Federalism and the Politics of Immigration Reform

By

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I. Introduction

The 112th Congress, like other recent congresses, is deeply divided over the issue of immigration reform. These divisions, which cross party lines, include questions about how to protect American citizens while compassionately addressing the needs of the estimated 11 million illegal aliens who live and work among us. While Congressional Republicans grapple over the desirability of instituting a mandatory employment verification system, Democrats continue to press for a "comprehensive" immigration reform package that they argue would bring undocumented persons "out of the shadows" and give them an "earned path to citizenship." The situation, however, is far more complicated than either party has admitted. Honest appraisals of the various immigration reform proposals emerging from Congress in recent years show that the proposed solutions are anything but comprehensive in their identification of immigration problems and their proposed solutions. Conflicting and contradictory immigration reform proposals have contributed to a political stalemate, opening the door for state and local governments to craft their own legislative proposals to address the myriad problems created by illegal migration. A new report from the National Conference of State Legislatures shows the 50 states along with Puerto Rico have introduced a record 1,538 bills and resolutions relating to immigrants and refugees in the first quarter of 2011

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(National Conference of State Legislatures 2011). This number surpassed the first quarter of 2010 by 358.

With growing state involvement, it has become increasingly likely that the U.S. Supreme Court will have to decide whether the principles of federalism support shared and overlapping power when it comes to immigration reform. Immigration has already generated considerable litigation, leading to conflicting opinions and confusion among the courts as to the appropriate allocation of authority between state and federal governments. At least six states now face lawsuits for their recent legislative attempts to address immigration within their borders. The Obama Administration has taken up these lawsuits, seeking to enjoin several states from entering into a policy domain long thought to be the exclusive jurisdiction of the federal government.

With the national government unable to develop meaningful solutions, "immigration federalism" has been reborn, fueled by state and local governmental concerns about the failure of the federal government to enforce existing laws and regulations against illegal migration. At the forefront of state immigration legislation, Arizona opened the door to aggressive immigration federalism. In 2010, the state passed the "Support Our Law Enforcement and Safe Neighborhoods Act" (introduced as Arizona Senate Bill 1070): a comprehensive attempt to address the costs of illegal immigration within the state. Jan Brewer, Arizona's Republican governor, cited the U.S. government's failure to provide adequate enforcement as the primary motivation behind the law. Even the former Arizona Governor, Janet Napolitano, now head of the Department of Homeland Security, was a leader in the movement, in an attempt to hold the federal government accountable for securing the points of entry into her state.

Despite the highly public lawsuit from the Obama Justice Department and the negative publicity that Arizona has faced after a federal court struck down key parts of S.B. 1070, five more states have passed or are now considering similar legislation (Five States Considering 2011). The handful of states pursuing comprehensive immigration measures are outliers of a larger trend, as almost every state in the union has drafted legislation to address the growing presence of illegal immigrants within their borders. Wider expansion of state action in response to immigration has been documented by an increasing number of legislative efforts and enactments.

Though examples of non-federal involvement in immigration abound, such involvement leaves some legal scholars questioning whether this allocation of authority is justified by our Constitutional tradition and the cases surrounding it (Wishnie, 2004; Motomura, 1999). After providing a historical background of immigration policy that shows federal dominance over immigration for the last century, we will argue that the Constitution does not forbid state involvement and that state involvement creates new opportunities for policy innovation that can work to the benefit of immigrants and the citizens of the various states.

Indeed, the structure of the Constitution does not exclude states from involvement in the issue of immigration; instead, immigration is a policy area that states can share initial authority to regulate with the federal government. If states overstep their bounds by addressing areas regarding removal or admission of aliens into the country, the federal government may preempt by statute and by the Supremacy Clause. Traditionally courts have drawn a sharp distinction between permissible areas of regulation according to the content of suggested policies. If legislation governs removal or admission of immigrants,

referred to as "pure" immigration, the federal government controls, with only a limited role for state or local governments; if the legislation governs rights and obligations of non-citizens while in the country, referred to as "alienage law," states may jointly-govern (Huntington 2008). The problems that we are witnessing are coming about because of the increasingly complex issues of immigration reform that make these categories outdated.

Due to the profound affect of immigration on state and local governmental budgets, these entities often act out of desperation in response to the failure of the federal government to act. The distinction between pure immigration law and alienage law has always been more formal than real,[3] and in the modern era the blurring of distinction can create an untenable situation (Motomura 1994). Though the federal government has been the dominant force in immigration for over 100 years, the recent increase in state and local involvement in immigration could be our best hope for real policy change and innovation.

I. Historical Background[4]

For over fifty years our nation has struggled with immigration policy. In defining who will legally enter our country and on what terms, immigration policy touches at the core of American identity. At the beginning of the 20th century immigrants primarily traveled from Europe; by the end of the century, immigrants were predominantly from Asia and Latin America. Though immigrants in the first half of the 20th century were

[4] We acknowledge and credit Carolyn Wong's outstanding book *Lobbying for Inclusion: Rights Politics and the Making of Immigration Policy* for providing much of the historical narrative that we cite prior to our discussion of the George W. Bush and Barack Obama eras.

motivated by the prospect of employment, immigrants today are often drawn to immigrate in order to be reunited with family and to enjoy political freedom. Yet despite the significant shift in the nature of immigration over the years, many of the issues of the past remain constant. Immigrants create concern about jobs and the impact they have on the ever- changing culture of America. New concerns about the rising cost of entitlements and the burden immigrants place on an already strained system also come into play. How can the welfare system sustain millions of additional participants? The debate about appropriate changes and solutions is often burdened by labels of nativism and racism. With little consensus and a growing population of both legal and illegal immigrants, how will America greet newcomers?

Despite reforms toward the end of the 20th century, immigration remains one of the most divisive political issues today. No major reform has been enacted into federal law, and policy preferences have found expression through state action. Though the politics of immigration policy were once dominated by labor unions and policy groups, states have proved essential parties to success in the 21st century. The challenges created by expanding legal immigration and the out of control growth of illegal immigration demand new solutions to perennial problems.

Immigration and Nationality Act of 1965 (The Hart-Cellar Act)

The 1960s was an era of massive social and political change that resulted in the passage of four major Civil Rights Acts: The Civil Rights Act of 1964 that outlawed discrimination in public accommodations; the Voting Rights Act of 1965; and the Open Housing Act of 1968 that prohibited discrimination in the rental and sale of houses. Alongside these domestic changes, Congress passed the Hart-Cellar Act, which

eliminated racist national-origin quotas that had existed since the 1920s; instituted a family reunification policy that established priority for close relatives of naturalized citizens; and established an immigration policy that favored highly skilled professionals, scientists and artists along with unskilled laborers for jobs in fields experiencing a labor shortage.

A general assumption surrounding the creation of the Hart-Cellar Act was that the volume and nature of immigration would not change with the elimination of nation-based quotas. However, the Hart-Cellar Act had the unintended consequence of radically changing the racial and ethnic complexion of America. The two most noteworthy changes from the Act were a significant expansion in legal immigration from Asia and increased movement of undocumented workers across the U.S.-Mexico border. Though the majority of immigrants previous to passage of the law were European, the secondary emphasis on skilled workers allowed for an influx of Asian immigrants. Visas for Asian professionals quickly overwhelmed the quota allotted for skilled workers. As these professionals immigrated, they soon brought their families from abroad.

The Act placed quotas on the Western Hemisphere for the first time, leading to the second unexpected effect of increased border crossings between Mexico and the United States. In a piece of legislation that lifted so many barriers to immigration, this restrictive provision is often overlooked. Previous to 1965, Canada and Mexico had enjoyed unlimited visas as neighboring economies. Following passage of the law, economic crisis gripped Latin America, increasing immigrant flow into the U.S. The growing Mexican-American population led to expanding influence for ethnic rights

groups, which would play an important role in the immigration reform of the coming decades.

Prior to passage of the law, politicians argued any change in the ethnic make-up of immigration was unlikely. The Act permitted immigrants to bring in not only spouses and children, but parents and siblings as well. It was thought that prioritization of family unification ensured the dominance of immigration from Europe. However, the impact of the law quickly disproved these theories: of the ten countries that predominantly sent immigrants in 1965, only two (Germany and Italy) were among the nations the State Department predicted would send the most immigrants in 1969 (Wagner 1986). By the 1980s, immigrants from Asia and Latin America constituted the majority of immigration, which continues to be true today (Wong 2006).

Despite the unintentional expansion of immigration following the passage of the Act, the law remained difficult to challenge, resulting in relatively stable immigration policy for the next twenty years. The strength of the law lay in the role of bipartisanship in passing it, the impact of family-based immigration on the electorate, and the reduction of labor contentions for a short space of time. Despite the unexpected impact of the law that rapidly changed the racial and ethnic composition of the nation, politicians were unable to challenge the legislation without sounding racist (Wagner 1986, 464-465). With a growing immigrant population, attempts to overturn the family unification goal that brought in low-skilled workers in favor of a more skill-based system grew even more difficult.

The Immigration and Reform Act of 1986

By the early 1980s, America faced a new immigration crisis that included the presence of large numbers of undocumented workers. The debate on how to address undocumented workers had been submerged during the reforms of the 1960s, but gradually the issue became too significant to ignore. Labor unions, civil rights groups, employers and ethnic groups fueled the debate, often coming at the issue from different directions. By the mid-1970s, three major Hispanic groups opened offices in D.C., initiating a new era of political activism (Wong 2006, 68). Gradually, with a growing legal and illegal population of Hispanic immigrants, the Hispanic policy groups became major actors in policy reform. They would later join forces with the Congressional Black Caucus and the Leadership Conference for Civil Rights to advance an agenda that undercut employer sanctions and other reforms that might have decreased illegal migration while protecting the most vulnerable U.S. populations.

As was true in previous decades, labor unions continued to be concerned about job competition and downward pressure on wages resulting from the oversupply of low-wage undocumented workers. But the importance of labor unions was waning, and immigrants were essential to reviving the weakening institutions. By the early 1970s, labor groups began to pressure Congress to address the deluge of illegal workers entering the country, and the National Association for the Advancement of Colored People (NAACP) pointed out that illegal aliens were depriving poor people of jobs for which they qualified (Tichenor 2002, 226-227). Focusing on the need for employer sanctions, the AFL-CIO and groups such as the NAACP, the United States Conference for Catholic Bishops, and the League of United Latin American Citizens demanded penalties for employers who contributed to the problem by encouraging illegal migration.

In response to the interest groups, agricultural lobbyists rallied to prevent the imposition of civil fines on employers who demonstrated a "pattern or practice" of hiring undocumented aliens. In response, Congress created the H-2 program, which allowed agricultural and non-agricultural employers to hire contract workers from foreign countries under certain conditions. Claiming this program was too expensive and insufficient to meet their needs, the western growers began a debate that would lead into the reforms years later.

By the early 1980s, Congress attempted to address both legal and illegal immigration in a single legislative effort. In their initial attempt to deal with both issues through one piece of legislation, various senators suggested caps on legal immigration, leading to a strong push back from the Reagan administration. President Reagan had praised America as a "shining city upon a hill," welcoming immigrants to a land of opportunity and freedom. Interpreting any caps on legal immigration as an affront to this ideal, the administration was able to lobby for separation of these portions of the legislation to be dealt with in the future. Thus the legislative effort was split, with illegal immigration to be dealt with first.

The Immigration Reform and Control Act of 1986 was the first stage of the legislation, addressing the rising tide of illegal immigrants in an attempt to close the "back door" to illegal immigration in order to "keep the front door open." (Wong 2006, 96) Concerned by the prospect of racial profiling and discrimination by employers, Hispanic groups fought aggressively against more severe employer sanctions. By the time the employer sanctions were enacted in law, they had been debated for a full fifteen years (Wong 2006, 96). But despite the initial alliance between Hispanic groups and

western growers to prevent harsh employer sanctions, the debate began to shift to the topic of an agricultural worker program. Western growers focused on establishing alternative sources of foreign labor, once it was indicated that employers would have an "affirmative defense," releasing employers from the obligation to check the authenticity of documents presented to them. Hispanic policy groups also saw the opportunity for advancing immigrant interests in the offer of amnesty, eventually accepting the tradeoff of employer sanctions for the prospect of citizenship. Over time the two most controversial and noteworthy elements of the bill were the issue of amnesty and a future guest worker program, both of which were divided along ideological lines.

There were no hearings on the bill; instead, representatives of western growers, labor unions and Hispanic interest groups engaged in several rounds of political trading, leading to the compromises of the final legislation. The primary accomplishments of the law were sanctions on employers who knowingly hired illegal immigrants, grants of amnesty for immigrants who had resided in the United States since January 1, 1982, and a path to citizenship for those who had worked as seasonal laborers for a certain amount of time. Many considered the sanctions against employers to be the centerpiece of the law, though the sanctions would prove insufficient to address the uncontrollable flow of illegal immigration. The legislation criminalized the act of knowingly hiring an undocumented immigrant, though it did not require employers to question the authenticity of documents presented to them. The Act also established a probationary guest-worker program, that granted "earned-stay" rights to special agricultural workers, labeled as "SAW." After working for at least ninety days within the agricultural sector, SAWs were able to pursue employment in other industries and ultimately gain citizenship.

Ultimately 1.3 million agricultural workers would take advantage of this provision. (Reimers 1992).

The Immigration and Reform Act of 1990 and the George H.W. Bush Administration

After the passage of the ICRA, Congress turned its attention to legislation dealing with legal immigration. In the few years between the legislative enactments, the economy had significantly improved, changing the context of reform. Several studies indicated a skill gap in the workforce, suggesting the possibility of a shortage of skilled labor (Wong 2006, 101). In response, the Select Commission on U.S. Immigration and Refugee Policy called for increased admissions of highly trained immigrants that could contribute to American industry, while simultaneously arguing for preservation of existing family-unification goals. Several high-technology companies in computer and electronic industries, including Microsoft, also joined forces to push for improved access for trained professionals from foreign countries. Republicans were largely in favor of the suggested increase in professional visas, but they opposed the demands of ethnic groups to increase the number of family visas. Democrats, particularly from the Northeast, acted in support of the ethnic groups, lobbying for an increase in visas for family purposes.

More expansive reform would ultimately be determined by the ability to build powerful coalitions among pro-immigration groups. Like the Reagan Administration, the George H. W. Bush administration was generally supportive of liberal legal immigration, and their influence won over a large block of Republicans to vote in favor of the legislation. But the most noteworthy coalitions were the business groups and the ethnic policy groups, referred to as the "family coalition." As discussed above, the business groups were driven by a desire to bring in more skilled professionals and to improve the

ability to recruit temporary employees. Though there was no explicit agreement between the business groups and the "family coalition," there was a tacit acknowledgement that they would act in support of each other, and not oppose each other's demands (Wong 2006, 102). Another particularly important coalition was between the ethnic groups in favor of family reunification policies, and the older immigrant groups who favored a special type of visa for nations in the minority of immigration. As many of the original immigrants to America no longer had living relatives in their native countries, they were unable to benefit from family-reunification policies, and they demanded an additional "diversity" visa that would permit increased immigration from these nations. Though the two groups arguably had competing interests, their cooperation ensured success for both goals.

Lastly, though forming no new coalitions, labor unions continued to play a powerful role in negotiations over reform. Labor argued aggressively for protection of jobs for native workers, attempting to limit visas for temporary professionals at 65,000 and suggesting a head tax on employers who hired foreign workers, higher standards of proof that business had attempted to recruit American workers, and a requirement that any hiring be linked to state and federal certification of a labor shortage. Eventually the suggested head tax would be eliminated, but the cap on admission of temporary foreign workers was retained as a concession to organized labor.

Largely based on bi-partisan support, the Immigration Act passed in 1990. The most significant accomplishments of the final legislation included an increase in the total number of legal immigrants allowed into the United States each year, and the creation of "diversity visas" for countries from which immigration had been low. Eventually, the

"diversity" program would be awarded 55,000 visas a year, and the legislation would increase the visas for non-immediate relatives by 300,000, including siblings. Despite attempts to limit family-unification policies, the Act preserved the visas allotted prior to the legislation. The Act also removed homosexuality and AIDs as grounds for exclusion from immigration and provided for exceptions to the English testing process required under the Naturalization Act of 1906. After the legislation was enacted, annual immigration to the United States increased by 500,000 additional immigrants (Wong 2006).

In an attempt to tighten policy on illegal immigration, the Act also significantly strengthened the power and resources of the U.S. Border patrol. This legislation would eventually lead to the "prevention through deterrence" policy of the Immigration and Naturalization Service (INS) in the early 1990s. In one of the earliest examples of the lessons to be learned from immigration federalism, this particular federal strategy mimicked an attempt by the Texas government to address illegal entry in "Operation Blockade." Immigrants who had previously entered through El Paso, the targeted city, were forced into more rural areas as a result of the operation. The Border Patrol adopted the plan on a national level in 1994. With the increased resources granted from the 1990 legislation, the Border Patrol began "Operation Gatekeeper" near San Diego, using high-intensity floodlights to deter illegal entry. Similar to Operation Blockade, Operation Gatekeeper pushed immigrants into more rural areas, though it is arguable they did little to deter overall migration.

The build-up of resources on the border continued in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, discussed below. Once more,

legislation focused on increasing physical obstacles to illegal entry, along with increased Border Patrol agents and the technology available to them. By 2002, the total INS budget was thirteen times its 1986 level, the Border Patrol budget was ten times its former level, with three times as many officers, and eight times as many hours patrolling the border (Massey 2007, 132). Formal deportation also grew rapidly, increasing nearly tenfold from 1986 to 2002. Douglas Massey (2007) argues that instead of deterring illegal immigration, these policies eventually led to an increased retention of illegal immigrants, as the costs and dangers of making a border crossing rose. Due to increased border security, many immigrants were hesitant to return once they had entered the country, a "perverse consequence" of heavy border enforcement (Massey 2007, 135). Thus the illusion of a "controlled border," begun in the 1990 legislation, may have only exacerbated illegal entry and the greater illegal immigrant population on the whole.

Immigrant Responsibility Act of 1996 and the Clinton Era

By the early 1990s, American opinion had turned against illegal immigration. Several highly publicized attempts of illegal migration, including multiple boats from China filled with immigrants attempting to land illegally, renewed attention to the ongoing problem of improper border crossings (Wong 2006, 133). There was a sense that the policies of the 1986 legislation had failed. There was no reliable system in place to determine the authenticity of laborer's documents, and an underground industry for false identification was thriving. During this period states began to demonstrate both their frustration with federal attempts to address the issue of immigration, and their ability to sway national politics through their own legislation. Most notably, in California citizens enacted Proposition 187 and elected a Republican Governor who ran

on the platform of fighting against illegal immigration. Proposition 187 was an initiative to deny public services to illegal immigrants in California. The measure passed by 59% of the vote in 1994, expressing the deep and desperate frustration of the people of California.[5] As one of the more populous states in the union, California drew attention to the growing problem of illegal border crossings, and the failed attempt by the federal government to restrict the number of illegal migrants entering the county each year. Alongside the events in California, Republicans gained control of both houses of Congress for the first time in 40 years. Part of that victory was a "Contract with America," a list of promises and goals to be achieved with a conservative majority. Among other goals, an attempt to address illegal immigration was originally listed in the contract with the people.[6]

In response to the Republican Congressional victories and the backlash displayed in California, Senator Alan Simpson and Texas Representative Lamar Smith introduced bills calling for restrictions to be placed on legal immigration alongside limitations on illegal immigration. Though initially it appeared the country was eager for the suggested measures, there were several political hints that the severe legislation would not have a smooth journey. Eventually due to divisions within the party, immigration was struck from the list of goals within the Contract with America.

Once more, Hispanic and Asian groups relied on a left-right coalition to manipulate the legislation in favor of their policy goals. High technology companies, including the National Association of Manufacturers, Intel and Microsoft, also rose up against the bill, staging several high profile "fly-ins" to the capital to argue against any

[5] Proposition 187 was ultimately overturned, but it is relevant in showing the rise of state action and its effect on national politics.
[6] Peter Spiro uses this turn of events to indicate the need for the "steam-valve" function, discussed below.

limits on legal immigration (Wong 2006, 137). The Business Coalition explained that international operations made employment of immigrants vital to the future success of their companies.

The bill was initially introduced as a reform of both legal and illegal immigration. Pro-immigration interest groups recognized the current hostility toward illegal immigration, and knew that if the two issues were joined, there was a great risk that legal immigration would be blamed for the problems of illegal immigration. Pro-growth libertarians and economic conservatives were soon persuaded by the family coalition that legal immigration must be protected, and they also joined the struggle against a bill attempting to address all types of immigration. As there was significantly less momentum attached to the issue of legal immigration, these interest groups were able to stall this portion of the legislation. A series of "dear colleague letters" went out in support of splitting the bill, tying legal immigration to free trade and free markets. Conservatives explained that they would be willing to address legal immigration at a later time, but it was necessary to separate the issues in order to address them effectively. Eventually, with the approval of the Clinton Administration, support for splitting the bill was widespread, and the cuts to legal immigration were deferred for another legislative session.

Despite their importance in previous immigration reform, labor unions had a significantly diminished voice in the 1996 legislation. Without a Democratic majority, it was difficult for labor unions to gain a seat at the table. Even so, Senator Edward Kennedy lobbied aggressively on their behalf, arguing for protections to be added to the bill in favor of American workers. But with a weak political position, the unions were

ultimately cut out of any significant discussions, and even the reforms added by Senator Kennedy were largely eliminated by the time the bill was passed.

Once the bill was split, the final legislation was focused on increased protection of the border, and greater responsibility for incoming immigrants and their family sponsors. A significant factor in the call for reform was a belief that the employer-sanctions put in place by the 1986 legislation had failed. With no reliable method of determining the authenticity of documentation, employers could easily claim an affirmative defense against the sanction's force. Originally, it was suggested that a phone verification system should be put in place to provide certification of documents. Though a pilot version of this phone verification system was put into place, the focus of reform shifted away from a correction of the sanctions, to stricter control over the border. One thousand U.S. Border police were added, alongside more severe consequences for those entering the country illegally. The proposed legislation barred admission for three years for aliens unlawfully present in US for 180 days, and barred admission or any legal status for ten years if an illegal immigrant was present in the country for more than a year. The legislation changed laws for excluding and removing aliens, limiting the judicial review of INS decisions.

The suggested reforms also placed greater responsibility on family sponsors to prevent increased dependence of new immigrants on public services. Financial responsibility rules limited admission of immigrants that were likely to be reliant on the welfare system by requiring sponsors of relatives to prove the requested immigrant had an income 25% above the poverty line. Once an immigrant had entered the United States, their family-sponsor was required to sign a legally binding affidavit of support, and the

sponsor's income was included with the alien's income for any qualification for public support. Under the welfare reforms of 1996, states were also delegated the authority to determine immigrant eligibility for federal benefits. Some scholars argue this authorization of state-level discretion put an end to the era of federal exclusivity that had dominated the 20th century, inviting states into the debate on the legal status of immigrants (Spiro 1997, 1627). Peter Spiro argues that the provision ensured that the alien's status would no longer be fixed in Washington, but also in the states.

In the final stages of passage, a controversial amendment arose that threatened to destroy the legislation. The "Gallegy Amendment," an early attempt to increase the role of immigration federalism, granted power to states to deny public schooling to children present in the country illegally. Opponents of the bill argued that keeping immigrant children out of school would increase crime and victimize children who had no part in the illegality of their entry. Though conservative Democrats from the South favored the amendment, President Clinton came out strongly against it and threatened to veto the entire bill if the amendment was included. In the midst of the presidential election, the Republican candidate for president, Robert Dole, lobbied aggressively for inclusion of the amendment, believing this would force President Clinton to either veto the bill, losing votes in California, or backtrack on his promise, losing legitimacy with the electorate. But despite the pressure from Republican leaders, Republican representatives saw the risk that the bill would fail, and stood firm on excluding the Gallegy Amendment in the final legislation.

The Bush Era and the Attacks on September 11th

At the commencement of the George W. Bush Presidency, there was hope that more comprehensive reform would be possible. President Bush invited Mexican President Vincente Fox as the first foreign dignitary under the new administration, signaling the importance of the relationship between the two countries. As the two national leaders debated the terms of a trade agreement, pro-immigration groups remained hopeful that immigration reform within the U.S. would follow. On September 11, 2001, American policy goals experienced a severe and unexpected shift. An opening of American borders was taken off the table, and policies focused on tightening the border and determining who was in the United States illegally. The Department of Homeland Security was created, absorbing various units of the Immigration and Naturalization Service (INS). U.S. visas dropped precipitously and perception of illegal immigration, and even legal immigration, began to grow unfavorable.

Just two years later, immigration would become increasingly politicized. After the auspicious climate for immigration reform had faded away with the attacks on September 11th, the momentum for a new guest worker program with Mexico and a possible grant of amnesty had been replaced with increased attention on border control and security. Out of frustration over delayed reforms and unfulfilled promises of possible amnesty, over 800 people departed from nine major cities, traveling by bus to Washington, D.C.. In an attempt to mimic the black Freedom Rides of the 1960s, the protestors hoped to use the journey to recast amnesty and further immigration policy liberalization as the great civil rights struggle of our time, while presenting secure borders and effective immigration law enforcement as the new Jim Crow. The protestors lobbied for the legalization of over 10 million immigrants, and an increase in opportunities for

immigrants to bring family members into the country. But rather than raising awareness of their cause, these protestors highlighted the growing size of the illegal immigrant population. American citizens who had stayed out of the debate previously could no longer avoid the vivid images of immigrants boldly waving flags of their own country, fearlessly declaring their undocumented status.

In response, the general public demanded greater enforcement of existing laws, leading to the Real ID Act of 2005. The Real ID Act focused primarily on security and authentication standards for state driver's licenses and identification cards, along with various immigration issues including terrorism concerns. The Act created restrictions on political asylum, increased enforcement mechanisms, restricted some due process rights and imposed federal restrictions on state driver's licenses for immigrants, making it more difficult for illegal immigrants to procure and use certain types of documents for official purposes.

On May 1, 2006, protestors once more thrust immigration issues into the public view. Mass protests had begun in the spring of 2006, with breathtakingly large turnouts in April and May. The organized rallies had continued the politicization of immigrants begun with the Freedom Rides, inadvertently raising the national consciousness about illegal immigration and the financial burdens it imposed (Swain 2007). On May 1st, immigrants coordinated an economic protest labeled "A Day without Immigrants." The nation-wide protest was an effort to display the necessity of immigrants to the U.S. economy, further bolstering calls for reform and amnesty. Despite the participation of over 50 cities, from Las Vegas to Miami, the impact of the boycott was minimal. But the political significance of the protests was lasting and widespread. The sea of Mexican and

Latin American flags, the language of a "stolen land" and "reconquista," and the sight of thousands of illegal immigrants demanding citizenship shook American conceptions regarding immigration. The image presented by the protests stood in direct contradiction to earlier portraits of illegal immigrants as frightened or docile people, cowering behind locked doors, never knowing if the next knock would bring deportation (Swain 2007).. Citizens became concerned, rather than empathetic.

Largely in reaction to the protests, the House and the Senate passed two vastly different immigration bills. In December 2005, the House of Representatives passed a restrictionist immigration bill (H.R. 4437) that many people saw as punitive, although it seemed to be in harmony with public wishes. The bill would have criminalized being in the country illegally, required the deportation of illegal aliens, and imposed new penalties on employers and service providers who offered assistance to illegals. It provided no provisions for guestworkers nor did it offer a pathway to citizenship. In reaction to a public outcry, a few months later, the Senate passed a friendlier bill (S. 2611) that offered a tiered path to citizenship, a guestworker program, and a provision for bringing more legal immigrants into the country. It also included a controversial provision that would require private and public employers to pay the prevailing wage to guestworkers on all construction projects. The proposed bills died in the conference committee where members of both houses tried to reconcile differences to create a single bill to be voted up or down. Thus, the federal government failed in its last major attempt to reform immigration.

Perhaps, in reaction to federal failure the states increased their activism in the area of immigration reform. By July 2006, 30 states had passed 57 laws that dealt with some

aspect of immigration reform. Although a few of these laws expanded benefits for noncitizens, the vast majority made it more difficult for illegal immigrants to receive government benefits such as unemployment, driver's licenses, employment in government-funded projects, and gun permits (Immigration Bills Compared 2005). Aggressive actions by state and local governments are likely to continue until Congress offers some real leadership on the issue.

The Obama Era

Despite the intensity of the debate, Congress has been unable to reach consensus on the issue of immigration, with most changes in the last decade coming from the state level or through administrative channels. Even so, legislation to address immigration has been the subject of virulent debate within the legislative branch, spilling over into state legislatures. One of the most salient pieces of legislation is the "DREAM Act," a suggested program for development, relief and education of alien minors.

The DREAM Act has been debated as a legislative solution for over ten years. Originally introduced in 2001, the initial version of the legislation was placed alongside various other immigration-related bills that eventually failed. Politicians expressed concern that the bill could encourage chain migration, aggravating rather than solving the issue of illegal immigration. Other politicians agreed with the principals of the bill, but refused to act on the legislation unless it was a part of a more comprehensive immigration reform. Others recognized the importance of the measure, but found it to be distracting in light of more pressing issues.

The Act was reformulated to address these concerns, resulting in what remains the most current version of the legislation (S.3992). In its present state, the DREAM Act

would allow illegal alien-students to gain "conditional nonimmigrant status" if they have had "good moral character" since entry into the United States, as determined by the Department of Homeland Security; have graduated from a U.S. high school, have a GED or otherwise have gained admittance to an institution of higher education; arrived in the United States before the age of 16, prior to enactment of the bill; and have lived in the country continuously for at least five years. If an applicant meets these qualifications, they may be granted "temporary residence" once they have completed two years of armed service, acquired a degree from an institution of higher learning, or completed two years and are in good standing in a program for a bachelor's degree or higher. Previous to completion of two years of any of these activities, participants in the program would only qualify for "nonimmigrant" status. The age cap previously placed at 35, was lowered to 30 in recent changes to the bill. The legislation also bars any immigrant who has committed marriage or voter fraud, committed a felony or three misdemeanors, abused student visa provisions, engaged in persecution, poses a public health risk or is likely to become a "public charge." Applicants must also agree to pay taxes, demonstrate an ability to read, write and speak English, and an understanding of the fundamentals of the history, principles, and form of government of the United States typically required for naturalization. The bill specifically states that the measure will not force states to charge in-state tuition rates to illegal immigrants, though they would be permitted to do so if they choose to.

Despite significant changes to the Act, many citizens disagree with the fundamental assumptions of the legislation, and the undesirable effects they believe it will create. Opponents also claim that the Act provides an unjustified reward for illegal

immigration, as American-born and legal immigrant parents and children do not benefit under the Act. Though the Act is still pending, several states have acted on the model provided by the federal bill, demonstrating the ability of states to test policies the nation is not yet prepared for. California recently enacted a state version of the DREAM Act, granting access to state funded financial aid for illegal immigrants who meet GPA requirements, graduate from a California high school, and enter the U.S. before age 16 (A.B. 131). In August of 2011, Illinois followed suit, also providing privately-funded scholarships for legal and illegal immigrant children (S.B. 2185).

Though little has been accomplished in terms of bringing about expansive immigration reform through the legislative process, the Obama administration has communicated a broad policy to reduce deportation of certain groups of immigrants. In June of 2011, the administration quietly announced new rules in a memo from top officials at the U.S. Immigration and Customs enforcement agency (Immigration Customs Enforcement Memo 2011). Many have labeled the memo as an attempt to pass the DREAM Act through an executive order, as the memo highlights the use of "prosecutorial discretion," encouraging officers to limit enforcement of immigration laws if illegal immigrants are enrolled in an education center or if their relatives have volunteered for the U.S. Military.

The overall Obama record on immigration enforcement is mixed. Although the Administration boasts of having had an unusually high record of deportations (close to one million to Bush's 1.57 million in two years), most of its deportations have been of criminal aliens. A much more lenient policy of catch and release for non-criminal aliens seems to have been the norm. Representative Lamar Smith (R-TX), Chairman of the

House Judiciary Committee, has questioned the administration's record of enforcement. Smith has accused the administration of inflating its numbers (Smith 2011). According to Smith, the numbers are misleading because it "includes voluntary removals in the deportation statistics." Voluntary removals are not deportations because the "illegal immigrant is not then subject to penalties for returning to the United States. . .a single illegal immigrant can show up at the border and be voluntarily returned numerous times in one year — and counted each time as a removal." (Smith 2011).

In the legislature, there are slight differences in the approaches of Democrats and Republicans. Both groups would like to gain the votes of the new immigrants, but Republicans have an additional incentive: to continue to provide cheap, docile labor for big business and for middle-class families who can now afford nannies, gardeners, and cooks. Democrats would like to see a liberal bill passed that includes a guestworker program and a path to citizenship, because they believe the immigrants will eventually support their political party.

III. The Return of Immigration Federalism

States have always been active in immigration regulation, occasionally enforcing sanctions against employers, and regulating immigrant access to public services. But the trend in state and local immigration legislation in the 21st century has been dramatic (Rodriguez 2008). The noticeable rise of state action on immigration issues can be explained by several factors. First, since 1990, the nation has been in the midst of a demographic reordering, as the majority of immigrants now come from Asia and Latin America, rather than the traditional Europe (Rodriguez 2008). By 2006, approximately 11.5 million immigrants were also unauthorized (Pew 2006). The year 2011 brought

dismally low rates of unemployment, but immigration was at the highest rate ever recorded (Record Setting Decade 2011). Due to changes in border control, immigrants have been dispersed deeply and broadly across the nation, bypassing traditional urban centers. These changing immigration patterns have brought non-citizens into new regions of the country, who feel the need to generate a policy response. Effective integration of new citizens has required states to adopt positions, often in tension with federal immigration policy. The city of Hazelton, PA developed laws stricter than federal regulation, enforcing sanctions against landlords in addition to employers; whereas cities such as New Haven, CT provided ID cards and other benefits to undocumented immigrants the federal government does not yet recognize (Rodriguez 2008, 579). State and local government responses to immigration are also motivated by a sense that the cost of unauthorized immigration falls unevenly across the levels of government, with some states going so far as to sue the federal government for reimbursement (Schunk 2007, 790). Lastly, since the terrorist attacks of September 11th, the federal government has come to rely on law enforcement assistance from the states, who have willingly accepted the authority granted by federal agencies.

State and local governments have had growing incentive to become involved in immigration policy as they respond to the necessity of local enforcement, the lack of federal enforcement, and the need to integrate new immigrants into their societies. Clare Huntington (2008) recognizes three primary areas of growing state and local involvement in immigration policy flowing from these motivations: acceptance of delegated authority from the federal government to local governments, state enforcement of existing federal law without a delegation of authority, and laws generated by the states regarding non-

citizens. The federal government began to delegate authority to state and local law enforcement beginning with the Immigration Reform and Immigrant Responsibility Act of 1996. Section 287(g) of the INA was enacted by Congress to authorize the Secretary of Homeland Security to enter into agreements with state and local governments to enforce federal immigration law. This delegated authority entailed broad responsibilities, including the power to arrest and detain non-citizens for immigration violations, investigation of immigration violations, and collection of evidence in preparation for immigration cases brought before an immigration judge. Several states and localities entered into such agreements, accepting oversight by federal immigration officials. The second clear delegation over immigration authority came from the PROWRA, which granted states the ability to determine immigrant eligibility for federal benefits programs. Though it was expected most states would use this authority to enforce stricter limits on access to benefits, states were commonly more generous than the federal government had been (Schunk 2007). Though a few states took advantage of these opportunities in the 1990s, 23 states have signed the mutual agreement provided under 287(g) in the last ten years (Immigration and Customs Enforcement Fact Sheet 2011).

The next category of growing state action is enforcement of existing federal laws that the federal government either enforces ineffectively or not at all. In a controversial opinion by the Office of Legal Counsel, the Justice Department found that states and localities possess inherent authority to enforce both the criminal and civil provisions of the INA in 2002 (Office of Legal Counsel 2002). Though this formal opinion provides more limited authority than that granted under section 287(g), there is an indication that assistance of local and state agents in arresting non-citizens and delivering them to

federal officials will be accepted in certain instances. With rising populations of undocumented immigrants, states are showing an increasing willingness to enforce existing federal law to protect the interests of their citizens.

The final category of state action is legislation that affects non-citizens either indirectly or directly. These laws range from granting in-state tuition to immigrants to forbidding businesses from employing undocumented workers. While critics of the rise of immigration federalism fear increased discrimination against immigrants, many state laws benefit non-citizens, including unauthorized migrants, through provision of health care, identification cards, access to higher public education, and limits on racial profiling of employers (Huntington 2008). Other states have acted in response to the federal government's failure to curb unauthorized migration, with Arizona enacting one of the more far reaching laws in the nation to date.

IV. Constitutional Authority Over Immigration

Proponents and opponents of immigration federalism often share one basic assumption: immigration is the exclusive responsibility of the federal government. Those who oppose recent state action reason that states are legislating on a matter forbidden to them, which must be stopped. Proponents of state action argue that states are forced to act because the federal government has failed to do so. But neither side recognizes the powerful marriage of innovation and authority the federal-state-local dynamic offers in solving the issues of immigration. In order for such an arrangement to succeed, courts must abandon the political rhetoric and legal doctrine of federal exclusivity that has blocked and limited the potential for state solutions. Though immigration has been viewed as an area of exclusive federal authority, this is only an accurate description of the

current legislative landscape. There is no constitutional mandate for federal exclusivity over immigration law, and the states' access to such authority is far more legitimate than the debate suggests.

There are three ways to perceive federal authority over immigration: structural, with no appropriate role for state or local governments; dormant, requiring the federal government to activate underlying state authority; and statutory, where state and federal governments have initial authority to regulate, but the federal government may exclude state action through preemption. Dormant preemption requires explicit delegation, which does not apply in the case of immigration. Typically structural preemption also requires a clear textual basis in the Constitution, as seen with copyright and bankruptcy law, though some scholars have argued that structural preemption is implied when dual regulation on an issue would be undesirable (Huntington 2008).

Structural preemption is one of the more common classifications of immigration authority, as many perceive a need for a uniform standard for exit and entry into the country. But the Constitution refers only to the need for a uniform rule of naturalization, not sole authority over immigration by the federal government. Rather than rely on an explicit textual mandate, proponents for the structural view of immigration insist that the issue is comparable to treatment of foreign affairs, and must be exclusively controlled by the federal government to preserve sovereignty and uniformity. But the classification of immigration as a purely national issue has grown increasingly outdated, and all that remains is a formal doctrine without strong constitutional justifications. Several countries with powerful central governments now allow sub-national regions to control

their immigration policy.[7] With the rise of non-state actors, other nations are less likely to interpret the actions of a state as indicative of broader national policy. Foreign affairs are only tangentially related to the issue of immigration, and an attempt to join the two overlooks the nuances of immigration policy. Though the federal government largely dominated immigration policy throughout the 20th century, this was a consequence of the need for a more uniform standard, not recognition of exclusive federal authority.

If authority over immigration is viewed under statutory preemption, states would share regulatory authority, but the national government would maintain the ability to preempt through federal statute according to the Supremacy Clause. This enables the federal government to maintain a consistent federal policy, while allowing for state innovation within its primary goals.[8] Broader federal protections, such as the Equal Protection Clause, the First Amendment and even landlord-tenant laws will continue to apply to state laws, ensuring that state action stays within certain bounds. Supreme Court precedent does not explicitly foreclose a statutory preemption view of federal authority; instead, it embodies the tension between an interest in a uniform rule on a national level, and states' interest in exercising police power to protect their citizens (Huntington 2008).

An understanding of the basis for federal authority will influence how courts will assess substantive laws of the states, and will open up the debate about the proper allocation of authority between the various government entities. Federal delegation of authority to states will be permissible under the statutory preemption view, though it would be expressly suspect under a structural view. Even in the absence of delegation by

[7] Germany, Australia, Canada and Switzerland allow sub-national units to determine immigration policy (Schunk 2007).

[8] Where there is a desire to maintain consistent national policy, the federal government may preempt. Huntington (2008) cites American Insurance Co. v. Garamendi as an example of effective statutory preemption of undesirable state legislation.

the federal government, state and local enforcement of federal immigration laws would be permissible unless statutorily preempted under a statutory interpretation. If the constitution provides for state authority, it would not limit states to enforcement of existing law, but would also allow them to develop their own. Statutory preemption would permit states to innovate where the federal government has not already legislated, or where the federal government does not enforce. Currently most courts begin with the assumption that state laws are constitutionally proper to the extent they accord with traditional areas of state authority, such as health, safety and other matters of local concern where Congress has not preempted through previous legislation. Structural preemption would distinguish these laws according to whether they can be labeled as alienage law, or pure immigration law. Under the statutory preemption view, most state laws would be permitted, though the federal government would be able to preempt through congressional legislation.

V. Viewpoints on Immigration Federalism

Even if state legislation is legally permissible, some scholars oppose the concept of immigration federalism and believe that individual rights will suffer under a "devolution" of immigration policy (Wishnie 2001). Other scholars are concerned that communities will see increase in crime if immigrants learn to distrust local law enforcement agents (Kittrie 2006). Opponents of the development argue that there is a need for uniformity in immigration policy, that the national government is better able to identify and correct for market imperfections and failures, better able to protect fundamental rights, and to guard against a regulatory race to the bottom.

But gradually scholars have to come to embrace the inevitable trend of immigration federalism, and are willing to see the benefits of such a development. Immigration federalism provides the opportunity for innovation, a "quintessential force multiplier" in the resources available to address the issue (Schunk 2007), and a "steam valve function" that allows states with strong anti-immigration leaning to have a voice without swaying all national policies (Spiro 1997).[9] States provide "laboratories of democracy," as they compete with each other for residents and resources, increasing political accountability and participation as they are able to address local needs and meet the demands of a smaller constituency (Spiro 1997). The full development of divergent views on the benefits and costs of immigration allow for policies to be tested before enactment on a national scale.[10] State policies often fall on either side of national policy, as states have demonstrated both hostility and openness to non-citizens. While the federal government was developing policy to build a wall along the border of the U.S., states like California were working to provide in-state tuition to undocumented immigrants (Huntington 2008). By allowing states to enact such policies, the federal government acknowledges the important economic and social stake that states and local governments have in immigration. Though many fear an increasing threat to individual rights, there is no reason to think the federal government is better at protecting such fundamental rights, and if anything, the states provide a check on such expansive power (Schunk 2007).

[9] Spiro argues that state action prevents a single state from pulling legislative reform in one direction- something he claims took place in the 1990s with California. While generally diminishing pressure on the structure as a whole, immigration fedederalism provides alternatives. Spiro explains it is "better from an alien's perspective to be driven from a hostile California into a receptive New York than to be shut out of the United States altogether." (Spiro 1997, 1635)

[10] Huntington (2008) explains that in the case of Colorado, citizens who were virulently opposed any form of immigrantion changed their opinion once their ideas were put into practice, and they were able to experience actual costs and benefits of stricter laws (832).

VI. Conclusion and Policy suggestions

Immigration is an issue that is only increasing in significance and volume. The nation's immigrant population, both legal and illegal, reached 40 million in 2010, the largest number in the nation's history (Record Setting Decade 2011). With the vast expansion of immigration throughout the country, negative externalities are no longer contained in border states, and certain communities have lost more than others.[11] Limited resources and a growing dependant population have left politicians with difficult decisions on how to allocate services to legal immigrants and residents as we enter into the 21st century.

State participation in immigration enforcement and policy has led some to question the legitimacy of such action, while others have seen the promise of a solution. Once we recognize that federal exclusivity is not constitutionally mandated, classic federalism arguments work well in determining the appropriate allocation of authority among levels of the government. The federal government may preempt states where it is necessary to have a unified policy, and broader Constitutional provisions will ensure that state legislation protects individual rights. Since 1986, Congress has only been able to achieve piecemeal immigration reform. As a consequence, it is likely we will see state legislation continue to fill voids immigration policy. As Cristina Rodriguez (2008)

[11] George Borjas (2009) estimates that the least well off of our society face lower wages or lost jobs as the result of the increasing presence of undocumented workers in their communities. Borjas explains that for African American men in particular, a 10% increase in competing laborers from illegal immigration leads to a 3% reduction in wage, and close to a 5% reduction in employment.

argues, immigration is no longer a purely national issue, it is a state issue in the same vein as education, crime control, and the regulation of health, safety, and welfare; not only because immigration influences every one of those interests, but because managing the immigration movement itself is a state interest.

In order to achieve the beneficial partnership between local and federal, courts should assess potential conflicts between federal and state laws without giving extra weight to "an overriding national interest" in immigration regulation (Rodriguez 2008). Lawmakers should be encouraged to engage in federal-state-local cooperation, and Congress should restrain from over-regulating the issue and thereby excluding state innovation. Integration and acceptance of new citizens must be taken on as a partnership. Although federal law will control who enters the country, states will play a necessary role in integrating new immigrants. Therefore, we have a national interest in seeing state laws upheld that reflect legitimate state interests, while not trampling on individual rights or the lofty goals and ambitions of federal immigration policy.

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