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Mr. Jefferson Must be Smiling: How State Challenges to Immigration Policy May Prompt Re-Evaluation of Federalism as a Core Concept of Our Republic

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ESSAYS

MR. JEFFERSON MUST BE SMILING: HOW STATE CHALLENGES TO IMMIGRATION POLICY MAY PROMPT RE-EVALUATION OF FEDERALISM AS A CORE CONCEPT OF OUR REPUBLIC

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To take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition.¹

I. INTRODUCTION

Throughout its history, the United States has implemented an erratic immigration policy. Schizophrenic in nature, U.S. immigration policy has vacillated over time between a willingness to accommodate nearly everyone and an intolerance reflected by policies excluding "undesirables."² Prevailing social, economic, and political moods dictate American attitudes toward immigration. Currently, these factors combine to produce a decidedly anti-immigrant sentiment.³ Many Americans may be against immigration because they believe it speeds the onset of the Malthusian nightmare.⁴ Notwithstanding the public's disfavor, however, national policy has been rather generous.⁵ Amidst

1. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 41, 42 (Jefferson Powell ed., 1991).

2. See J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1955).

3. Thomas Muller, *Missing the Boat on Immigration*, *NEWSDAY*, June 18, 1995, at 37; see also Peter Brimelow, *National Transformation in the Making?*, *WASH. TIMES.*, May 30, 1995, at A13 (detailing how public opinion has been, and still is, against immigration).

4. Reverend Thomas R. Malthus, an English economist, explored the effects of a geometrically increasing population on an arithmetically increasing food supply. He predicted that unchecked population increases would always outstrip the production of food. "[T]he necessary and inevitable consequence appears to be that the same produce must be divided among a greater number, and consequently that a day's labour will purchase a smaller quantity of provisions" THOMAS MALTHUS, *POPULATION: THE FIRST ESSAY* 47 (1959).

5. JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 349-354 (1989).

the changing policies, one idea remains unassailable: the federal government has the exclusive power and responsibility to develop and enforce immigration policy. The U.S. Constitution⁶ and the judiciary support this proposition.⁷

Recent lawsuits, over immigration policy, by six states against the federal government both challenge and rely upon the federal government's absolute authority over immigration.⁸ The affected states do not claim formal policy-making powers for themselves. Their lawsuits, nevertheless, attempt to establish a *de facto* policy role.

These lawsuits allege that the federal government has neglected its exclusive duty to enforce the immigration laws. As a consequence, the affected states assert that they have borne the costs of the *Federal Abdication and Default Policy*.⁹ According to recent estimates, the cost is substantial.¹⁰ Since immigration

6. The U.S. Constitution provides: The Congress shall have "[p]ower . . . to establish a uniform Rule of Naturalization . . ." U.S. CONST. art. I, § 8, cl. 4.

7. Numerous judicial decisions support the federal government's plenary authority to develop and implement immigration policy. See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977); *Galvan v. Press*, 347 U.S. 522 (1954) (upholding Congress's plenary power over immigration); *Henderson v. Mayor of City of New York*, 92 U.S. 259, 274 (1876) ("We are of the opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state and national . . ."). See also Stephen H. Legomsky, *Immigration Law and Principle of Plenary Congressional Power*, 6 SUP. CT. REV. 255 (1984); VERNON M. BRIGGS, JR., *IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE* 16 (1984) (explaining that beyond the tangential Constitutional grant that "Congress shall have power to establish a uniform rule of naturalization," the federal authority over immigration derives from the principle of national sovereignty).

8. Florida, California, Texas, Arizona, and New Jersey are all suing the federal government seeking reimbursement for alleged costs incurred as a result of illegal immigration. These states will hereinafter be referred to as the "affected states." New York has recently filed suit, but its complaint was unavailable for analysis at publication. Two federal district courts have dismissed the complaints filed by Florida and California. For a discussion of the grounds for dismissal, see *infra* note 177.

9. *Federal Abdication and Default Policy* is the term used by Florida in its complaint to describe the federal government's inability to effectively enforce the immigration laws. State of Florida Compl. at 13-14, *Chiles v. U.S.*, (S.D. Fla 1994) (No. 94-0676) [hereinafter *Chiles Complaint*] (Lawton Chiles is currently the governor of Florida).

10. In an effort to determine the fiscal impacts of undocumented aliens on the seven states in which 85% of the undocumented aliens reside (Florida, California, Arizona, Texas, New York, New Jersey and Illinois), a bipartisan study, commissioned by the Office of Management and Budget and the Department of Justice estimated the costs of supplying education, incarceration, and emergency medical services. With the exception of partial reimbursement of medicaid costs by the feder-

policy is exclusively within the federal government's domain,¹¹ the affected states are legally powerless to reduce the cost of immigration.¹² Thus, the question the states have posed is: Who should bear this cost? This essay submits that the substantial costs imposed by federal immigration policy on a small number of states cannot be written off as merely the workings of majoritarian politics. Rather, the federal burden represents unconstitutional cost-shifting.

The federal government's refusal to reimburse the affected states for immigration costs highlights the tension in federal-state relations over who should pay for federal policies that impose unreimbursed costs on states.¹³ This issue is often la-

al government, these costs are nearly fully borne by the states. The study estimates the total annual cost to these states at \$4 billion. See REBECCA L. CLARK ET AL., THE URBAN INSTITUTE, FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 56 (1994) [hereinafter URBAN INSTITUTE REPORT]. Despite its neutrality, the immigration report has been attacked by some as inaccurate—albeit mostly from those states which, according to the report, had overestimated the costs of undocumented aliens. See Editorial, *Muddy Study: Report on Illegal Immigration's Cost is of Little Help*, HOUS. POST, Sept. 18, 1994, at C2.

11. See *supra* notes 6-7.

12. Although the affected states' power to influence immigration policy is feeble at best, due to the electoral importance of the affected states, the President has been somewhat responsive. See Roberto Suro, *Clinton Requests \$350 Million to Help States Meet Costs of Illegal Immigrants*, WASH. POST, Apr. 23, 1994, at A10. Congress' response, however, has been more tepid. For example, Florida Congressman Alcee Hastings said the problem:

[I]s getting enough votes in Congress to carry out those ideas [combating illegal immigration]. Members of Congress from states that do not have major immigration problems view Florida's complaints as a local issue rather than a national or international one Even among Florida's 23 representatives there is little cooperation I'm not hopeful we will be able to get many solutions through the House of Representatives.

Bob Knotts, Lisa Ocker and Michael E. Young, *Legal Immigration Earns Forum Praise*, SUN SENTINEL, Oct. 19, 1994, at 1A; see also Marc Sandalow, *40 Lawmakers Back Florida Suit on Illegals*, S.F. CHRON., July 16, 1994, at A8 (reporting that of the forty congressmen who support Florida's lawsuit, most are from the affected states).

Notwithstanding Congressional "horsetrading", why would congressmen from the forty-three unaffected states choose to reimburse the affected states? Assuming a finite pool of federal funds, any money spent on the affected states necessarily reduces the money available for national programs that placate national constituencies. See discussion *infra* part II.A.2.

13. See Peter Dreier, *Detouring the Motor-Voter Law: Fear of Franchise*, NATION, Oct. 31, 1994, at 490 (covering California's refusal to implement the federal law because it is an unfunded mandate); Paul Gillmor and Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395 (1993); see also Edward A. Zelinsky, *Unfunded Mandates*,

beled "unfunded mandates."¹⁴ The unreimbursed immigration costs operate as unfunded mandates, undermining the delicate federal/state balance intended by the Framers and set forth in the Constitution. The argument is about federalism:¹⁵ Does it matter, and if so, what is the proper form and method of enforcement?

This essay explores how the Supreme Court's uncertain doctrine of federalism, most recently articulated in *New York v. U.S.*,¹⁶ might apply to a federal immigration policy that shifts

Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest and Public Services, 46 VAND. L. REV. 1355 (1993).

14. The Unfunded Mandate Reform Act of 1995 defines "Federal Mandate" as "any provision in a statute or regulation or any federal court ruling that imposes an enforceable duty upon states, local governments, or tribal governments including a condition of federal assistance or a duty arising from participation in a voluntary federal program." Unfunded Mandate Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995).

15. I use the term "federalism" to refer to both the structural division of political authority between the national and state governments and a normative construct where state governments are given greater power over their own internal policy affairs in areas that do not require uniform national policy. See generally Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993). I do not favor returning power to the states, solely, for the sake of enhancing "states rights"; there is no purpose in such a position. Nor do I crusade for a return to the federal-state balance of power espoused during Jefferson's time. Rather, I draw my argument for a re-evaluation of federalism from the rich pedigree of political commentary dating back to the Constitutional Convention which maintains that federalism promotes the welfare of our nation.

16. 112 S. Ct. 2408 (1992). In *New York v. U.S.*, the Supreme Court invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 [hereinafter the Act]. Faced with a crisis in storing low-level radioactive waste, the Act created various deadlines and incentives designed to force states to develop sites for the disposal of low-level radioactive waste. The Act's incentives were phased in over three stages that corresponded with some of the deadlines imposed by the Act. First, the three existing disposal sites were required to remain open but could, after July 1, 1986, collect surcharges on waste generated from outside of the state or regional compact to which the state was a party. A portion of the surcharges were placed in an escrow account. States that met certain deadlines received payments from this account. The surcharges escalated until January 1, 1990, which triggered the second phase, under which sites could deny access to material from states not in compliance with the Act's deadlines. The final stage provided that if a state could not dispose of all the waste produced within its territory by January 1, 1996, the owner of the waste could require the state to take title to the waste and assume all obligations including direct and indirect liability incurred by the owner of the waste as a result of the state's failure to take possession. *Id.* at 2414-17. The Court upheld the first two provisions of the act but invalidated the "take title" provision. The Court found that the "take title" provision unconstitutionally commandeered states into implementing a federal program in violation of the Tenth Amendment. *Id.* at 2434.

substantial costs from the federal government to a few states. Stated differently, is the affected states' reliance on *New York v. U.S.* proper? Some question the validity of the lawsuits themselves.¹⁷ Specifically, Part II analyzes the state claims as they relate to the Tenth Amendment, and seeks to develop a test under which a court might evaluate the novel equality argument set forth by the states. Part III briefly discusses whether a court can or should fashion relief.¹⁸ Part IV addresses the possible effects these lawsuits may have on federalism, immigration policy and immigrants themselves. The conclusion asserts that a court may decide in the states' favor and remain consistent with *New York* without undermining Congress' plenary power over immigration.

II. VIOLATIONS COMMITTED BY THE FEDERAL GOVERNMENT

A. *Constitutional Norms of Equality*

Two of the five affected states argue that the federal government has an obligation to impose and enforce the immigration laws, as well as an obligation to do so in a way that affects the states equally.¹⁹ The affected states also allege that the federal

17. Many people accused the respective governors of the affected states of suing the federal government strictly as a political ploy to gain votes in closely contested elections. See Neal R. Peirce, *The Ugly — But Inevitable — Debate*, NAT'L J., July 16, 1994, at 1700 (reporting on allegations that Governor Wilson used "veiled racism" to bolster an ailing gubernatorial campaign). These claims may be valid (four of the six governors: Florida, California, Texas, and Arizona were in extremely tight re-election races and there is a wave of anti-immigrant sentiment as evidenced by California's Proposition 187). Nevertheless, the claims do not affect the validity of the affected states' lawsuits. Unless standing analysis is affected, the validity of a constitutional challenge suffers no infirmity by virtue of a challenger's self-interest.

18. The brevity with which I discuss the justiciability of the affected states' suits does not reflect its importance in determining the outcome of these suits. Indeed, the political question doctrine may prove the greatest obstacle to judicial resolution in favor of the affected states. Nevertheless, as this paper focuses on the impact of these lawsuits on federalism, a more thorough treatment of justiciability is, regrettably, omitted. For a more thorough discussion of justiciability, see generally CHARLES GORDON POST, JR., *THE SUPREME COURT AND POLITICAL QUESTIONS* (1969). See also Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, (1993).

19. None of the affected states broadly assert a right to equal treatment, vis-à-vis all other states, within the immigration context. Rather Florida and Texas, for different reasons, cite to Article I, Section 8, Clause 4 of the U.S. Constitution (providing Congress the power to "establish a uniform Rule of Naturalization . . .") as

restrictions under the Medicaid and Aid to Families with Dependent Children ("AFDC") programs, as they apply to immigrants, violate this equality.²⁰ By combining the federal government's obligation to "establish a uniform Rule of Naturalization"²¹ with the restriction imposed upon federal spending under the *General Welfare Clause*,²² the affected states argue that the Constitution implicitly commands that they be treated equally under spending programs concerning immigration.²³

The federal government counters that both Medicaid and

one of the bases for their claims against the federal government. See Chiles Complaint, *supra* note 9, at 29; State of Texas Compl. at 14, Texas v. U.S., (S.D. Tex. 1994) (No. B94-228) [hereinafter Texas Complaint]. Texas cites Article I, Section 8, Clause 4 of the U.S. Constitution to demonstrate that Congress has both the power and responsibility to establish, implement, enforce and pay for immigration policy. Because the federal government has not reimbursed Texas for its expenditures related to illegal immigrants, Texas claims that the federal government is unconstitutionally neglecting its duty. *Id.* at 14. Florida, however, cites Article I, Section 8, Clauses 1 & 4 of the U.S. Constitution to support its equality argument [hereinafter *Norm of Equality Theory*] attacking the federal government's unequal distribution of matching funds under the Federal Medicaid and AFDC programs. See Chiles Complaint, *supra* note 9, at 91. Florida maintains that federal restrictions on the Medicaid and AFDC programs, which preclude states with large numbers of illegal alien recipients from receiving federal assistance on the same basis as those states with relatively few illegal aliens, are discriminatory and blatantly unconstitutional. See Pl.'s Mem. Law Opp'n Def.'s Mot. Dismiss at 7-8, Chiles v. U.S., (S.D. Fla 1994) (No. 94-0676) [hereinafter Chiles Reply].

20. According to the Medicaid and AFDC authorizing and implementing statutes, 42 U.S.C. § 1396b, 42 C.F.R. §§ 435.406, 435.408 and 42 U.S.C. § 202, 45 C.F.R. §§ 233.50, 233.51, 233.52, the federal government will not reimburse the states for any expenses incurred on behalf of an alien not having a specified "lawful status." An exception is made in the narrow cases where an illegal immigrant needs treatment for "emergency medical conditions." Chiles Reply, *supra* note 19, at 45. There is disagreement over whether the federal government reimburses Florida for even "emergency medical conditions." Mot. Dismiss at 49, Chiles v. U.S., (S.D. Fla 1994) (No. 94-0676) [hereinafter Government's Motion to Dismiss] (noting that since the Urban Institute Study does not mention federal reimbursement to the states of Medicaid expenditures for "emergency medical conditions", the federal government *has not* reimbursed the states for these costs). See also State of California's Compl. at 12-21, California v. United States, (Gen Dist. Cal. 1994) [hereinafter California Complaint].

Owing to Florida's large illegal immigrant population and the limited federal reimbursement for medical care, Florida must absorb disproportionate costs *vis-a-vis* states having small illegal immigrant populations.

21. U.S. CONST. art. I, § 8, cl. 4 [hereinafter Clause].

22. U.S. CONST. art. I, § 8, cl. 1 (providing that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." [hereinafter the *General Welfare Clause*]).

23. See Chiles Complaint, *supra* note 9, at 32.

AFDC are voluntary programs in which the states choose whether to participate.²⁴ Thus, it argues that the affected states' reliance on the *General Welfare Clause* is unavailing according to the federal government's reading of recent Supreme Court spending cases.²⁵ The federal government further contends that the *Naturalization Clause* is a grant of discretionary power, not an affirmative duty that the states may enforce on their behalf.²⁶ While the affected states' theory concerning a constitutional norm of equality may fairly be characterized as "novel,"²⁷ one should remember that today's "creative" interpretational theories often become tomorrow's accepted jurisprudence.²⁸

The Supreme Court's interpretation of conditional spending programs enacted by Congress pursuant to the *Spending*

24. Def.'s Mot. Dismiss Opp'n Pl.'s Partial Summ. J. Mot. at 33, *Chiles v. U.S.*, (S.D. Fla 1994) (No. 94-0676) [hereinafter Government's Opposition] (acknowledging that while a state may have a "strong" practical inducement to participate, no state is legally required to participate in either program).

25. Mem. Reply Pl.'s Opp'n Def.'s Mot. Dismiss at 25-30, *Chiles v. U.S.*, (S.D. Fla 1994) (No. 94-0676) [hereinafter Government's Memorandum]. The spending cases relied upon by the federal government are: *New York v. United States*, 112 S.Ct. 2408 (1992) (stating that the federal government may offer financial assistance to states, which they are free to accept or reject, and condition the assistance on the state's agreement to comply with federal restrictions on the use of funds for that program); *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning the grant of federal highway funds to the states on their agreement to raise the drinking age. Although it is an area of constitutional authority reserved to the states); *Lau v. Nichols*, 414 U.S. 563 (1974) (sustaining the federal government's conditioning of educational grants upon public schools providing bilingual education to non-English speaking public school students); *City of New York v. Richardson*, 473 F.2d 923 (2d Cir. 1973) *cert. denied sub nom. Lavine v. Lindsay*, 412 U.S. 950 (1973) (rejecting a challenge which argued that health care and public assistance were national problems to which the states were forced to contribute through programs such as Medicaid). While the federal government's argument is not without merit, the unique status of illegal immigrants may caution against the application of the most recent spending clause cases.

26. See Government's Opposition, *supra* note 24, at 29. In addition to determining whether the Clause is an enforceable duty, a court must determine to whom the federal government owes such a duty. Is this duty owed to the states, U.S. citizens, or both? This determination is critical for standing analysis.

27. See Government's Memorandum, *supra* note 25, at 27.

28. See the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); *Baker v. Carr*, 369 U.S. 186 (1962). Consider also the words of Chief Justice Marshall:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

McCulloch v. Maryland, 17 U.S. 316 (1819).

*Clause*²⁹ has significant ramifications for federal-state relations.³⁰ As power has become increasingly centralized,³¹ partly due to the Supreme Court's condoning of coercive spending programs,³² the tension in federal-state fiscal relations has prompted calls for a Constitutional Amendment to restore integrity to our federal-state structure.³³

1. The Federal Government's Duty to Establish and Administer Immigration Policy

In examining the validity of the affected states' *Norm of Equality Theory* as applied to spending programs touching on immigration, one must determine the constitutional grounding of the federal government's duty to establish an immigration policy. "The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . ."³⁴ While "naturalization" is not the equivalent of "immigration", the Supreme Court has repeatedly held that the federal government has exclusive control over immigration.³⁵ An examination of the Framers' intent proves no more insightful than the language of the *Naturalization Clause*.³⁶ Consider that naturalization presumes immigration;

29. This clause is the identical one described as the *General Welfare Clause* in *supra* note 22. I use the *General Welfare Clause* and *Spending Clause* interchangeably, depending upon whether I am describing an affirmative grant of power (*Spending Clause*) or an asserted limitation on that power (*General Welfare Clause*).

30. See generally Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 SUP. CT. REV. 85 (arguing that the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987) may impact federalism far more than *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)); see also Federal - State - Local Fiscal Relations, (Dep't of Treas. 1985) (Report to the President and Congress); JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM 103-34 (1992) (describing the influence of federal grants-in-aid programs in shaping "cooperative federalism"). Cooperative federalism is a euphemistic term that describes the "structuring of national-state relations by the coercive use of formal preemption powers, cross-over sanctions, and tax sanctions." *Id.* at 7-10. See also A. H. BIRCH, FEDERALISM, FINANCE AND SOCIAL LEGISLATION 25 (1955) ("The basis of political independence is financial independence").

31. See DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 101-105 (1984).

32. See McCoy & Friedman, *supra* note 30.

33. See Gillmor & Eames, *supra* note 13.

34. U.S. CONST. art. I, § 8, cl. 4 (hereinafter *Naturalization Clause*).

35. See *supra* notes 6-7.

36. If the states, prior to the Constitution, regarded themselves as independent sovereigns, see Jefferson Powell, *The Original Understanding of Original Intent*, 98

those born in the United States are citizens upon birth, leaving only immigrants in need of naturalization. Moreover, the federal government, notwithstanding its current performance, is better situated to handle immigration concerns.³⁷

How should one interpret "uniform" within the *Naturalization Clause*? Did the Framers intend to guarantee uniformity or merely assure that the states were not facially discriminated against? As an interpretive aid one may examine how courts have defined "uniform" within the bankruptcy and indirect tax contexts.³⁸ Again, the debates in the Constitutional Convention shed no light on the Framers' intent.³⁹ The purpose of these uniformity clauses was to prevent "undue preferences of one state over another in the regulation of subjects affecting their common interests."⁴⁰ Courts have held that the uniformity requirement in the impost, duty and excise clause, however, does not require Congress to devise a tax that falls equally upon each state.⁴¹ Courts have held likewise for federal bankruptcy laws.⁴²

The affected states do not explain how the immigration rules are not "uniform." Rather, they assert that the effects of illegal immigration resulting from federal policy are not uni-

HARV. L. REV. 885, 928-929 (1985), and had pre-constitutionally exercised power over immigration, one can infer from the absence of debate in the Constitutional Convention over who should control immigration, that either the states did not regard it as an important power or the states assumed that the *Naturalization Clause* included authority over immigration.

37. See *Henderson v. Mayor of City of New York*, 92 U.S. 259, 274 (1876). "We are of the opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state and national. . . ." *Id.* Additionally, public opinion has consistently disfavoured immigration, see *Muller*, *supra* note 3, at 350-56 (1989), such that states previously passed laws attempting to exclude certain groups of immigrants. See also BRIGGS, *supra* note 7, at 28. Although the Supreme Court invalidated these laws, the lesson was clear: as in commerce, immigration matters needed to be dealt with on a national level.

38. "Uniform" is used three times in U.S. CONST. ART. I, § 8 to modify: duties, imposts and excises (clause 1); rules of naturalization (clause 4); and bankruptcy laws (clause 4).

39. The duty, impost and excise clause, for example, was proposed on August 25 and adopted on August 31 without discussion. See M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 417-418, 481 (1911).

40. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 957 (T. Cooley ed., 1873).

41. See *United States v. Ptasynski*, 462 U.S. 74, 82 (1983).

42. See *Darling v. Berry*, 13 F. 659 (C.C.D. Iowa 1882).

form.⁴³ In doing so, the states effectively define "rule" to include the rule or law itself, the methods of enforcement, and the effects of such enforcement. While arguably more rational,⁴⁴ the affected states' definition of "rule" within Article I, Section 8, Clause 1 of the U.S. Constitution, is broader than its accepted legal meaning⁴⁵ and not supported by prior decisions.⁴⁶

43. With the exception of Florida's Medicaid and AFDC claim that is derived from its fusion of the *General Welfare Clause* and the *Clause*, see *supra* note 19, the affected states do not, and indeed cannot, argue that federal immigration laws as written are not uniform. See Texas Complaint, *supra* note 19, at 13-14. Thus, the affected states' argument is that the lax enforcement of the immigration laws, not the laws themselves, unequally impacts the states and is therefore non-uniform.

44. One might argue that a rule is not only defined by what it says, but also how it is applied. See WILLIAM TWINING AND DAVID MIERS, *HOW TO DO THINGS WITH RULES* 69-73 (3d ed. 1991) (noting that Holmes' "Bad Man" defines law as it operates upon society; caring not for the text of the law, but rather concerning himself with the law's most likely interpretation or implementation). What good is a uniformity requirement if a statute, according to its terms, is uniform, but is knowingly and regularly applied to create a situation of gross disparity among the states. After all, the protection was meant to be real, not merely apparent.

45. BLACK'S LAW DICTIONARY 1331 (6th ed. 1990) defines rule as: "a principle or regulation set up by authority, prescribing or directing action or forbearance."

46. See *Thomas v. Woods*, 173 F. 585, 590 (8th Cir. 1909); *Darling v. Berry*, 13 F. 659 (C.C.D. Iowa 1882) (explaining that "uniformity" as used in Article I, § 8, clause 4, relates to the law itself, not the operation or working of the law). "[W]hen a . . . naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the constitution, merely because its operation or working may be wholly different in one state from another." *Id.* at 667. However, the affected states' claims are somewhat distinguishable from the above cases. *Thomas* and *Darling* dealt with federal bankruptcy laws which, due to differences in state laws, operated unevenly among the states. While the federal law was uniform, its operation was not, due to variations in state laws. The affected states' argument is stronger because their own state laws are not responsible for the disproportionate number of illegal immigrants they have absorbed. Ineffective enforcement of federal immigration laws by the federal government is the sole reason for the non-uniform numbers of illegal immigrants visited upon these states. *Contra* Government's Memorandum, *supra* note 25 (the federal government argues that the affected states are providing incentives to illegal immigration by providing aliens with services above and beyond what are constitutionally required). This assumes, however, that illegal immigrants might stay in their home country or immigrate to a country other than the U.S. if the states did not offer these benefits. This is an implausible assumption given the standard of living and general social conditions in the countries from which the greatest numbers of immigrants come (e.g., Haiti, Cuba, and Mexico).

2. Federal Policy Must Apply Equally to All States

The affected states also rely on the *General Welfare Clause* to support their *Norm of Equality Theory*.⁴⁷ Pursuant to this clause, Congress must make expenditures for the general welfare. The affected states contend that Congress is not spending for the general welfare when it funds programs on the basis of need for some states and not others.⁴⁸ Yet, it does not necessarily follow that federal money disbursed to all the states, albeit in unequal amounts, runs afoul of the "general welfare" language.⁴⁹ In fact, the Supreme Court has never struck down congressional action under the spending power for failure to meet the "general welfare" criterion.⁵⁰

From a contemporary standpoint, a textual analysis of the *General Welfare Clause* reveals its broad implications.⁵¹ Government action is more often than not presumed to be in the "general welfare." The Framers abhorred such a presumption for fear that this clause would develop into a source of unlimited power.⁵² Although Framers' intent is an imperfect guide,⁵³ the argument that the Framers intended the *General Welfare Clause* as a limit rather than an independent grant is convincing.⁵⁴

47. "Congress shall have the power to collect taxes and spend the same for the 'general Welfare of the United States' U.S. CONST. art. I, § 8, cl. 1.

48. See Chiles Reply, *supra* note 19, at 47.

49. As argued by the federal government, the *General Welfare Clause* is a grant of power, not a limitation on federal power. See *City of New York v. Richardson*, 473 F.2d 923 (2d Cir. 1973), *cert. denied sub nom. Lavine v. Lindsay*, 412 U.S. 950 (1973) (rejecting the requirement that each state be given equal treatment in the context of a spending program).

50. See Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1113 (1987).

51. As a product of increasing governmentalism we surely conceive of a great deal more within the "general welfare" than did the Framers.

52. See RAOUL BERGER, *FEDERALISM: THE FOUNDERS DESIGN* 100-119 (1987). Thomas Jefferson dourly predicted that the *General Welfare Clause*:

[W]ould reduce the whole instrument to a single phrase, that of instituting a Congress, with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be a power to do whatever evil they pleased.

TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 128 (Rothman & Co. 1993) (quoting Thomas Jefferson (1791)).

53. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

54. See BERGER, *supra* note 52, at 100-19. Consider also the Supreme Court's determination of the Framers' intent in drafting the *General Welfare Clause*: "These

Since the New Deal, however, the Supreme Court has largely ignored the Framers' intent.⁵⁵ Thus, we must turn to the Supreme Court's controlling spending cases in evaluating the affected states' Medicaid and AFDC claims. The affected states argue that the conditions imposed upon them under the Medicaid and AFDC programs are coercive.⁵⁶ Relying on *South Dakota v. Dole*,⁵⁷ the federal government argues that it may offer financial assistance to states, who are free to accept or reject it, on the condition that the states agree to abide by federal restrictions.⁵⁸ These conditions may even apply to areas where the federal government could not legislate directly.⁵⁹ Many who realize the toll that this back-door legislating takes on federalism consider it constitutionally impermissible.⁶⁰ Usually, how-

words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and expend money." *United States v. Butler*, 297 U.S. 1, 65 (1935).

55. See BERGER, *supra* note 52, at 117. The Supreme Court's modern approach states: "Appellants' 'general welfare' contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause." *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976).

56. See California Complaint, *supra* note 20, at 18 (arguing that without a substitute source of funds, California cannot choose to discontinue the program despite the substantial burdens it imposes upon the state). In the same respect a drug addict does not "choose" to further his addiction when he continues to participate in drug abuse. He may have exercised choice up until the time he became addicted, but beyond that point any meaningful choice is non-existent. The question lies in whether the addict had full knowledge of all the deleterious externalities of drug abuse before he became addicted. Conceivably, the addict did not realize or anticipate that drug abuse would likely destroy his body and mind. In this sense, his initial "choice" is illegitimate, because uninformed, and his subsequent drug abuse is predicated on the coercive nature of addiction rather than continued choice. Similarly, if California initially "chose" to participate in the Medicaid and AFDC programs at a time of non-existent or extremely limited illegal immigration, and later grew dependent on the federal funding, their continuing participation in the programs notwithstanding the imposition of deleterious externalities may not be voluntary in any sense of the word. California's continued participation in these programs most likely derives from coercion rather than choice; see also CONFERENCE ON THE FUTURE OF FEDERALISM: REPORT AND PAPERS, Advisory Commission on Intergovernmental Relations, 99 (1981). "[T]o speak of 'voluntary' acceptance of these conditions as though in contrast to the 'coercion' of direct mandates is pure fantasy. Applying these terms honestly to public decision-making in today's federal system, the realistic conclusion must be that states have no choice." *Id.*

57. 483 U.S. 203 (1987). In *Dole*, the Court upheld a federal statute that conditioned the receipt of federal highway funds upon state enactment of a twenty-one year old minimum age level for alcohol consumption.

58. See Government's Memorandum, *supra* note 25, at 26.

59. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

60. Gillmor & Eames, *supra* note 13, and *supra* notes 16-19 and accompanying

ever, these constitutional objectors do not assert that the federal spending program is outside the "general welfare," but rather that it breaches an independent constitutional limit such as the Tenth Amendment.⁶¹ Because the affected states' *Norm of Equality Theory* relies on placing internal limits (*General Welfare Clause* and the uniformity requirement of the *Naturalization Clause*) on the federal government's power to impose restrictions on Medicaid and AFDC, it will likely be rejected under the Supreme Court's current *Spending Clause* analysis.⁶²

3. Proposed Test: *Enhanced Norm of Equality*

This essay contends that the affected states might be justified in asserting a broader concept of their *Norm of Equality Theory*. The fundamental premise the affected states might allude to is the notion that states deserve equal treatment under federal law.⁶³ Such an application of the *Equal Protection Clause*, to be sure, is not universally accepted,⁶⁴ and may prove

text; see also Note, *Federalism, Political Accountability and the Spending Clause*, 107 HARV. L. REV. 1419 (1994).

61. See *United States v. Butler*, 297 U.S. 1 (1936).

62. The Court's analysis under *Dole* provides that: 1) the exercise of the spending power must be in pursuit of the general welfare and courts should defer to Congress' determination that a particular expenditure is intended to serve general public purposes; 2) if Congress decides to condition a state's receipt of federal funds it must do so unambiguously; 3) conditions on federal grants should be related to the federal interest in particular national projects or programs; 4) other constitutional provisions may provide an independent bar to the condition of federal funds. See *South Dakota v. Dole*, 483 U.S. 203 (1987). It is only under the fourth factor that the affected states can plausibly argue that the federal restrictions are unconstitutional. The success of their *Norm of Equality Theory* is unlikely precisely because the affected states ground their Medicaid and AFDC claims on *internal* limits, rather than the *external* limits of the fourth factor.

63. Such an Equal Protection-like argument might contend that the total costs imposed on the states (education, incarceration, and medical assistance) infringe upon the fundamental right to representative government at the state and local level embodied in the *Guarantee Clause*, which states that "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

64. "[T]he Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas.'" *Griffin v. County School Bd.*, 377 U.S. 218, 230 (1964) (quoting *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954)); see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 184 (1977) ("For it is the 'laws' of the State, not of the nation, that are required to afford 'equal protection.'"). But see *United States v. Cohen*, 733 F.2d 128, 142 (D.C. Cir. 1984) (J. Mikva, *concurring*). "Congress has no power . . . to single out any particular state for distinct treatment under a federal

problematic.⁶⁵

Nonetheless, it is clear that the affected states are suffering under the discriminatory federal immigration policy.⁶⁶ The federal government has knowledge that its lax enforcement of immigration laws has caused and will continue to cause substantial costs to be imposed upon the affected states.⁶⁷ "The sad fact is that by blindfolding itself to illegal immigration for so long, the United States invited today's fiscal standoff and crisis in federalism."⁶⁸ Furthermore, the acknowledged discriminatory impact of federal immigration policy is not a "federally crafted discrimination,"⁶⁹ predicated on considered national goals. The disproportionate economic burdens under which the affected states suffer are not the result of the acceptable territorial discrimination linked to the operation of self-government in our federal system.⁷⁰ The federal government's contention that the affected states have brought this economic inequality upon themselves is strained indeed.

Although the federal government argues that any costs the affected states incur are assumed voluntarily⁷¹ or because of constitutional obligations,⁷² these contentions are without merit. The federal government asserts that the affected states actually encourage illegal immigration by providing Medicaid and

statutory scheme. A uniform federal rule ought presumptively to apply nationwide. That presumption, in my view, should invoke the equal protection component." *Id.*; see also Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987) (arguing that regional discrimination should be subject to equal protection analysis where the discrimination impinges upon fundamental rights).

65. In the interest of brevity, I will not discuss the standing problems posed by a state qua state asserting an Equal Protection challenge. Additionally, applying a broad equal protection analysis to federal policy which unequally impacts states could undermine most, if not all current federal policy. Consequently, the viability of such an analysis would depend on the extent to which one could develop a principled construct that accommodates the realities of modern governance, yet still recognizes that extraordinary abuse of principles of equality is impermissible.

66. See URBAN INSTITUTE REPORT *supra* note 10.

67. See Chiles Complaint, *supra* note 9, at 14.

68. Peirce, *supra* note 17.

69. Neuman, *supra* note 64, at 344.

70. *Id.* at 265, 344-48.

71. See *supra* note 56 (discussing whether the states "chose" to incur these costs).

72. See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that states must educate illegal immigrants who are of school-age).

AFDC benefits where federal law does not provide any. Additionally, the federal government argues that states are "choosing" to assume costs when they arrest and incarcerate illegal immigrants for breaking state laws.⁷³ This is a disingenuous characterization of "choice."⁷⁴ It is true that providing emergency medical care services, and incarcerating illegal aliens who break state law are not functions the Constitution requires of states. These programs, however, are practically required to prevent the spread of disease,⁷⁵ lawlessness, etc. They are undeniably some of the most fundamental reasons for forming a polity.

No one can deny that states are entities in their own right. Neither completely sovereign, nor mere geographic subdivisions of the federal government, they are partners in our compound republic.⁷⁶ The federal government's "choice" argument asks the states to choose between providing services to illegal immigrants to maintain the health and welfare of its citizenry—thereby foregoing federal reimbursement—or neglecting its citizens' needs—thereby promoting anarchy. Such a Hobson's choice puts the affected states in a lose-lose situation. They must effectively

73. See Government's Memorandum, *supra* note 25, at 32.

74. See Wayne O. Hanewicz, *New York v. United States: The Court Sounds a Return to the Battle Scene*, 1993 WIS. L. REV. 1605, 1624 (1993). Also consider the situation in which my neighbor's negligently maintained irrigation dam ruptures and water floods my farm. My "choice" consists of whether to pay X amount now to pump the water from my farm, or (X + 1) amount later to assume the costs of crop damage. Either alternative imposes the costs of another's inaction upon me. A cost-free alternative does not exist. Am I to be held responsible for the cost of pumping the water from my farm on the notion that I "chose" to do so? Assuming I have a right to protect my farm, what was my alternative? Similarly, if the states refused to provide bare-bone services such as Medicaid, incarceration, and education today, they would merely incur greater economic and social costs in the future. For example, a state's refusal to incarcerate illegal immigrants that break the law would allow criminals to roam free, exposing its citizens to danger. A state's refusal to vaccinate or provide emergency medical treatment to illegal immigrants would expose its citizens to health dangers (e.g., polio, measles, tetanus, etc.).

Without question, a state has a right to ensure a general quality of life by providing services to its citizens to the best of its ability. If refusing to provide minimal services to illegal aliens jeopardizes this right, one can understand how a state has no choice but to provide these services.

75. See Government's Memorandum, *supra* note 25, at 32.

76. The Constitution "leaves to the several states a residuary and inviolable sovereignty." THE FEDERALIST NO. 39, 232 (James Madison) (Henry Cabot Lodge ed., 1888); see also THE FEDERALIST NO. 51. "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments." *Id.* at 325.

choose between incurring costs and non-existence.⁷⁷ Courts have clearly condemned federal policies, such as the current federal immigration policy, which call for a surrender by the states of powers essential to their quasi-sovereign existence.⁷⁸

Therefore, it is undeniable that, at some level, states deserve equal treatment before the federal government.⁷⁹ The problem lies in determining how a court might apply a concept as amorphous as "equality." Should a court consider unequal distribution of benefits as well as burdens? Or is a net effect test preferable? What time-frame should a court use in evaluating purported unequal treatment?

One possible test is a consistent, direct, impairment analysis available to a state or a small number⁸⁰ of similarly situated

77. The federal government cannot abolish states, nor localities. By severely constraining state and local legislative choice, especially in those states subject to a state balanced budget amendment, the federal government indirectly destroys the states by undermining their ability to respond to citizen needs. In essence, the economic burdens placed on the affected states, as a result of federal immigration policy, function as a representative tax, drawing upon the representative capital available to state citizens. The affected states know first-hand the truth of Chief Justice Marshall's words that the "power to tax involves, necessarily, a power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

78. See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

79. See *Coyle v. Smith*, 221 U.S. 559 (1910) (holding that a state may not be placed in an inferior status as compared with other states). Consider that other areas of constitutional law such as the *Commerce Clause* also contain an element of equality. Does the burden placed on a few states potentially accord other states a competitive advantage, for example, with respect to corporate tax policies? Conceivably, the burdened states might have to raise corporate and individual tax rates to make up for what the state expends in handling federal policy. This makes the burdened states less competitive as an area of doing business. If so, the federal government, itself, is undermining its oft repeated rationale for federal intervention: providing an even playing field for a national market. In such a situation, not only would the federal government fail to ensure a uniform market, but its own policies would arbitrarily favor those states not burdened by federal policy; See also *California's Complaint*, *supra* note 20, at 56 (claiming that California is forced to raise taxes in order to recover what it loses as a result of federal policy).

80. The reason for restricting this analysis to single states or small numbers of states is because it is these plaintiffs who are least capable of influencing national policy. This approach does not attempt to negate majoritarian politics, it merely recognizes the great challenge in following the wishes of the majority, while respecting the rights of the minority. As James Madison warned in a letter to Thomas Jefferson:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the

states. This analysis would seek to protect the disempowered.⁸¹ States are not typically thought of as minorities. A leading constitutional scholar, however, recently argued that in certain instances states might be considered minorities for purposes of analysis.⁸² Furthermore, if the states' ability to effect a change in national policy is the rationale behind screening potential plaintiffs, it becomes clear that only burdens and not benefits need be considered in evaluating federal policy.⁸³

One may question the practicality of a direct/indirect analysis because prior attempts to draw this distinction, in interstate commerce, have fallen in⁸⁴ and out⁸⁵ of favor. Yet any proximate cause determination in a tort claim depends upon an evaluation of directness,⁸⁶ and drawing lines is precisely what courts do.⁸⁷

The Constitution contemplates a theory of representative government, which the Framers embodied in the *Guarantee Clause*.⁸⁸ Under the *Guarantee Clause*, a republican form of

major number of the Constituents."

Quoted in Randy E. Barnett, *James Madison's Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE* 21 (Randy E. Barnett ed., 1989).

81. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing that the relative inability of such groups to participate in or to be represented by the political process is said to justify a judicial role designed to bring about better democracy). But see G. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (1951) (asserting that public choice theory shows that, in general, "discrete and insular minorities" are exactly the groups that are likely to obtain disproportionately large benefits from the political process).

82. See *Gatt Implementation Legislation, 1994; Hearings on S.2467 Gatt Implementing Legislation Before the Senate Committee on Commerce, Science, and Transportation*, 103rd Cong., 2nd Sess. 3 (1994) (statement of Laurence Tribe); see also Neuman, *supra* at note 64.

83. If a few states receive disproportionate benefits from a federal policy, it is presumably a result that the majority of states approve, or otherwise they would change the policy.

84. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (defining the scope of congressional power under the interstate commerce clause depending upon whether the targeted activity had a direct or indirect impact on interstate commerce); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

85. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (rejecting the direct/indirect distinction as unworkable).

86. "That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." *BLACK'S LAW DICTIONARY* 1225 (6th ed. 1990).

87. See Paul J. Mishkin, *The Current Understanding of the Tenth Amendment*, in *FEDERALISM AND THE JUDICIAL MIND* 154-55 (Harry N. Scheiber ed., 1992).

88. The Constitution's supporters read the *Guarantee Clause* as an assurance of

government gives effect to the Framers' representative theory by yielding, in substance, a responsive government.⁸⁹ The *Guarantee Clause* claims discussed below⁹⁰ do not depend on this broader concept of a *Norm of Equality*.⁹¹ This essay uses the *Guarantee Clause* in the *Norm of Equality* context to illustrate that the *opportunity* for responsive representation is a fundamental right,⁹² a right that must exist equally throughout the United States.

Given the necessary interaction between federal and state policies, the federal government action must be consistent and it must impair, not merely inconvenience, the representative nature of a state's government. The fundamental right to experience the responsive government embodied in the *Guarantee Clause* deserves the protection intended by the Framers.⁹³

The requirement that the unequal treatment be consistent does not rest on an attempt to evaluate the federal government's intent.⁹⁴ The focus should be on the extent of the state's impairment. In fact, whether a state's representative capacity is impaired will be a function of consistency or duration.⁹⁵ Addition-

popular, responsive government. See WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 70 (1972).

89. The *Guarantee Clause* emphasized the substance as well as the form of republican government. *Id.* at 67; see also Debra F. Salz, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993).

90. The affected states also claim that the federal immigration policy violates the *Guarantee Clause* as well as the Tenth Amendment. See Chiles Complaint, *supra* note 9, at 33-36; State of Arizona's Compl. at 11-13, Arizona v. U.S., (Dist. Ariz. 1994) (No. 94-0866) [hereinafter Arizona Complaint]; California Complaint, *supra* note 20, at 23-25; State of New Jersey's Compl. at 5-11, New Jersey v. U.S., (Dist. NJ 1994) [hereinafter New Jersey Complaint]; Texas Complaint, *supra* note 19, at 13-18.

91. In effect, the *Norm of Equality Theory* says that it may be constitutional for federal immigration policy to impose such costs on states, but it is unconstitutional to do so in a discriminatory fashion. In contrast the Tenth Amendment and *Guarantee Clause* claims discussed *infra* argue that imposing the costs of federal immigration policy on states is unconstitutional, even if imposed uniformly.

92. In order to plead such an extraordinary claim to a court, the alleged right being violated must be fundamental.

93. See *supra* note 88.

94. Intent in this instance is irrelevant because it is the federal/state relationship, not the federal government's intent in establishing that relationship, that matters for constitutional analysis.

95. For example, if the federal government jails all the legislators of state X for one day, the state's representative capacity to respond to its citizens may be inconvenienced, but not impaired. Incarcerating state X's legislators for one month,

ally, this test should apply to any and all federal policies that meet the aforementioned criteria.⁹⁶

The proposed test is also applicable in the context of evaluating *Guarantee Clause* claims. Yet, it is unnecessary to determine whether the federal policy creates disparate impact upon the states in order to find a *Guarantee Clause* violation. Since the Supreme Court has relegated the *Guarantee Clause* to the Constitutional dustbin,⁹⁷ any reliance upon it is suspect. A court, however, should be willing to entertain the affected states' *Guarantee Clause* claims when considered in conjunction with the unequal treatment the affected states have received. When one combines an element of inequality with the pernicious effects of a federal violation of the *Guarantee Clause*, one can appreciate the call for judicial relief.

If enforcement of the *Guarantee Clause* is to be primarily entrusted to Congress,⁹⁸ the strongest justification for judicial intervention arises where the political process has broken down and a minority of states are subjected to the tyranny of the majority. Consistent unequal treatment of a minority of states by a majority of states is strong evidence that the political process has failed. Thus, the equality analysis provides a litmus test for courts to insure that any intervention is justified.⁹⁹

In applying the *Enhanced Norm of Equality Test* to the

however, cripples state X's ability to provide responsive government to those citizens who take the opportunity to exercise their democratic rights.

96. "Policy" would principally focus on legislation and other congressional enactments, but ought to include Executive Orders, Administrative Agency policies, and other pronouncements that have the force of law. Theoretically, "policy" should also include policies of inaction that implicate the *Enhanced Norm of Equality Test*. See *infra* part II.A.3. The instant cases make this point. Including inaction in "policy" for cases that are less factually compelling, however, is practically difficult due to the increase in the scope of judicial review. Still, the legitimacy of the judiciary need not be undermined, for the alleged inaction must be egregious in order to find a violation under the *Enhanced Norm of Equality Test*.

97. See WIECEK *supra* note 88, at 247-289. But see *New York v. U.S.*, 112 S.Ct. 2408, 2432-33 (1992) (Justice O'Connor may have signalled a willingness to entertain *Guarantee Clause* claims. Justice O'Connor found that the justiciability of *Guarantee Clause* claims was not a settled issue); see also Salz, *supra* note 89.

98. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (holding that *Guarantee Clause* claims are nonjusticiable political questions).

99. Professor John Hart Ely expounds such a process-oriented construct in his representation-reinforcing approach. "Rather than dictate substantive results it [the Judiciary] intervenes only when the 'market,' in our case the political market, is systematically malfunctioning." ELY, *supra* note 81, at 102-03.

federal government's immigration policy, it is apparent that federal policy is responsible for the substantial costs imposed on the affected states.¹⁰⁰ Furthermore, the federal government has consistently carried out a policy of lax border patrols¹⁰¹ that reflects a lack of concern, rather than an inability to control the problem.¹⁰² Additionally, the affected states are in a minority position *vis-a-vis* national policy, unable to effect funding legislation that appropriately provides relief.¹⁰³ Lastly, the federal immigration policy has impaired the representative capacity of the affected states,¹⁰⁴ especially those operating under state balanced budget amendments who cannot adopt the federal practice of deficit-spending.¹⁰⁵

On balance, however, the affected states' reliance on a *Norm of Equality Theory* is problematic. Beyond the judicial tradition of not deciding constitutional issues where the case can be disposed of alternatively,¹⁰⁶ the *Norm of Equality Theory* implicates many of the political question factors set forth in *Baker v.*

100. Incarceration costs are probably most strongly linked to the federal government's immigration policy. See Hr'g Mot. Dismiss at 38, *Chiles v. United States* (S.D. Fla 1994) (No. 94-0676) (discussing the Eleventh Circuit decision in *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989), holding that Dade County's police response to rioting illegal aliens was caused, for standing purposes, by the federal policy that allowed the illegal aliens into Florida. Therefore, the federal policy directly caused Florida's incarceration costs.

101. See *Chiles Complaint*, *supra* note 9, at 14 (citing former Attorney General William French Smith's 1981 statement that "[W]e have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively."). See also Attorney General Janet Reno's remarks that Congress is drafting budget and legislative packages "that will help us continue to reverse the failed immigration policies and practices of the past." *Special White House Briefing: Immigration Initiative*, FED. NEWS SERV., Feb. 7, 1995, available in LEXIS, Nexis Library, CURNWS File.

102. See Deputy Attorney General Jamie Gorelick, *Justice Department Weekly Media Availability*, FED. NEWS SERV., Oct. 13, 1994 (describing how increased efforts at controlling portions of the Southwestern border known as "Operation Hold the Line" have been very successful at severely reducing the rate of illegal immigrants crossing into California).

103. See *supra* note 12 (documenting the affected states' inability to get meaningful relief from Congress). Congress has authorized that some monies be distributed to the states, but the authorization falls woefully short of providing the affected states appropriate relief.

104. See *Texas Complaint*, *supra* note 19, at 13; *New Jersey Complaint*, *supra* note 90, at 6.

105. See *Arizona Complaint*, *supra* note 90, at 11; see also *New Jersey Complaint*, *supra* note 90, at 11 ("In New Jersey, the State Constitution prohibits deficit spending.").

106. A court may decide the affected states' lawsuits on statutory grounds.

Carr.¹⁰⁷ Furthermore, a decision based on a *Norm of Equality Theory* might be too sweeping in its precedential impact,¹⁰⁸ even if a court gives a narrow holding. Conversely, a decision on Tenth Amendment grounds or a specific statutory duty would be more limited in scope.

B. Principles of Federalism Inherent in the Tenth Amendment and the Guarantee Clause

The crux of the affected states' complaints is that the federal government's poor enforcement of the immigration laws allows massive numbers of illegal immigrants into those states, resulting in substantial costs.¹⁰⁹ The affected states argue that these costs strain their resources to the point where the state legislative processes are unconstitutionally commandeered, and political accountability is undermined.¹¹⁰

The affected states' focus on *illegal* immigration, however, is somewhat of a red herring. To the extent that the affected states rely on the Tenth Amendment and the *Guarantee Clause* as a basis for relief, the legal/illegal immigration distinction is immaterial.¹¹¹ For example, assume the federal government enacted

107. 369 U.S. 186 (1962). Potential areas of attack are a "lack of judicially discoverable and manageable standards, or the impossibility of a court deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217. It is important to note that the potential non-justiciability of the *Norm of Equality Theory* does not affect a court's analysis of the affected states' claims on other constitutional or statutory grounds.

108. *Contra* Chiles Reply, *supra* note 19, at 43 (arguing that a decision favorable to the states will have limited precedential value).

109. See New Jersey Complaint, *supra* note 90, at 12; Chiles Complaint, *supra* note 9, at 14-23; Texas Complaint, *supra* note 19, at 12-13; California Complaint, *supra* note 20, at 1-2; Arizona Complaint, *supra* note 90, at 8-9.

110. Five states: Florida, California, Texas, New Jersey, and Arizona contend that federal immigration policy, as carried out, violates (1) the Tenth Amendment which provides: "[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," U.S. CONST. amend. X; and (2) the *Guarantee Clause*: "[T]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

111. The affected states' costs for incarceration and education are not currently eligible for federal reimbursement. Assuming it costs states the same to incarcerate and educate legal as well as illegal immigrants, the legal/illegal distinction is irrelevant. See *infra* note 120. For constitutional purposes, the legal/illegal immigration distinction is only important because the federal government does not reimburse the states for the emergency medical care they are required to provide to illegal immi-

a new immigration policy of accepting all immigrants. The affected states' Tenth Amendment and *Guarantee Clause* arguments would remain viable because their reliance on *New York v. U.S.* derives from the reasoning in that case that commandeering state legislatures undermines political accountability.¹¹² The potential commandeering of a state's legislative apparatus due to federal immigration policy depends upon the immigration-related costs imposed on the state.¹¹³ These costs will be the same irrespective of whether the immigrants are legal or illegal.¹¹⁴

The affected states' claims are justified by the federal government's plenary power over immigration policy.¹¹⁵ The states argue that the federal government cannot constitutionally impose the costs of federal policy on the states. Some might contend that if the legal/illegal distinction does not matter, the affected states' Tenth Amendment and *Guarantee Clause* claims can be reduced to the following proposition: The federal government has an obligation to reimburse the states for costs resulting from artificial increases¹¹⁶ in state population. For instance, if the federal government adopted a completely open immigration policy, the states would be swollen with *legal* instead of *illegal* immigrants. The costs or benefits of immigration

grants. See URBAN INSTITUTE REPORT, *supra* note 10, at 107-108. The Federal Government does, however, partially reimburse the states for the cost of providing emergency medical care to legal immigrants. *Id.* at 108.

112. See *New York v. United States*, 112 S.Ct. 2408 (1992).

113. The likelihood that a state's legislative processes will be commandeered is directly related to the costs imposed on the state. Determining the point at which costs imposed on a state effectively operate to commandeer its legislative apparatus is case-specific and, admittedly, difficult. For example, state A, if wealthier than state B, may have a higher commandeering threshold. Thus, the same costs imposed upon A and B may commandeer B's legislative machinery, but not A's. States making such a Tenth Amendment claim would carry a heavy burden indeed, because a court, in an effort to combat charges of judicial overreaching, would require a strong showing that the state's legislative apparatus is commandeered. A closely related point concerns the impairment to a state's representative capacity/republican form of government that results from substantial cost impositions. See *supra* notes 102-103, and accompanying text. Thus, the federal imposition of unduly burdensome costs on states may violate either the *Guarantee Clause*, the Tenth Amendment, or both.

114. See *supra* note 111.

115. See *supra* notes 6-7.

116. I use "artificial" to mean a level substantially higher than the rate of increase attributable to births minus deaths, plus the net effects of the migration of residents from other states.

aside,¹¹⁷ one might argue that the imposition of 50,000 legal immigrants on a state is analogous to a situation where 50,000 New Yorkers moved *en masse* to Florida.

Yet such an argument misses the mark. While it is true that the costs imposed upon the affected states might be substantially the same,¹¹⁸ the federal government does not possess plenary power over interstate migration as it does over immigration.¹¹⁹ The affected states' Tenth Amendment and *Guarantee Clause* claims are applicable, regardless of the legal/illegal distinction,¹²⁰ precisely because immigration policy is exclusively a federal policy. The federal immigration policy is constitutionally suspect because in our federal system the states are not to be reduced to servants, "directed to enact or administer"¹²¹ a federal program.

The legal/illegal immigration distinction, however, is important to the other claims made by the affected states. For example, the affected states allege that the federal government has failed to perform its duties under federal statutes that apply specifically to illegal immigration.¹²²

The gravamen of the affected states' arguments is their contention that federal immigration policy violates the Tenth Amendment and the *Guarantee Clause*. Examining the Tenth Amendment argument first, the affected states rely heavily on the Supreme Court's most recent Tenth Amendment interpreta-

117. See generally JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 337-46 (1989) (discussing the economic and social costs and benefits of legal and illegal immigrants).

118. *Id.*

119. See *supra* notes 6-7 (tracing the federal government's plenary power over immigration).

120. This essay has argued that the affected states' constitutional claims do not depend on the legal/illegal immigration distinction itself. See *supra* note 111. The states challenge the constitutionality of incurring substantial nonreimbursed costs resulting from federal policy. If the federal government partially reimbursed the affected states for the cost of providing emergency medical care to illegal immigrants, and the costs for incarcerating and educating immigrants, legal or illegal, presumably the affected states would be satisfied. Thus, only to the extent that the affected states' costs vary, according to the legality of the immigration, is the legal/illegal distinction relevant. Even if the costs to the states for legal and illegal immigration are equivalent, the affected states may challenge these costs under the Tenth Amendment or the *Guarantee Clause*. See the Enhanced Norm of Equality Test, *supra* section II.A.3.

121. *New York v. U.S.*, 112 S.Ct. 2408, 2434-35 (1992).

122. See, e.g., California's claims under 8 U.S.C. § 1252 and 1326, *infra* part II.C.

tion in *New York v. U.S.*¹²³ The Court in *New York* invalidated on Tenth Amendment grounds the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985.¹²⁴ Under the take title provision, states failing federal standards for the disposal of low level radioactive waste must assume ownership of such waste and all liabilities attached to it.¹²⁵

Writing for a unanimous Court, Justice O'Connor invalidated the take title arrangement on the basis that it "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution."¹²⁶

Justice O'Connor's opinion in *New York* principally rests on two grounds: the first is the Framers' conception of the proper structure of federal-state relations,¹²⁷ while the second regards

123. 112 S.Ct. 2408 (1992). This decision did not expressly overturn the leading case of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Consequently, there has been some division over the proper weight to be accorded *New York*. At least one district court, in interpreting *New York*, declared part of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) [hereinafter Brady Bill] unconstitutional. It reasoned that *New York* and prior Tenth Amendment cases form a continuum against which the facts of each case must be compared in determining which precedent appropriately controls. Compare *Koog v. United States*, 852 F.Supp. 1376 (W.D. Tex. 1994) and *Printz v. U.S.*, 854 F.Supp. 1503 (D. Mon. 1994).

124. *New York*, 112 S.Ct. at 2434.

125. See 42 U.S.C. § 2021e(d)(2)(c).

126. *New York*, 112 S.Ct. at 2421 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 288 (1981)).

127. 112 S.Ct. at 2421. This position is most fully articulated in O'Connor's concurrence in *FERC v. Mississippi*:

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.

456 U.S. 742, 777 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). See also Powell, *The Oldest Question* at 675-681; RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987). But see John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990) (arguing that the Framers did not choose the federal model set forth in the Constitution, but instead were forced to compromise). He asserts that the Framers debated and initially approved a model which vested more power in the national government,

political accountability.¹²⁸ On the first point, O'Connor found that the Framers considered and ultimately rejected a system where Congress would pass laws operating on the states, instead of directly on individuals.¹²⁹

The stronger of Justice O'Connor's reasons is the second argument concerning political accountability,¹³⁰ although it is treated as less important.¹³¹ Legislation like the take title provision, which applies only to states, allows federal decision-makers to make policy while remaining hidden from view, leaving state officials exposed to the public's wrath.¹³² Where the federal government compels states to regulate, it diminishes the

but, due to the length of the Constitutional Convention, approved a weaker federal model drafted by the Committee of Detail.

128. *Id.* at 2420-22.

129. *Id.* at 2421. Although Justice O'Connor cites the Framers' rejection of this federal-state structure, the underlying reason for such a rejection was to create a stronger central government to avoid the decentralization problem that incapacitated the Articles of Confederation. Thus the Framers were not rejecting that method of governance to protect the states or the people, but rather to form a stronger central government. However, exactly why the Framers chose to reject Congress legislating upon the states in their sovereign capacities rather than upon the people directly, is difficult to know due to the problems in ascertaining the Framers' intent. See generally Hueston, *supra* note 127.

130. Some believe Justice O'Connor's discussion of the intended federal-state structure is a red herring. See Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493 (1993). Proponents of this belief decry Justice O'Connor's appeal to the Framers' intent regarding the "proper" federal-state structure as an attempt to impose anachronistic ideas of federalism on a modern republic. Often explicit in these attacks is the notion that original intent is an illegitimate basis for constitutional adjudication. However, some of our leading constitutional scholars strongly support the use of original intent. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 264-65 (1989); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (acknowledging the weakness of originalism but concluding that it is superior to any other judicial method). Justice O'Connor's reliance on the importance of the Framers' intent likely extends beyond the Constitutional Convention. See generally W. ANDERSON, *THE NATION AND THE STATES, RIVALS OR PARTNERS?* 86-87 (noting that the first Congress rejected proposals to rely upon state officials to enforce federal law and suggesting that this decision to leave the states free to work out and to concentrate their attention and resources upon their own functions has become part of our constitutional understanding). This argument implants the Framers' intentions into our constitutional jurisprudence, providing greater force for Justice O'Connor's reliance.

131. *New York v. U.S.*, 112 S.Ct. 2408, 2418 (1992). "Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution." *Id.*

132. *Id.* at 2420.

accountability of both state and federal officials.¹³³

For example, if the citizens of Florida do not consider a certain state policy to be in their best interests, they may elect state officials who share their view. The resulting state legislation can be preempted under the *Supremacy Clause* if it is contrary to the national view and within the federal government's competence. In such a case, it is the federal government that acts in the public view, and it will be federal officials who suffer the consequences if the decision proves unpopular.

Conversely, consider a situation where the federal government directs the states to implement federal policy. The state officials, apparently acting in their state capacity, bear the brunt of any public disapproval while the federal officials, who are responsible for the program, remain insulated from the electoral ramifications of their policy choices. Accountability and responsiveness are diminished when federal coercion, rather than local political pressure, controls the actions of state officials on matters not pre-empted by federal legislation.¹³⁴ Such a situation presents obvious dangers because diminished accountability threatens democracy.¹³⁵ *New York*, unfortunately, does not provide answers to some of the most critical questions concerning the cases at hand.

Probably the most important question concerns the definition of "commandeer." At what point can a state argue that its legislative prerogatives have been commandeered? Must a state legislature be required to act in compliance with a federal statute, or can significant restrictions imposed upon its legislative choices, as a result of federal policy, constitute commandeering? Does the *New York* analysis apply only to federal legislation or is federal action or inaction a proper area of review? All of these questions can be reduced to: can *New York v. U.S.* be applied to the affected states' challenges to federal immigration policy?¹³⁶

133. See Powell, *supra* note 127, at 686-87, notes 253-257 and accompanying text.

134. *New York*, 112 S.Ct. at 2424. See also Powell, *supra* note 127, at 686-687, note 256 and accompanying text.

135. A system lacking accountability becomes "undemocratic . . . in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic." ELY, *supra* note 81, at 132.

136. Inextricably tied to this question is the issue of whether *New York* should

It is useful here to consider how courts have since applied *New York*.

Most recently, four of five federal district courts, relying on *New York v. U.S.*, struck down part of the Brady Bill.¹³⁷ The challenged provision of the Brady Bill requires the Chief Law Enforcement Officer ("CLEO") in a locale to conduct a background check on any person seeking to purchase a handgun.¹³⁸ Although the CLEO has discretion over the thoroughness of the background check, depending on the circumstances, the CLEO is assigned the obligation of performing a check in some capacity.¹³⁹

The federal district courts held that this provision of the Brady Bill violates the Tenth Amendment because it substantially commandeers state executive officers and indirectly commandeers state legislative processes in administering a federal program.¹⁴⁰ Importantly, one court read *New York* as not only

be applied in the immigration context. Whether *New York* is applicable and whether the affected states' Tenth Amendment claims are justiciable are issues closely dependent upon one another. For example, a court may decide that the "commandeer" test established by *New York* cannot be applied in any principled way to these cases. In the absence of establishing a new Tenth Amendment standard, a court may conclude that the affected states' lawsuits for Tenth Amendment purposes are nonjusticiable, due to a lack of judicially manageable standards. See *Baker v. Carr*, 369 U.S. 186 (1962). To the extent practicable, this essay attempts to analyze these issues separately.

137. See Brady Bill, *supra* note 123. See also *McGee v. U.S.*, 863 F.Supp. 321 (S.D. Miss. 1994); *Printz v. U.S.*, 854 F.Supp. 1503 (D. Mon. 1994); *Frank v. U.S.*, 860 F.Supp. 1030 (D.Vt. 1994); *Mack v. U.S.*, 856 F.Supp. 1372 (D.Ariz. 1994). Compare *Koog v. U.S.*, 852 F.Supp. 1376 (W.D. Tex. 1994) (upholding the challenged Brady Bill provision).

138. See Brady Bill, *supra* note 123, at § 102(a)(2).

139. For example, if the CLEO knows the potential gun purchaser personally, the CLEO has the discretion to determine that a background check is unnecessary. However, the possibility that the CLEO will not have to conduct a background check does not discharge his or her duty under the Brady Bill to decide initially whether a check is necessary.

140. The court in *Printz* explained:

[T]hey [local governments] are faced with the choice of forcing the CLEOs to divert resources from another area of operation, diverting resources from another budget area into each CLEO's department budget, or increasing the CLEO's department budgets through raising taxes. As a result, local citizens will receive fewer services from each of the chief law enforcement officer's departments, fewer services from other agencies, or higher state and local taxes. Indirectly commandeering the legislative processes of the states in this way may lead to the perception among voters that state and local government have become less efficient and responsive to their needs.

prohibiting federal compulsion of states to enact a federal regulatory program, but also as prohibiting the administration of such a program.¹⁴¹ Another court described *New York's* holding as broadly applicable, extending to cases where federal law does not require the state to legislate, but merely requires it to expend time and resources toward implementation of the federal act.¹⁴²

Despite the overwhelming invalidation of the Brady Bill provision by the federal district courts, Robert Yates' remarks in the constitutional debates support the proposition that *New York v. U.S.* is inappropriately used to strike down the Brady Bill provision.¹⁴³ Assuming, *arguendo*, that these district courts

854 F. Supp., at 1515. Accordingly, members of these elected bodies may be held accountable. The federal government will not suffer any financial responsibility either.

141. See *Printz v. U.S.*, 854 F. Supp. 1503, 1515 (1994).

142. See *Mack v. U.S.*, 856 F. Supp. 1372 (D.Ariz. 1994). The affected states' lawsuits are conceptually similar to this situation, except that the states are required to expend time and resources as a result of *mis-implementation* of a federal policy.

143. One might argue that *New York* does not support judicial invalidation of the Brady Bill provision. *New York's* application to the Brady Bill provision calls into question any federal/state cooperative efforts where state officers are required to act in compliance with federal law (e.g., state reporting of crime statistics to the FBI for compilation of national figures). Invalidating such federal/state arrangements might, in practice, prove politically unpopular and administratively problematic. The Brady Bill is an example of cooperation between the federal government and the states that had overwhelming political support. In fact, more than 90% of the American public supported the Brady Bill's passage. See Karen Tumulty, *Brady Bill Clears Logjam in the Senate for Final Approval Legislation: Clinton Gets Compromise Version of Gun-Control Measure after GOP Drops Politically Damaging Filibuster. Congress Recesses for the Year*, L.A. TIMES, Nov. 25, 1993, at A1. Such public support is important to some commentators who argue that public opinion is a legitimate interpretive factor that ought to influence many constitutional decisions. See James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 4 B.Y.U. L. REV. 1037, 1104-25 (1993).

Additionally, the Brady Bill was enacted by a Congress sensitive to the concerns of federalism. Congress and the states had worked together to produce what they thought was a constitutional arrangement. See H.R. REP. NO. 344, 103rd Cong., 1st Sess. 8 (1993). In support of the weight to accord congressional interpretation of the Constitution, consider the remarks of Robert Yates, an influential voice in the constitutional debates:

Had the construction of the constitution been left with the legislature, they would have explained it at their peril. . . [A] constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them, and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine

correctly applied *New York* to invalidate the Brady Bill provision, one must still determine whether the affected states' immigration lawsuits are sufficiently analogous to warrant the same results.

A facial comparison of the affected states' lawsuits and the Brady Bill cases reveal a number of differences. The Brady Bill provision is a federal statute that requires compliance by state and local actors for its execution. In contrast, the affected states' lawsuits involve the ineffective enforcement of federal law by the Executive,¹⁴⁴ as well as a congressional failure to fulfill a constitutional and statutory duty to reimburse the affected states.¹⁴⁵ Thus, the Brady Bill provision explicitly requires affirmative state action, whereas the federal immigration policy ostensibly requires nothing of the states.¹⁴⁶ Furthermore, the

contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm*.

ROBERT YATES, THE LETTERS OF BRUTUS (1788), reprinted in THE ANTI-FEDERALISTS 350, 357 (Cecilia M. Kenyon ed., 1985) (emphasis in original). Thus, one may argue that the judiciary should not employ overly formalistic notions of federalism (a concept of dubious constitutional importance) to override federal/state cooperative efforts that are functionally important and politically popular.

These objections to invalidating the Brady Bill under *New York*, however, are misguided. While public support may make certain legislation easier to pass, it does not make legislation constitutional. Justice Jackson noted public opinion's irrelevance to constitutional adjudication when he stated: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The notion that politically popular legislation is beyond the reach of judicial review is indefensible. As Chief Justice Marshall stated in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). Furthermore, the underlying assumption of these objections is that federalism is not worthy of judicial enforcement. This illustrates a substantive judgment about federalism that is contrary to Justice O'Connor's position in *New York* which states: "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. U.S.*, 112 S. Ct. 2408, 2434.

144. See *Chiles Complaint*, *supra* note 9, at 26-30 (alleging that the Attorney General abused her discretion).

145. *Id.* at 30-36.

146. It is this aspect of the affected states' suits that most diminishes their

Brady Bill cases involve a federal statute that imposes easily determinable costs upon states, but the immigration cases involve costs resulting from dereliction of federal policy; costs that are not as readily identifiable or agreed upon.¹⁴⁷

Despite these differences, the same justifications behind *New York* support these immigration cases: a lack of political accountability, and violation of the essential structure of federal-state relations.¹⁴⁸ Under either the Brady Bill provision or the federal immigration policy, the affected states suffer the same fate, aptly described by New Jersey in its complaint: the federal government's failure to enforce the immigration laws results in costs imposed upon New Jersey that commandeer its "scarce state resources for implementation of federal policy choices and prerogatives rather than state objectives."¹⁴⁹

Assuming *New York* applies, does federal immigration policy commandeer the affected states' governments? The Brady Bill cases found that even the relatively small costs imposed on states and localities in complying with the law were not *de minimis*.¹⁵⁰ The Brady Bill provision, however, explicitly assigned a state officer (CLEO) the task of implementing federal law, whereas federal immigration policy does not.

According to Justice O'Connor's prior opinions, a state need not be explicitly directed to act in order to be commandeered.¹⁵¹ Justice O'Connor's conception of the meaning of commandeer, as stated in *FERC v. Mississippi*, extends beyond any

chances of success. Precisely because federal immigration policy, as written, requires nothing of states, the federal government can claim that the states could not possibly have been commandeered under *New York*. The states are not legally obligated to either legislate or implement a federal program. This position aptly illustrates the competing perspectives urged upon the courts: the federal government wants to analyze federal immigration policy as written, while the affected states focus on immigration policy as applied.

147. See e.g., the URBAN INSTITUTE REPORT, *supra* note 10, at 129 (providing discrepancies between its calculation of costs and those claimed by the states).

148. *New York*, 112 S.Ct. at 2432.

149. New Jersey Complaint, *supra* note 90, at 5.

150. The *de Minimis* analysis established by Justice Rehnquist in *South Carolina v. Baker*, states that where the federal imposition on a state's sovereignty is very slight, it does not violate the Tenth Amendment. 485 U.S. 505 (1988).

151. Justice O'Connor's concurrence in *FERC v. Mississippi* argued to invalidate federal policies which "absorbed state resources in the consideration of federal concerns and in adherence to federal procedures." 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part).

formal requirements. In fact, O'Connor found that the imposition of a congressional agenda on state institutions "drains the inventive energy of state governmental bodies" by commandeering scarce resources of time, attention and public concern, making a state "less able to pursue local proposals."¹⁵²

Federal immigration policy surely falls within Justice O'Connor's definition of commandeer. The federal policy operates to impose Congress' agenda on the affected states. In this instance Congress' agenda is not an affirmative legislative program, but a policy of indifference. This agenda dumps Congress' failure to adequately control illegal immigration on the affected states. Unfortunately, the affected states may not simply ignore the illegal immigration problem as Congress has.¹⁵³ The costs¹⁵⁴ of illegal immigration imposed upon the affected states absorb "state and local revenue—the life-blood of local autonomy,"¹⁵⁵ thereby commandeering the state and local governments.

The affected states' complaints additionally assert that the federal immigration policy violates the *Guarantee Clause*.¹⁵⁶

152. *Id.*

153. See Chiles Complaint, *supra* note 9, at 18-20 (arguing that the affected states are compelled to pay the cost of the federal abdication and default policy); see also *supra* notes 71-74 and accompanying text (discussing the affected states' lack of choice in assuming the costs thrust upon them as a result of federal immigration policy).

154. URBAN INSTITUTE REPORT, see *supra* note 10, commissioned by the federal government itself documents the staggering costs the affected states must absorb in dealing with the illegal immigration problem. However, the position that cost impositions are dispositive in proving a Tenth Amendment violation is undercut to the extent that the Brady Bill cases relied on the affirmative duty placed on the CLEO, rather than the money or resources expended. Still, the substantial numbers of illegal immigrants allowed into the affected states impose both constitutional and practical obligations on the states.

155. Hans Linde, *Justice Douglas on Freedom in the Welfare State*, WASH. L. REV. VOL. 39, No. 4, 117-118 (1964).

156. See *supra* note 90. The *Guarantee Clause* claims are so intertwined in the states' Tenth Amendment arguments previously set out, see *supra* text accompanying notes 109-22, that I will only touch upon the origins of the clause to avoid redundancy. The affected states also rely on the "invasion clause" within the *Guarantee Clause*. This little known clause provides that the United States "shall protect each of them [states] against Invasion." U.S. CONST. art., IV § 4. Florida and California claim that the illegal immigrants flooding into their states constitute an invasion, against which the federal government has failed to protect. The federal government ably refutes this assertion arguing that the Framers meant armed invasion when they drafted the clause. The federal government supports its position by citing Article I § 8, clause 15: "To provide for calling forth the Militia to execute Laws of the

"The *sine qua non* of a republican form of government is the political accountability of elected officials to the citizens."¹⁵⁷ The states allege that the money they spend on illegal immigrants reduces the pool of funds available in allocating resources pursuant to the state electorate's needs.¹⁵⁸ The states thus argue that this vote dilution violates the *Guarantee Clause*. As previously noted, however, the Supreme Court has been content to let the "sleeping giant" lie.¹⁵⁹

The Court's reluctance to apply the *Guarantee Clause* does not reflect the importance given to it by the Framers.¹⁶⁰ Indeed, the Framers regarded this clause as essential to permit the federal government to both suppress insurrections in the states and to guarantee that states maintained a republican form of government.¹⁶¹ Though some thought it would prove meaningless,¹⁶² the Framers intended the *Guarantee Clause* to protect the *form* of republican government as well as the substance.¹⁶³ The Framers believed that the substance of republican government was the assurance of "popular responsive government."¹⁶⁴

The affected states allege the very violation that the *Guarantee Clause* was intended to protect: the undermining of the republican form of government within the states. The states claim that federal immigration policy has weakened the republican nature of the states by impairing their ability to provide popular responsive government.¹⁶⁵ Does this mean that the affected states no longer have republican governments? Probably

Union, suppress Insurrections and repel Invasions." Government's Motion to Dismiss, *supra* note 19, at 35-36.

157. Texas Complaint, *supra* note 20, at 15.

158. A situation which is particularly acute for the affected states, who must comply with state constitutional balanced budget amendments.

159. See WIECEK, *supra* note 88, at 67 (noting the Supreme Court's position that *Guarantee Clause* claims are nonjusticiable).

160. "There is not another in the whole instrument more important; or, on the right understanding of which, the success and duration of our political system more depend." John C. Calhoun in WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 134 (1972).

161. *Id.* at 4.

162. *Id.* at 71.

163. *Id.* at 67. See also *supra* notes 88-89 and accompanying text.

164. *Id.* at 68.

165. See New Jersey Complaint, *supra* note 90, at 14; Chiles Complaint, *supra* note 9, at 33-36; Texas Complaint, *supra* note 19, at 15-18; California Complaint, *supra* note 20, at 8-11; Arizona Complaint, *supra* note 90, at 12-14.

not. If the Framers intended the Clause, however, to protect the substance as well as the form of republican government, perhaps the affected states' claims may best be understood as an argument that federal immigration policy has so fundamentally impaired the purpose and advantages of republican government, that the form as it exists in these states is merely a hollow shell. Yet, it is doubtful that a court will "enter this political thick-et,"¹⁶⁶ notwithstanding the Supreme Court's refinement of the political question doctrine.¹⁶⁷

C. Statutory Claims

In general,¹⁶⁸ the affected states allege that the Attorney General has abused her discretion by failing to promulgate standards and disburse funds under the Immigration Reform and Control Act¹⁶⁹ and to reimburse states for the cost of incarcerating illegal aliens.

III. WHETHER A COURT CAN PROVIDE A REMEDY?

This question likely poses the greatest obstacle to the affected states' success. As will be discussed, a court may follow the federal government's reminder that "the Constitution does not

166. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

167. See generally Salz, *supra* note 89 (arguing that Justice Brennan's development of political question factors in *Baker v. Carr*, 369 U.S. 186 (1961), narrowed the political question doctrine, making it easier for a court to read substance into the *Guarantee Clause*).

168. An in-depth treatment of the affected states' statutory claims is beyond the scope of this paper. The statutory claims are secondary in importance to the states' constitutional claims. They are more helpful in affirming the federal government's responsibility over immigration, than in showing how that responsibility translates into an enforceable duty.

169. Pub. L. 99-603, § 113, 100 Stat. 3359 (establishing an "Immigration Emergency Fund", and authorizing the disbursement of funds upon the President's determination that an immigration emergency existed). The law also provided for an annual appropriation of \$35 million to be used to reimburse state and local governments dealing with an immigration emergency). Pub. L. 101-649, § 705, 104 Stat. 5087 (authorizing the AG to disburse up to \$20 million to the states without the president's declaration of an immigration emergency). Pub. L. 102-140, Title VI, § 610, 105 Stat. 832. (requiring the AG to promulgate regulations for the disbursement of this money). Congress further authorized the appropriation of such sums as necessary to reimburse the states for costs "incurred by the state for the imprisonment of any illegal alien. . . who is convicted of a felony by such State." 8 U.S.C. § 1365.

provide judicial remedies for every social and economic ill."¹⁷⁰

A. *Justiciability*

Assuming that a court finds that the federal immigration policy, as carried out, violates the Constitution, the court must determine whether it *should* provide relief.¹⁷¹ This decision directly implicates the integrity of the judiciary.¹⁷²

The affected states argue that their challenge to federal immigration policy does not present a political question.¹⁷³ They concede that the federal government's failure to enforce immigration policy is a "crisis with profound political dimensions,"¹⁷⁴ but note that "not every matter touching on politics is a political question."¹⁷⁵ The federal government counters that the affected states do not assert any judicially manageable standard by which a court can judge their claims.¹⁷⁶ Two initial federal district court rulings agree.¹⁷⁷

170. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

171. See *Smith*, *supra* note 18, at 1549 (noting that non-justiciability does not foreclose a court's consideration of the claim. "[R]ather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962))).

172. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.*

173. See *Chiles Reply*, *supra* note 19, at 4-12.

174. *Id.* at 4.

175. *Japan Whaling Ass'n v. American Cetacean Soc.*, 106 S.Ct. 2860, 2865 (1986) (citing *Baker v. Carr*, 369 U.S. 186, 209 (1962)).

176. See Government's Memorandum, *supra* note 25, at 2.

177. Two federal district courts have dismissed the complaints filed by Florida and California. See Order on Motion to Dismiss and Motion for Summary Judgment, *Chiles v. U.S.*, 874 F. Supp. 1334 (S.D. Fla 1994), *motion granted* [hereinafter Government's Judgment]; Nancy Cleeland, *State's Suit over Illegal Immigration Dismissed*, SAN DIEGO UNION-TRIB., Feb. 14, 1995, at A1. Both courts cited several reasons for dismissal, the most prevalent being that the states' challenges involved a nonjusticiable political question.

In order to grant the restitution requested by Plaintiffs [Florida], the Court would be forced to review the United States entire enforcement of Federal immigration laws, including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those additional resources should be allocated. The Court is unable to identify satisfactory criteria for making these determinations. This is clearly beyond the Judiciary's authority, and should be left to the Legis-

The states do not argue, and a court cannot articulate, a precise mathematical standard to evaluate a state's claim. Nonetheless, the lack of an exacting judicial standard did not prevent the Supreme Court from ordering redistricting in *Baker v. Carr*.¹⁷⁸ As *Baker* illustrates, courts that are committed to resolving disputes can and will use "fuzzy" standards. In these cases, the affected states liken a court's ability to discern a constitutional violation to the amorphous standards used to determine when governmental regulation of private property constitutes a "taking" for Fifth Amendment purposes.¹⁷⁹

Interestingly, the federal government has not argued that the affected states' suits implicate foreign affairs. The Supreme Court has held that immigration implicates foreign affairs,¹⁸⁰ and has granted the federal government more leeway in matters touching on foreign policy.¹⁸¹ Accordingly, one would expect the federal government to assert these arguments to bolster its claim that these suits present a non-justiciable political question.

B. Relief

The affected states seek an injunction requiring the federal government to make payments under statutes mandating finan-

lative and Executive branches of government.
Government's Judgment, at 1344.

178. 369 U.S. 186, 198 (1962)

179. Interview with Carol Licko, Special Assistant Attorney General, State of Florida (Oct. 6, 1994).

180. See *Galvan v. Press*, 347 U.S. 522 (1954) (placing immigration policy within Congress's broad foreign affairs prerogative); see also Stephen H. Legomsky, *Immigration Law and Principle of Plenary Congressional Power*, 6 SUP. CT. REV. 255 (1984). Cf., Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (arguing that foreign policy and national security concerns are not responsible for courts' reluctance to adjudicate immigration claims). Instead, Schuck contends that the association between immigration law and national sovereignty lies at the heart of judicial deference. "The idea of sovereignty . . . [is compelling] when a unified national government deploys its laws against one who is plausibly seen as an outsider — as, quite literally, [an] alien" *Id.* at 17.

181. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at 281, note 1 § 5-16 (1978). *Contra* Ann-Marie Slaughter Burley, *Book Review: Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)) (arguing that judicial review should extend equally to foreign and domestic affairs).

cial assistance,¹⁸² and equitable restitution.¹⁸³ The affected states' request—that the court enjoin the federal government to enforce its immigration laws—is the broadest and least likely relief to be granted.¹⁸⁴ The federal government asserts that this request effectively asks a court to supervise the enforcement of federal immigration laws.

Lastly, the affected states request an injunction to require the federal government to fulfill its constitutional obligation by providing the states with financial assistance. The affected states seek to recover the amounts they have paid and are likely

182. Authorized by *Bowen v. Massachusetts*, 487 U.S. 879 (1988). The authority to review agency action derives from the Administrative Procedures Act, 5 U.S.C. §§ 702 and 706. Florida, New Jersey and Arizona request that the Attorney General promulgate standards and release funds pursuant to Pub. L. No. 102-140, Tit. VI, § 610, 105 Stat. 832 and Pub. L. No. 101-649, § 705, 104 Stat. 5087. See *supra* note 20 for an explanation of these statutes. Arizona, New Jersey and California further request that the Attorney General and the Commissioner and Director of the OMB be enjoined to take all necessary action to reimburse the states for all their incarceration costs. This relief goes beyond the \$20 million that the Attorney General is authorized to release annually without Presidential declaration of an immigration emergency. Pub. L. No. 101-649, § 705, 104 Stat. 5087. Arizona, New Jersey and California rely on Public Law 103-121 which provides an appropriation from the U.S. Treasury to the Attorney General of \$1,048,538,000 for expenses necessary to the administration and enforcement of laws relating to the immigration, naturalization and alien registration. Finally, since Florida's request for relief is more comprehensive than either New Jersey or Arizona (not California), it is unclear from which appropriation Florida seeks its reimbursement (other than Pub. L. No. 99-603, § 113, 100 Stat. 3359, establishing an "Immigration Emergency Fund", and the Medicaid and AFDC programs). The federal government contends that this request is now moot because of 59 Fed. Reg. 30,520 (1994) promulgating rules for implementation of Emergency Fund Act. Although the federal government has released some money to the states to help pay for incarceration costs, it is less than the amount requested.

183. The states attempt to characterize the monetary relief they seek as equitable restitution rather than damages in order to avoid the federal government's defense of sovereign immunity. The amount requested is substantial and is broken down as follows: Florida: \$1 billion; See Bob Knotts, Lisa Ocker and Michael E. Young, *Legal Immigration Earns Forum Praise*, SUN SENTINEL, Oct. 19, 1994, at 1A; New Jersey: \$1.05 billion; see New Jersey Complaint, *supra* note 90, at 8; Texas: \$5 billion, Heather Ann Hope, *Who Gets the Bill for Illegal Immigrants? In the End, Supreme Court may Decide*, BOND BUYER, Sept. 9, 1994, at 1; Arizona: \$121 million, Jeff Barker, *State Overestimated Number of Inmate Illegals, Study Says*, ARIZONA REPUBLIC, Sept. 9, 1994, at B1; California: \$8.65 billion, California Complaint, *supra* note 20, at 11.

184. The affected states admit that this is probably beyond the power of a court, since it involves the court in matters relating to the conduct and foreign relations and the deployment of the military forces of the U.S. See Chiles Complaint, *supra* note 9, at 6. California also seeks an injunction mandating that the INS Commissioner initiate deportation proceedings against illegal immigrants deportable under federal law. See California Complaint, *supra* note 20, at 43.

to pay as a result of the failed federal immigration policy. The federal government argues that neither the *Guarantee Clause*, nor the Tenth Amendment provide any justiciable standard for such a claim. The federal government further contends that the states are not guaranteed by the Constitution an allotment of a given amount of dollars to spend as they wish. It argues that this case is a matter of degree, and that there is no principled way to determine at what point, if any, the states are commanded by costs resulting from illegal immigration.

IV. IMPACT ON FEDERALISM, IMMIGRATION POLICY, AND IMMIGRANTS

A. *Federalism*

The states' lawsuits over immigration policy may actually produce a substantive expansion of existing Tenth Amendment jurisprudence. Although the states' claims do not fit as neatly within *New York's* reasoning as did the Brady Bill Cases, the particular equities of the current immigration crisis weigh powerfully in favor of the affected states. Most people would agree that the current imposition of costs on the affected states is unfair. This essay acknowledges, however, that an unfair situation does not create a constitutionally enforceable obligation to remedy the inequity. Nevertheless, the states deserve federal assistance. If they cannot receive this assistance through political appeals and the courts further turn a deaf ear, people may question whether *New York's* "procedural federalism" provides any meaningful protection.

O'Connor's "procedural federalism" is primarily concerned with protecting the integrity of state processes, rather than defining a substantive realm of state legislative autonomy.¹⁸⁵ Although substantive federalism is preferable,¹⁸⁶ provided it is

185. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 650-651 (1993); Wayne O. Hanewicz, *New York v. United States: The Court Sounds a Return to the Battle Scene*, 1993 WIS. L. REV. 1605, 1626-27 (1993).

186. This position rests upon a proposition stated both explicitly and implicitly throughout this essay: limiting the domain of federal power to the extent that any encroachment on state prerogatives must be justified secures the public good. The attendant advantages of this federal-state conception are exhaustively noted throughout the literature. See generally, Gillmor and Eames, *Reconstruction of Federalism: A*

feasible,¹⁸⁷ neither approach is without problems.¹⁸⁸ Perhaps, the challenges in applying *New York's* "commandeer" analysis will prove too much for a court.¹⁸⁹ Overall, the application of *New York's* "autonomy of process"¹⁹⁰ principle to the illegal immigration-related costs may disappoint those who wish to see *New York* gain strength within limits. One can argue that it is a stretch to apply *New York's* doctrine to these lawsuits. As such, an unprincipled extension of any doctrine necessarily compromises the legitimacy of the doctrine itself.¹⁹¹ Perhaps *New York* is distinguishable from this case on the basis that *New York* conceptualized federal-state relations in domestic policy areas, whereas the affected states' lawsuits involve foreign policy.

Constitutional Amendment to Prohibit Unfunded Mandates, 31 HARV. J. ON LEGIS. 395 (1993).

187. The Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), rejected a judicially enforced notion of federalism. The Court explicitly reasoned that such a position invites the judiciary to impose its substantive views into an area the Framers, arguably, intended to leave to the political process. Note Justice O'Connor's concurrence which questions the majority's assumption that federalism is not a substantive theory. In doing so, Justice O'Connor implicitly recognizes a role for the judiciary in defining the federal/state relationship. "The issue . . . is whether the federal system has any legal substance, any core of constitutional rights that courts will enforce." *Id.* at 580.

188. See Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 349 (1990).

189. If a court were to extend *New York's* commandeer analysis to the affected states' suits, it would be critical for the court to narrowly define its holding. Taken broadly, the application of a ruling in favor of the affected states could grind either the federal judiciary or the federal government to a halt. As noted *supra* notes 111, 120 and accompanying text, the affected states' cases hardly depend on the legality of the immigration. Thus, their argument might be restated as follows: the federal government is responsible for reimbursing states that suffer adverse economic consequences as a result of legitimate federal policy. One can see, by considering various hypotheticals, how a court's support of such a proposition would prove unworkable in today's interdependent economic federal/state relationship.

As an example, consider that the Federal Reserve raises interest rates. Due to the higher rates, fewer people buy new homes. As housing starts begin to decline, states particularly dependent on the housing industry experience increases in unemployment. Consequently, these states have to expend more on unemployment benefits. In short, as a result of the federal policy, some states are disproportionately burdened. Would anyone rationally argue that the federal government is constitutionally mandated to reimburse these states for their increased costs?

190. See Powell, *supra* note 185 ("autonomy of process" is the term given to Justice O'Connor's process-oriented or procedural federalism; a conception of federalism concerned with the integrity of the process rather than with the substantive policy area involved).

191. As Justice O'Connor won victory over those who believe that the Court should not act as a referee for federal/state relations, she might be loathe to jeopardize the fledgling *New York* doctrine by applying it to marginal cases.

Justice O'Connor's procedural or "autonomy of process" federalism may be the only brand that is practically feasible in modern politics.¹⁹² The *New York* opinion may not be expansive enough for some, but it has at least reinvigorated the idea of a judicially enforced federalism¹⁹³ that addresses unfunded mandates.¹⁹⁴ Thus, even if the affected states lose their challenges, their willingness to argue that *New York* should apply indicates that the atmosphere is ripe for a constructive reordering of our federal-state relations.¹⁹⁵

B. Immigrants

This essay contends that maintaining a "healthy" federal-state balance is beneficial for all citizens, but especially for immigrants.¹⁹⁶ Voting and non-voting immigrants alike will benefit from a renewed federalism.¹⁹⁷ One of the purported benefits of federalism is to bring decisions closer to the people, thereby increasing citizen participation in the political process.¹⁹⁸ Assuming that immigrants are politically disempowered,¹⁹⁹ they are especially vulnerable to exclusion from the national political arena. Cuban-Americans in Miami or Mexican-Americans in

192. See Powell, *supra* note 185, at 659. "O'Connor has proposed an answer to 'our oldest question of constitutional law' that articulates a judicially enforceable law of federalism without succumbing to the impractical desire to repudiate the modern federal government." *Id.*

193. *Id.* at 659.

194. Unfunded mandates are an extremely contentious area in federal-state relations. See Gillmor, *supra* note 13. The federal government extends the reach of federal authority in an effort to solve whatever ails the American citizenry. Meanwhile, the states are directed to administer these federal elixirs using state resources.

195. See the Brady Bill Cases, *supra* notes 137-42 and accompanying text and California's Challenge to the Motor-Voter Bill, *supra* note 13.

196. Reference is to all immigrants regardless of whether they are eligible to vote.

197. Naturalized citizens would have greater power to shape policies that affect their lives. Grounding more decisions at the local level will not benefit immigrants as much as naturalized citizens, eligible to vote. Immigrants (illegal immigrants included) will benefit, however, to the extent that they can influence local leaders through non-electoral pressure (ie., public dissatisfaction, protests or demonstrations).

198. See Cass R. Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 504-506 (1987) (arguing that the New Deal's wholesale shift in the locus of control from the states to the federal government has deprived citizens of the opportunity to meaningfully participate in self-determination).

199. But see, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 44-46 (1984) (arguing that the political influence of recent immigrant groups has increased and will continue to rise as their populations grow).

California may wield significant political power at the local and state level, but rarely at the federal level. By decentralizing the decision-making base, immigrants are better off.²⁰⁰ After all, the intended beneficiary of federalism is not the state in its sovereign capacity, but the individual.²⁰¹

This essay does not consider the historically anti-immigrant sentiment that has plagued parochial politics.²⁰² Sensibly shifting some power back to the states need not be a euphemism for trampling minority rights. City or state policies of dubious constitutional validity would still be subject to challenge.²⁰³

C. Immigration Policy

Now more than ever, people discuss immigration policy as the economic policy tool it has always been.²⁰⁴ The affected states' suits elicit, and will continue to elicit, debate on the costs associated with illegal immigration. While Congress will probably continue its recalcitrance in dispersing any significant money to ease the affected states' burdens, these cases have prompted some reconsideration of our immigration policies.²⁰⁵ The federal government's increased commitment to effectively patrolling the borders is testament to this point.²⁰⁶

200. I do not propose federalism as a panacea to completely cure the chronic political disempowerment many immigrant groups suffer. Rather, I argue that it will somewhat improve their ability to be heard on issues that closely affect their lives.

201. See *Gregory v. Aschcroft*, 111 S.Ct. 2395, 2399-2400 (1991); see generally Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

202. For a discussion of this history, see Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 4 B.Y.U. L. REV. 1139, notes 82-129 and accompanying text (1993).

203. See, e.g., *U.S. Judge Blocks Anti-Immigrant Bill*, THE WASH. POST, Nov. 16, 1994, at A5 (reporting that Proposition 187 was temporarily enjoined because it may conflict with federal statutes and/or the Constitution).

204. See generally VERNON M. BRIGGS, *IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE* (1984).

205. See Michael T. Lempres, *The Solution is Immigration Reform*, WASH. TIMES, Sept. 16, 1994, at A21 (suggesting immigration reforms which are being considered, as well as those which ought to be considered); see also Neal R. Peirce, *The Ugly—But Inevitable—Debate*, NAT'L J., July 16, 1994, at 1700 ("We're moving into the first major national immigration debate in over 100 years," said Dan Stein of the Washington-based Federation for American Immigration Reform.). *Id.*

206. *Operation Hold the Line* is a pilot program on the Mexico-California border which is showing promising results. By increasing Border Patrol personnel and implementing various new techniques, the federal government has drastically reduced

Overshadowing any benefits derived from this public debate is the danger that a decision in favor of the states could undermine Congress' plenary power over immigration. Even if a court, in finding for the affected states, explicitly pronounced that its decision in no way recognized a state's power to influence immigration policy, a state implicitly gains power.

The Supreme Court has consistently denied states any meaningful role in the administration of immigration policy.²⁰⁷ Although states have enacted policies that affect immigrants,²⁰⁸ congressional power over immigration policy has been exclusive.²⁰⁹

Should one worry about a greater role for states in developing immigration policy? Is state influence on immigration policy inherently bad? Consider that federal-state cooperative relations regarding immigration policy in countries with similar federal-state governmental structures has proven workable.²¹⁰

Still, it seems that a better policy is to renounce all state authority over immigration policy, save for matters that implicate purely state concerns. Immigration is an area that demands uniform action. Despite the strong anti-immigrant rhetoric voiced by citizens and politicians alike,²¹¹ immigration continues to be a net benefit for America.²¹² As such, immigration policy cannot be driven by the parochial fears of those who misunderstand or choose to ignore its value.

the rate of illegal aliens who successfully cross into California. See Michael Kirkland, *Efforts to Stem Illegal Aliens Praised*, U.P.I., Mar. 14, 1994.

207. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (holding that a state attempt to tax or regulate immigrants cannot stand in light of Congress' power under the *Commerce Clause* and the *Supremacy Clause*).

208. See, e.g., *De Canas v. Bica*, 424 U.S. 351 (1976) (in which the Supreme Court upheld a California law that restricted the employment of illegal aliens).

209. Justice Frankfurter stated, in recognition of Congress' plenary power over immigrants, that "there is not merely 'a page of history'. . . but a whole volume." *Fiallo v. Bell*, 430 U.S. 787, 792 (quoting *Galvan v. Press*, 347 U.S. 522 (1954)). See *supra* notes 6-7, 37, and the accompanying text.

210. See generally Valerie Mathews Lemieux, *Immigration: A Provincial Concern*, 13 MANITOBA L.J. 111 (1983) (describing how the Canadian provinces have the power to set immigration law in certain areas within their federal structure).

211. See David Ferrell and Robert J. Lopez, *State Waits To See What Prop. 187 Will Really Mean; Reaction: As Measure Becomes Law, Emotions Range From Fear to Elation. But There Is Also Great Uncertainty*, L.A. TIMES, Nov. 10, 1994, at 1.

212. See JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989); VERNON M. BRIGGS, *IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE* (1984).

The constitutional origins of the federal government's broad power over immigration is well-apparent.²¹³ There are also structural and economic reasons that counsel against the states having any authority in matters impacting immigration policy. State politics are "closer to the people." They are less concerned with the "broader picture" than with the economic well-being of its citizens. Accordingly, the states are ill-equipped to manage a national economic resource. Furthermore, state politics are apathetic to foreign policy issues that may demand a national response.²¹⁴

In the absence of any sizable state immigrant constituency, state policies favoring immigration are likely to be exploitative of immigrants.²¹⁵ In the alternative, state policies aimed at discouraging immigration may be severe. We would be well-served to remember Madison's belief that states are more susceptible to factional tyranny than is the nation.²¹⁶ Federal policy has often been a leader; tackling problems that, according to public opinion, would otherwise be left unresolved.²¹⁷ Studies that have shown federal immigration policy to be more generous in accepting immigrants than policy would be if driven by public opinion,²¹⁸ counsel against allowing states power to determine immigration policy.

Just as the states, due to self-interest, are not trusted to regulate interstate commerce, the states should not be given immigration policy-making power.

VI. CONCLUSION

The rapid expansion of federal power within the last sixty years was, undoubtedly, necessary to accommodate the increased economic and social interaction that accompanied technological

213. See *supra* note 6.

214. Take the Cuban crisis for example, where the federal government used immigration policy to accommodate overall foreign policy objectives.

215. Since public opinion is largely against immigration, see SIMON *supra* note 3, at 349-356, state policies that favor immigration would probably be less interested in enhancing cultural diversity and more interested in access to a cheap labor pool.

216. See THE FEDERALIST NO. 10 (James Madison).

217. See *infra* note 218.

218. See SIMON, *supra* note 212, at 349-356.

advances. This essay recognizes the federal government's role in addressing the social injustice that has stained our national character.²¹⁹ The New Deal's wholesale shift in the presumption of decisionmaking from the local to federal level, however, has gone too far.²²⁰ Today, many decisions made at the federal level could more properly be made at the state and local level.²²¹ While the Supreme Court has rejected the notion that there are "traditional state functions,"²²² it has sanctioned the federal government's imposition of unfunded mandates on the states.²²³ In an effort to restore some semblance of a federal/state balance of power, the Court in *New York* endorsed a process-oriented federalism.²²⁴ The Court held unconstitutional federal attempts to direct the states to administer a federal program.²²⁵

Applying *New York's* reasoning, the federal government's refusal to reimburse the affected states for immigration-related costs is unconstitutional. Although the costs are not an explicit command by the federal government to implement federal immigration policy, the effect is the same. This is because it undermines the essence of a state's residuary sovereignty; the right to exercise its power as it chooses, within its limited sphere.

A court should look beyond the immigration policy as written and observe the true impact of its operation. A court ought not revert to the policy of judicial abdication exhibited in *Garcia v. San Antonio Metropolitan Transit Authority*,²²⁶ in which the Supreme Court cloaked its indifference toward federalism in the pretext that it is incapable of enforcing the Tenth Amendment. *New York* convincingly reasserts that the judiciary should be the final arbiter in federal-state relations.

219. The federal government's passage of the Voting Rights Act of 1964, to prohibit voting discrimination against Americans of color is a prime example of necessary federal leadership.

220. See Sunstein, *supra* note 198, at 501-10 (arguing that the New Deal's abandonment of the "original goals of federalism was myopic."). *Id.* at 505.

221. See generally Gillmor, *supra* note 13 (exposing the absurdity of "federalizing" issues that ought to be handled at the state or local level).

222. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

223. See generally Gillmor, *supra* note 13.

224. See *New York v. U.S.*, 112 S. Ct. 2408 (1992).

225. *Id.*

226. 469 U.S. 528 (1985).

A court may recognize, without undermining the federal government's plenary power over immigration policy, that the federal government has transgressed our "economic federalism"²²⁷ by unconstitutionally burdening the states. The courts hearing the affected states' claims must affirm the recent recognition of "economic federalism."²²⁸ Anything less would render *New York v. U.S.* a paper tiger.

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227. I use this term to describe a federal-state economic order in which the federal government's exercise of exclusive power in a policy area ought to be coupled with a concomitant monetary pledge to offset the most glaringly costly externalities suffered by states. The economic consequences of federal policy are too often forgotten in the larger federal-state struggle over policy turf. As with most unfunded mandates, the affected states are not arguing over who is constitutionally empowered—or best able—to act in a particular policy arena. The states, instead, are claiming that it is unconstitutional for them to have to pay for federal policy. For example, a federal-state struggle over who can set the minimum drinking age derives from the states' belief that the issue is beyond the federal government's authority. In contrast, the affected states' lawsuits concede the federal government's exclusive power to set immigration policy, but argue over who should pay for it. Although equally legitimate, the states' constitutional arguments are different in kind. The former lays stake to a specific policy area, while the latter argues that the current federal-state economic arrangement jeopardizes a state's ability to respond to its citizens needs.

228. See Brady Bill Cases, *supra* notes 137-142 and accompanying text; see generally Gillmor, *supra* note 13.

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