedder et al., Immigration and Unemployment: New Evidence (1994) (de Tocqueville Institution study concluding that immigrants create jobs in the aggregate); George Borjas, Friends or Strangers (1990) (slight differences in welfare benefits to immigrant families are due to location of aliens); U.S. Department of Justice, Immigration and Naturalization Service, Report on the Legalized Alien Population (1992) (costs for health care for legalized aliens was reimbursed by U.S. government at half the rate reimbursed for remainder of population); Maria Tienda and Leif Jensen, Immigration and Public Assistance Participation: Dispelling the Myth of Dependency (1985) (refugees and immigrants participate in welfare plans with less frequency than do natives); Chris Hogeland and Karen Rossen, Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity (1991) (study of Latina undocumented women showing one quarter had citizen children eligible for AFDC but only 5% received welfare benefits for which their children were eligible); Jeffrey Passel and Michael Fix, Myths About Immigrants, 95 For. Pol'y 151 (Summer, 1994) (collective advantages of increased immigrants). But see Donald Huddle, supra note 72.

account for California’s extraordinary economic gains in the 1970’s and 1980’s.79

However, given the poor data and politicization of the cost/benefits issue, it is clear that this is far more than an arithmetic issue. But it is also more than a geographic concern. There are more Latinos in both Illinois and New York than there are in Arizona and New Mexico. Both the non-Southwestern states have taken steps to allow undocumented students to attend public colleges as resident students.80 To be sure, California has more undocumented aliens, but as the largest state, California has more of virtually any demographic category.81 Moreover, our federal system is a quilt of cross-subsidies, shoring up river beds in certain areas, building dams for arid parts of the country, and offering wetlands protections elsewhere. In effect, we all cross-subsidize each other’s needs, as federal projects are funded by general Treasury funds and earmarked revenue bonds. California does not get any consideration to weaken the preemption doctrine for immigration expenses any more than Detroit’s car manufacturing economy gets any special pleading for preempting air pollution legislation. And Texas, who filed suit against the United States, also alleging a shortfall, will have to explain why it returned $90 million in unexpended alien assistance and relocation funds in 1994.82 After a thorough review of this complex literature, I have to conclude that the

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79. Even the Director of the INS has described the scapegoating phenomenon:
   "In attempting to explain the current unease over immigration, [Doris] Meissner
drew a comparison with attitudes a decade ago, saying, "you didn’t see this
[outrcy] in the 80’s when California was growing and this cheap labor . . . really
contributed significantly to California’s boom. Now you have an accumulation of
people who look very different and a lack of jobs and a tremendous shock in the
economy."

Ronald Ostrow, Immigration Chief: Instinct to Survive Accounts for Masses, Hous.
J., Apr. 22, 1994, at A10 (reviewing economic contribution to Orange County by immi-
grants); Sam Verhovek, Texas and California: 2 Views of Illegal Aliens, N.Y. Times, June

80. Alarcon v. Board of Trustees of the University of Illinois, Illinois Cir. Div., No. 87-
Ch. 02855 (July 14, 1987) (undocumented students may become state residents); William
O’Connell, College and University Attendance by Out-of-Status and Undocumented

81. Verhovek, supra note 79; Deborah Sontag, Illegal Aliens Put Uneven Load on
States, Study Says But Immigrant Total is Viewed as Boon, N.Y. Times, Sept. 15, 1994, at
A8.

82. James Cullen, Blame the Newcomers, Tex. Observer, Aug. 19, 1994, at 2, 3 (analysis
of state suits to recover costs of alien benefits).
research literature does not reveal that a hardship has befallen the states sufficient to weaken the traditional preemption doctrine. I do not believe Professor Spiro sustains the burden of persuasion in this important part of his analysis.

III. THE FOREIGN RELATIONS POWER AND THE LURE OF INTERNATIONAL LAW NORMS

In his final leg of the tripod, Professor Spiro, so dour in his burial ceremony over the preemption doctrine, is positively giddy with the prospects of internationalizing the normative law regulating the states. However, his brief treatment of this complex dimension raises more questions than it answers. In addition, he appears to believe that international law norms would simplify the equation and provide the necessary check on rogue states (of the fifty United States). Unfortunately, this line of reasoning does not advance beyond the exhortatory aspects of international law (states "will need to accept the responsibility of their actions" and "Would California wish to be known as an international lawbreaker up against a law-abiding Texas?"). Second, international law, strictly interpreted, would not allow the individual states to do what Professor Spiro would allow them to do, under Proposition 187, for starters. If international law norms cannot carry the day under a preemption regime, why would they be more effective or compelling in his decentralized world? And, as a practical matter, why should I have to schlep to Geneva to file an injunction against Proposition 187 in a demi-sovereign world when I can get a TRO in court in Oakland? Simply making the remedy more attenuated or more difficult to put into play does not guarantee the rise of international law norms. Rather, they promise to substitute more ethereal promises as a clear tradeoff for enhanced demi-sovereignty. This one-sided equation is no bargain, especially when I have so many other protections, even if preemption were to be peeled away, in the face of all precedent.

Consider the example of Proposition 187's attempt to repeal Plyler v. Doe, the case upholding the right of undocumented school children to attend public schools. Because the case was decided on alternative grounds, particularly an expanded Equal Protection theory, it is little noticed that the federal district judge cited the

83. Spiro, supra note 1, at 177.
1967 Protocol of Buenos Aires (Art. 47) as an international law precedent, guaranteeing equality of opportunity for all children residing in the country. Under Professor Spiro's reformulation, undocumented children would be required to argue customary international law, embodied in the International Covenant of Civil and Political Rights, the Convention on the Rights of the Child, and the U.N. Charter and Universal Declaration, among many other such protocols. Most usefully, the United States is a signatory to most of these basic building blocks of international law and human rights jurisprudence. However, the Supreme Court has never found international law norms to be determinative in the context of the undocumented, either in Plyler or in its successor case, Martinez v. Bynum, which reaffirmed Plyler. The additional protections arguably available under international law norms seem incongruous in Spiro's formulation, which he labels a "sort of

86. 993 U.N.T.S. 3.
89. 461 U.S. 321 (1983) (allowing school districts to deny residency to undocumented aliens who move to district solely to attend school without establishing requisite domicile). The Supreme Court held in Plyler that the undocumented could establish domicile. Plyler, 457 U.S. 202, 227 n.22 ("[I]llegal entry into the county would not, under traditional criteria, bar a person from obtaining domicile within a State."). This point is often ignored by policymakers who act as if establishing domicile is not possible for persons who are in the country illegally. There is no common law "dirty hands" preclusion to traditional domicile establishment. See, e.g., Castillo-Felix v. INS, 601 F.2d 459, 464 (9th Cir. 1979) ("To establish domicile, aliens must not only be physically present here, but must intend to remain."). Accord Lok v. INS, 681 F.2d 107 (2d Cir. 1982); see also Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 795-99(D. Kans. 1980), aff'd on other gds., 654 F.2d 1382 (10th Cir., 1981).

When there is an unavoidable clash between an international treaty and U.S. federal law, there are well-entrenched judicially-created doctrines to handle the problem. For example, it has long been accepted that when there is such a clash between a treaty and the U. S. Constitution, our courts will apply the Constitution domestically even though such action places the United States in violation of international law at the international level.

medieval construct in which multifarious sources of authority find their place on a vertical chain of hierarchy, one that tolerates gross inequalities, but at the same time acknowledges all powers.\textsuperscript{90} Not to put too fine a point on it, this is a dubious desideratum. I choose a higher common denominator, one that builds upon Plyler, adds international law principles and protections, and preserves the preeminent federal role, lest every state revert to the lowest common denominator.

\textbf{IV. Conclusion}

Contemplate the true costs and benefits of Professor Spiro’s radical notion. It is not clear that he has considered all the consequences of his proposal, particularly the possibility that devolution of immigration policy could, under his scheme, not only allow the restrictionists to prevail, but an occasional safe haven could emerge. In the nuclear world, townships and municipalities have declared themselves symbolic nuclear-free zones. Would Spiro’s scheme admit of a Mexican-American governor who ran on a platform of no capital penalty and no unfair immigration enforcement? What if the governor declared his state a sanctuary and safe haven for the undocumented? What if a person aided the entry for an undocumented alien into this state? Would the citizen be able to plead that he believed the governor had waived any previously-existing federal penalty that might have been leveled at him? Consider a state university that banned all students from any country that held U.S. citizens hostage. These cases, unimaginable in fiction or in Professor Spiro’s reformulation, occurred.\textsuperscript{91} I believe this proposal, however elegant and well-crafted, is a Trojan horse, to be kept outside the walls in any event. Preemption, for all its detriments and foolish inconsistencies, is the devil we know. A postmodern state cannot coexist with medieval constructs.

\textsuperscript{90} Spiro, supra note 1, at 178.