Trusts Betrayed: The Absent Federal Partner in Immigration Policy

SWATI AGRAWAL*

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* Associate, Paul, Weiss, Rifkind, Wharton, & Garrison. B.A. 1992, University of Michigan; J.D. 1995, Yale Law School. I would like to express my gratitude to Professors Harold Koh and Jerry Mashaw of Yale Law School, and to Michael Fix of the Urban Institute for their helpful comments, suggestions, and support. I am especially indebted to Anthony Saldana for his unflagging support and encouragement. Research on this Paper was facilitated by a grant from the John M. Olin Foundation, awarded by the Yale Center for Law, Economics, and Public Policy.

The States enjoy no power with respect to the classification of aliens . . . . This power is 'committed to the political branches of the Federal Government.' Although it is 'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, . . . and to 'take into account the character of the relationship between the alien and this country,' . . . only rarely are such matters relevant to legislation by a State.[1]

I. INTRODUCTION

Many states—particularly those with large immigrant populations—view themselves as indentured hosts to undocumented aliens residing in this country as guests of the federal government. Over the past few years, states have raised growing concerns that the federal government has not met its obligations when establishing and administering policy regarding undocumented aliens—concerns based on facts and figures such as the $500,000-a-day rate of increase for undocumented alien health care expenses under the California state-funded Medi-Cal program.[2] Putting such dramatic statistics aside, one sees that the deeper thrust of the states' concern is that our federal system has failed to protect them from unjust cost allocation in the area of immigration. What is less apparent from the states' allegations is that the federal government has left other victims in the wake of its failure. In particular, the political process has created a backlash against disenfranchised groups, such as immigrants, who are the beneficiaries of state and federal redistributive programs.

Recently, state perceptions of low federal accountability and unjust cost allocation[3] have appeared to catalyze not only anti-immigrant

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1. Plyler v. Doe, 457 U.S. 202, 225 (1981) (citations omitted).
2. Liese Klein, *Wilson Vows to Defend Proposition*, UPI, Nov. 21, 1991, at 13 (citing California Department of Health and Welfare).
3. Unjust cost allocation between illegal immigrant and legal resident or citizen, and unjust cost allocation between the federal and state governments are two forms of redistribution commonly cited in current discussions regarding fiscal responsibility for illegal immigration. *See, e.g.*, *Keep Heat on President, Congress for Money to Support Immigrants*, SUN-SENTINEL, May 25, 1996, at 18A; Pete Wilson, *Illegal Immigration Hurts America*, DES MOINES REGISTER, July 25, 1995, at 11; Jim Specht, *Republican Task-Force Issues Tough-on-Illegal Immigrants Report*, GANNETT NEWS SERVICE, June

sentiment among citizens,[4] but also cynicism about the federal government as the states' cooperative partner in the federal system. In ratios of approximately two to one, the American public believes that the United States must curtail levels of immigration and should not provide government assistance for those who legally immigrate to the United States.[5] Initiatives taken in 1994, 1995, and 1996 to restrict alien access to welfare benefits and to increase federal fiscal responsibility for immigrants marked some of the most significant manifestations of such sentiment, calling into question the welfare state's capacity to absorb immigrants. The State of California passed Proposition 187, which denies undocumented aliens education and, with the exception of emergency medical services, health care benefits.[6] Over fifty immigration bills directed against immigrants, taking measures that range from ending all immigration for a period as long as five years to denying education to illegal immigrants, have been introduced in Congress.[7] In August 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Act, which denies, among other things, food stamps and Supplemental Security Income to most legal immigrants.[8] And, most importantly, six states, Arizona, California, Florida, Texas, New Jersey, and New York (hereinafter collectively referred to as the "immigration states" and "plaintiff states") brought suit against the federal government, seeking reimbursement for selected costs resulting from immigration. If one were to take current public sentiment as reflected in legislative proposals, as a proxy for a welfare state's success in "absorbing" legal immigrants, the United States would certainly score quite low.

29, 1995; Richard C. Reuben, *Law and Politics, The New Federalism*, 81 A.B.A. J. 76 (1995).

4. California Senator Diane Feinstein recognized this effect when she stated, "If we fail to act, it's only going to continue to escalate ill-will toward all immigrants," in reference to an immigration bill she reintroduced in June, 1994 to eliminate AFDC and SSI for non-citizens, including legal aliens. Michael Doyle, *Feinstein Gets Tougher on Immigration*, SACRAMENTO BEE, June 16, 1994, at A7.

5. Frank Wright, *Legislative War Waged on Immigrants, Refugees; Foreigners Seeking Haven Will Bear Brunt as Congress Pursues Ways to Cut Budget*, STAR TRIB., June 4, 1995, at 15A.

6. Nearly sixty percent of California voters ratified Proposition 187. Dan Walters, *California Voters Join Nationwide Shift to Right*, FRESNO BEE, Nov. 10, 1994, at A3.

7. Ellen Debenport, *In Divided Congress, Immigration Showdown Looms*, ST. PETERSBURG TIMES, May 25, 1995, at 12A. Presidential hopeful, Pat Buchanan, rode on the anti-immigration wave and called for a moratorium on immigration to the United States. *Id.*

8. PUB. L. NO. 104-193, 110 Stat. 2105, 2260-2267 (1996) (to be codified in scattered sections of 8 U.S.C. and 42 U.S.C.).

A. A Modern Approach to Old Problems: A Paradigm Based on Modern Economic Principles of Trust

The federal government appears to have adopted an agenda to shift the risks and the costs of illegal immigration to the states. To what implications does this agenda give rise, and how should federal policymakers rethink the allocation of respective state-federal duties associated with illegal immigration? Arguably, because the federal government holds responsibility for inadequately supporting services and public benefits for undocumented aliens, it also holds ultimate responsibility for creating the current animosity against legal and illegal immigrants alike. This contention runs counter to popular thinking that advocates the broad exercise of federal plenary power—thinking based largely on the belief that the national government is a better guardian of individual rights than the state governments.

Does such a state of affairs reflect the way things should be? Unfortunately, the federalism principles articulated by the framers and contained in the Constitution provide little guidance in constructing a modern, intelligible theory of federalism to be applied to immigration policy. Even if this were not the case, the task would likely be formidable because issues of federal-state power relations have metamorphosed to a point where the framers would find the current state of federalism a faded vestige of their original conception.[9] Consequently, any framework for analyzing how the federalism structure affects the ability of the United States to absorb immigrants successfully must focus on and extrapolate from the shared concerns and understandings underlying the constitutionally-protected, dual-tier system of American government.

This Article takes such an approach and concludes that the notion of trusteeship was central to the federal government's relationship with the state governments.[10] State demands for federal reimbursement of state

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9. In the context of immigration policy, for example, there exist elaborate covenants between the federal and state governments, including grants-in-aid for services for undocumented aliens who reside in this country as a result of "the default of the political branches of the Federal Government." Plyler v. Doe, 457 U.S. 202, 242 n.1 (1982) (Burger, J., dissenting).

10. *See infra* parts V, VI. It is interesting to note that early analyses of immigration policy and immigrant rights have often invoked the idea of 'contracting.'

costs for immigration can be reconceptualized, in part, as ex post facto challenges to the federal government's failure to meet a duty assumed under an implicit trust that binds the states to their citizens and binds the federal government to the states and the national citizenry. Given this framework, the search for intelligible principles to guide judges and policymakers must look beyond historical analysis to private law theories of trusts, contracts, and remedies.

This Article goes further to argue that the status quo of intergovernmental fiscal relations in matters of illegal immigration contravenes the principles of the original trust relationship established between the federal and state governments by the Constitution. Applying principles of the private law of trusts and drawing from the jurisprudence of federal trusteeship duties to subordinate, sovereign regimes, such as the Native American tribes, this Article strives to develop guiding principles for future federal policymaking and remedial action. As a first step, this Article methodologically rethinks the constitutional principles on which the Supreme Court has relied when reviewing the constitutionality of federal action claimed to preclude a state's ability to participate viably in our federal system of government. As such, it does not focus on how federalism should be structured, but instead, focuses on what responsibility the federal government has to the states affected by the exercise of federal power. The overarching aim is to give modern, pragmatic substance to the federal government's affirmative duty to protect the states from fiscal subversion—a duty which originates in the federalism principles articulated by the framers and contained in the Constitution.[11]

B. Layout of the Article

The goal of this Article is to develop a framework for analyzing claims such as those brought by the immigration states against the federal government. In this pursuit, part II of the Article will focus on

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However, in contrast to this Article, which addresses this problem in terms of trusts between the states and the federal government, they addressed the problem as based on a contract between the alien and the United States. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

> Since under the classical order the alien's entry was conceived of as a privilege whose continued enjoyment was conditional upon her compliance with the formal terms that the government prescribed, deportation was simply the revocation of her license, a reversion to the status quo ante. No procedural safeguards for this reversion where thought to be necessary.

Id. at 27.

11. *See* Janice C. Griffith et al., *Judicial Review of Federalism Issues in the Third Century of the Constitution—A Dialogue*, *in* FEDERALISM: THE SHIFTING BALANCE 77-90 (Janice C. Griffith ed., 1989) [hereinafter FEDERALISM].

the question of federal plenary power over immigration matters and restrictions on state alienage classifications limiting immigrants' access to the welfare state. Part III will examine the central claims of the immigration states against the federal government. Here, the examination will concentrate on the state lawsuits seeking federal reimbursement for the costs of services for illegal immigrants. Next, part IV of the Article examines the constitutional underpinnings of federal duties to states. It will focus on the ideas of John Locke and the notions held by the Founders, examining the importance and centrality of the federal system to the Constitution. Part V puts forth the trust model for federalism and outlines the contours of the dual-trust paradigm. The next section examines the Guarantee Clause and the Tenth Amendment as sources of the federal trustee duty. Finally, the Article looks to instructive forerunners which provide examples of the courts' treatment of governmental trusts. Specifically, it addresses trusts over coastal waters, Indian trusts, and trusts with associated states. The Article argues that the courts should draw from jurisprudence in these other areas of governmental trust when umpiring state claims for reimbursement of costs imposed by illegal immigration.

II. IMMIGRATION POLICY: A TALE OF FEDERALISM GONE AWRY

Look to any of the central United States Supreme Court cases or law journal articles regarding state alienage classifications or public benefits for undocumented aliens, and you will probably come across common constitutional buzzwords describing the sharing of power between the federal and state governments: Federalism, intergovernmental relations, supremacy, preemption, etc. Like other areas of policy which rely heavily on the successful symbiosis of federal promulgation and state implementation, immigration policy has become plagued with questions regarding the locus of governmental control and accountability—questions of federalism. Traditionally, the courts have regarded questions of federalism as inappropriate for judicial resolution, and more appropriate for resolution through the political process. But such an approach may not be suitable for a number of matters touching on alienage and federalism, because it not only presupposes that the status quo is the creation of popular will, but also fails to recognize that the political process may be incapable of providing a remedy.

Recently, the judiciary once again showed its reluctance to intervene in state-federal struggles—this time in very high-profile cases regarding immigration matters. A number of federal judges dismissed lawsuits brought by California, Florida, and Texas which sought reimbursement of the costs of providing for undocumented immigrants.[12] More significantly, the Supreme Court refused to hear Florida's appeal.[13] The lawsuits had alleged that the federal government was encroaching upon state sovereignty by forcing the states to divert state revenues away from state programs to respond to problems created by illegal immigration.[14]

The states' battle for reimbursement was uphill from the beginning. First, the states failed to find a remedy through the political process. Second, the states' resort to the legal system faced a number of difficult obstacles that served as signs of unlikely victory: The federal government's sovereign immunity, an attempt to use the Tenth Amendment as a sword,[15] and the difficulty of asking the courts to decide an inherently political question.

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12. U.S. District Judge Edward B. Davis dismissed Florida's suit on December 20, 1994 stating, "The court recognizes that the state of Florida is suffering under a tremendous financial burden due to the methods in which the federal government has chosen to enforce the immigration laws. . . . But recognizing these facts does not create a legal theory under which this court may grant relief. Without such a legal theory, this court must dismiss this action." Reena Shah Stamets, *Chiles' Suit Against U.S. Tossed Out*, ST. PETERSBURG TIMES, Dec. 21, 1994, at 1A. On December 14, 1994, U.S. District Judge Filemon Vela gave the state of Texas additional time to file briefs in its case against the federal government, but indicated that he was effectively dismissing the suit. Christy Hoppe, *Judge Rejects Role in Suit on Immigration*, DALLAS MORNING NEWS, Dec. 15, 1994, at 1A. On February 13, 1995, U.S. District Judge Judith Keep dismissed California's lawsuit to cover the expenses of providing services to illegal immigrants. Tony Perry, *State's Immigration Suit Against U.S. Dismissed*, L.A. TIMES, Feb. 14, 1994, at A3; *see also* Nancy Cleeland, *State's Suit Over Illegal Immigrants Dismissed*, SAN DIEGO UNION-TRIB., Feb. 14, 1995, at A1

> Reading from a lengthy prepared text and citing case law, U.S. District Court Judge Judith Keep rejected each of the state's eight claims. Several times she said the question of reimbursement should be decided by Congress or the executive branch, and pointed out the federal government is immune from lawsuits seeking monetary damages.

Id.

13. Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1674 (1996). The original complaint was filed in Florida in April of 1994. *See infra* note 73.

14. *See*, Heather Ann Hope, *Who Gets the Bill for Illegal Immigrants? In the End, Supreme Court May Decide*, BOND BUYER, Sept. 9, 1994, at 1.

15. For example, prior to any of the dismissals, constitutional scholars commenting on the lawsuits showed great skepticism about states' cause of actions based on the Tenth Amendment. One Scholar, Jonathan Varat, a professor at UCLA School of Law stated, "They're trying to use the Tenth Amendment as a sword, not as a shield, and that would be pretty far-fetched. It's a pretty aggressive use of it, which is okay, but it doesn't even work that often as a shield." *Id.*

The significance of the state lawsuits is certainly not a function of their justiciability. That is, the cases are not "baseless" as the Department of Justice would have one believe.[16] The lawsuits may not have a recognized cause of action, but the issues they raise call into question the basic structural foundation of the American system of governance. Moreover, they reveal a general deficiency in the jurisprudence of federalism, highlighting the unwillingness of courts to protect and foster structural arrangements of governance vital for a fair game of federalism.[17]

The legal field tends to discount non-justiciable questions, which are usually the most challenging, troubling, and difficult for our institutions to address. If the judiciary refuses to involve itself in the dispute, the question of voluntary political remedy remains open. If the states' remaining appeals ultimately fail, the question of the federal government's duty to the states will not die with them. The issues promise to continue to challenge state and federal governments far into the future until a satisfactory resolution is achieved. Thus, the question of intergovernmental relations in matters of illegal immigration deserves attention from the legal community—if not to find law-based solutions, then to consider political ones.

A. The Balance of Powers: The Court has Stacked the Weights in the Federal Government's Favor

The federal government enjoys a preeminent role in regulating domestic matters pertaining to aliens. In fact, it enjoys a freedom to take actions against immigrants—legal as well as illegal—that would likely be held inimical to principles of equal protection if applied to citizens, such as racial minorities.[18] In contrast, state assertions of

16. *See id.*

17. *See* FEDERALISM, *supra* note 11, at viii (noting that one school of thought "visualize[s] the Court as the guardian of a sphere of state and local autonomy from federal control, a role in some respects similar to the one that the Court has assumed in protecting individual liberties").

18. In the oft-cited case of Mathews v. Diaz, 426 U.S. 67, 69 (1976), the Court upheld a classification of aliens that was based on duration of residence and residency status. Congress had erected the classification for purposes of classifying individuals ineligible for Medicare Part B. *Id.* at 69-70. Political flexibility, judicial manageability, and limited resources (traditional legal arguments for Court deference to Congress in immigration matters) were extended as arguments for deference in the alien benefits

power over immigration and alienage classifications are regarded by the courts as highly suspect, requiring review under a strict scrutiny standard.[19] Naturally, the question of federal plenary power over immigration matters has raised many questions regarding the appropriate state role in making policies affecting immigrants within their borders.

The federal government possesses virtually absolute power over policies concerning both immigration and immigrants.[20] The Supreme Court has interpreted the Constitution to grant the federal government plenary authority over immigration matters, including terms and conditions for residence in the United States, as well as conditions for admission to and exclusion from the country.[21] And it has gone so far

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area:

> [T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can 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.

Id. at 80.

19. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971). The Court reasoned that a

> State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens . . . . The saving of welfare costs cannot justify an otherwise invidious classification.

Id. at 374-75 (citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969)); *see also* Toll v. Moreno, 458 U.S. 1,30 (1982) (Rehnquist, J., dissenting) (describing the Graham Court as inferring "a congressional purpose not 'to impose any burden or restriction on aliens who become indigent after their entry into the United States'"). *But see*, Tom Gerety, *Children in the Labyrinth: The Complexities of* Plyler v. Doe, 44 U. PITT. L. REV. 379, 393 (1983) (noting that, "[i]n less than a decade [after *Graham*] exceptions made for a variety of public offices—including teachers and probation officers—[had] swallowed up this newfound rule of suspicion").

20. Peter Schuck explains the expansive federal power to classify aliens as follows:

> [T]he explanation can be found in the classical tradition's self-consciously political definition of national community and in its norm of extraordinary judicial deference to that choice. By the very nature of this definition, citizens and aliens are almost *never* "similarly situated," while the federal government's interests in emphasizing that difference—for example, giving preference to citizens in order to encourage aliens to naturalize and thus join the national community—is almost *always* deemed compelling.

Schuck, *supra* note 10, at 24.

21. *See* Gerald M. Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government,* 1977 SUP. CT. REV. 275, 315-317 (1977). Rosberg distinguishes between the federal government's control over "an immigration rule that operates as a condition subsequent and one that operates as a condition precedent" to actual immigration. *Id.* at 332. He argues that the Court, in cases such as Mathews v. Diaz, 426 U.S. 67 (1976), has failed to draw proper distinctions between immigration matters, for which the government may legitimately impose burdens upon

as to say, "[o]ver no conceivable subject is the legislative power of Congress more complete . . . ."[22]

The Court has found federal authority to control and regulate immigration to emanate from a number of constitutional provisions, including the power granted to establish a uniform rule of Immigration and Naturalization,[23] international commerce power, and authority over foreign affairs.[24] The concomitant constitutional restrictions on federal immigration powers, such as the "uniformity" requirement for immigration and naturalization, have for the most part been reduced to "merely hortatory."[25] Also tied to the notion of Congress's plenary immigration power is the concept of sovereignty. According to the Court, regulation of immigration, in so far as it signifies control of borders, not only stands as an important symbol of the American polity's exercise of autonomy against intrusion, but also symbolizes a vital component of national security.[26]

Matthews v. Diaz summed up the Supreme Court's position that federal plenary power mediates in favor of judicial abstention from review of federal actions affecting immigrants:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been

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aliens, and nonimmigration matters, for which invidious classifications carry the risk "of impermissible injury to aliens" and threaten the country's historically embedded premise that immigrants are full members of the American community. *Id* at 337.

22. Fiallo v. Bell, 430 U.S. 787, 792 (1977). For a general discussion of congressional use of preemption power, see FEDERALISM, *supra* note 11, at vii.

23. U.S. CONST. art. I, § 8, cl. 4. Peter Schuck notes that the implicit, as opposed to textual, nature of the broad federal power inferred from the Immigration and Naturalization Clause has raised difficulties in determining the appropriate relationship between the federal government's power to classify and other constitutional guarantees placing restraints on government action. Shuck, *supra* note 10, at 24.

24. U.S. CONST. art. I, § 8, cl. 3; *see* Toll v. Moreno, 458 U.S. 1, 10 (1982) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); *Diaz*, 426 U.S. at 81 n.17; Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)). The foreign affairs justification for federal control over immigration includes concerns regarding "political flexibility" in foreign affairs—a concern the court believes is not equally shared by the states. *See, e.g., Diaz*, 426 U.S. at 83.

25. Gerety, *supra* note 19, at 381. The Court noted that "Congress might disregard the constitutional policy of uniformity with impunity: uneven or inconsistent legislation is hardly an unknown quantity in immigration." *Id.* at 380-81.

26. See John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669, 677-78 (1993), for more discussion on the reasons the Supreme Court has deferred to Congress in the alien benefits area.

> 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. . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. 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.[27]

That such precedent promises to compel the Supreme Court's future deference to federal authority over immigration and immigrant matters is underscored by the Court's earlier admission that the preponderance of legal precedent obliged the court to continue to give great deference to the federal government with respect to immigration matters.[28] This license of virtually unbounded federal control over matters affecting immigrants has been used with little regard to questions of fiscal accountability to states.

B. A Higher Standard of Scrutiny for State Alienage Classifications

As a means of dealing with costs incurred because of illegal immigration—without demanding reimbursement from the federal government—states have attempted to restrict alien access to state public welfare benefits. Such attempts have been largely unsuccessful.[29] The Supreme Court applies strict scrutiny to state alienage classifications that

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27. 426 U.S. at 81-82. The *Diaz* Court cites *Harisiades*, 342 U.S. at 588-89, for authority on the Federal Government's plenary power over immigration matters:

> [A]ny 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. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Id. at 81 n.17. Whereas *Diaz* presented a due process question concerning an alienage classification for the Medicare supplemental medical insurance program, *Harisiades* presented a due process question concerning the retroactive application of a statute that established Communist Party membership as a ground for deportation. In this instance, *Diaz* serves to illustrate the indistinct lines that the Court draws between immigration and immigrant issues. See Rosberg, *supra* note 21, for a discussion of the distinction between alien immigration (condition subsequent immigration rules) and alien benefits (condition precedent immigration rules).

28. Galvan v. Press, 347 U.S. 522, 530-32 (1954).

29. *See* Graham v. Richardson, 430 U.S. 365, 374-75 (1971); *see also* Peter H. Schuck, *The Great Immigration Debate*, AM. PROSPECT at 113, Fall 1990 ("Traditionally, immigration policy was designed to enhance the sovereign autonomy of the United States at the expense of all other values, and the courts interpreted the Constitution accordingly.").

disparately impact aliens, and rejects the state justification of resource preservation.[30] The Court has also viewed discriminatory classifications as affecting the naturalization incentive, a federal power upon which the states have no business infringing: "Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."[31] Thus, apart from the "political function" exception, which enables states to determine the qualifications of their most important governmental officials, states possess very limited power to take actions against aliens.[32]

To reconcile federal alienage classifications with those created by states, the Supreme Court has often found state alienage classifications invalid under the Supremacy Clause on the ground that they have been preempted by national law. The doctrine of preemption recognizes Congress' constitutional power to exclude the states from regulating a given area.[33] Among other things, states may not enact laws or

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30. Plyler v. Doe, 457 U.S. 202, 227 (1982). The Court specifically stated that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Id.*

31. Nyquist v. Mauclet, 432 U.S. 1, 10 (1977) (holding that a New York statutory provision that bars resident aliens from state financial assistance for higher education violates the Equal Protection Clause of the Fourteenth Amendment).

32. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991); *see also* Toll v. Moreno, 458 U.S. 10, 13 n.17 (1982) (the *Toll* Court clarified that its "cases do recognize . . . that a State, in the course of defining its political community, may, in appropriate circumstances, limit the participation of noncitizens in the States' political and governmental functions" (citing Cabell v. Chavez-Salido, 454 U.S. 432 (1982)); Gerald Rosberg, *Discrimination Against the "Nonresident" Alien,* 44 U. PITT. L. REV. 399, 400 (1983) ("The 'political exception' may eventually swallow up the entire proposition that alienage classifications are suspect . . . and it is plainly the strongest argument a state can offer in defending a statue that disadvantages aliens.").

33. *See* JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION: THE SILENT REVOLUTION 3 (1991). A significant variation of formal federal preemption is informal preemption. In contrast to formal preemption which is initiated by the exercise of preemptive powers by Congress, informal preemption occurs when state and local governments apply for and accept conditional grants-in-aid. *Id.* at 35. Grants-in-aid effectively provide the national government control over States' expenditures. Some commentators have observed that informal preemption has affected the roles of the legislative, executive, and judicial branches of federal government as well as the state governments, local governments, interest groups, and citizens. For example, the Domestic Policy Council, Working Group on Federalism, concluded:

> [T]he net result of the massive increase in conditional funding . . . has been to give the national government power to oversee the States' compliance with a wide range of conditional grants, and thus to direct state policy in areas of traditional state concern. . . . The carrot of federal funding has often induced

regulations that are inconsistent with federal law regarding either immigration or immigrants. And preemption goes so far as to prohibit states from imposing any type of burden not sanctioned by Congress in admitting aliens to the United States. In light of federal plenary power over immigration matters, virtually all state laws and regulations that touch on immigration are highly susceptible to judicial invalidation on preemption grounds.

The Supreme Court case of *Toll v. Moreno*[34] provides an illustration of preemption analysis applied to classifications harming aliens. In *Toll*, the Supreme Court considered whether a policy of the University of Maryland, a state-operated university that denied in-state status and derivative preferential treatment for tuition and fees to resident aliens holding G-4 visas, violated the Supremacy Clause.[35] The Court held that the University's policy was invalid under the Supremacy Clause, stating, "[State] regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."[36] The Court regarded Maryland's policy in this case to be a frustration of federal treaties, statutes, and international agreements giving G-4 aliens special tax exemptions.[37] Furthermore, the Court found that Congress had explicitly decided not to disallow G-4 aliens from acquiring domicile.[38] In dissent, Justice Rehnquist noted: "[T]he Court suggests in dicta that any state law which discriminates against lawfully admitted aliens is void, presumably without regard to the strength of the State's justification, if Congress did not contemplate such a law."[39]

Of course, as the Court noted in *Toll* as well as in the earlier case of *De Canas v. Bica*,[40] the federal government can empower the states to

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States to take steps that they might otherwise forego or actively resist. Joseph Lesser, *The Course of Federalism in America: An Historical Overview in* FEDERALISM, supra note 11, at 11 (quoting DOMESTIC POLICY COUNCIL, WORKING GROUP ON FEDERALISM, THE STATUS OF FEDERALISM IN AMERICA (1986)). Notably, just as state governments may appear to "voluntarily" apply for conditional grants-in-aid, they may appear to "voluntarily" institute programs and expend funds on behalf of illegal immigrants.

34. 458 U.S. 1 (1982).
35. *Id.* at 3.
36. *Id.* at 12.
37. *Id.* at 1.
38. *Id.* at 14.
39. *Id.* at 28 (Rehnquist, J., dissenting).
40. 424 U.S. 351 (1976). In *De Canas*, the Court addressed whether a California statute making it illegal to employ illegal aliens in some circumstances was invalid under the Supremacy Clause. The Court upheld the state statute, reasoning that Congress had intended to allow states, "to the extent consistent with federal law, [to] regulate the employment of illegal aliens." *Id.* at 361.

enact legislation that arguably discriminates against aliens if it is consistent with federal law. For example, the enactment of the Immigration and Nationality Act did not negate consistent state regulations pertaining to aliens, even if those regulations were discriminatory.[41] Generally, silence or apathy on the part of the federal government is not, however, sufficient to authorize state policies discriminating against aliens because it would open up the possibility for state usurpation of federal plenary power. The federal government must have shown some intention to allow such state action, which would then be consistent with federal law.[42] For example, in *Plyler v. Doe*,[43] the Court held that a Texas statute denying funding for the public education of undocumented alien children and permitting local districts to refuse admission of such children to schools was invalid under the Equal Protection Clause. The Court noted that no existing federal policy supported Texas' decision to deny elementary education.[44] *Plyler* is also significant, in so far as the state classification applied to undocumented aliens, who, unlike the legal immigrants discriminated against in *Toll* and *Graham*, were not lawfully admitted under conditions imposed by Congress.[45]

Yet even in *Plyler*, the Justices recognized the federal government's responsibility to be fiscally accountable for the immigration costs that

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41. *Toll*, 458 U.S. at 27 (citing 424 U.S. at 358).
42. Gerety, *supra* note 19, at 385.
43. 457 U.S. 202, 226 (1981).
44. *Id.* at 225-26.

> As we recognized in *De Canas v. Bica*, 424 U.S. 351 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. . . . In contrast, there is no indication that the disability imposed [here] corresponds to any identifiable congressional policy. The State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration.

Id. (citations omitted); *see also* Graham v. Richardson, 403 U.S. 365, 377-78 (concluding that state restrictions on welfare benefits for resident aliens on the basis of alienage violated not only the Equal Protection Clause, but also constituted an "encroachment" on federal power over lawfully admitted aliens). Interestingly, the Department of Justice had indicated in its brief that the federal government had decided it had no interest in the issue. Gerety, *supra* note 19, at 396.

45. *See Plyer*, 457 U.S. at 225-26.

are concentrated in a handful of states.[46] Like the analysis in *Plyler*, the discussion presented here is not intended to question the propriety of locating control over immigration and immigrant policy with the federal government. Nor is it intended to question Supreme Court jurisprudence regarding state alienage classifications and other immigration matters. Rather, this discussion is simply highlighting the fact that states' hands are tied when it comes to responding to costs imposed by illegal immigrants. Surely, invidious discrimination by state governments against immigrants, both legal and illegal, is inimical to the United States' well-established commitment to immigration and immigrants, and should be subject to close scrutiny by the courts. But even though immigration matters may be best controlled by the federal government, the question remains as to whether federal fiscal unaccountability for illegal immigration has created failures in our system of governance that the federal government has a duty to remedy. Notably, reimbursement, one of the most obvious remedies consistent with the United States' commitment to immigrants, does not conflict with federal plenary power over immigration and does not require a shift in control over immigration matters.[47]

III. PROMETHEUS UNBOUND: FEDERAL ABDICATION RUNNING AMUCK?

One of the significant consequences of federal plenary power over immigrant benefits and services is the concomitant decrease in the states' power to respond to state-specific economic and social issues raised by immigrant populations. The fact that the locus of power to regulate immigration, as well as immigrant policy, resides with the federal government has opened opportunities for risk and cost shifting, precipitating the breakdown of the United States' ability to absorb immigrants successfully.

Take one current example. A number of federal welfare reform proposals, introduced by Republicans as well as Democrats, have aimed to eliminate, with few exceptions, immigrant eligibility for AFDC, SSI,

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46. *Id.* at 240-241 (Powell, J., concurring) ("So long as the ease of entry remains inviting, and the power to deport is exercised infrequently by the Federal Government, the additional expense of admitting these children to public schools might fairly be shared by the Federal and State governments.").

47. Reimbursment does not implicate the concern voiced by Justice Blackmun who joined the majority decision of National League of Cities v. Usery, 426 U.S. 833, 856 (1976), with the understanding that it embraced a balancing approach to state and federal power, and did not prohibit the federal government from acting in areas where the federal interest was clearly predominant and where state compliance with federal standards would be critical.

Food Stamps, or Medicaid. The Administration's own proposal seeks to extend deeming requirements for federal programs such as SSI, Food Stamps, and AFDC. From a state perspective, such proposals may effectively shift costs to states which are powerless to respond. Specifically, the effects on one state are described by State Senator James J. Lack (R-NY):

> The con game would work like this: Congress withholds federal assistance from noncitizens, including legal immigrants and refugees, on a broad range of programs: food stamps, Supplemental Security Income (SSI), Aid to Families with Dependent Children (AFDC) and others. The State of New York and our cities and counties will immediately become responsible for more than $1 billion in additional social-service costs . . . . We, the [State and local] taxpayers . . . will have to pick up the entire federal tab.[48]

Lack's observation is particularly troubling when one considers that most revenues from immigrants flow to the federal treasury, but most costs are incurred at the local level.[49]

As Lack has recognized, despite the fact that most revenues from immigrants flow to the federal treasury, the federal government has the power to force states to absorb immigrant-related costs. Studies suggest that, overall, immigrants contribute more in taxes than they use in services.[50] Whether immigrants impose net costs or generate a net surplus in public revenue varies by level of government. At the federal level, immigrants generate a net surplus in revenue.[51] The result varies at the state level, where immigrants may generate either a net surplus or net cost.[52] At the local level, immigrants generate net costs, primarily in the form of costs for educating immigrant children.[53] Simple standards of fairness suggest that the federal government should redistribute its net revenue suplus generated from immigrants to states and localities that experience a net loss through no fault of their own.

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48. James. J. Lack, *Playing Switcheroo with Welfare*, NEWSDAY, May 26, 1994, at A7. Contrary to Lack's claim, the degree of cost shifting is unlikely to be 100% and will depend upon the structure of individual state's welfare programs.

49. MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT, 57-62 (1994).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

A. State Legalization Impact Assistance Grants (SLIAG)

In the immigrant context, what has been the states' experience with Congress imposing costs and mandates without providing the money to pay for them? Have the states been relegated to interest group status?[54] As previously discussed, state initiatives to respond to immigration issues are often unsuccessful because they are found to be inconsistent with and preempted by federal legislation.[55] Because preemptive federal legislation delimits states' ability to act on their own behalves, preemptive statutes that are unwanted by the states may be viewed as intrusive and even subversive of state governance. According to *Garcia v. San Antonio Metropolitan Transit Authority*, protection against such fate lies in "procedural safeguards inherent in the structure of the federal system [rather than] judicially created limitations on federal power."[56]

The state lawsuits seeking reimbursement for immigration costs bring to light Congressional promulgation of legislation disparately impacting select states. Here, structural safeguards, such as the representation of state interests through representatives in Congress, proved insufficient to protect against the failure of the federal government to follow through with funds and administrative activity originally promised by and attached to federal immigration legislation. States' experiences with undocumented alien medical assistance requirements under the Omnibus Budget Reconciliation Act of 1986[57] and with State Legalization Impact Assistance Grants (SLIAG)[58] for alien residents legalized under the Immigration Reform and Control Act (IRCA) are examples of federal legislation highly instructive on the practical politics of federalism—at least in the immigration context.

Medicaid requirements for state medical services to undocumented aliens illustrate the shifting of immigration costs from the federal to the state governments. The Omnibus Budget Reconciliation Act of 1986 amended the Social Security Act to require states to provide medical assistance to undocumented immigrants not permanently residing in the United States under color of law (PRUCOL). Specifically, the Omnibus

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54. *See* Robert W. Gage, *Key Issues in Intergovernmental Relations in the Post-Reagan Era: Implications for Change*, 20 AM. REV. FOR PUB. ADMIN. 155 (1990).

55. *See* discussion *supra* part II.A.

56. 469 U.S. 528, 552 (1985). The Court stated: "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Id.* at 550.

57. Pub. L. No. 99-509, 100 Stat. 1969 (1986) (codified as scattered sections of the U.S. Code).

58. 8 U.S.C, § 1255a.

Budget Reconciliation Act of 1986 amended Medicaid to expand state eligibility to include Medicaid payments made for the treatment of an emergency medical condition of an undocumented alien who did not qualify as PRUCOL.[59]

The Medicaid program is a state-administered program that provides medical services to individuals in need.[60] The program is jointly funded by federal and state governments. States must have a federally approved state plan to receive federal reimbursement assistance for program costs. Because the federal government has not provided full funding for emergency medical services provided to undocumented aliens, states have been forced to absorb much of the cost.

Like the Omnibus Budget Reconciliation Act of 1986, the passage of the Immigration Reform and Control Act (IRCA) in 1986 and the Special Agricultural Worker (SAW) program increased states' fiscal responsibility to provide for immigrants. When Congress passed the Immigration Reform and Control Act (IRCA) in 1986, one of the key provisions was a legalization program for immigrants who had been living illegally in the United States.[61] Similarly, under the SAW program, undocumented aliens who established that they had worked at least 90 days in the United States seasonal agriculture industry received temporary, and subsequently permanent, legal status.[62] The great majority of immigrants legalized under IRCA were barred from federal benefits for five years, whereas immigrants legalized under SAW were barred from Aid to Families with Dependent Children (AFDC) and some select medical benefits for five years.[63]

The question naturally arose as to who would pay for the government services provided for these individuals and their families once they ceased hiding and began using public hospitals, schools, and other facilities. It was clear at the time that the legislation would impose disproportionate social service costs on states such as California. Officials for cities and counties with large immigrant populations

59. *See* 42 U.S.C. § 1396b(v)(2).
60. 42 U.S.C. § 1396 (1994).
61. The other key provision established sanctions to prevent employers from hiring illegal immigrants. CRS REP. FOR CONG, STATE LEGALIZATION IMPACT ASSISTANCE GRANT (SLIAG) PROGRAM FUNDING: FACTS AND ISSUES, 93-592 EPW at CRS-1 (June 17, 1993) [herinafter CRS REP. FOR CONG.].
62. *Id.*
63. *Id.*

successfully argued that, since immigration is a federal responsibility, Congress should help them defray costs for the medical, welfare, and educational costs[64] of serving newly legalized residents.[65] Consequently, section 204 of IRCA, titled State Legalization Impact Assistance Grants (SLIAG), allotted $1 billion a year for four years (FY 1988-1991) to reimburse state and local governments. IRCA provided that SLIAG funds were to be used to reimburse states and localities for public assistance, public health services, and educational services for eligible legalized aliens. The funds were to be used as well for public outreach and education to inform temporary residents about the process of adjusting to permanent resident status and to inform the public about employment discrimination.[66]

The federal government only partly kept its promise. In 1989, Senate and Administrative officials "raided" SLIAG funds to pay for drug programs and health research, but promised to restore the money at a future date. They justified the action as a use of surplus SLIAG funds.[67] In 1990 and 1991, the Bush Administration cut a total of $1.12 billion of SLIAG funds, but failed to replace the funds in the 1992 appropriations.[68] The funds were then deferred to 1993, but only

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64. These costs include subsidized housing and literacy education. Associated Press, *Panel OKs Funds for Immigrants,* SAN DIEGO UNION TRIB., Oct. 2, 1992, at A3.

65. More than half (1.6 million) of the 3 million immigrants who applied for amnesty under IRCA were residents of California. Jennifer Toth, *Congress OKs Big Cut in Immigrant Aid Funds*, L.A. TIMES, Oct. 27, 1990, at A21.

66. CRS REP. FOR CONG., *supra* note 61, at CRS-2.

67. *Roybal: Only Part of a Very Long Tradition*, L.A. TIMES, Dec. 24, 1991, at B6 [hereinafter *Roybal*]; *see also* CRS REP. FOR CONG., *supra* note 61, at CRS-3 (for a breakdown of SLIAG funding history).

68. *Roybal*, *supra* note 67, at B6; Mary Benanti, *Group Decries States' Lack of Amnesty Funds*, GANNET NEWS SERVICE, Sept. 24, 1991. The *San Diego Union Tribune* described SLIAG as "a slush fund for politicians' pet projects," explaining that "Rep. Dan Rostenkowski, D-Ill., and White House budget director Richard Darman conspired to raid SLIAG funds to finance expansion of the business school at Chicago's Loyola University, Rostenkowski's alma matter." *The Cost of Immigration*, SAN DIEGO UNION TRIB., Nov. 27, 1991, at B8. Some federal officials described the cuts as affecting only surplus SLIAG funds. Jane Mason of the American Public Welfare Association responded to this argument, stating: "In reality, there is a lag time between when the states incur the costs and when they ask the federal government for reimbursement . . . . [T]he fiscal situation is so tight on labor and health and human services subcommittees that SLIAG competes with AIDS funding, education funding, mental health, energy assistance." Mary Benanti, *Group Decries States' Lack of Amnesty Funds*, GANNET NEWS SERVICE, Sept. 24, 1994. Another commentator described "surplus" funds as follows:

> The so-called surplus in SLIAG existed because the funds accumulated while the federal government has been slow in reimbursing local governments and not because there is no demand for the money. For instance, Los Angeles county, with the largest number of immigration amnesty applicants of any local jurisdiction in the nation, has asked for $230 million from the federal

$325,672,000 of the $1.12 billion was actually appropriated, with approximately $800 million deferred until 1994.[69] Thus, through the end of the 1993 federal fiscal year, only $2.7 billion of the original $4 billion authorized and appropriated to SLIAG had actually been allotted to the states.[70]

The passage of the Immigration Reform and Control Act and the authorization for SLIAG funds have the trappings of a funded mandate, but have many of the qualities of an unfunded mandate. Together with the amended Medicaid requirements under the Omnibus Budget Reconciliation Act, IRCA represents an affirmative measure by the federal government to enfranchise individuals who had either overstayed legal visas or had illegally entered this country despite federal border control policies in which states play almost no role. Yet, as recognized by the SLIAG grant scheme, these federal actions had potentially significant implications for states with large immigrant populations, such as California.

B. State Lawsuits for Federal Reimbursement: Demands for Change

States affected by high levels of immigration have responded to the federal government's actions and nonfeasance in the immigration arena. They have raised their voices against federal commandeering using a number of means, the most visible and potentially powerful of which are lawsuits seeking reimbursement of costs. Although a majority of the states' lawsuits seeking reimbursement (or, in the alternative, an injunction) for costs associated with undocumented aliens have been dismissed at the initial stage, review of the lawsuits is highly useful because they provide a summary of the rights the states believe they possess and the obligations the states believe the federal government owes with respect to illegal immigration.

The plaintiff states' complaints evolved in a climate of growing demands on state officials to find a solution to a fiscal sclerosis believed

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government in the current fiscal year and gotten only $28 million back so far. San Diego County is seeking a more modest $2 million, but has received only $300,000.

Stealing from Immigrants, L.A. TIMES, Sept. 29, 1989, Part II, at 6.

69. CRS REP. FOR CONG., *supra* note 61, at CRS-3.

70. *Id.* at CRS-4.

to result from illegal immigration,[71] and as such, reflect political exigencies[72] and paint a picture of an immigration invasion[73]—with rising numbers of undocumented aliens growing out of control and placing intolerable burdens on the states' polities.[74] Certainly the states skewed the picture in their favor,[75] but the question remains: Do the principles that animate the federal system demand that the federal government reimburse the plaintiff states? The discussion of the complaints below concentrates on select suits brought by Florida, California, and Arizona, as these capture the main legal issues before the courts.

1. Overview of the States' Lawsuits

In 1994, the states of Arizona, California, Florida, as well as Texas, New Jersey, and New York,[76] brought separate suits against the federal government to seek reimbursement of the cost of providing federally mandated public services, such as emergency medical services and AFDC, for undocumented immigrants. Some also sought reimbursement for the cost of incarcerating undocumented aliens.[77] The plaintiff states tried to convince the courts that their claims go to the heart of the United States federalist system—casting serious, compelling doubt upon

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71. Overall, illegal immigrants appear to represent a net cost to the economy. FIX & PASSEL, *supra* note 49, at 70.

72. Immigration is a central issue in state political campaigns this election year and state legislators have introduced proposals to limit state services for immigrants. *See, e.g.*, Gregory & Luis Wilmot, *Referendum is a Poor Way to Govern*, DALLAS MORNING NEWS, March 10, 1996, at 6J; Dan Morain, *Assembly Panel Fails to OK State Budget*, L.A. TIMES, June 1, 1995, at A3; Julia Preston, *U.S. Rebuts U.N. Critics of Human Rights Record*, WASH. POST, March 30, 1995, at A19; David LaGesse, *Discontent Grows Toward Immigrants; Florida May Duplicate California Measure*, SUN-SENTINEL, Jan. 8, 1995, at 4A.

73. *See* Florida Complaint at 14, Chiles v. United States, (S.D. Fla.) (No. 94-0676-CIV) (filed April 11, 1994) [hereinafter Florida Complaint].

74. *See e.g.*, *id.* at 3, 6.

75. For example, the Florida Complaint states that "the Federal Government is exclusively and directly responsible for the uncontrolled influx of aliens to Florida. . . ." *Id.* at 4. This statement is inaccurate. States have often created incentives for illegal immigration. For instance, many employers in the plaintiff states benefit from hiring immigrants and have formed strong lobbies to protect their interests, at the same time creating strong economic incentives for illegal immigration. See, e.g, *Latinos Divide Over Immigration*, CA. J. WKLY., Sept. 6, 1996.

76. Arizona, California, and Florida are, hereinafter, collectively referred to as the "plaintiff states."

77. Florida seeks reimbursement only as an alternative to "an injunction directing the defendants to cease the policies that have subjected plaintiffs to an invasion of aliens and commandeered their legislative processes to meet the resulting costs . . . ." Florida Complaint, *supra* note 73, at 36.

the ability of the national political process to protect state sovereignty.[78] Abuse of power easily emerges as the powerful, overarching theme of the claims and implicates Constitutional provisions, including the Tenth Amendment, the Guarantee Clause,[79] and Article I, Section 8, Clause 1[80] of the of the United States Constitution, as well as the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The plaintiff states argue that because the Supreme Court's established jurisprudence, regarding equal protection restrictions on state alienage classifications, has left them relatively powerless to target alien benefits, the federal government has been able to fetter them by imposing incompletely funded mandates and by forcing them to absorb the unavoidable costs[81] of maintaining the state citizenry's well-being in the face of illegal immigration.

Overall, the complaints paint a picture that absolves the plaintiff states by depicting the federal government as not only failing in its duty to

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78. *See e.g.*, California Complaint at 6, Wilson v. United States, (S.D. Cal.) (No. 940674K(CM)) (filed April 29, 1994) [hereinafter California Complaint One].

> At issue is . . . whether the federal government may force state governments to implement federal policies through the disbursement of state generated tax funds, turning the Constitution of the United States into a suicide pact for states like California by abrogating the promise of federalism established and promoted by that document.

Id. at 2; *see also*, Florida Complaint, *supra* note 73, at 25.

> The national political process has provided no adequate safeguard against this discrimination. The costs imposed by the continuing influx of aliens on state and local governments are disproportionately concentrated in only a few states, including Florida. Representatives of other states have a political incentive to ignore such costs, or to provide only small and thus far ineffective tokens of assistance, rather than ensure that they are borne equitably.

Id. at 25-26.

79. The Guarantee Clause provides, in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . . ." U.S. CONST. art. IV, § 4.

80. The United States Constitution, provides, in pertinent part: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl.1.

81. *See* Florida Complaint, *supra* note 73, at 20.

> [E]ven if no legal obligation exists, as a practical matter plaintiffs have no choice but to expend state and local government funds to support, educate, house, care for, feed, supervise, and incarcerate many aliens who enter the State as a result of the Federal Abdication and Default Policy, or else suffer injury to its sovereign interests through increased crime, disease, illness, homelessness, and the many problems presented by an uneducated or poorly educated populace.

Id.

prevent the entry of undocumented aliens into the United States, but also adopting policies that encourage the influx of undocumented aliens into their respective states.[82] Specifically, the complaints allege that the federal government has constructively repudiated its fiscal responsibility and rendered itself fiscally unaccountable for illegal immigration in a number of ways: 1) By refusing to pay the full costs of alien benefits, 2) by failing to allocate total federal funds appropriated for partial alien program funding, and 3) by delegating broad power over disbursement of appropriated funds to administrative agencies. Failure to achieve resolution of these claims through the political process has forced the states to seek judicial remedy. I will address the central, non-duplicative counts of Florida's, California's, and Arizona's complaints.

2. *Seeking to be Made Whole: Florida's Claims Against the Federal Government*

The state of Florida estimates that in fiscal year 1993 it spent approximately $2.5 billion in state and local funds to provide services to aliens.[83] Of the $2.5 billion, $884 million (a little over one third) was estimated to flow to undocumented aliens.[84] Citing the fact that the federal government not only has plenary power over immigration matters, but also receives an estimated two-thirds of aliens' tax dollars,[85] Florida contends that its "forced" outlay of funds on behalf of aliens is "repugnant to constitutional norms of equality and fairness."[86]

Florida's claim contains four separate counts against the United States: 1) Failure to develop regulations governing disbursement of the Immigration Emergency funds, 2) failure to enforce and effectively administer immigration laws, 3) unconstitutionality of program restrictions, and 4) violation of plaintiffs' rights under the Guarantee Clause and the Tenth Amendment of the United States Constitution.

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82. *See id.* at 13. Given the concentration of immigrants within a few states, immigration has become an increasingly localized issue. As such, one might choose to distinguish between immigration "into respective states" and immigration into the United States.

83. *Id.* at 20.

84. *Id.* The complaint provided a breakdown of the costs, in an attached exhibit: EXECUTIVE OFFICE OF THE GOVERNOR, OFFICE OF PLANNING & BUDGETING, INTERGOVERNMENTAL AFFAIRS POLICY UNIT AND FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, THE UNFAIR BURDEN: IMMIGRATION'S IMPACT ON FLORIDA, i, iii (March 1994).

85. *Hearings Before the U.S. House Subcomm. on Human Resources* (1993) (testimony of Charles Wheeler of the National Immigration Law Center).

86. Florida Complaint, *supra* note 73, at 6.

Florida argues that judicial relief for counts one and three is warranted by existing law and that judicial relief for counts two and four follows logically from the Supreme Court's decisions in *Bowen v. Massachusetts* and *New York v. United States*.[87]

a. Count 1: Failure to Develop Regulations Governing Disbursement of the Immigration Emergency Funds

Florida raises the issue that the Attorney General has failed to develop the regulations necessary to disburse the "Immigration Emergency Fund" and asks the court to review the administrative action, issue an injunction to the Attorney General that directs her to "comply with her duties under 8 U.S.C. §1101;[88] . . . develop a plan . . . for disbursement of the Immigration Emergency Fund; [and] grant to Florida its just share of funds."[89] As described by Florida, the "Immigration Emergency Fund" was authorized by section 113 of the Immigration Reform and Control Act. Section 113 amended 8 U.S.C. §1101 to authorize an annual appropriation sufficient to maintain a balance of $35 million in funds (the "Immigration Emergency Fund") to be disbursed to state and local governments incurring costs during a presidentially declared immigration emergency.[90] Although the federal government has never

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87. *Bowen*, 487 U.S. 879 (1988); *New York*, 505 U.S. 144 (1992); Florida Complaint, *supra* note 73, at 7. Florida also places general reliance on the dicta in the majority and dissenting opinions in Plyler v. Doe, 457 U.S. 202 (1982). *Plyler* held that a Texas law which withheld funding for illegal alien children and allowed districts to deny enrollment for these children violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 230. The complaint does not focus on *Plyler*'s reasoning, but does focus on the fact that five Supreme Court Justices in *Plyler* agreed that the federal government should bear the cost of providing education to illegal alien children. Florida Complaint, *supra* note 73, at 7. The complaint quotes Chief Justice Burger's *Plyler* dissent,in which three other Justices joined:

> It does not follow . . . that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens . . . . If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burden of their presence here.

Id. (citing *Plyler*, 457 U.S. at 242 n.1) (Burger, C.J., dissenting). The complaint also cites Justice Powell as stating "the Federal Government should bear financial responsibility for its actions." *Id.* (citing 457 U.S. at 241 (Powell, J. concurring)).

88. ("[A]s amended by Pub. L. 99-603, Pub. L. 101-649 and Pub. L. 102-140").

89. Florida Complaint, *supra* note 73, at 27.

90. *Id.* at 24.

formally declared an immigration emergency,[91] a further amendment to 8 U.S.C. §1101, adopted in 1990, grants the Attorney General discretion to disburse up to $20 million a year from the $35 million annual fund without the President's declaration of an immigration emergency.[92] Furthermore, other amendments to 8 U.S.C. § 1101 require the Attorney General to promulgate regulations to describe the situations that would qualify as immigration emergencies, and to set the standards and process for reimbursing states for costs incurred as a result of such an emergency.[93]

Notwithstanding the Attorney General's failure to delineate the criteria for an immigration emergency, Florida insists that an "immigration emergency," as defined by Public Law 99-603, has existed continuously since at least 1986.[94] Florida further argues that by failing to establish the conditions that would constitute an immigration emergency and failing to develop the regulations that would enable disbursement of Immigration Emergency Funds, the Attorney General has precluded reimbursement of states in violation of the 1990 and 1991 amendments.[95] Thus, Florida alleged that, despite the authorization of the initial appropriation of $35 million in 1986, the federal government had saved almost $280 million by not disbursing any of the funds to Florida or any other state.[96]

b. Count 2: Failure to Enforce and Effectively Administer Immigration Laws

The second count focuses on costs Florida has been forced to absorb in order to preserve the public health and safety of the state. Florida argues that the federal government has refused to accept financial responsibility for the failure of the INS Commissioner, the Attorney general, the INS Acting Regional Director, and the INS District Director to enforce and administer immigration laws effectively. Florida describes this failure in enforcement and administration as an abuse of discretion and "at best an arbitrary, capricious, and irrational Federal Abdication and Default Policy" that has imposed fiscal and political

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91. *Id.* at 26.
92. *Id.* at 24 (citing the Immigration Act of 1990, Pub. L. No. 101-649, §705, 104 Stat. 5087).
93. *Id.* (citing Pub. L. No. 102-140, Title VI, §610, 105 Stat. 832 (1991)).
94. *Id.* at 26.
95. *Id.* at 27 ("As much as $60 million could have been available to the states . . . over the last three years.").
96. *Id.* at 24.

responsibility for immigration on states like Florida. The impact on such states disadvantages them relative to the other states:

> Florida and its political subdivisions have effectively been required to pay a grossly disproportionate share of the costs of a national problem as compared to almost all other states, resulting in a studied inequality among the states contrary to a fundamental premise of the United States Constitution.[97]

Florida claims it has no choice but to pay the costs of certain services for undocumented aliens who were able to enter the state because the federal government failed to enforce immigration laws.[98]

c. Count 3: Unconstitutionality of Program Restrictions

Florida currently participates in two state-federal "cooperative programs" which serve persons in need, including some illegal as well as legal aliens:

> (a) Medicaid[99]—as provided for under 42 U.S.C. § 1396b and implemented under 42 C.F.R. § 435.406; and
> (b) Aid to Families with Dependent Children ("AFDC")—as provided for under 42 U.S.C. §602 and implemented under 45 C.F.R. §§ 233.50, 233.51, and 233.52.

Under the arrangement, Florida must contribute some state funds in order to obtain a certain level of federal funding.[100] However, the state cannot be reimbursed for the costs of providing services to aliens who fall outside the restrictions of the Medicaid and AFDC statutes and regulations.[101]

Florida claims that it should not be disqualified from receiving federal funds for the amount it must spend on behalf of needy "ineligible" aliens, because such disqualification penalizes Florida for having an alien population. Consequently, Florida holds the position that the current restrictions on federal funding for Medicaid and AFDC for certain

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97. *Id.* at 29.
98. *Id.* at 28 ("If [Florida does] not provide such services, the State will suffer injury through increased crime, disease, illness, homelessness, and the many problems presented by an uneducated or poorly educated populace.").
99. The Medicaid program's purpose is to allow states to provide medical services to individuals in need. *See* 42 U.S.C. § 1396.
100. 42 U.S.C. § 1396a(a)(2); 42 U.S.C. § 602(a)(2).
101. 42 U.S.C. § 1396b(v); 42 U.S.C. § 602(a)(33).

classes of aliens have no logical, rational, or constitutional basis.[102] Florida argues that the cooperative program provisions and regulations have also enabled the United States and the HHS Secretary to commandeer the legislative process of Florida and its subdivisions and to punish the state for conditions created by the federal government.[103]

The remedy to this problem, Florida insists, is for the federal government to provide Medicaid and AFDC funding on the same basis other states are assisted: Need.[104] Eligibility-but-for-alien-status standards for federal cooperative program funding discriminate against states like Florida for having a disproportionately large population of aliens, in that the federal government reimburses other states for nearly all of their expenditures for need-based medical care and AFDC.[105] In light of the circumstances described, Florida requests that the Court declare the AFDC and Medicaid restrictions on alien coverage either contrary to the cited statutes (in the case of regulations only) or unconstitutional.

3. California's Complaint Regarding Medicaid for Undocumented Aliens

California brought three separate suits to recover the costs of illegal immigration. They respectively seek: a) Reimbursement of approximately $400 million in annual emergency health care costs of undocumented aliens,[106] b) reimbursement for the incarceration costs for undocumented immigrants, and c) reimbursement of the cost of educating undocumented immigrant children. In its action regarding Medicaid, California challenges provisions amending the Social Security Act that require the state to expend money from its general fund to implement federal policy to provide emergency health care to undocumented aliens. California must pay fifty percent of the costs of such health care from its general funds.[107]

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102. Florida Complaint, *supra* note 73, at 31.
103. *Id.* at 32.
104. *Id.* at 31.
105. *Id.*
106. The complaint states that in fiscal year 1988-1989, the first year of implementation, federal law mandated that California provide emergency medical services to approximately 31,600 OBRA 86 aliens at a cost of $21.1 million. California asserts that because the number of OBRA 86 aliens has "risen dramatically", the number of OBRA 86 aliens for whom it was required to provide medical services rose to 299,900 (at a cost of $337.5 million to the State General Fund). California Complaint at 9, Wilson v. United Sates, (C.D. Cal.) (No. 94-3561LBG) (filed May 31, 1994) [hereinafter California Complaint Two].
107. *Id.* at 2.

a. California Challenges Federal Requirements for State Funding of Emergency Medical Services

The Omnibus Budget Reconciliation Act of 1986 amended the Social Security Act to require states to provide medical assistance to undocumented immigrants not permanently residing in the United States under color of law.[108] Specifically, the Omnibus Budget Reconciliation Act of 1986 amended Medicaid to expand state eligibility for select Medicaid benefits to undocumented aliens (the complaint refers to such aliens as "OBRA 86 Aliens").[109] The Medicaid Program is a state-administered program, jointly funded by federal and state governments.[110] States must have a federally approved state plan to receive federal reimbursement assistance for program costs.[111] The Omnibus Budget Reconciliation Act of 1986 was enacted in conjunction with the Immigration Reform Control Act of 1986 (IRCA 86), which combined employer sanctions with broad amnesty for undocumented aliens, in an effort to "dramatically reduce the flow of undocumented aliens into the United States."[112] California argues that the changes made by these pieces of legislation have failed to meet their goal of reducing the flow of undocumented aliens into the United States, but instead, have resulted

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108. *Id.*

109. *Id.* The complaint cites regulations implementing OBRA 86 which are set forth in 42 C.F.R. §§ 435.406(c) and 440.255(c). "The Administrator is charged by law and delegation to implement and apply the provisions of 42 C.F.R. §§435.406(c) and 440.255(c) to the State of California and its State Medicaid Plan." *Id.* at 7-9.

110. 42 U.S.C. § 1396a(a)(2); 42 U.S.C. § 602(a)(2).

111. If California failed to provide emergency health care to OBRA 86 aliens, federal financial participation in the approved medical assistance plan would cease. California Complaint Two, *supra* note 106, at 12-13 (citing 42 U.S.C. §1396).

> In 1988, the State of California enacted legislation, including Welfare and Institutions Code section 14007.5 (Senate Bill 175, Stats. 1988, ch. 1441), to authorize the State Medi-Cal Program to provide emergency health care to OBRA 86 Aliens, as required by federal law, and such provisions, as amended (Senate Bill 485, Stats. 1992, ch. 722) were in full force and effect at all times relevant to the allegations set forth in this complaint. The definition of emergency health care, as required by federal law was included in Welfare and Institutions Code section 14007.5 as enacted by Senate Bill 175, and as amended by Senate Bill 485. References in this complaint to 'SB 175' are to chapter 1441 of the Statutes of 1988, as originally enacted and amended by chapter 722 of the Statutes for the State of California.

Id. at 9.

112. *Id.* at 8.

in substantially higher levels of illegal immigration. As a result, federally mandated Medicaid coverage for qualified undocumented aliens that was partly based on the expected success of IRCA sanctions will cost the California State General Fund an estimated $1,760,971,224 by the end of state fiscal year 1994-95.[113] Because the federal government has not provided full funding for emergency medical services provided to undocumented aliens, California has been forced to absorb much of the cost of an imperfect federal immigration policy.

b. Finding Authorization for Reimbursement

California brings two separate claims—one pursuant to Public Law 103-112 and the other pursuant to Public Law 103-121. According to the complaint, both Public Law 103-112 and Public Law 103-121 entitle California to full reimbursement of the amount it has spent to provide emergency medical services to OBRA 86 aliens.

i. Claim Pursuant to Public Law 103-112

As described by the complaint, Public Law 103-112 appropriated funds to the Department of Health and Human Services for the 1994 federal fiscal year and portions of the federal fiscal year 1995 to support federal financing of the Medicaid Program.[114] California contends that Public Law 103-112 appropriates funds to reimburse California for 100 percent of the cost of providing emergency medical services to OBRA 86 aliens, and has requested the Secretary of HHS (hereinafter "Secretary") and Administrator of the Health Care Financing Administration

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113. *Id.* at 10.

114. *Id.* at 15 (quoting Public L. No. 103-112, 107 Stat. 1982, 1905 (1993):

> *Be it enacted by the Senate and House of Representatives of the United States in Congress assembled*, that the following sums are appropriated out of any money in the Treasury not otherwise appropriated for the Departments of . . . Health and Human Services . . . for the fiscal year ending September 30, 1994, and for other purposes, namely: . . .
>
> Health Care Financing Administration
> GRANTS TO STATES FOR MEDICAID
>
> For carrying out, except as otherwise provided, titles XI and XIX of the Social Security Act, $64,477,413,000, to remain available until expended.
>
> For making, after May 31, 1994, payments to States under title XIX of the Social Security Act of the last quarter of fiscal year 1994 for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.
>
> For making payments to States under title XIX of the Social Security Act for the first quarter of fiscal year 1995, $26,600,000,000 to remain available until expended.).

(hereinafter "Administrator") make such funds available.[115] In contrast, the Secretary and Administrator (as described by the complaint) interpret Public Law 103-112 as not affecting reimbursement for OBRA 86, which they believe is limited to the federal medical assistance percentage dictated by the provisions of 42 U.S.C. § 1301 (a)(8)(B).[116]

California claims that if 42 U.S.C. § 1396(b) and 42 U.S.C. §1396(d), which describe the OBRA 86 costs for which California may be reimbursed, and 42 U.S.C. § 1301 (a)(8)(B), which provides for determination of the federal medical assistance percentage, are construed by the United States or any of the named defendants to prevent reimbursement of California's total costs for providing emergency medical services, such provisions and actions violate provisions of Article IV, Section 4 and the Tenth Amendment of the Constitution.[117] Furthermore, the complaint argues that the failure of the Attorney General, the Commissioner of INS, the Director of OMB, the Secretary, and the Administrator to reimburse California for its total costs constitutes an abuse of discretion granted them by the President and Congress to implement immigration laws and disburse funds appropriated in that regard.[118]

ii. Claim Pursuant to Public Law 103-121

California's second claim is very similar to its first in that it argues that a federal Appropriation Act, Public Law 103-121, includes authorization to the Attorney General to disburse funds for the purpose of reimbursing states, such as California, for their full costs of providing emergency care to OBRA 86 aliens.[119] Public Law 103-121 provides an appropriation of $1,048,538,000 from the Treasury to the Attorney

115. *Id.* at 16 ("Appropriations to the Department [of Health and Human Services] in the amounts set forth above include authorization to the Secretary to expend funds for reimbursement to the State of California for those costs described in 42 U.S.C. § 1396b and §1396d, as set forth above.").

116. *Id.* at 17 ("On December 20, 1993, the Secretary, acting pursuant to 42 U.S.C. [§] 1301(a) (8) (B), promulgated the federal medical assistance percentage applicable to the California State Plan for medical assistance, for the 1994-95 Federal Fiscal Year, to be 50 percent of the total amount expended by the State of California as medical assistance under the State Plan. 58 Fed. Reg. 66863 (1993).").

117. *Id.*

118. *Id.* at 20.

119. *Id.* at 22 (explaining that these are the costs of implementing federal immigration policy as set forth in 42 U.S.C. § 1396b(v)).

General for expenses "necessary for the administration and enforcement of laws relating to immigration, naturalization and alien registration" during federal fiscal year ending September 30, 1994.[120] The Attorney General disputes California's claim, refusing to reimburse California on the grounds that 103-121 provides no authorization for reimbursement of states' costs for emergency medical care of OBRA 86 aliens.[121]

Failure by the federal government to provide full reimbursement of OBRA 86 alien medical assistance costs has, as described by the complaint, harmed California in a number of ways. First, California has been forced to pay an increasingly disproportionate cost to implement federal immigration policy. Second, California was forced to forego spending for other purposes.[122] This outcome resulted because California's constitution prohibits deficit budgeting, thereby limiting the amount of funds that may be appropriated by the State Legislature and local legislative bodies, and limiting the amount of particular taxes that may be raised.[123] Because California has not received relief through the political process, the complaint seeks relief in the form of: 1) A judgment declaring that California has the right to reimbursement of 100 percent of its expenditures for emergency medical services for OBRA 86 aliens (made pursuant to 42 U.S.C. § 1396b(v)) from appropriations made to the Attorney General and Secretary of HHS by Public Law 103-121; 2) an injunction requiring the Attorney General, Secretary of HHS, and Director of OMB to make such a disbursement; and 3) a judgment that any federal law that prevents the reimbursement of California's costs

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120. *Id.* at 21-22.
121. *Id.* at 22.
122. *Id.* at 18.
123. *Id.* at 18-19. The complaint describes the federal government's demands on California general funds as impinging on California's ability to exercise its sovereignty:

> In California, the budget is the single most important policy document undertaken by government . . . . The United States has, by failing to reimburse the State of California the full cost of providing emergency health care to OBRA 86 Aliens, and by enacting other laws or implementing other policies claimed by it to limit the right of the State of California to such reimbursement, required that State taxes be raised, that State funds be expended, that State statutes be enacted and implemented—all to further the interests of the United States and the immigration policies adopted by it. By its immigration policy and the requirement to provide emergency health care to OBRA 86 Aliens, the United States and defendants have prevented the State of California from exercising its sovereign right to expend funds to further the polices and interests of its citizens as determined by the people of the State of California and their elected representatives, acting pursuant to the California Constitution.

Id. at 19.

in question is void and in conflict with Article 4, Section 4 and the 10th Amendment of the United States.[124]

4. Reimbursement of Undocumented Alien Incarceration Costs: Arizona and California

a. Incarceration in Arizona

Arizona invokes the Constitution and the Administrative Procedure Act in bringing a claim against the federal government for reimbursement of costs incurred for the imprisonment of undocumented aliens convicted of a felony in Arizona. The complaint contends that Arizona is entitled to such reimbursement pursuant to the Immigration Reform and Control Act of 1986, which requires the Attorney General to reimburse states for such costs and authorizes the appropriation of funds for such reimbursement.[125] The complaint quotes the following provisions of the Act:

> (a) Subject to the amounts provided in advance in appropriation Acts, the Attorney General shall reimburse a State for costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such a State.
> (b) There are authorized to be appropriated such sums as are necessary to carry out the purposes of this section.[126]

Like the California complaint that seeks reimbursement of emergency medical service costs for OBRA 86 aliens, Arizona invokes Public Law 103-121, which provides an appropriation (in the amount of $1,048,538,000) for expenses incurred in administering and enforcing immigration, naturalization, and alien registration laws during the fiscal year ending September 30, 1994.[127] In addition, the complaint cites an amendment to the Immigration and Nationality Act which permits increased fines and forfeitures for immigration laws to be used to

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124. *Id.* at 23, 24.
125. Arizona Complaint at 14, Symington v. United States (D. Az.) (No. 94-0866) (filed May 2, 1994) [hereinafter Arizona Complaint] (citing 8 U.S.C. § 1365(a), 100 Stat. 3443., Pub. L. 99-603 and 8 U.S.C. § 1365(b)).
126. *Id.* (quoting the Immigration and Reform and Control Act, 8 U.S.C. § 1365(b) (1986)).
127. *Id.* at 6 (citing U.S.C., Congressional & Administration News, 103rd Congress, 1st Session, Public Law 103-121, 07 Stat. 1153, 1160).

enhance "the enforcement of the immigration laws, including the identification, investigation, and apprehension of criminal aliens."[128]

According to the complaint, incarceration expenditures by Arizona, which are not otherwise provided for, are incurred in administering and enforcing laws pertaining to immigration, naturalization, and alien registration, as contemplated by 8 U.S.C. § 1365(a).[129] Arizona contends that the appropriation under Public Law 103-121, and any additional funds made available through 8 U.S.C. § 1330, cover incarceration costs described by the Immigration Reform and Control Act, 8 U.S.C. § 1365(a), and therefore, seeks reimbursement pursuant to the appropriations.[130] Arizona asserts that failure to make such appropriations constitutes an abuse by the Attorney General, the Commissioner of INS, and the Director of OMB of discretion granted them by the President.[131]

Arizona's State Department of Corrections and the United States Immigration and Naturalization Service (INS) have estimated that almost ten percent (1,760) of Arizona's total inmate population (17,968) met the definition of "illegal alien," as provided for in 8 U.S.C. § 1365(a), and thereby, are subject to deportation.[132] Given an annual incarceration cost of approximately $15,773 per inmate, Arizona estimates that it has spent approximately $25 million for the incarceration of undocumented aliens.[133] Also, Arizona has a constitutional provision, similar to that of California's, that places a debt limitation on expenditures by the state legislature.[134] Limits on deficit spending have forced the Arizona state legislature to forego some appropriations on behalf of its legal residents because the state tax income goes to incarcerating and paroling undocumented aliens.[135]

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128. *Id.* at 7 (citing 8 U.S.C. § 1330(b), 104 Stat. 5057, Pub. L. 101-649).
129. *Id.*
130. *Id.*
131. *Id.* at 13.
132. *Id.* at 9.
133. *Id.* at 7.
134. *Id.* at 11 (citing ARIZ. CONST. art. 9, § 5).
135. Like the other states, Arizona argues that its failure to find a political remedy requires the Court to issue: 1) A judgment declaring that Arizona is entitled to reimbursement for the cost of incarcerating undocumented aliens pursuant to 8 U.S.C. § 1365(a) "from any appropriation to the Department of Justice for the administration and enforcement of laws relating to immigration, naturalization and alien registration, including Public Law 103-121, funds made available pursuant to 8 U.S.C. § 1330, and funds appropriated for those purposes by Congress in any subsequent fiscal year"; 2) a permanent injunction requiring the Attorney General, INS Commissioner, and the Director of OMB to make such reimbursement pursuant to Arizona; 3) a judgment declaring that any law enacted which prevents reimbursement of Arizona's costs for incarcerating undocumented aliens is void and in conflict with Article IV, Section 4 and

b. California's Complaint for Reimbursement of Undocumented Alien Incarceration Costs

As in the case of Arizona, California's case challenges the federal government's failure to reimburse the State of California for the cost of incarcerating undocumented immigrants.[136] The claims and relief sought on the issue of reimbursement for incarceration costs are nearly identical to their counterparts in the Arizona complaint.[137] Probably the most interesting aspect of this case is its request for a judgment declaring that the Attorney General, the Commissioner of INS, and federal employees under their direction have an administrative duty, pursuant to the Immigration and Nationality Act and the Immigration Reform and Control Act, to deport persons convicted of deportable offenses (under these Acts) as well as prosecute persons who return to California in violation of any deportation order.[138] The complaint seeks an injunction mandating the defendants' compliance with such duties. Further, it seeks that any law that prevents defendants from performing the duties in question be found to violate Article IV, Section 4 of the Constition and the Tenth Amendment.[139]

According to the complaint, federal law requires that the INS begin deportation proceedings "as expeditiously as possible" after the conviction of an alien eligible for deportation.[140] California contends

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the Tenth Amendment of the Constitution of the United States; 4) a permanent injunction prohibiting the Attorney General, INS Commissioner, and OMB Director from applying any federal law that would prevent reimbursement for the costs of incarcerating undocumented aliens. *Id.* at 16.

136. In contrast to the Arizona case, incarceration costs include prison construction necessary to house alien felons and parole supervision for illegal aliens not deported. California Complaint One, *supra* note 78, at 6.

137. It bears noting that during California fiscal years spanning between 1991-92 and 1993-94, California experienced a "financial crisis" and found it necessary to issue Revenue Anticipation Warrants and registered warrants to meet the state's financial obligations. *Id.* at 13.

138. *Id.* at 5 (citing 8 U.S.C. § 1326).

139. *Id.* at 4.

140. *Id.* at 16. "[I]n the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General *shall begin* any deportation proceeding as expeditiously as possible after the date of conviction." *Id.* (emphasisis added) (quoting 8 U.S.C. § 1252(i)). It appears that Congress intended deportation proceedings to begin at the time of conviction, not release. 132 CONG. REC. H9785-01 (Oct. 9, 1986).

that the intent behind expediting deportation proceedings was to minimize the cost that states would have to absorb for incarcerating convicted undocumented aliens and to reduce state prison overcrowding. As described by the California complaint, INS currently follows a policy under which interviews and processing of incarcerated aliens subject to deportation are prioritized according to the "*most imminent release date*," notwithstanding the alien's actual date of conviction and incarceration.[141] California maintains that the failure of the Commissioner of the INS to implement the provisions of 8 U.S.C. § 1252(i) constitutes an abuse of her delegated discretion, and requests that the Court issue an injunction pursuant to a declaration that under 8 U.S.C. 1252 (i), which states the defendant has a duty to begin deportation proceedings as soon as possible after the date of conviction.[142]

The complaint also raises the claim that the Attorney General and INS Commissioner have failed in their duty under 8 U.S.C. § 1252 to take custody of inmates who are released from confinement and eligible for deportation.[143] California argues that failure to take custody is an abuse of authority which has imposed security and medical costs on California. Accordingly, the state seeks a judgment recognizing defendants' custodial duty and an injunction compelling them to comply with it. Finally, California brings a claim to require the Attorney General to adopt an effective enforcement policy when administering 8 U.S.C. § 1326, which subjects alien felons re-entering the United States to federal imprisonment for a maximum of 2 to 15 years upon conviction.[144] The complaint contends that California has experienced an illegal alien inmate return rate of 37%—which California attributes largely to the failure of the Attorney General to prosecute under 8 U.S.C. §1326 undocumented aliens who illegally re-enter after formal deportation. As a remedy, California seeks a judicial declaration that the Attorney General has a duty to prosecute under 8 U.S.C. § 1326 and a duty to expend appropriate funds for this purpose, or in the alternative, reimburse California for its actions enforcing federal immigration policy. The fifth and final claim seeks a declaration and injunction by the court that would establish a mandate that the Attorney General and Commis-

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141. California Complaint One, *supra* note 78, at 17. The complaint also states that California officials believes that "INS/Border Patrol agents are not interviewing inmates that have six or more months left to serve on their state prison terms." *Id.* The upshot of such a policy is that INS is able to lower or minimize its spending on deportation proceedings by shifting the costs, in the form of increased incarceration periods, to California.

142. *Id.* at 19.

143. *Id.*

144. *Id.* at 22-23.

sioner execute all final orders of deportation (pursuant to 8 U.S.C. § 1252(c)) by removing a deportee to a location in the "country of origin most likely not to result in re-entry."[145]

IV. THE POLITICAL REALITY OF COST SHIFTING

A. Back-Door Mandates: Imposing Costs Indirectly

On the surface, the states' complaints all appear to implicate federal unfunded mandates—costs that were unavoidable, imposed by the federal government, and that used funds that would otherwise have gone to programs directed at legal residents. However, unlike federal mandates, the state money was not spent pursuant to a constitutional, statutory, or administrative requirement, nor could it be described as the difference between the amount a state government would spend on an activity absent a federal mandate and what it is required to spend by the mandate.[146] Although there existed no explicit federal directive requiring states to provide costly services, the expenditures arguably were created by the nonfeasance of the federal government as well as state reliance on federal reimbursement for select expenses[147] on behalf of undocumented immigrants—a form of "back-door" unfunded mandating. The states expended the money out of perceived necessity; because the federal government failed to handle illegal immigration matters successfully and refused to allocate appropriated funds, they were left with little choice but to absorb costs for programs and services necessary to protect the general state welfare. Given the fiscal impact of compounded backdoor mandating of this kind, it is hardly surprising

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145. *Id.* at 33.

146. *See* ZIMMERMAN, *supra* note 33, at 152. "Unfunded mandate" has become a political catch-term, which the general public applies to everything from grants-in-aid to statutorily defined national criteria/standards to any form of national regulation that imposes costs on states. *See e.g., Capitol Hill Hearing Testimony, House Rules Comm. Hearing, Unfunded Mandates*, Jan. 11, 1995 (testimony of Sen. St. George, Assistant Director State Fiscal Project Center on Budget and Policy Priorities). As described by Congressman Gary Condit (D-Cal), the U.S. Conference of Mayors reported that "over 1,000 local officials around the Nation held events in which they singled out unfunded Federal mandates as the biggest problem they face." Rep. Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395, 397 n.10 (1994) (citing 139 CONG. REC. H8568 (daily ed. Oct. 27, 1993)).

147. See *supra* part III.B.2.a. for a discussion about immigration emergency funds.

that the states describe the government as "commandeering" their legislative processes.[148]

B. Possibility of Political Remedy

Another notable feature of the much publicized states' lawsuits is their function as a sword in the battle over control and accountability of illegal immigration. The suits ostensibly seek judicial remedy, but the high probability that the courts would eventually find the cases nonjusticiable and dismiss (as they already have for many) suggests that the suits may really be a maieutic agent in the struggle for voluntary political remedy by the federal government.[149] Viewed within the framework of an organizational paradigm of federal-state dynamics known as the "dialectical" model,[150] seeking increased federal accountability through high-profile lawsuits is a logical step to changing the federal-state order in the immigration sphere. The dialectical model predicts that the opportunity for reform will arise when tensions in the inter-organizational, political, and administrative system can no longer be suppressed, and that at such time a rival organizational paradigm will emerge.[151] Applying the model to the immigration context, does it appear that a new organizational paradigm will prevail? If recent

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148. For a discussion of the effects of unfunded mandates on states generally, see Gillmor & Eames, *supra* note 146.

149. The federal government has taken some action to respond to concerns regarding state costs of immigration. For example, the 1994 Crime Law expedited deportation of criminal aliens, expanded categories of crimes for which criminal aliens could be deported, and, most importantly, provided a $1.8 billion reimbursement to states for the costs of incarcerating illegal criminal aliens. Katharine Q. Seelve, *Anti-Crime Bill as Political Dispute: President and G.O.P. Define the Issue*, N.Y. TIMES, Feb. 21, 1995, at A16. However, it remains to be seen how much of this $1.8 billion actually reaches the states. As far as education and medical services are concerned, President Clinton's 1996 budget authorized $100 million for educational assistance for both legal and illegal immigrants, and $150 million to subsidize the state costs of providing emergency medical care to illegal immigrants. *Hearings Before the U.S. H.R. Comm. on the Judiciary, Subcomm. on Immigration and Claims* (Apr. 5, 1995) (testimony of Michael Fix and Jeffrey S. Passel of The Urban Institute).

150. Arthur Benz, *Regionalization and Decentralization*, *in* FEDERALISM AND THE ROLE OF THE STATE 127, 130 (Herman Bakvis & William M. Chandler eds., 1987) [hereinafter ROLE OF THE STATE].

151. *Id.* at 131. Other theories explaining the impetus of change exist. For example, Herman Bakvis and William Chandler predict that "outside forces such as those stemming from changes in the international economy may reduce the resources available to one or more governmental units or interest groups", which would spur a demand for change in the federal-state relationship. Herman Bakvis & William M. Chandler, *The Future of Federalism*, *in* ROLE OF THE STATE, *supra* note 150, at 314. They describe another source for demands for change as the federal relationship itself, which "generate[s] within itself those features that sooner or later will result in alteration of that relation." *Id.*

political circumstances are any indicator, it seems it may.[152] But the solution will come only after the states have absorbed significant costs. Moreover, political solutions may not prevent further metastasizing of federal abdication. Such possible outcomes suggest that political solutions may be neither a sufficient nor a reliable bulwark against failures in the federal system.

C. Interstate Redistribution: The Economic Incentives of Undersupply

Division of power between the state and federal governments fosters efficiency of governance. Efficient distribution of power means that the federal government is not only responsible for harmonizing and unifying policy regarding foreign and interstate relations—policies that affect the entire country proportionally, but is also responsible for establishing programs and providing national public goods such as national defense—goods that would be underproduced if left to the individual states. Such goods which are better left under the control of the federal government may be termed "national public goods." Likewise, production of public goods that affect only one level of society are properly left to the more localized governments of the states and cities that contain those sectors affected. Such goods may be termed "local public goods."

Allowing state and local governments to provide local public goods enables those people who are affected to decide whether program benefits exceed the costs. Different communities will then provide different combinations of goods that cater to their respective citizenries.[153] Theoretically, when the effects of localized goods are concentrated within the sphere of the state or local government providing them, aggregate utility should be greater than if the national government were responsible for providing the goods uniformly throughout the country.[154] Programs and services dealing with illegal immigration and

152. This effort is already seeing political results. *See supra* note 149.

153. Assuming that perfect mobility exists, people will move to those areas that provides a mix of goods that best satisfies their demands. *See* PAUL E. PETERSON ET AL., WHEN FEDERALISM WORKS (1986).

154. *Id.* at 11 ("Playgrounds can be concentrated where young children are abundant; recreation halls for senior citizens can be clustered in adult communities; parks can be maintained at varying levels of care, depending on local aesthetic tastes.").

illegal immigrants fall somewhere between pure national public goods and pure state public goods. Accordingly, some public expenditures targeting illegal immigration and services for illegal immigrants are funded by national taxes, while others rely upon state and local resources.

Redistribution of resources necessary to respond to illegal immigration will be of a territorial and social variety—entailing the transfer of resources among states as well as the transfer of resources from American citizens to immigrants who are residing in the United States without the consent of the U.S. government.[155] Citizens in states with high undocumented immigrant populations may believe that the interest in preserving the state's general welfare and meeting basic standards of human decency mediate in favor of making available to illegal immigrants a minimal level of public services and benefits, such as medical assistance. At the same time, individual states that experience high levels of illegal immigration may be disinclined to provide services or public benefits to illegal immigrants. Immigration states may fear that, by redistributing state resources to illegal immigrants, they will increase the incentive for illegal immigrants to locate in their states. Furthermore, states with relatively few illegal immigrants would incur both the direct and externality benefits of the immigration states' socially redistributive policies benefiting illegal immigrants; the direct benefits would be the avoidance of costs that might be distributed nationally, and the externality benefits would take the form of enhanced national welfare.

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155. Because of the importance people may place on citizenship, social redistribution to non-citizens may be particularly difficult to achieve. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT 99 (1985) (arguing that "the essence of consensual political identity" is the notion of "us" versus "them," which then explains the desire to preserve resources for those who belong to "us."); *see also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, WIS. L. REV. 955, 961 (1988).

> Social relations in most communities can be viewed, in abstract terms, as being comprised of rules and practices that constitute community membership at two distinct, though related, levels. The concern at the first level is with who is in and who is out — with determining the *subjects* of community membership. At the second level, the focus is on the nature of the relationships between those people acknowledged to be members — on establishing the meaning or *substance* of the membership.

Id.; Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 3 (1988) ("Among full members of the community, the ideal of equality prevails; as to outsiders, the issue of equality seems irrelevant. Equality and belonging are inseparably linked. To define the scope of the ideal of equality in America is to define the boundaries of the national community.").

Because of the collective action problems raised by the territorial and social redistribution of both resources and services, national government is in many ways best suited to assume responsibility for providing services and goods.[156] Unfortunately, centralized provision of public goods and services creates a disjunction between those who make decisions as to how to meet national objectives and those who pay the bills. This disjunction characterizes much of immigration and immigrant policy, as illustrated by the Refugee Act of 1980. In many ways, Congress has acceded to the Executive's willingness to admit refugees at record levels, while neither branch related refugee flow to overall migration levels.[157] Policymakers regarded difficulties as local problems unconnected to unregulated immigration from Mexico, which itself was considered a local problem. A handful of states were thus left with increased costs for welfare and social services, a situation that has fueled local resentment and fostered continued refugee backlash.

To the extent that particular benefits of the federal system are decentralized, diseconomies arise which promote the undersupply of public goods that have interregional spillovers. What one state gains through redistribution is perceived as a loss by other states. Thus, the federal government operates under the pressure of assuaging states that experience (or simply perceive) national encroachments on their power and that are angered by actual and anticipated loss of resources.[158]

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156. *See* PETERSON ET AL., *supra* note 153, at 17 (noting that the federal government will be best positioned to assume responsibility for redistribution when it "takes the form of a cash award based on some fairly well defined criteria," but that when "commodities are to be distributed or services are to be performed—housing, education, medical care, food, legal assistance, or social services —the administrative complexity of the redistributive program may call for participation and cooperation by local governments.").

157. John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 855 (1982) (discussing the impact of the Refugee Act of 1980). The author makes the related point that immigration issues should sometimes be viewed as local. With reference to Texas' refusal to apportion state aid to educate undocumented immigrants, he argues:

> [I]n Texas, regional economic interests have been largely responsible for a federal border policy that has consistently encouraged 'back door' migration. The benefits of this policy have accrued largely to that state; therefore, it seems fair that Texas should bear the reasonable educational costs that are incidental to these benefits.

Id. at 861-62.

158. *See* William M. Chandler, *Federalism and Political Parties*, *in* ROLE OF THE STATE, *supra* note 150, at 164 (discussing the ability of national political parties to

Redistribution of resources from non-immigration to immigration states underscores the conflicts of interest among states. Although mutuality of states' interests underlies immigration policy, there exists a strong incentive for the national government to fund programs and services related to illegal immigration below the efficient level. Of course, the idea behind redistribution is that, as members of the larger nation, states should experience externality benefits from national programs that bring gains to other states. Even so, national decisionmakers will undervalue the benefits because they will discount the benefit of the externality by the probability that the states which are not directly consuming will actually perceive the externality benefits.[159] If the problem is viewed as localized and no externality benefits are perceived by other states, or if such benefits are de minimus, the undervaluation may be significant.

V. THE GOVERNMENT AS THE PEOPLE: A TRUST MODEL ANALYSIS OF FEDERAL DUTIES

A. The Complexity of Bringing Order to Federalism

As discussed earlier, the states' complaints regarding the federal government's role in formulating, implementing, and funding policy concerning illegal immigration are largely complaints about our system of federalism. Appropriately, analysis and evaluation of the states' claims should take place from such a perspective. In order to answer the question of whether the states have made a claim for which the American system of federalism demands remedy, we must first analyze the relevant positive rights created on behalf of states under the Constitution. Second, we must examine the nature of federal duties arising by virtue of such positive rights. Unfortunately, the task is formidable. Federalism remains a structural farrago, not readily amenable to coherent understanding. The central constitutional protections for state rights, the Tenth Amendment and the Guarantee Clause, lacking as they are in content, have become creatures of interpretation. Every stroke of the academic's pencil has left the veneer

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"serve as integrative mechanisms, which through formal and informal ties can prevent regional parties from neglecting the interests of those outside their own jurisdiction").

159. Distributional coalitions may form as a partial remedy to the mismatch between the costs and benefits of public goods. The effect of such coalitions will be a function of their interests and relative bargaining power. *See* Bakvis & Chandler, *supra* note 151, at 313. Bakvis and Chandler describe distributional coalitions as seeking benefits for the members at a cost to the larger community. *Id.* The existence of such coalitions is explained by economic self-interest. *Id.*

of federalism riddled with streaks. One commentator captured the central problem of scholars' attempts to bring order to federal-state dynamics, describing the analysis as "typically a set of imprecise images that dramatize the chaos, disorder, and lack of controlled purpose said to characterize the current system."[160] Eschewing the classic conundrum for workable principles of federalism, as they pertain to fiscal responsibilities, requires a morphologic approach to a theory of states' positive rights.

The steady growth of constitutionally sanctioned federal power over a veritable bevy of economic and social issues since the time of the New Deal brought with it a concomitant shrinkage in state autonomy as well as confusion about the meaning of federalism in the United States.[161] Many critics of federalism, such as William Riker, applauded such development as a proper move against "at best . . . a confusion of contradictory policies, and at worst as a tyranny by minority and 'impediment to the freedom of all.'"[162] For those such as Riker, who view a federally-dominated system of government as more efficient and democratic than a state-dominated republic, I ask the question: does the dissonance between federal plenary power over immigrants and the state provision of welfare and services for immigrants not create substantial inefficiencies that deserve correction? If so, how strongly does an efficiency argument hold up against challenges? Beyond the normative questions, do states' rights embodied in the Constitution carry an

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160. PETERSON ET AL., *supra* note 153, at 217 (citing Thomas J. Anton, *Intergovernmental Change in the United States: An Assessment of the Literature*, *in* PUBLIC SECTOR PERFORMANCE: A CONCEPTUAL TURNING POINT 22 (Trudi C. Miller ed., 1984)). Peterson goes on to quote Anton's findings on characterizations of American federalism: "[T]he federal system has been described as 'out of control,' 'dangerously dysfunctional,' 'a Leviathan run amuck,' 'ungovernable,' largely 'uncontrolled and unaccountable,' and suffering from a 'centralization maelstrom.'" *Id.*

161. *Id.* at 5.

> But because of a series of New Deal Supreme Court decisions that whittled away the exclusive powers of the states and gave Congress the authority to act in virtually all areas of economic and social life, this doctrine became moribund, and the scholarship on federalism became as confused, ad hoc, and inchoate as federal policy itself.

Id. In moving from an analysis of what powers properly belong in the federal and state spheres respectively to an analysis of what responsibilities accompany the shift or amalgamation of power, we may be able to circumvent some of the conceptual problems that have faced the academics described by Peterson.

162. Thomas O. Hueglin, *Legitimacy, Democracy, and Federalism*, *in* ROLE OF THE STATE, *supra* note 150, at 34.

accompanying command to remedy fiscal inefficiencies? I argue that the Constitution established a trust relationship between the states and the federal government and that the nature of this relationship dictates that the federal government be more accountable to the states. Admittedly, a damage action may not be a practical remedial dimension of the Guarantee Clause and the Tenth Amendment, and may thus call for the Supreme Court to render a simple declaration that a particular action of the federal government has violated either or both of these clauses.

B. Duality of Trusts: A Framework for Analysis

An oft-neglected touchstone of our federal system of government is that the federal government is a fiduciary entrusted with confidence and owing the highest duty to act in good faith for the benefit of its citizens. No concept is more closely associated with fiduciary relationships than that of the trust, a type of fiduciary relationship which involves a trustee who holds legal title subject to the rights of beneficiaries.[163] The fiduciary relationship is created by a party called the settlor, who puts her property in the trust. The trustee then manages that property for the purpose of benefiting a beneficiary. The most common form of trust, an express trust, is created expressly by the settlor and must possess the following elements: A trustee who has consented to the relationship, property managed by the trustee (res),[164] and beneficiaries who may include the trustee or the settlor. The word "trust" need not appear in an express trust, as evidence of the settlor's intention to create such a relationship suffices. In the case of federalism, evidence of the settlement of the governmental trust may be adduced from the history of the Constitutional Convention.

C. Locke's Vision of Government as Trustee

American federalism, the principle of sharing power between the states and federal government, is the product of a constitutional compromise between those championing a strong central government and those preferring the looser bonds of the confederation.[165] Since the framing of the Constitution, the United States has seen a significant evolution in both the immigration and federalism issues to which the Constitution is

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163. *See generally* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, chs. 1-3 (3d ed. 1984); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

164. "Property," for purposes of trust, may consist of anything recognized by the law as such. RESTATEMENT (SECOND) OF TRUSTS § 74b (1959).

165. *See e.g.*, Arnold I. Burns, *The Perspective of Federalism at the United States Department of Justice in 1987, in* FEDERALISM, supra note 11, at 45.

applied. Historical and political changes notwithstanding, I use induction from historical fact to show that our governmental system is one based on trust, with certain duties inhering in powers granted and exercised.

The notion that the formative process of government bears analogy to a trust model is not novel.[166] However, past discussions of the government trust have focused on the duties and obligations of the federal and state governments to the people and have neglected to use the trust framework to analyze the respective rights and obligations that arise between the federal and state governments themselves.[167] Although the theory of government as trustee for the people did not gain widespread attention until it was applied by John Locke—undoubtedly the most famous advocate of the extended trust metaphor for civil governance—the idea was discussed as far back as the early seventeenth century.[168] American adoption of the trust doctrine can be traced back to the ideas and writings of Locke. Locke had a large influence on the creation of the American government, beginning with the Declaration of Independence, when his "impact [was] unmistakable,"[169] and continuing through the period of constitutional construction, when his theories shaped the federal paradigm.[170] Locke believed that government was the product of a contract among people, that legislators were trustees for the public good of the people—trustees who could be impeached if they breached the trust.[171] For Locke, the formative process of civil

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166. John Locke was one of the earliest advocates of the trust model of gonvernance. *See* Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 61 n.50 (1985) (citing J. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 156 (2d ed. 1973)).

167. *See, e.g*, J. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 154-192 (2d ed. 1973); JOHN LOCKE, TWO TREATIES OF GOVERNMENT, SECOND TREATISE, 376-381 (P. Laslett ed. 1960).

168. Doernberg, *supra* note 166, at 61 n. 50.

169. *Id.* at 64 (citing E. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 20, 42 (1950) and A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 90 (1948)).

170. "Professor G. Mace notes, 'Locke has long been considered the political theorist who exerted the greatest influence upon our national-rights heritage . . . . Many go so far as to suggest his influence upon the American Funding Fathers was so great that the United States may be termed a Lockean nation.'" *Id.* at 58 n.36 (citing G. MACE, LOCKE, HOBBES, AND THE FEDERALIST PAPERS 9 (1979)).

171. *Id.* at 64. However, "[s]everal writers suggest that Locke's repeated resort to the trust metaphor should not be taken to connote a trust in a literal or formal sense." *Id.* at 62 (citing J. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 175-78 (2d ed. 1973)

government, where the people served simultaneously as the settlors and beneficiaries, underpinned the trust relationship.[172]

D. The Question of Sovereignty: The Founders' Envisionment of Federal-State Roles Under the Constitution

State delegates attending the Constitutional Convention of 1787 (Convention) faced the formidable task of crafting a new system of federal governance. The Convention marked an ideological departure from the principles that animated the Articles of Confederation, the American people's failed attempt to create a federation of states. Driving forces behind the Convention included the delegates' desire to correct abusive state behavior engendered under the Articles of Confederation. Such state abuses were thought by many to impinge on individual rights,[173] and two prevailing bodies of thought, Federalist and Antifederalist, endeavored to find a solution to the problem.

The Antifederalists feared the loss of control that they believed would accompany concentration of power at the national level.[174] As described by Gordon Wood:

> [T]he Antifederalists' lack of faith was not in the people themselves, but only in the organizations and institutions that presumed to speak for the people . . . . They were 'localists,' fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic . . . . The Antifederalists saw themselves in 1787-88 fighting the good old Whig cause in defense of the people's liberties against the engrossing power of their rulers.[175]

Like the Whigs, the Antifederalists feared the dichotomy between national interests and state interests. Federalists, on the other hand, advocated a strong national government. They sought to empower national government as a remedy to the failing of the Articles. Some Federalists, such as Edmund Randolph, the author of the Virginia plan,

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and J. LOCKE, TWO TREATISES OF GOVERNMENT SECOND TREATISE 112 (P. Laslett, ed. 1960)).

172. *Id.* at 61.

173. For example, Madison argued that "[t]he rights of individuals are infringed by many of the state laws—such as issuing paper money, and instituting a mode to discharge debts differing from the form of the contract." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1440 n.60 (1987) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-319 (M. Farrand rev. ed. 1937). Amar describes the Federalists view of the Articles of Confederation. *Id.* at 1440-42.

174. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 521 (1969) (citation omitted).

175. *Id.* at 520-21.

even wanted to go so far as to create "a strong *consolidated* union, in which the idea of states should be nearly annihilated."[176]

The Antifederalists' fear that a strong national government would subsume state governments[177] held significant ramifications for the Federalists in framing the Constitution, for they knew that if people believed the Constitution would eventually destroy the states and produce a consolidation, it would never be adopted.[178]

Consequently, in their constitutional debates, both the Federalists and Antifederalists came to focus on the question of the power to be reserved to the states.[179] To respond to the Antifederalists' concern about state power, the Federalists posited a number of explanations of how the proposed constitutional system would protect against unbridled aggrandization of national power at the cost of state independence. These explanations covered a broad range. Some emphasized the fact that "the new government in many of its provisions was so 'dependent on the constitution of the state legislatures for its existence' that it could never 'swallow up its parts.'"[180] Others argued that "each state was only 'giving up a portion of its sovereignty' in order 'better to secure the remainder of it.'"[181] Some felt there were "two governments to which [people] . . . owe[d] obedience,"[182] while still others argued that "'[t]he sphere in which the states moved was of a different nature' from that of the federal government."[183] The controversy did not end there. Some felt that the Constitution was "not completely consolidated, nor [was] it

176. *Id.* at 525 (quoting Edmund Randolph's description of his proposed Virginia Plan).

177. Antifederalists argued that the supremacy of federal government would "'eventually annihilate the independent sovereignties of the several states.'" *Id.* at 528 (citation omitted).

178. *Id.* at 528-29.

179. *Id.* at 529.

180. *Id.* (citation omitted).

181. *Id.* (citation omitted).

182. *Id.* (citation omitted).

183. *Id.* (citation omitted). Wood quotes Edmund Pendleton as arguing that

> [t]he two governments act in different manners, and for different purposes . . . the general government in great national concerns, in which we are interested in common with other members of the Union; the state legislature in our mere local concerns . . . . They can no more clash than two parallel lines can meet.

Id.

entirely federal,"[184] and others believed that sovereignty "*reside*[*d*] in the PEOPLE, as the fountain of government."[185]

Ultimately, the argument that supreme sovereignty resided in the people and that state governments would be protected as long as the sovereign people so deemed won the battle for the Federalists. According to this argument, the people "only dispensed such portions of power as were conceived necessary for the public welfare" and could "delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper."[186] As the genuine sovereign, the people were the source of ultimate, preeminent authority. Thus, the people could "take from the subordinate government's powers with which they have hitherto trusted them, and place these powers in the general government."[187] How the powers were to be distributed between the state and federal governments was a choice to be left to the people who could "distribute one portion of power to the more contracted circle called State governments [and] furnish another proportion to the government of the United States."[188] Under this framework, the state and national governments were to serve the people.

VI. A PRINCIPAL-AGENT GAME: GOVERNMENT TRUSTEES

Although the Framers did not expressly describe government as being based on a trust model, the formative process of governance under the Constitution is infused with the spirit of Lockean trusteeship. The trust analogy applies to the relationship between the states and their citizenry as well as the relationship between the federal government and the people of the nation. Collectively, the states of the union acted as settlor of the trust between the people of the nation and the national government. At the time of constitutional construction, the states respectively served as trustee for the interests of their local citizenry. Both before and after the drafting of the constitution the states were vested with "numerous and indefinite" police powers over the affairs of state citizens.[189] Such powers "extend[ed] to all the objects which, in the ordinary course of affairs, concern[ed] the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the

184. *Id.* (quoting James Madison).
185. *Id.* at 530 (quoting James Wilson).
186. *Id.* (quoting James Wilson).
187. *Id.* (quoting James Wilson).
188. *Id.* at 530-31 (quoting James Wilson).
189. THE FEDERALIST NO. 45, at 292 (James Madison) (New American Library, 1968) [hereinafter FEDERALIST NO. 45]; *see* ZIMMERMAN, *supra* note 33, at 25.

State."[190] Yet, such power was not to be used in any manner the state chose, but rather, to further the interests of the citizen beneficiaries.[191] The states owed the highest duty of good faith to their citizens, and this explains why, at the time of constitutional construction, concerns about preserving state and local interests were foremost on the Founders' minds (see Table 1 on following page).

The federal and state governments were to assume the responsibilities of trustees acting on behalf of the people. As the beneficiaries of the trust relationship, the people retained the power to control state and national governments directly through elected representatives and indirectly through the threat of revocation or alteration of delegated power.[192] And in the capacity of trustee, the state and federal governments were respectively endowed with the power to compel action and compliance by the sovereign people.

Under the structural setup, government was required to act within its delegated power.[193] Such delimitation of power was crucial to the two-tiered protection provided by the co-existing national and state trusts:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.[194]

The state and national governments were duty-bound to the people, who could be considered the settlor of the state and national trusts.[195] For

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190. FEDERALIST NO. 45, *supra* note 189, at 292-93.
191. ZIMMERMAN, *supra* note 33, at 25.
192. Doernberg points to judicial review as an additional source of governmental accountability. Doernberg, *supra* note 166, at 67
193. As described by Akhil Amar, "government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People." Amar, *supra* note 173, at 1436.
194. THE FEDERALIST NO. 51, at 350-51 (James Madison) (Jacob E. Cooke ed., 1961).
195. By extrapolating from the trust framework of governance, one sees that the people of the individual states functioned as settlor of the state trust, whereas the states, acting on behalf of their citizens, functioned as settlor of the national trust.

TRUST	SETTLOR	TRUSTEE	BENEFICIARIES	PROPERTY
STATE	The People of the Individual States	Individual State Governments (endowed with state police power)	The People of the Individual States	Individual Property
NATIONAL	State Governments (acting as agents of the citizens of their respective states)	Federal Government (endowed with plenary power)	The People of the Nation	State Fiscal Resources (aggregated)

A DUAL TRUST MODEL OF AMERICAN GOVERNANCE

this reason, Founders such as Alexander Hamilton, James Madison, John Marshall, and James Iredell, considered governments as sovereign only within the sphere of their delegated power.[196]

A. The States as Secondary Beneficiaries of the National Trust: Protection Against the Risks of Aggregating Sovereignty

Under the trust framework, the states' role was not limited to serving as trustee of their respective citizenries and as settlor of the trust between the people of the nation and the national government. The states played an additional, important role in the American system of governance, serving as secondary beneficiary of the federal government's trusteeship under the national trust. It is useful to think of the national trust as a trust formed among the people of the states.[197] As discussed earlier, the people of the nation served in the role of primary beneficiary of the national trust. The national government owed a fiduciary duty to the people, and by virtue of this cardinal responsibility, assumed an ancillary duty to the states. The ancillary duty, embodied in the Guarantee Clause and Tenth Amendment of the Constitution, functioned to ensure that national policy could not completely subsume the interests of the people of the individual states. More specifically, the federal duty to the states could be described as a duty not to act outside delegated powers without the consent of the People, or alternatively, a duty to protect states powerless to protect themselves against plenary power.[198]

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196. Amar, *supra* note 173, at 1437. "Just as a corporation could be delegated limited sovereign privileges by the King-in-Parliament, so governments could be delegated limited powers to govern. Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of the delegation itself." *Id.* at 1435 (citation omitted).

197. Recall that Locke believed that government derived from a "contract among people rather than between rulers and ruled." Doernberg, *supra* note 166, at 67. The idea of a trust formed among and between states contrasts with the state sovereignty theory, which views the Constitution as a contract among and between the states and, accordingly, treats the states as free to renounce and withdraw from the contract. The trust theory does not endorse this implication of the state sovereignty theory, but rather, views the Constitution as manifesting the aggregation of sovereignty. As such, the primary focus of the trust theory is on the national duties to which the formation of the trust among and between the people of the states gave rise. *See* Walter Berns, *The Meaning of the Tenth Amendment*, *in* NATION OF STATES 139 (R. Goldwin 2d ed. 1973) (discussing the implications of the state sovereignty theory).

198. Such consent could be expressed through a constitutional amendment, or alternatively, through a constitutional moment. *See* BRUCE ACKERMAN, WE THE

The sovereign people of the individual states granted power to the national government to maximize their own welfare. Aggregation of individual sovereignty could only have been achieved by a feeling that gains of aggregation would outweigh losses.[199] By aggregating collective sovereignty at the national level, the people reconstituted sovereignty that was previously concentrated in the people at the state level.[200] Yet national power was to operate in tandem with the power reserved by the people at the state level. To think as a common, sovereign people, the people at the more localized levels of the states needed assurance that their interests would not be stampeded by other states wielding majority power through the national government. Thus, the structural design of government needed to limit opportunities for national overreaching—that is, opportunities to eat away at the power reserved for the individual states and, accordingly, the rights reserved for their citizens.

B. The Federal Government's Duty Not to Destroy: The Structural Importance of States to American Governance

The grant of plenary power over particular matters to the federal government relies on the premise of states functioning as the secondary beneficiaries of the national trust. The Antifederalists recognized that in a country this vast, states could protect local interests from despotism at the national level. The single legislature was incapable of adequately representing such diverse interests.[201]

PEOPLE: FOUNDATIONS (1991).

199. *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (describing the rent-seeking and free-riding interests that dominate collective action).

200. States' rightists and nationalists disagreed as to whether sovereignty was concentrated principally in the people of the states or the people of the nation. Whereas the states' rightists viewed the Constitution as a compact among the sovereign peoples of the individual states, the nationalists saw the Constitution as "a supreme statute deriving from the supreme sovereign legislature—the People of the nation." Amar, *supra* note 173, at 1452. I argue that regardless of whether one takes a states' rightists' or nationalists' view, protection of the bounded sovereignty retained by the states—the building blocks of the nation—was central to the Constitution. Under either view, the redefinition of the sovereignty structure could only be achieved with the acquiescence of the people themselves and the assurance that in exchange for sacrifices made on behalf of the nation, the individual states would retain some ability to resist encroachment by the rest of the country.

201. WOOD, *supra* note 174, at 527 (citation omitted). For a discussion of colonists' perceptions of the unrepresentative British assembly ruling over the states, see Amar *supra* note 173, at 1445. Arguably, such perceptions gave rise to suspicion and skepticism of power removed from local levels. The Articles of Confederation represent one such manifestation of colonists' skepticism.

The experience with British rule left the colonists with this indelible anti-imperialist sentiment, but complete decentralization was not the solution, either. What was needed was an intermediate form of authority structure. As described by Akhil Amar, the Constitution's solution then represented "a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body."[202] Without a national duty to protect the states, the national government's gravitational force threatened to drag the states into it.

Moreover, the states' role as beneficiary of the trust was critical to the envisioned scheme of government, because state power created "a double security . . . as to the rights of the people. The different governments control each other, at the same time that each will be controlled by itself."[203] States needed credible means of exercising power against overreaching by the federal government: Without a zone of autonomy from the federal government's reins, the states would not possess sufficient power and independence to serve the double security function.[204] As such, the national government was to exercise power over "certain enumerated objects only . . . leav[ing] to the several States

202. Amar, *supra* note 173, at 1449 (citation omitted).

203. Burns, *supra* note 165, at 46 (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). See Madison's discussion of aggrandization of power in the context of separation of powers: "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition." THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

204. The Supreme Court has recognized the importance of states as "a check on the abuses of government power" as well as counterbalancing the national government in order to protect "our fundamental liberties." Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citations omitted); *see also* discussion *infra* part VII.B.

TRUST	SETTLOR	TRUSTEE	PRIMARY BENEFICIARIES	SECONDARY BENEFICIARIES	PROPERTY
STATE	The People of the Individual States	Individual State Governments (endowed with state police power)	The People of the Individual States	The People of the Nation (receiving externality benefits)	Individual Property
NATIONAL	State Governments (acting as agents of the citizens of their respective states)	Federal Government (endowed with plenary power)	The People of the Nation	The People of the Individual States (receiving direct consumption and externality benefits)	State Fiscal Resources (aggregated)

THE DUAL TRUSTS—DUAL BENEFICIARIES MODEL

a residuary and inviolable sovereignty over all other objects."[205] Of course, the states' zone of autonomy has never been of fixed scope. History has shown that the zone may contract when there is a growth of federal power.[206] Thus, the federal government's duty to the secondary beneficiaries of the states implies that the expansion of federal power into such zones carries responsibilities with it. In particular, if the national government took actions that removed state control over specific issues, the national government assumed a duty to act as a fiduciary, ensuring in good faith that the power shift did not decrease the welfare of the states.

VII. EXPRESSION OF THE TRUST: THE GUARANTEE CLAUSE AND THE TENTH AMENDMENT

A. Origins of Powers and Duties

The Constitution represents the expression of the trust between the people of the nation and the federal government. The Constitution placed expansive powers in the federal government but also placed terms and restrictions on the exercise of such powers. Like the powers granted to any trustee, the Constitution entrusted the national government to act for the betterment of the people, the primary beneficiaries of the trust. For one, the Constitution granted Congress the power to tax, which is a concurrent state power not subject to federal preemption.[207] Notably,

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205. Burns, *supra* note 165, at 45 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). Hamilton's discussion of the relative powers of state and federal governments gives further support to the argument that a sphere of autonomy was reserved to the states:

> It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people[, the beneficiaries of the states' trusteeship.

THE FEDERALIST NO. 17, at 199 (Alexander Hamilton).

206. *See, e.g.*, ACKERMAN, *supra* note 198, at 47-48 (discussing the constitutional moment of the New Deal and the change in the nature of federal power).

207. *But see* ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 30 (1984) [hereinafter INTERGOVERNMENTAL RELATIONS].

> Like the commerce power, the use of the taxing power as a regulatory device has worked most frequently to preempt state activity . . . . However, clear

concurrent powers extended far beyond taxation, encompassing specific powers granted to Congress but not denied to the states, such as the power to regulate commerce and the power to spend. The Supremacy Clause,[208] and the powers that ensue from it, empowered the federal government to nullify state laws in conflict with federal law, and thereby regulate and preempt state activity.[209] However, the Supremacy Clause only applies to federal laws that comport with the other provisions of the Constitution.

Federal action must not contravene constitutional mandate. The Guarantee Clause and the Tenth Amendment state that the exercise of plenary power by the federal government faces restrictions. In this capacity, the Guarantee Clause, together with the Tenth Amendment, is an expression of the subsidiary trust between the states and the federal government—tantamount to a statement that the states stand as the secondary beneficiaries of the federal government's trusteeship, protected against federal destruction. The Guarantee Clause states "that [t]he United States shall guarantee to every State in this Union a Republican Form of Government."[210] Most scholars agree that Republican Government is a government in which the rulers are controlled by the people—"a government based on popular control."[211] But only when the people have the ability to shape and direct their respective state governments is it possible for a republican government to exist.[212] Deborah Jones Merritt, a scholar who argues that the Guarantee Clause is a shield for state autonomy, summarizes the dual charges of the clause. She states that the clause prohibits the states from adopting nonrepublican forms of government, and so long as the states comply,

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> manipulation of tax policy has also been used to "induce" state performance of certain functions. In fact, the now familiar inducement versus coercion standard "first evolved in cases challenging conditions attached to credits against federal taxes awarded to encourage state development of a particular program."

Id. (quoting Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COL. L. REV. 858, 883 (1979)).

208. U.S. CONST. art. IV, cl. 2. The Supremacy Clause specifically states: "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 . . . ." *Id.*

209. ZIMMERMAN, *supra* note 33, at 24; *see also* INTERGOVERNMENTAL RELATIONS, *supra* note 207, at 25.

210. U.S. CONST. art. IV, §4.

211. Deborah Jones Merritt, *Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23-25, N. 126 (1988) (citing J. LOCKE, SECOND TREATISE OF GOVERNMENT § 149 (C.B. Macpherson ed., 1980); *see also* THE FEDERALIST NO. 39, at 252 (J. Madison) (J. Cooke Ed. 1961); THE FEDERALIST NO. 22, at 139 (Alexander Hamilton) (J. Cooke Ed. 1961).

212. Merritt, *supra* note 211, at 25.

prohibits the federal government from taking actions that would destroy the states' republican character.[213] These two dimensions of the Guarantee Clause reinforce each other, ensuring that republican government is protected. So long as the states promote and preserve republican governance, the Guarantee Clause entitles them to protection against federal intrusion.[214] This interpretation of the Guarantee Clause is supported by the history of the founding[215] and has been echoed by the federal courts in numerous, prominent cases of the past century.[216] In other words, the Guarantee Clause pronounced that the federal government was affirmatively duty-bound by the national trust to protect qualifying state beneficiaries.

The Tenth Amendment, which states that "[t]he 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,"[217] bolsters the force of the Guarantee Clause as an expression of the states' role as secondary beneficiaries of the national trust. Although the Tenth Amendment has generally been found to "state[] but a truism that all is retained which has not been surrendered,"[218] it is, nonetheless, impor-

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213. *Id.* (tracing the history and meaning of the Guarantee Clause).

214. Note that the Guarantee Clause interpretation discussed here does not indemnify states from federal preemption. As noted by Deborah Jones Merritt, "[a] republican government . . . need not exercise its authority over any particular substantive area . . . . The guarantee clause assures the states the right to maintain autonomous, republican governments. The [S]upremacy [C]lause, however, denies those governments the power to regulate any fields properly preempted by Congress." *Id.* at 59.

215. *Id.* at 29-36. "[B]oth advocates and foes of the new Constitution recognized the[G]uarantee [C]lause as an attempt to mark the boundary between federal power and state sovereignty." *Id.* at 35.

216. For example, the Sixth Circuit also made the very important statement that a Guarantee Clause challenge to EPA regulations directing states to enforce federal pollution standards "was neither frivolous nor irresponsible." *Id.* at 28 (citing Brown v. EPA, 521 F.2d 827, 838-40 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977)). The court made the sagacious statement that the disjunction between the power to spend and the power to tax would ravage popular accountability and "encourage few even casually acquainted with the writings of Montesquieu and the Federalist papers to assert that the states enjoyed a Republican Form of Government." *Id.* (quoting *Brown*, 521 F.2d at 840.) Accordingly, the court invalidated the offending regulations. *Id.* at 25-28.

217. U.S. CONST. amend. X.

218. United States v. Darby Lumber Co., 312 U.S. 100, 124 (1940). *But see* New York v. United States, 505 U.S. 144 (1992) (stating that the Tenth Amendment confirms that powers reserved by the states are protected by limits on the federal government's constitutional powers).

tant as a "declar[ation] of the relationship between the national and state governments as it had been established by the Constitution before the amendment."[219] Moreover, the purpose of the Tenth Amendment was to "allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."[220]

The Supreme Court has very visibly vacillated in its reading of the Tenth Amendment, oscillating between the interpretation that the Amendment places affirmative, justiciable limitations on federal displacement of state power and the interpretation that the Amendment is an inappropriate vehicle for challenging encroachments on sovereignty. For example, in 1918, the Court's majority opinion in *Hammer v. Dagenhart*[221] struck down a federal statute that excluded products of child labor from interstate commerce, in an attempt to eliminate child labor within the states. Justice Day, who wrote the majority opinion, stated: "In interpreting the Constitution it must never be forgotten that the Nation is made up of States, to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved."[222] Justice Holmes, in his dissenting opinion, expressed his disagreement with the majority: "I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State."[223] Holmes was later vindicated by the Court's holding in *United States v. Darby Lumber*.[224] In *Darby Lumber*, the Court upheld the federal Fair Labor Standards Act of 1938, which established a minimum wage for a forty-hour work week as well as overtime for some interstate activities. Writing for the majority, Justice Stone's opinion resonated with the principles expounded in Justice Holmes' *Dagenhart* dissent: "[T]he power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution."[225]

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219. *Darby Lumber*, 312 U.S. at 124.
220. *Id.*
221. 247 U.S. 251 (1918).
222. *Id.* at 275.
223. *Id.* at 278 (Holmes, J., dissenting).
224. 312 U.S. 100 (1941).
225. *Id.* at 116; *see also* Jennifer Smith, *Judicial Review and Modern Federalism: Canada and the United States*, *in* ROLE OF THE STATE, *supra* note 150, at 118-19 (discussing the shift in reasoning by the majority in *Darby* and *Dagenhart*).

More than a quarter century after *Darby Lumber*, the Supreme Court revisited the Tenth Amendment in *National League of Cities v. Usery*,[226] and reversed the course of its long-standing jurisprudence. In *National League*, the Court recognized that the states needed judicial assistance in resisting federal usurpation of their powers and held that Congress could not impose federal minimum wage standards on state employees because it "would impair [their] ability to function effectively within a federal system" and destroy their "separate and independent existence."[227] In so holding, the Court also recognized a sphere of inviolable state powers. *National League* was not the end of the story, however. The decision was effectively overturned by *Garcia v. San Antonio Metropolitan Transit Authority*,[228] which seemed to seal the fate of the Tenth Amendment by concluding that the Amendment was mere tautology and did not establish positive rights on behalf of the states. *Garcia* held that the Tenth Amendment did not immunize a city transit authority from the federal government's power to regulate workers' hours and wages. Justice Blackmun cited the difficulties of defining traditional state functions entitled to immunity from federal regulation, emphasizing that the Framers intended for the restraints on federal power to inhere in the daily functioning of the federal government.[229] Thus, procedural limitations of the federal system of government were more appropriate for resolving disputes than judicially created restrictions on federal power.[230] Thus, with *Garcia*, Americans saw arguments for judicial safeguards for federalism give way to arguments based on faith in the political process.

Many thought *Garcia* marked the death of federalism, but the recent case of *New York v. United States*,[231] gave reason to believe that the Court was willing to recognize federalism as a substantive constitutional principle. In *New York*, the Supreme Court held that the Tenth Amendment protects the sovereignty reserved to states by prohibiting congressional commandeering of state's legislative processes "by directly

226. 426 U.S. 833 (1976).
227. *Id.* at 851-52.
228. 469 U.S. 528 (1985).
229. *Id.* at 554; *see* discussion *supra* note 56 and accompanying text.
230. *Garcia*, 469 U.S. at 554.
231. 505 U.S. 144 (1992).

compelling them to enact a federal regulatory program."[232] Pursuant to this holding, the Court struck down a portion of the federal Low-Level Radioactive Waste Policy Act, which required states unable to provide for disposal of waste to take title to the waste. Yet the potential implications of *New York* were minimized by the Court's concession that Congress could have had the power to preempt state radioactive waste regulation.[233] In the end, *New York* was another swing of the pendulum that continued the pattern of oscillation that had been set decades earlier.

Some have interpreted the Court's mercurial position as trivializing, and even subverting, any strength or significance one might attach to the Tenth Amendment. However, the fact that the Court has not taken the hard-and-fast line that the Tenth Amendment constitutionally limits congressional power to displace certain state functions does not undermine the contention that the Tenth Amendment, coupled with the Guarantee Clause, gives rise to federal duties to states. Rather, the Court's vacillation reflects the difficulty of enforcing the national government's duty as trustee to the states, and should be interpreted as a call for workable principles of federal-state relations.

B. Reconciling the Dual Sovereignty and the Sovereign People Paradigms

Traditionally, the relationship between state government, federal government, the people of the states, and the people of the nation has been classified under one of two paradigms: The people as sovereign or dual sovereignty. Dual sovereignty between the states and federal government places all powers of sovereignty, except those explicitly granted to the federal government, in the state governments.[234] The notion of dual sovereignty has animated some of the most important discussions of American federalism of the past century, including Justice O'Connor's recent majority opinion in *Gregory v. Ashcroft*, which held that the Age Discrimination in Employment Act did not invalidate the Missouri Constitution's mandatory retirement provision, as applied to state judges.[235] Underscoring the importance of states to democratic

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232. *Id.* at 176 (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)).

233. *Id.* at 160.

234. *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 30-75 (1987).

235. 501 U.S. 452 (1991). The mandatory retirement provision of the Missouri Constitution being challenged stood in apparent conflict to the Federal Age Discrimination in Employment Act (ADEA), which made it illegal for employers to discharge workers over 40 on the basis of age. The Court held that before the ADEA could be

governance, O'Connor described the basic precepts of our Constitional system of dual sovereignty:[236]

> '[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . '[W]ithout the States in union there could be no political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[237]

The dual sovereignty paradigm described by O'Connor and others stands in contrast to the concept that sovereignty resides in the people of the nation.[238] Whereas the crux of the dual sovereignty paradigm lies in preservation of inviolable state power to counteract federal power, the basic tenet of the sovereign people paradigm is maximization of the people's ability to exercise their sovereign rights (which may or may not be achievable through dual sovereignty.)

The dual trusts model proposed by this Article finds false dichotomy between these two mainstream paradigms regarding the vestiture of power in the federal government. Instead of viewing state and federal government as either dual, independent sovereigns or as agents of a single, omnipotent sovereign (the people), the trusts model accommodates both views. Under the trusts model, the power of the state and federal governments, which is usually referred to as the power of the sovereign by the dual sovereignty paradigm, would be described as the power of a trustee, limited by the terms of the trust relationship. Also, in contrast to the notion that the people of the nation act as a single sovereign to control the federal government, the trusts model envisions federal government as the agent of the sovereign people of the nation, but also duty-bound to the states. The federal government serves as agent of the sovereign people of the states (subgroups of the larger sovereign) through its relationship with state governments.

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applied to the forced retirement of state judges, Congress had to make a "plain statement" to that effect. *Id.* at 464.

236. *Id.* at 457.

237. *Id.* (citing Texas v. White, 7 Wall. 700, 725 (1869), quoting Lane County v. Oregon, 7 Wall. 76 (1869)).

238. *See* discussion *supra* parts V.D. to VI.A.

In accordance with the Founders' views of sovereignty and governance, academic discussions of federalism that center on the doctrine of dual sovereignty can be properly recast around the doctrine of dual trusteeship. With the growth of national power over areas of policy traditionally controlled by the states, the doctrine of dual sovereignty began to languish as a conceptual tool for analyzing problems of federalism.[239] As New Deal programs empowered Congress to act in most areas of economic and social concern and simultaneously diminished powers that had formerly belonged in the exclusive sphere of the states, the doctrine of dual sovereignty became moribund.[240] The dual trusts model is capable of resisting such an unfortunate fate because it allows for shifts in the relative powers of state and federal governments if the sovereign people have mandated the shift.[241] Yet, in the event of a shift, the federal government, in the capacity of trustee, would assume an affirmative, fiduciary duty to protect states disempowered to act on their own behalf.

VIII. REFINING THE TRUSTS MODEL OF GOVERNANCE: INSTRUCTIVE FORERUNNERS

Having presented the merits of the trust model as a conceptual tool, the question remains: What federal responsibilities does the trust relationship impose with respect to states fiscally affected by illegal immigration? Moving away from the abstract, theoretical contours of the trust paradigm, to an analysis of the federal duties owed to states that pick up the tab for federally designed and engineered immigration programs, this Article looks for guidance and extrapolates from other areas of public law where the trust doctrine has been invoked.

The notion of federal trust is not new. It has been applied in the context of federal Indian law, coastal management, and international law applicable to the relationship between the United States and its commonwealths and territories.[242] The existence of a legally enforceable trust underlies the application of the trust doctrine in many of these analogous contexts. Of the prototypes, federal Indian law and international law are especially instructive because they demonstrate a trustee's duties to beneficiaries with sovereign qualities. For each of the illustrative prototypes, the Article probes to find the underlying purpose

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239. PETERSON ET AL., *supra* note 153, at 5-10.
240. *Id.*
241. Such a mandate might take the form of a constitutional amendment, or more probably, a constitutional moment, such as the New Deal.
242. *See* discussion *infra* notes 243-291 and accompanying text.

of the trusteeship and its rules of interpretation. The analogies presented here provide insight as well as some precedence for conceiving the state and national governments as trustees with decisionmaking power over fiscal resources for the benefit of the people of the nation and the states.

A. Land Use

1. The Public Trust Doctrine

The "public trust" is the specific label placed on states' special titles to coastal waters, the lands beneath, and the living resources inhabiting the waters.[243] According to the public trust doctrine, these special titles are held by states in trust for the benefit of the public and establish the public's right to make use of the trust waters, underlying lands, tidelands, and resources for recognized public uses.[244] The doctrine's intended purpose was to function as a "proscriptive statement on the limits of sovereign authority."[245] The public trust doctrine is an ancient property law principle which derived from English common law heritage and now exists in every U.S. state.[246] The common law heritage of the public trust doctrine has enabled it to adapt to changing social conditions while maintaining its central character of assuring the public's continued benefit from waterways.[247] It is believed that the doctrine's flexibility will ensure its continued applicability and survival.[248]

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243. DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK xvi (1990); *see also* JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 5 (1994).

244. *Id.*

245. Randal David Orton, Inventing the Public Trust Doctrine: California Water Lake and the Mono Lake Controversy 25 (1992) (unpublished Ph.D. dissertation, University of Cal. (Los Angeles)).

246. Philips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (holding that the public trust doctrine applies in every state to all tidal waters); *see also* ARCHER, *supra* note 243, at 4.

247. ARCHER, *supra* note 243, at 4-5.

248. SLADE, *supra* note 243, at xxi.

> The Public Trust Doctrine has evolved from preserving the public's rights to use trust lands and waters for commerce, navigation and fishing, to protecting modern uses that are "related to the natural uses peculiar to that resource." This dynamic nature, firmly documented by the courts over the centuries and fundamental to the application of the doctrine, has enabled it to persist for over 1,500 years.

The public trust doctrine vests authority in states by virtue of their control over state property. Pursuant to the doctrine, states have the power to govern and manage land, water, and living resources that fall within the scope of the doctrine as their own property.[249] States properly exercising public trust power are not susceptible to takings challenges because they are considered to be exercising authority over their own property, not the property of private individuals.[250] Similarly, the national government, exercising trust authority over national fiscal and other resources, is viewed as exercising power over resources belonging to it. Yet, in both these cases, the government "ownership" is subject to a trust for the benefit of the public subject to certain rights of usage.

2. *Limitations Imposed by Jus Publicum and Jus Privatum*

Grants of public trust lands to private owners are subject to the public trust and to the state's duty to "protect the public interest from any use that would substantially impair the trust."[251] Consequently, the state trust of coastal areas is a hybrid, divided into two forms of titles: *jus publicum* (the public's trust title) and *jus privatum* (a private proprietary title). The *jus privatum* is the title to the transferable property held by the government in the use and possession of trust lands. The *jus privatum* may be conveyed into private ownership, but the conveyance will be conditioned. That is, the *jus privatum* will always be subservient to the dominant *jus publicum*, the collective public right to use and enjoy public trust lands, waters, and their resources for particular traditional purposes, such as navigation and fishing.[252] Thus, the use of public trust land held in *jus privatum* will always be restricted by the *jus publicum*.[253] Under English common law, conflicts between the exercise of

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Id. (citation omitted).

249. *Id.* at xxiii (positing that a state governing and managing public lands as its own property "is in sharp contrast to a State regulating a citizen's private property through its police powers").

250. *Id.*

251. ARCHER, *supra* note 243, at 4.

252. *Id.* at 6-11; *see also* SLADE, *supra* note 243, at 176 (nearly one-third of trust land in the United States is privately owned).

253. Illinois Cen. R.R. v. Illinois, 146 U.S. 387, 453, 455 (1892).

> The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property . . . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.

Id.

private and public rights in public trust lands and waters were decided in favor of the public.[254]

The bifurcated ownership interests that arise when the *jus privatum* is conveyed into private ownership spawn tension between public and private rights because individual rights in conveyances that have been made for purely private, non-water dependent, or related purposes conflict with common rights of usage in those lands.[255] Both the English common law and its American progeny have given some resolution to the problem by establishing mechanisms that operate *ex ante* to regulate the state's conveyance of the *jus privatum* of trust lands to private ownership. To validly convey the *jus privatum* to private ownership, the state must authorize the conveyance through legislation, which must describe the conveyance in clear and definite language, and all ambiguities must be construed in favor of the state and against the private party.[256] The conveyance must primarily serve the public interest and benefits to private parties must be subsidiary, and must not substantially impair the public interest in the remaining land or water.[257] Non-compliance with any of these requirements constitutes violation of the public trust doctrine, and may void the conveyance. This is because states lack the authority to "abdicate [their] trust over property in which the whole people are interested."[258]

One can view the tension between private and public interests arising under the *jus privatum* as analogous to the tension between national (aggregated) and state (disaggregated) interests regarding accountability and control for illegal immigration matters. Limitations placed on the conveyance of the *jus privatum* are generally instructive of the state trustee's inalienable, affirmative duty to maintain and protect the corpus

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254. SLADE, *supra* note 243, at 180.

255. ARCHER, *supra* note 243, at 9; *see Illinois Cen. R.R.* 146 U.S. 387.

256. State legislatures may delegate the authority to trust lands to a state agency. SLADE, *supra* note 243, at 177.

257. *Id.* at 178. With respect to impairment, Slade notes:

> On occasion courts have recognized that some impairment of the trust resource of the public's trust rights therein is unavoidable, even though the degree of impairment may not be substantial. In such cases, some courts have noted the states' "duty as trustee to consider the effect of taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust".

Id. at 179 (quoting National Audubon Soc'y v. Superior Court, 33 658 P.2d 709, 728, *cert. denied*, 464 U.S. 977 (1983)).

258. *Illinois Cen. R.R.*, 146 U.S. at 453; *see also* SLADE, *supra* note 243, at 179.

of the trust.[259] Applied to federal duties regarding immigration matters, the public trust doctrine militates in favor of a clear standard of federal performance when the federal government assumes trustee duties by preempting state power to legislate and assumes responsibility for reallocating resources. The public trust doctrine implies that the state has heightened responsibility for its decisionmaking in a trustee capacity. Moreover, the public trust doctrine underscores the fact that reallocation by the trustee must primarily further the interests of the primary beneficiaries (the people) and secondary beneficiaries (the states) and that reallocation must take place in such a way that the beneficiaries are able to discern it. Yet it should be noted that although the public trust doctrine sheds some insight on duties of trustees, it is distinguished from the dual trust paradigm by the fact that the beneficiaries are not themselves entities protecting sovereign interests of some subgroup. Other federal trust examples, as in the Indian context, provide further insight on the rights of states' interests affected by the loss of resources as a result of an allocation decision made by the federal government as trustee.

B. Indian Trusts

1. The Nature of Governmental-Trustee Duties

The United States government has a fiduciary, trustee relationship with Indian tribes and their trust property.[260] That is, it has agreed to act in good faith to promote the best interest of the Indians. Like the national trust paradigm put forth in this Article, the Indian trust is distinct from most other forms of trusts, such as private trusts, because "strict trust law cannot fully accommodate the sovereign nature of both the trustee and the Indian tribal beneficiary."[261] Commentators have

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259. However, some believe that the public trust doctrine is "little more than a sham—a mask for the unauthorized substitution of judicial for administrative discretion." Orton, *supra* note 245, at 22. Under such a view, the public trust doctrine provides cannot provide much guidance for reifying other trust paradigms, such as the national trust paradigm proposed in this Article.

260. *See* United States v. Sandoval, 231 U.S. 28, 46-47 (1913).

261. GILBERT L. HALL, INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, DUTY OF PROTECTION: THE FEDERAL INDIAN TRUST RELATIONSHIP 2 (1979). I do not wish to overstate the similarity between the Indian tribes and the states. The sovereign nature of states may be distinguished from the sovereign nature of Indian tribes. As noted by Judith Resnick,

> Blurring the lines between "state" and "Indian tribe" may obscure the political differences between the two "sovereigns." At least in theory, states have entered into a compact, called the United States Constitution, and willfully ceded powers to a central government. At least in theory, states participate via

offered a few, slightly contrasting descriptions of the federal trust responsibility to Indians. For example, the Department of Interior describes the crux of the federal trust duty as an obligation to protect "valuable Indian lands, water minerals, and other natural resources."[262] The American Indian Policy Review Commission describes the trust duty as an obligation to safeguard and promote Indian self-government and economic independence by providing Indians with social and economic resources that would raise their standard of living to a level commensurate with their non-Indian neighbors.[263] Others view the trust responsibility as a duty to provide an Indian aid program, which would facilitate restoration of their tribal economies and invigorate self-government.[264]

All the descriptions of trust duties based on Indian treaties and agreements, judicial decisions, tribal statements, and congressional acts, point to a common purpose: "the continued survival of Indian tribes as self-governing peoples."[265] From this purpose ensues the duty to protect, not control, Indians in the defense of their property and rights, as well as the duty to provide certain services.[266] The beneficiary arrangement is parallel to the arrangement under the national trust. Just

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> their representatives in Congress in the decisions of the national government. Such claims cannot be made, even in theory, for the Indian tribes, whose representatives neither signed the Constitution nor sit in Congress.

Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 680 (1989).

262. HALL, *supra* note 261, at 2 (quoting *Oversight Hearings on BIA Management Before the Senate Select Comm. on Indian Affairs* (Aug. 1, 1977) (statement of Under Secretary James A. Joseph, Dept. of the Interior)).

263. *Id.* at 2. Hall cites The American Indian Policy Review Commission, which described the trust responsibility as

> an established legal obligation which requires the United States to protect and enhance Indian trust resources and tribal self-government and to provide economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

Id.

264. *Id.* at 2-3; *see also* Larry B. Leventhal, *American Indians—the Trust Responsibility: An Overview*, 8 HAMLINE L. REV. 625 (1985) (presenting an overarching analysis of the federal trust responsibility to Indians).

265. HALL, *supra* note 261, at 3. "Protection is the key word used in the definition of the trust responsibility: protection of Indians, their property and rights by the United States government". *Id.* The three broad areas of federal trust responsibilities for Indians are: "1. protection of Indian trust property, 2. Protection of the Indian right to self-government [and] 3. Provision of those social, medical and educational services necessary for survival of the tribe." *Id.* at 9.

266. *Id.* at 3.

as the people of the nation are the primary beneficiaries and the states and their citizens are the secondary beneficiaries under the national trust, individual Indians are the primary beneficiaries and the tribes, through which the individuals receive benefits, are the secondary beneficiaries under the Indian trust.[267]

2. *Evincing the Trust: Treaties*

Treaties and agreements, the United States Constitution, judicial decisions, and federal statutes all serve as sources for the government's trust responsibility to Indians. An example of trust responsibilities assumed under treaties includes the U.S. treaty with the Kaskaskias Indians. This treaty stated, "the United States will take the Kaskaskias tribe under their immediate care *and* patronage, and will afford them a *protection* as effectual against the other Indian tribes and against all other persons whatever as it is enjoyed by their own citizens."[268] Constitutional powers and duties regarding Indians originate from the Commerce Clause, the power to make treaties, the power to negotiate for conditions of peace, the power to provide for the general welfare, and the power over federal territories.[269] As pertains to federal relations with Indians, the treaty-making power as well as the commerce power, have been interpreted by many courts to be as much a limitation on federal power as a grant of broad authority.[270] Federal statutes fortify the federal government's duties to the Indians. As recognized by the Court of Appeals in *Seneca Nation v. United States*, legislation such as the Trade and Intercourse Acts establishes a "special relationship

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267. *Id.* at 12.

268. *Id.* at 4 (quoting Treaty with the Kaskaskias, August 13, 1803, art. 2, 7 Stat. 78). "[T]he 'undersigned Kings, Chiefs, and Warriors, for themselves and all parts of the Creek Nation within the limits of the United States, do acknowledge themselves, and the said parts of the Creek Nation, to be under the *protection* of the United States.'" *Id.* (quoting Treaty of August 7, 1790 with the Creek Nation, art. 2, 7 Stat. 35).

> The contracting parties agree that the laws now in force, and such others as may be passed, regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the *protection and guardianship of the Government* of the United States, shall be as binding and obligatory upon the said Utah as if said laws had been enacted for their sole benefit and protection.

Id. (quoting Treaty with the Utah of 1849, art. IV, CHARLES KAPPLER, KAPPLER'S INDIAN AFFAIRS, LAWS AND TREATIES, Vol. II, 8-10 (Washington, D.C.: U.S. Govt. Printing Office, 1904)).

269. *Id.* at 5.

270. *Id.*; *see* United States v. Kagama, 118 U.S. 375 (1886); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

between the Federal Government and those Indians covered by the legislation."[271]

3. *Interpretation and Enforcement of Trustee Obligations: The Role of the Judiciary*

a. *Fiduciary Obligations and Rules of Interpretation*

Judicial decisions are a very important source of pronouncements regarding federal trust duties to Indians. Generally, decisions will consider the sum of treaties, legislation, and the history of arrangements between the United States Government and Indians. In response to the unequal bargaining power between the tribal beneficiaries and the government trustee in treaty negotiations, the United States Supreme Court has developed rules for interpreting the meaning of treaties and federal laws pertaining to Indians.[272] Under such rules of interpretation, federal courts will use heightened scrutiny when interpreting Indian treaties as compared to other international treaties. Furthermore, such rules of interpretation compel courts and federal agencies to act in benefit of Indian rights, when they may not have done so otherwise.[273]

Cherokee Nation v. Georgia[274] is the first case to imply the trust duties of the federal government to Indians. *Cherokee Nation* reasoned that the relationship between Indians and the United States "resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants."[275] The Court viewed the trust relationship as a source of

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271. 173 Ct. Cl. 917, 925 (1965).

272. HALL, *supra* note 261, at 5. For a list of federal cases defining and applying these rules, see Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 607 (1975); and Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1214-15 (1975).

273. HALL, *supra* note 261, at 5; *see also* Chambers, *supra* note 272 (discussing the development of the Indian trust doctrine through federal common law adjudication).

274. 30 U.S. 1 (1831).

275. *Id.* at 17; *see also* United States v. Kagama, 118 U.S. 375, 383-84 (describing Indian tribes as "wards of the nation . . . *dependent* on the United States . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power").

federal responsibility as well as a source of federal power.[276] The Court narrowed decisions which seemed to legitimize the broad exercise of federal plenary power over Indians[277] by finding that positive duties arose from plenary trustee power.[278]

Numerous cases illustrate the Court's view of federal duties. In *United States v. Creek Nation*, the Supreme Court found that constitutional provisions restricted the plenary trust power, and held that the United States could not expropriate Indian land without providing "just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'"[279] Similarly, in *Seminole Nation v. United States*, the Court invoked equitable considerations to rule in favor of the Seminole Indians who were suing the United States for failure to observe particular treaties, agreements, and statutes.[280] As stated by the Court, the United States' obligations of trusteeship made it more than a mere contracting party.[281] The Court went on to emphasize the high standard to which the government should hold itself: As trustee, the government is subject to the most exacting fiduciary standards in its dealings with the Indians.[282]

The United States' fiduciary obligation under the Indian trust was also relied upon by the Court of Claims when it found that the United States had the duty to properly manage Indian money under its trusteeship. Thus, the court held that the United States was liable for failing to

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276. *See Kagama*, 118 U.S. 375 (upholding the application of the 1885 Indian Appropriation Act — federal criminal law — to Indian country on the basis of the guardian-ward relationship); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding federal action in violation of the terms of the 1867 Treaty of Medicine Lodge on the grounds that the federal government possessed plenary power over Indian affairs).

277. *See Lone Wolf*, 187 U.S. 553; *see also* William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987) (describing the broad power of Congress to define the parameters of Indian sovereignty).

278. *But see* Nevada v. United States, 463 U.S. 110, 128 (1983) (stating that the "Government cannot follow the fastidious standards of a private fiduciary" when the Executive branch is faced with congressionally-imposed duties inconsistent with the protection of Indian resources).

279. 295 U.S. 103, 110 (1935)(citation omitted). The Court further explained:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such guardianship and to pertinent consitutional restrictions.

Id. at 109-10; *see also* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the "Sioux Nation" Rule*, 61 OR. L. REV. 245 (1982).

280. 316 U.S. 286, 295 (1942).

281. *Id.* at 296.

282. *Id.* at 297.

deposit Indian funds in the Menominee Log Fund, a Treasury account which carried a higher interest rate than other Treasury accounts.[283] A district court affirmed this principle more than 25 years later, holding that, by virtue of its "unquestioned . . . trust obligation to the Indian people," it had a duty to invest Indian trust funds in accounts that produced income.[284]

b. Extrapolating from the Jurisprudence of Indian Trusts

Immigration legislation, such as IRCA, which involves an element of bargaining between states and the federal government for the exchange of cost-imposing immigration measures and federal assistance, shares characteristics with treaties between Indians and the United States. Although such legislation is not technically a formal agreement between the federal government and the states, as a treaty would be, the exchange of obligations and the creation of accompanying rights between states and the federal government resembles the promises enshrined in most Indian treaties. In both situations the United States Government negotiates and bargains with entities that have sovereign, self-governing qualities. The Supreme Court has recognized the sovereign nature of Indian tribes as "domestic dependent nations" which existed as "distinct political societ[ies] . . . capable of managing [their] own affairs and governing [themselves]."[285] This status of the Indian tribes is analogous to the states of the Union.[286] Thus, drawing from the example of the Indian Trust, rules of interpretation applied to immigration legislation should favor states when it is apparent that they possessed

283. Menominee Tribe v. United States, 59 F.Supp. 137, 141 (Ct. Cl. 1945) (In the capacity of trustee, the United States is "under the obligation to use funds in its hands in the way most beneficial to plaintiff.").

284. Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973). The Court concluded that trust duties include the duty to use "reasonable care and skill to make the trust property productive". *Id.* at 1245.

285. Cherokee Nation v. Georgia, 30 U.S. 15, 16 (1831).

286. Judith Resnick argues that the multiple court systems, including federal, state, and tribal courts, is dominated by the federal courts which possess enormous power yet continue to allow state and tribal courts to thrive. Resnick, *supra* note 261, at 740-59. Resnick contends that by exploring the relationship between federal courts and Indian tribes together with the history and treatment of Indian tribes, we can illuminate the relationship between state and federal systems, and come to better understand the role of "brute force" in constitutionalism. *Id.*

significantly less bargaining power than the federal government which enacted the legislation.

C. An Excursus on American Commonwealths: The United States Relationship with its Associated States

The relationship between the United States and Puerto Rico, a commonwealth in free association with the United States, and between the United States and the Trust Territory of the Pacific Islands, parts of which are now in free association with the United States,[287] is characterized by power disparities and dependence. This situation calls to mind the situation facing states dependent on federal funds for programs and services related to illegal immigration. Both Puerto Rico and the Trust Territory of the Pacific Islands fall under the category of associated state, "an entity that has delegated certain competences . . . to a principal state, although it retains its international status as a state."[288] As described by Michael Reisman:

> Where two states of unequal power establish formal and durable links, we may speak of an "association". . . . A relationship of association in contemporary international law is characterized by recognition of the significant subordination of and delegations of competence by one of the parties (the associate) to the other (the principal) but maintenance of the continuing international status of statehood of each component. . . . Association involves a recognition of the political dependence of an entity, but at the same time an insistence on its continuing discrete identity under the international scrutiny accorded to all states.[289]

As the principal in the association with Puerto Rico and the Trust Territory of the Pacific Islands, the United States has taken on a fiduciary duty to its associates.

The power relationship characterizing the U.S. associations is manifested in several ways. By virtue of its relationship with the United States, which is based on "a bilateral compact of association between the

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287. The Trust Territory of the Pacific Islands is also known as Micronesia and consists of four entities: the Federated States of Micronesia, the Marshall Islands, the Northern Mariana Islands, and Palau. In 1975, the Northern Marianas became a Commonwealth. The U.S. approved Compacts of Free Association with the Federated States of Micronesia and the Marshal Islands in 1983. *Trusteeship Council Reviews Situation in Palau*, UN CHRONICLE, Sept. 1991, at 38. Free association replaces trusteeship with some form of self-government, an arrangement characterized by neither pure independence nor pure supervision. W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION 10 (1975).

288. Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L. L. 858, 859 n.13 (1980).

289. REISMAN, *supra* note 287, at 10, 19.

metropolitan state and its former colony,"[290] Puerto Rico is not subject to federal income tax. Moreover, Puerto Rico benefits from the umbrella of U.S. protection, has free access to U.S. markets, and is favored by tax incentives to stimulate investment.[291] In addition, Puerto Rico receives over $3.7 billion dollars in federal funds and federal guarantees for loans received by the Puerto Rican government. Puerto Ricans also have American citizenship, but they are not able to vote in federal elections—with representation limited to a non-voting resident commissioner on Capitol Hill.

The Trust Territory of the Pacific Islands is also subordinate to the United States in many of its activities. First and foremost, the United States retains military authority in exchange for American aid to the region.[292]

Although the associated state relationship provides a vivid example of a dependency relationship that the U.S. federal government dominates, the courts, unfortunately, have not spoken on the United States' duty to its associated states. Thus, this area provides no real guidance as to what role the U.S. judiciary should take to remedy federal abdication of duties owed to beneficiaries of the federal trusteeship. Given the highly political nature of the associated state relationship, it is unlikely that the court will ever speak on the question of federal duties to associated states. Does a similar fate await the immigration states? The answer does not have to be "Yes."

IX. TRUSTEESHIP AND ACCOUNTABILITY: LESSONS FOR THE COURTS

Analysis of the federal government's Guarantee Clause and Tenth Amendment duties under the trust paradigm differs from traditional analyses because it imposes a higher standard of public review of the federal government's performance when the federal government assumes trustee duties by preempting state power to legislate and by taking responsibility for reallocating resources.

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290. *Id.* at XI.
291. *House Backs Puerto Rico Referendum*, FACTS ON FILE WORLD NEWS DIG., Oct. 26, 1990, at 795.
292. Clyde Haberman, *Micronesia Resents a Far Land Called Washington*, N.Y. TIMES, Oct. 25, 1985, at A2.

Like a term in a contract, a promise to assist states in a particular manner in connection with a particular statutory scheme—particularly when the scheme imposes hardship on select states—represents a bargained-for condition on which passage of a bill may turn. The Court has advanced compelling reasons for federal dominance, but the question of fiscal accountability remains. The Court has shown, as in the case of coastal waters and Indian tribes, that it can play a role in ensuring that the federal government does not disempower states without meeting the accompanying responsibilities that arise from such disempowerment.

The federal government is the trustee of the national trust, and the executive branch is specifically responsible for executing policy that will impact the trust's beneficiaries. The Court should use strict rules of interpretation, as it has in Indian trust cases, when reviewing the actions of those administering laws. Such rules should ensure that the executive branch acts vigorously and faithfully to carry out the national trusteeship for the states. Moreover, such rules should negate the federal impetus to delegate program costs to states.

The great power that inheres in judicial review renders the Court a depository of significant political power. Thus, the decision to leave resolution to the political process is, in and of itself, a decision not to use the political power possessed by the Court. As discussed by Henry Monaghan:

> [The Court has a] power to fashion a substructure of implementing 'legislative' rules—rules that are admittedly *not* integral parts of the Constitution . . . . Since the states and federal government have apparently not taken steps to create a self-regulating regime, and since the Court is necessarily involved in the definition of the dimensions of the constitutional rights involved, there seems little reason for the Court not to prescribe rules sufficient to create self-regulation.[293]

If the Court should continue to hold that state sovereign interests are better protected by the procedural safeguards built into the federal system of governance than by judge-made limitations on federal power,[294] then the federal government must develop self-regulating guidelines and mechanisms that prevent and remedy failures in our system of federalism, which, if left uncorrected, threaten to undermine the intent of the Framers and our system of federal governance. The task is formidable, but the trusts model should be instructive. Legisla-

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293. Henry P. Monaghan, *Foreword: Consitutional Common Law*, 89 HARV. L. REV. 1, 23 (1975) (discussing the "utility of providing the police with guidance in the *Miranda* and lineup situations so that they may understand (and presumably follow) their duty with regard to individual liberties") (citations omitted).

294. *See* discussion *supra* n.56 and accompanying text.

tion to prevent unfunded federal mandating is not an answer, because such legislation does not resolve the issue of backdoor unfunded mandating, which is central to the problem in the immigration area. The Court can and should play a role in umpiring federalism issues that arise in the context of backdoor unfunded immigration mandates.

X. CONCLUSION

The states' claims for reimbursement of immigration costs find no easy answers. Certainly, for the Court to find that the states have a cause of action under the Tenth Amendment or the Guarantee Clause for reimbursement of all costs incurred in association with illegal immigration, a radical new jurisprudence would be required. The Court is unlikely to go that far. However, partial federal nonfeasance, as in the instance of the Attorney General's failure to develop regulations necessary to disburse the "Immigration Emergency Fund" or failure to reimburse states for the costs of incarcerating illegal immigrants, lends itself to analysis under the trust paradigm and calls for rules of interpretation that should be inspired by jurisprudence from other areas of governmental trusteeship. Applying the trust paradigm provides greater guidance than other standards in analyzing the state claims for reimbursement, including questions as to whether conditions on federal funding are simply pressure (a valid exercise of the spending power) or coercion (an invalid exercise of the spending power).[295]

The Constitution properly limited the states' power to act on their own behalf in the immigration sphere, but this constitutional mandate presupposed minimal structural protections inherent in the underlying trusteeship of the federal government—protections including fiscal accountability. As history has shown, federal plenary power over immigration has threatened and commandeered the autonomy and resources of immigration states. Congressional proposals to further limit immigrant access to federal benefits will impose future costs on states that have no choice but to ensure the welfare of their residents. Congress should think before it indirectly delegates program costs. In the event Congress fails to do so, the Court should step in, as it has in the past, and hold the federal government to its trusteeship duties.

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295. South Dakota v. Dole, 483 U.S. 203, 210 (1987).