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Immigration and the States: Reinforcing Federalism through Limited Preemption

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IMMIGRATION AND THE STATES: REINFORCING FEDERALISM THROUGH LIMITED PREEMPTION

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INTRODUCTION

Over the past few decades, the United States' chromic troubles with illegal immigration have brought the federal government and state governments into frequent tension. The federal government claims that regulation of immigration is exclusively a federal responsibility, derived from Congress's constitutional power to "establish a uniform Rule of Naturalization.".[1] Unfortunately, the federal government ineffectively enforces the border and illegal immigrants concentrate in a small number of affected states. These states must bear the substantial costs associated with the increase in population, but they are powerless to address the source of the problem with immigration regulations of their own. When affected states bring their concerns to Washington, they face an ambivalent nation that only sees the overall economic benefit of illegal immigration. Due to the differences in costs borne by immigration-impacted states and the federal government, it is certain that given the opportunity, the two would pursue different immigration policies. This conflict highlights the tensions of the American federal system.

The controversy came to a head in two important instances. In California in 1994, voters approved Proposition 187, the "Save Our State" initiative, which excluded illegal immigrants from public programs within the state. Governor Pete Wilson said in support of the initiative: "California will not submit its destiny to faceless federal bureaucrats or even congressional barons. We declare to Washington that California is a proud and

[1] U.S. CONST. art.1, § 8, cl. 4.

sovereign state, not a colony of the federal government."[2] The law passed with 59% of the vote, but was largely overturned by a federal court on the grounds that it violated the conditions of federal law in some places and was unconstitutional in others. By this time, new Governor Gray Davis entered a negotiated settlement on the decision, yielding to the plaintiffs on all essential points and killing the issue before it reached the United States Supreme Court.

More recently, the Arizona state legislature enacted a controversial immigration law that requires state law enforcement agencies to enforce federal immigration law. Governor Jan Brewer signed SB 1070 emphatically in April 2010. Brewer argued that again, the federal government's lax enforcement of immigration laws and prohibition of concurrent state regulation threatened to trample state sovereignty: "Our federal government has reached new levels of arrogance, foolishness and disregard for the Constitution," she said in January in her 2010 State of the State Address, "The biggest external threat [to state sovereignty] comes from the federal government… failing to control our southern border and refusing to pay for its failure."[3] A federal court granted in part and denied in part an injunction on the law, preventing certain provisions of the law from taking effect until a higher court has a chance to rule on the matter.

It is without question that federal failure to enforce immigration law impedes upon the state's powers to spend state revenues as they wish. In many ways, illegal immigration's cost to the states is a classic example of an unfunded federal mandate. The federal government holds political responsibility for the problem, but voters hold state

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[2] William Claiborne, "Wilson Challenges Hill to Match His Hard Line," *Washington Post*, January 10, 1995, A7.
[3] Jan Brewer, "2010 State of the State Address," Delivered at the Arizona State Capitol, January 11, 2010.

officials accountable when state budgets are depleted. When political accountability is destroyed, the constitutional structure of federalism is at risk.

The central question of this thesis concerns the approach Supreme Court should take when determining the proper balance of immigration regulatory authority between the states and the federal government. To this end, the thesis challenges the widely-held assumption that the federal government should be exclusively responsible for all manners of immigration regulation. Neither history nor precedent supports the broadest interpretation of exclusive federal power under the Naturalization Clause, and there is evidence that voters already expect state and local officials to accommodate or deter illegal immigrants with tailored public policy.

The Supreme Court will soon have an opportunity to overturn the Arizona state law on the grounds that it is preempted structurally by the Constitution and statutorily by existing federal regulation. When interpreting the extent of federal power, the Court should respect immigration federalism and reconnect political responsibility with political accountability by reaffirming the states' initial immigration regulatory authority. States should be free to regulate except in areas where following both the state and federal law is mutually exclusive, or in areas where Congress has included language that states its intent to expressly preempt state laws. This solution will force the federal government to confront the policies it dislikes, reinvigorating national deliberation over immigration policy. If Congress fails to act, the states retain the authority to address the immediate needs of their communities. The Court's support of a cooperative federal-state regulatory relationship will best address the ends of American immigration policy.

CHAPTER 1: ILLEGAL IMMIGRATION AND THE NATIONAL ECONOMY

The effect of illegal immigration on the American economy is the subject of considerable debate. Proponents of legalizing currently illegal labor often claim that illegal immigrants take jobs Americans "don't want," maintain the average wage, and contribute positively to the economic immigration surplus. Opponents claim that illegal workers take American jobs, drive down the average wage and consumer more in public services than they pay in taxes or contribute to gross domestic product.

It is difficult to assess any of these questions objectively. Economists suffer from a lack of good data. The total population of illegal immigrants is officially unknown because the Census Bureau does not ask whether respondents are illegal immigrants. Even the most accurate estimates of the population cannot provide good data on labor force participation. Because they are subject to fines for employing illegal workers, employers do not divulge the rates they pay their under-the-table help. Researchers can collect data with surveys, but cost, time and access constraints limit the practicality of this method on a large scale. Since studies must rely on initial assumptions to answer these questions and others, they are susceptible to bias. Even the most serious studies on the economic effects of illegal labor face inherent problems with modeling an underground labor force.

The policy implications are huge. Since Americans disagree about the basic economic facts of illegal immigration, it is not clear they are talking about solutions to the same problems. A review of the extensive studies on the economic effects of illegal

immigration reveals that interest groups often hold positions which lead to conclusions that directly contradict their premises.

This chapter is only concerned with two possible outcomes: 1) illegal immigration is a net benefit to GDP, or 2) illegal immigration is a net cost to GDP.[4] The chapter reviews the models that lead to either a cost or benefit conclusion, and the premises that must be accepted if one is to advocate policy based on either conclusion. To address the definition of "benefit," the country needs to agree on what constitutes a benefit – a certain policy will benefit one constituency but not benefit another. Since this thesis contrasts the American people as a whole with the population of specific states, this chapter evaluates benefit defined in terms of the economic well-being of the national native population plus legal immigrants. When referring to the "national economy" it only takes into account GDP and excludes government transfer payments and changes in income distribution. In this case, economic well-being is measured in terms of GDP or per capita income, which does not compare changes in income distribution

Illegal Immigration and Wages

Although it is difficult to measure the number of illegal immigrant laborers and their hourly wages, several studies have attempted to do so. Researchers are interested in both relative wages and exact wages. Since employers do not divulge how much they pay to illegal employees, the only way to estimate the exact wages of illegal immigrants is through surveys of illegal workers. In a 1976 survey of 793 recently-apprehended undocumented immigrants from around the United States, David S. North and Marion F. Houstoun found that those apprehended earned significantly less than all American

[4] There are many other long run secondary economic effects, such as the effects on public welfare usage or tax revenue on both the national and state economies that will be addressed in later chapters.

production and nonsupervisory workers in the manufacturing and construction industries. They earned an average hourly wage of $2.66 compared with the industry average of $4.47 an hour. Federal minimum wage beginning January 1, 1976 was $2.30. Over one-fifth of those surveyed said they were paid less than minimum wage.[5]

Researchers accept that illegal immigrants earn less than legal workers, but they dispute the causes of this phenomenon. The distinguishing factors may include employer discrimination, the skill set and educational attainment of illegal immigrants, or a combination of the two.

A number of studies suggest that the wage difference between Hispanic and non-Hispanic workers is based on variances in education and English proficiency. In 1983, Cordelia Reimers found that differences in education and English proficiency accounted for 27 of a 34% wage difference between non-Hispanic white men and Mexican men.[6] Other studies argue that these differences evaporate when Hispanics' educational and English proficiency matches that of non-Hispanics'. In a 1983 study, Walter McManus et al. found no significant difference between white men and Hispanic men proficient in English, after controlling for other socioeconomic conditions.[7] After controlling for differences in education, geographic location, language, and time since immigration, James P. Smith's 2004 study confirmed McManus's results and found no statistically significant difference in the wages of Hispanics and non-Hispanic whites.[8]

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[5] David S. North and Marion F. Houstoun, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study.* (Washington, DC: Linton, 1976).
[6] Cordelia W. Reimers, "Labor Market Discrimination Against Hispanic and Black Men," 65 *Review of Economics and Statistics* 4, 1983: 570-579.
[7] Walter McManus, William Gould, and Finis Welch, "Earnings of Hispanic Men: The Role of English Language Proficiency," 1 *Journal of Labor Economics* 2, 1983: 101-130.
[8] James P. Smith, *Hispanics and the American Dream: An Analysis of Hispanic Male Labor Market Wages 1940-1980.*

Federal fines also cause employers to discriminate against illegal immigrants. Since the availability of low-cost labor was attractive to employers and offensive to unskilled American workers, Congress enacted the Immigration Reform and Control Act (IRCA) in 1986 to lower employers' incentives to hire illegal workers. Researchers found that employer sanctions lower the average wage of both illegal and legal workers in the manufacturing sector.[9] Employers discriminate based on certain signals – foreign appearance, lack of English proficiency, among others – forcing down the wages of those discriminated against.[10] After the threat of fines, employers were willing to pay illegal workers even less than they had been before IRCA, and the effect of this wage depression means that the wage in areas that frequently employ illegal immigrants is on average lower for both illegal and legal workers.

Although IRCA bars the employment of illegal immigrants, illegal immigrants can still find employment. However, unless they provide false documents, they cannot directly work for an employer. Subcontracting is a common alternative employment arrangement is subcontracting. A subcontractor will contract with an employer to provide a certain amount of work for a certain price, but the subcontractor can hire illegal help without detection. The subcontractor is relatively free to pay illegal immigrants wages below federal or state minimum wage, and the immigrants have no legal recourse to prevent these abuses.

When controlled for age, educational attainment, skill level, and English proficiency, legal immigrants earn significantly more than their undocumented peers,

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[9] Deborah A. Cobb-Clark, Clinton R. Shiells, and B. Lindsay Lowell, "Immigration Reform: The Effects of Employer Sanctions and Legalization," 13 *Journal of Labor Economics* 3, Jul. 1995: 472-498, 496.
[10] Cobb-Clark, et al., 474.

suggesting that being undocumented in and of itself can determine wages received for a particular job.[11] David M. Heer's finding was based on a pre-IRCA study of the undocumented immigrant labor force in Southern California, and its conclusions are limited locally. But, its conclusions show that failing to have documents can result in considerable wage losses at least in some locations within the United States. A 1993 study of IRCA amnesty applicants by George J. Borjas and Marta Tienda confirms Heer's conclusion. Borjas and Tienda conclude that "legal immigrants earn approximately 30% more than their undocumented counterparts from the same regional origins" and "national origin alone accounts for about half of the wage gap between legal and undocumented migrants."[12] According to James P. Smith and Barry Edmonston, the annual earnings gap widened at the end of the 20th century: in 1970, the gap for immigrant men and native men was 19%, and by 1990 it was 35%.[13]

Immigrants' Effects on Labor

In certain unskilled sectors legal workers and illegal immigrants are substitutes.[14] An increase in the number of immigrant laborers in a workforce slightly lowers the average wage of native workers. In a 1991 study, Joseph G. Altonji and David Card found that a 10 % increase in the number of immigrants would reduce weeks worked by less skilled natives up to 0.6%.[15] Instead, workers with more legal opportunities

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[11] David M. Heer, *Undocumented Mexicans in the United States* (New York: Cambridge University Press, 1990).
[12] George F. Borjas and Marta Tienda, "The Economic Consequences of Immigration," 235 *Science* 4789, Feb. 6, 1987: 645-651.
[13] James P. Smith and Barry Edmonston, *The New Americans: Economic, Demographic and Fiscal Effects of Immigration* (Washington, DC: National Academy Press, 1997), 176.
[14] Borjas and Tienda, "The Economic Consequences of Immigration," 647.
[15] J.G.Altonji and D. Card. "The Effects of Immigration on the Labor Market Outcomes of Less-Skilled Natives," in J. Abowd and R. Freeman, eds., *Immigration, Trade and the Labor Market* (Chicago: University of Chicago Press, 1991), 201-234.

available to them can choose to leave the market when illegal immigrants enter, opting instead to specialize in an industry with no wage competition from a new population willing to work at a lower wage. Therefore, native workers on average are not hurt by illegal immigrants. Those who are hurt significantly are those who for legal or other reasons cannot leave the labor market. For example, foreign workers already in the United States are "strongly and negatively affected by an increased supply of new immigrants…A 10% increase in the number of new immigrants reduces the average wage of resident foreign workers by 2 to 9%."[16] Many studies confirm this outcome.[17] Jean Grossman's 1982 study concludes that a 10% increase translates into a 2% wage decrease;[18] Altonji and Card argue that the same increase results in a 4% wage decrease.[19]

Although it is generally true that immigrant labor negligibly affects native worker wages, the effects can be much more dramatic in specific industries. Available studies have only aggregated data for large, diverse groups, but it might be true that the effects on wages are much more dramatic in small subgroups of the native workforce. A 10% increase will "have a significantly larger impact on native workers in the few labor markets where foreign workers are disproportionately concentrated." [20] A wage race to the bottom caused by competition from new immigrants can dramatically displace the native workers in the industry. For example, Richard Mines and Philip L. Martin studied the effects of new immigrants on Ventura County, California's citrus industry and found

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[16] Borjas and Tienda, "The Economic Consequences of Immigration," 647.
[17] James P. Smith and Barry Edmonston, *The New Americans: Economic, Demographic and Fiscal Effects of Immigration* (Washington, DC: National Academy Press, 1997), 223.
[18] J.B. Grossman, "The Substitutability of Natives and Immigrants in Production," 64 *Reviews of Economics and Statistics* 4, 1982: 596-603.
[19] Altonji and Card, "The Effects of Immigration on the Labor Market Outcomes of Less-Skilled Natives."
[20] Borjas and Tienda, "The Economic Consequences of Immigration," 647.

that the employment of unionized workers, mostly Mexican immigrants, decreased.[21] The disjunction between the effects on the national labor market versus those on state, local, or industry labor markets is important, especially as all immigration-enforcement decisions happen on the federal level.

One popular objection to the argument that illegal immigrants lower the average wage of native workers is that illegal immigrants are employed in industries that would not exist without illegal labor – i.e. that immigrants take jobs Americans simply "don't want." According to this argument, Americans have as many opportunities available to them as permitted by citizenship, and they take the "best" jobs first. Illegal immigrants are restricted to jobs in a secondary market that pays less than the primary market. Proponents of the "undesirable market" explanation argue that if illegal immigrants leave the American labor market, secondary markets will disappear and certain segments of American production that utilize illegal labor, including construction and agriculture, will cease to exist in their current form.

Yet this argument contains in it the assumption of the argument that wages are lowered by illegal immigrants, so it cannot serve as a counterargument. Labor economist George J. Borjas describes the distinction of a primary and secondary labor market as "fundamentally arbitrary" and the existence of such division "difficult to establish empirically."[22] Legal workers, with more options than undocumented workers, do not want the jobs offered in exchange for the low compensation packages offered by employers, which at least some illegal immigrants will accept. If all illegal immigrants

[21] R. Mines and P.L. Martin, "Immigrant Workers and the California Citrus Industry," 23 *Industrial Relations* 1, 1984: 139-149.
[22] Borjas and Tienda, "The Economic Effects of Immigration," 646.

instantly left the American labor market, economic competition will force employers to raise wages and benefits to hire American workers.[23] Of course, the costs of these products would go up to account for the increase in production costs.

Positive Outcome Immigration Model

Borjas's book *Heaven's Door: Immigration Policy and the American Economy* describes properties of the nature of immigration labor economics. First, the skill levels of the immigrant cohort matters. If the immigrant population contained the same mix of specific vocational skilled and unskilled laborers as the native population, then per capita GDP would not be affected – the economy would grow to accommodate the new individuals who would provide services and consume at the same rates as the native population.[24] A country only gains when immigrants bring a mix of talents, skills and resources that complement the talents, skills and resources of natives.[25] Therefore, it matters whether the immigrants vying for access are primarily skilled or unskilled, as they will compete with different segments of the population.

When immigrants move to and work in the United States, natives benefit. Immigrants need services that natives provide, bringing greater profit and more jobs for native corporations and workers. Immigrants also often do the same jobs as natives for lower pay, providing a source of cheap labor, improving the economic well-being of natives who will spend less for the same product or services. The obvious losers are those

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[23] Daniel Gross, "Dirty Work: What Are the Jobs Americans Won't Do?" *Slate*, Jan. 12, 2007.
[24] George J. Borjas, *Heaven's Door: Immigration and the American Economy* (Princeton, New Jersey: Princeton University Press, 1999), 20.
[25] Immigration surplus is the amount of growth in GDP attributed to immigration. Labor's share of the national income is the amount of product attributed to labor. The fraction of the labor force that is foreign-born is multiplied by the amount the average wage is lowered. It is important to note that the immigration surplus (in bold) can only be a positive number if there is a percent drop in the native wage, otherwise there is no immigration surplus. See Borjas, *Heaven's Door.*

who would compete for the jobs that immigrants are willing to do for a lower wage. Borjas writes an equation to calculate the immigration surplus, the "difference between what winners win and losers lose":

> ***Immigration surplus as a fraction of GDP*** *= ½ x labor's share of national income x percent drop in native wage due to immigration x fraction of labor force that is foreign-born*[26]

The addition of any unskilled workers to a particular labor market lowers the average wage for labor in that market, since more competition for jobs drives down wages. When the average wage (cost to an employer) decreases, the employers (or service consumers) benefit. There are two consequences of this model as applied to the American example. Given the large influx of unskilled laborers to the United States in the form of illegal immigrants, the nation net gains and the economic pie becomes larger. Yet those who compete for jobs with new unskilled laborers lose when their wages decrease, and employers reap the benefits of the wage reduction. "Ironically," Borjas concludes, "even though the immigration debate views the possibility that immigrants lower the wage of native workers as a very harmful consequence, the economic benefits from immigration might not exist otherwise."[27]

The net gains of unskilled immigration are so small that they probably are not significant for immigration policy debate. Immigration has much more real significance

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[26] Rachel Friedburg and Jennifer Hunt, "The Impact of Immigration on Host Country Wages, Employment, and Growth," 9 *Journal of Economic Perspectives* 2, Spring 1995: 23-44 in Borjas, *Heaven's Door.*
[27] Borjas, *Heaven's Door,* 90.

in redistributing wealth. The small margin by which the country is made better off is not enough to cause the controversial debates over policy, but the distribution in wealth is certainly contentious. The primary impact of increased immigration is not on total GDP but on how it is distributed.

American immigration policy since 1965 has favored a mix of skilled and unskilled immigrants. Yet the policies have done little in the way of stemming the flow of illegal immigrants, a topic considered in future chapters. Illegal immigrants are not permitted to work in the United States, but weak enforcement procedure allows them limited participation in the unskilled labor market.

International migration to the United States differs in nature from migrations of the past. Whereas the United States faced heavy influxes of immigrants from Ireland, Germany, Eastern Europe, and Asia in the past, today most immigrants come from Mexico. Mexican immigrants can evade U.S. immigration enforcement more easily than those who had to arrive in a boat, and thus their decisions to immigrate can be based on personal benefit, relatively unmitigated by the policies of the United States. Immigrants almost always only come when they perceive they can benefit and can leave when they no longer benefit.[28] Government analysts of immigration policy recognize the unique ability of Mexican immigrants to easily enter or exit the labor market based on personal utility. Researchers divide illegal immigrants into three groups: “settlers,” “sojourners,” and “commuters.” Settlers emigrate to the United States with no intention of returning to

[28] Smith and Edmonston, *The New Americans*, 174-181.

Mexico, sojourners come for long periods of time but intend to leave, and commuters cross the border often, as frequently as daily, to work.[29]

The rate of U.S. Border Control apprehensions mirrors the relative conditions of the Mexican and American economies, further supporting the claim that illegal immigration is economically driven. The number of apprehensions rises in the months following a devaluation of the peso or when the Mexican real wage drops. Additionally, when the American economy improves, the number of apprehensions rises.[30]

Most of the illegal immigrants that have arrived and worked in the United States since the 1980s have been unskilled workers.[31] The participation of illegal immigrants in the labor market is difficult to study. Illegal immigrant workers are not easily counted or studied, as employers try to hide this economic activity from the law. Even if the number of workers and the wages they receive are unknown, the theoretical model presented by Borjas can predict the outcome in cases where these workers are lowering the average wage or keeping the average wage constant.

No matter what assumptions are plugged into the Borjas model, the immigration surplus is between $7 and $21 billion, a small fraction of the multitrillion-dollar economy.[32] Based on Borjas' own evidence, his assumptions calculate the actual surplus at one-tenth of 1% of GDP, around $8 billion for 1998.[33] However, the small surplus conceals dramatic income redistribution. In an $8 trillion economy, native labor earnings

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[29] Frank D. Bean, Barry Edmonston, and Jeffrey S. Passel, *Undocumented Migration to the United States: IRCA and the Experience of the 1980s* (Washington, DC: The Urban Institute Press, 1990), 23.
[30] Gordon H. Hanson and Antonio Spilimbergo, "Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexico Border," 89 *American Economic Association* 5, 1999: 1337-1357.
[31] Borjas, *Heaven's Door,* 63.
[32] Borjas, *Heaven's Door,* 99.
[33] Borjas, *Heaven's Door*, 91.

would drop by $152 billion. Employers and consumers of services pocket the savings in labor costs as well as the surplus, totaling $160 billion, or 2% of GDP.

Conclusion

The workable evidence strongly supports the conclusion that undocumented workers earn less than legal immigrants and native workers, although a lack of demographic and wage data makes accurate analysis difficult. However, if we assume illegal immigrants do earn less, it is likely because employers discriminate against undocumented workers because of federal employer sanctions, or because undocumented workers have a different skill set than legal or native workers. Undocumented workers do not take jobs Americans "don't want" but simply offer a more competitive wage for unskilled labor, perhaps due to lack of options caused by discrimination or unique skill sets.

As the average wage decreases, either as a result of competition with native laborers or competition within other foreign-born legal and illegal populations, the economic surplus increases in a functional relationship to the reduction of wages. When average wages go down, GDP grows. But the economic pie is redistributed in a way that favors capital and disfavors labor. Less is spent on labor, and employers benefit.

This conclusion undermines the arguments of both those who would legalize now illegal labor and those who oppose it. If, as supporters argue, illegal immigrant labor benefits the country's economic well-being, then it certainly reduces the well-being and wages of unskilled workers, contrary to interest group claims that no legal worker is harmed. Yet as opponents argue, when legal workers lose jobs to illegal labor, the economic pie grows larger, contrary to claims that there are no benefits to illegal labor.

Considering the widely accepted conclusion that illegal immigrants earn less than native and legal workers, and considering there is no "secondary" labor market of jobs Americans "don't want" it is reasonable to conclude based on Borjas's model that some wages are lowered on average and GDP benefits as a result, although only to a small degree. Although the pie grows larger, the pieces change size, with more income going to employers and capital, and less going to laborers. The question that remains for policymakers is whether the small benefit to GDP is worth the larger income redistribution.

Of course, when opponents throw in arguments about the effects of immigrant usage of public welfare services, the net economic benefit argument is undermined, as public spending increases to serve the needs of a growing population of low-income illegal immigrants. The effect of illegal immigrants on public services will be the subject of the next chapter.

CHAPTER 2: FISCAL EFFECTS OF ILLEGAL IMMIGRATION ON THE STATES

Discussions of the fiscal effects of illegal immigrants on the states are often clouded by claims that the inquiries themselves have an anti-immigrant motive. Rationally, however, one must consider that with an increase in population, the state is on the hook for increases in social service usage, law enforcement, education and other general costs that grow proportionally with population. Assumptions made about the actual resource use of the incoming population further complicate analysis. Do illegal immigrants use more public resources than the current population, and do they contribute revenue through taxes? In California and other immigrant-impacted states, the increase in public welfare usage is substantial. This chapter will show that state and local lawmakers must choose how to spend dwindling resources on a population that they can neither legalize nor exclude.

Most studies conclude that illegal immigrants pay less in state and local taxes than they receive in state and local government services.[34] These studies are controversial, however, because they have methodological problems. It is difficult for researchers to gather data on employment, tax, and service usage for an illegal immigrant population. Some researchers have noted critically that the outcomes of such research depend entirely on initial assumptions, which can reasonably differ. In a summary of existing research, George Vernez and Kevin McCarthy note that "all studies are forced to rely on estimates, and those estimates vary significantly in the services and revenues they include, and in the variables, behavioral assumptions, and methodologies they use… The way these

[34] Peter Orszag, "The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments," *Congressional Budget Office*, December 2007.

issues are addressed can predetermine a study's outcome."[35] Yet in spite of these differences, the vast majority of academic work shows that "the cost of providing public services to unauthorized immigrants at the state and local levels exceeds what that population pays in state and local taxes."[36] Voters certainly take the statistics seriously and the problem is worth investigating when state budgets in immigration-impacted states are struggling.

Size of Illegal Immigrant Population

It is difficult to study the effects of illegal immigration when it is almost impossible to make a definitive count of the illegal population in the United States or in any of the various states. The Pew Hispanic Center annually provides one widely-cited estimate. The Center uses data provided by the U.S. Census Bureau's Current Population Surveys, subtracting the legal foreign-born population from the total adjusted foreign-born population. Because it is unlikely the survey method captures a representative portion of illegal immigrants, the statistics are subject to a wide margin of error. The Pew Hispanic Center estimated that the illegal immigrant population in the United States in 2010 was 11.2 million.[37] By its estimates, an additional 350,000 children were born to illegal immigrants parents in 2010.

Although most people believe that illegal immigrants are largely of Mexican origin, Mexicans made up only 58% of the illegal alien population in the United States in

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[35] George Vernez and Kevin F. McCarthy, *The Costs of Immigration to Taxpayers: Analytical and Policy Issues* (Santa Monica, Calif.: RAND, 1996).
[36] Orszag, "The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments."
[37] Jeffrey S. Passel and D'Vera Cohn, "Unauthorized Immigrant Population: National and State Trends, 2010," *The Pew Hispanic Center,* February 1, 2011, 1.

2010, while 23% came from other Latin American countries.[38] Interestingly, more than 70% of deportees in 2009 were Mexican.[39] As of 2010, there were an estimated 8 million illegal immigrants in the United States workforce representing 5.2% of the total workforce.

Impact on States and Local Governments

Chapter 1 argues that illegal labor benefits the country's gross domestic product overall. But the most objective studies on the matter conclude that although immigrants are a fiscal net benefit to the federal government, they net cost impacted states and local governments.[40] Studies over the last two decades show that the economic benefit makes up for any public funds spent on immigrants—legal and illegal. Academic consensus is that over the long term, tax revenues generated by immigrants generate enough taxable economic activity to exceed the costs of their services on the sum of the federal, state and local level.[41] But when one analyzes the separate spheres of revenue and expenditure, the benefit does not generalize at every level. Federal, state and local governments provide different services and have different revenue sources. For example, the federal government is the only administrator of Social Security, whereas state and local governments are largely responsible for funding public education. The federal government and state government do not tax the exact same sources. These differences are the sources of the differences in the effects of illegal immigration on federal versus state and local programs.

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[38] Passel and Cohn, "Unauthorized Immigrant Population," 12.
[39] Ibid., 10.
[40] Fix and Passel, "Immigration and Immigrants," 6 cited by Peter Skerry, "Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?" 25 *Publius* 3: The State of American Federalism, 1994-1995, (Summer 1995), 71-85, 77.
[41] Orszag, "The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments."

In some cases, the work of the federal and state or local governments overlaps. In the past, when Congress created a new program it explicitly excluded illegal immigrants from participating, but laws restrict state government from doing the same with their parallel coverage. For example, illegal immigrants are mostly restricted from collecting Social Security, Food Stamps, Medicaid and Temporary Assistance for Needy Families, all federal programs.[42] A series of court decisions restricts the states from denying illegal immigrants access to very similar programs on the state level.

California's Experience

In California, illegal immigration is a contentious political topic. Since the state is facing a budget deficit of over $25 billion, voters often call for a third way to close the gap. Instead of raising taxes or cutting services, some claim that eliminating illegal immigrants will alleviate the burden. But removing illegal immigrants from state programs is impossible under current law and it also would not solve the state's budget woes. Most estimate that illegal immigrants cost the state between $5 and $10 billion, a sizeable amount but not nearly enough to close the gap.[43]

California has the largest total population of any state and also the largest number of illegal immigrants. An estimated 2,550,000 illegal immigrants live in California, a number that has not significantly changed since 2007.[44] Illegal immigrants make up 6.8% of California's total population, a share surpassed only by Nevada where 7.2% of the state's population is illegal. California's population represents nearly a quarter of the

[42] Ibid.
[43] George Skelton, "Illegal immigrants are a Factor in Budget Gap Math," *Los Angeles Times,* February 2, 2009.
[44] Passel and Cohn, "Unauthorized Immigrant Population," 15.

national population of illegal immigrants. Illegal immigrants comprise 9.7% of California's workforce, with 1.85 million working illegal immigrants.[45]

Illegal immigration was a high-profile political topic in the early 1990s, when the state was facing tough economic times and Governor Pete Wilson demonstrated a strong desire to take matters into the state's hands. The prevailing attitude inspired several isolated studies on the effect of illegal immigrants on state and local revenues. Los Angeles County reportedly spent 11.5 times the amount of revenue they received from illegal immigrants on services for illegal immigrants.[46] San Diego County reportedly spent 4.6 times the amount of revenue received from illegal immigrants on illegal immigrants.[47] The same trends were visible on the state level. The Urban Institute estimated that the state was obligated to 2.5 times more than they received from illegal immigrants.[48] Philip J. Romero, Andrew J. Chang and Theresa Parker estimated the ratio on the state level was 4.6 times.[49]

The numbers are difficult to compare, because the studies do not agree on fundamental assumptions. They assume different sizes of the illegal immigrant population, and they also selectively include different programs and revenue sources. But importantly, they all demonstrate the fiscal burden illegal immigrants impose on the state and local level in California.

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[45] Ibid.
[46] Los Angeles County Internal Services Department, *Impact of Undocumented Persons and Other Immigrants on Costs, Revenues and Services in Los Angeles County: A Report* (Los Angeles County Board of Supervisors, Nov. 6 1992).
[47] Richard A. Parker and Louis M. Rea, *Illegal Immigration in San Diego Country: An Analysis of Costs and Revenues,* (State of California, State Senate Office of Publications, 1993).
[48] Rebecca L. Clark, *Costs of Providing Public Assistance to Immigrants* (Washington D.C.: Urban Institute, August 1994).
[49] Philip J. Romero Andrew J. Chang, and Theresa Parker. *Shifting the Costs of A Failed Federal Policy: The Net Fiscal Impact of Illegal Immigrants in California* (Sacramento, CA: Governor's Office of Planning and Research, 1994).

Allegedly, illegal immigrants cost the state in three main areas: law enforcement, education, and health/welfare services. The Urban Institute led debates in the early 1990s with extensive research on the costs of illegal immigration in seven impacted states. More recently, conservative think-tank Federation for American Immigration Reform (FAIR) released a study claiming that illegal immigrants cost California's state and local governments $10 billion annually.[50] FAIR billed the 2004 study as an update to an influential Urban Institute study conducted in 1994 on the costs of illegal immigrants to seven states. FAIR estimated that California had between 2.8 and 3 million illegal immigrants within its borders, about 23-30 percent of the national total, while in 2005 the Pew Hispanic Institute estimated that in 2004 California hosted 2.4 million illegal residents, or about 24% of the national population.[51]

To calculate the number of illegal immigrant schoolchildren in California K-12 public schools, FAIR assumed that one of every seven illegal aliens is school-aged and in school, totaling 425,000 students.[52] For the cost estimate, the study also includes 597,000 children born in the United States to illegal immigrant parents, bringing the number of associated children to 1,022,000 – bringing the state's burden up to 15.5% of the state's K-12 public school enrollment.[53] Considering California spent an average of $7,577 per pupil in the 2003-2004 school year, FAIR estimates that the education for illegal

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[50] Federation for American Immigration Reform, "The Costs of Illegal Immigrants to Californians," November 2004 at http://www.fairus.org/site/DocServer/ca_costs.pdf?docID=141.
[51] Jeffrey S. Passel, "Estimates of the Size and Characteristics of the Undocumented Population," Pew Hispanic Center, March 21, 2005, 6.
[52] This number does not include children born in the United States of illegal immigrant parents, which is sometimes factored into studies of the subject. FAIR, "The Costs of Illegal Immigrants to Californians," 7.
[53] FAIR, "The Costs of Illegal Immigrants to Californians," 7.

immigrant children cost $3.22 billion per year and the cost of education for the children of illegal immigrants cost $4.52 billion per year for a total of $7.7 billion in burden.[54]

Based on the Urban Institute's 1994 estimate of illegal immigrants' unfunded healthcare costs, FAIR estimates that emergency healthcare costs have increased proportionally with the growth in population and also inflated over time, therefore illegal immigrants cost the state between $260 and $400 million annually.[55] Other studies indicate that the costs to the state could be as much as $1.5 billion.[56] Estimates of uncompensated medical care should be viewed with reasonable doubt, however, because hospitals do not record the immigration status of patients nor is easy to average out medical costs for a specific population. The Government Accountability Office issued a report claiming that the costs of medical services to undocumented people might be estimable by considering costs of patients who did not report a Social Security Number.[57]

In terms of law enforcement, FAIR claims that California has an estimated illegal immigrant inmate population of 48,000, a contentious increase from the Urban Institute's 1994 count considering the drop in crime rates from the mid-1990s. In the state's budget, the estimated cost per year of incarceration was $30,929.[58] Multiplying the two numbers leaves the state with a $1.5 billion bill. Congress does make direct reimbursements for some of these costs through the State Criminal Alien Assistance Program, but not nearly enough to offset the claimed costs.

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[54] Ibid., 8.
[55] Ibid., 9.
[56] Ibid., 9.
[57] "Undocumented Aliens: Questions Persist about Their Impact on Hospitals Uncompensated Care Costs," *Government Accountability Office,* May 21, 2004.
[58] Ibid., 11-12.

Federal Reimbursements to States and Local Governments

Congress has tried to alleviate the cost burdens on states and local governments, but the reimbursement programs have not met states' full cost claims. In part, this is due to a lack of willingness on the federal level to spend money on a localized problem, and in part it is due to inherent flaws in the programs' disbursement methods and formulas.

Over the past two decades, Congress has directly and indirectly supplemented the education, health care, and law enforcement costs of illegal immigration to states and local governments.

Education

In *Plyler v. Doe* (1982), the Supreme Court struck down a Texas statute that excluded illegal immigrant children from primary and secondary public schools. The Court found that such exclusion violated the children's rights as protected by their status as "persons" under the Equal Protection Clause of the Fourteenth Amendment."If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by showing that it furthers some substantial state interest," wrote Justice William J. Brennan writing for the 5-4 majority.[59] Whether this case properly weighed the interests of the state in regulating public education is debatable, but beyond the scope of this paper.

According to the Congressional Budget Office, there were 53.3 million school-aged children in the United States in July 2006, and illegal immigrant children make up about 4 % of that population.[60] The Department of Education does not address the problem of illegal immigrant school costs directly with a reimbursement program, but

[59] Opinion by Brennan, J., *Plyler v. Doe,* 457 U.S. 202, 230 (1982).
[60] Orszag, "The Impact of Unauthorized Immigrants," 8.

does offer federal grants to supplement primary and secondary education on the state level. Of the estimated $1 trillion spent nationwide on all levels of primary and secondary education in 2007-2008, the Department of Education estimates that 90% will come from state, local and private funding, while the federal government will supplement these costs with grants and supplementary funding measuring to 10% of the total education budget.[61]

States receive most of this funding through goal-directed federal grant programs, including the No Child Left Behind Act of 2001, the Individuals with Disabilities Education Act of 2004, the Head Start Program as administered by the Department of Health and Human Services, and the School Lunch Program administered by the Department of Agriculture. These programs generally address student need but do not address the additional costs incurred by states for educating illegal immigrants. After the state has met the qualifications of each program, the grants are disbursed at a per-student rate regardless of the student's immigration status. The federal government cannot claim that federal supplements under these programs are adequate reimbursement for the costs of illegal immigrant schoolchildren, because in doing so they would be claiming that legal schoolchildren in immigrant-impacted states are entitled to less federal school funding than similarly situated legal students in other states.

Congress reimburses some of the education costs of illegal immigrants indirectly though the English Language Acquisition Program, a subprogram created under No Child Left Behind in 2001 to address the costs incurred by states in teaching English to students with limited proficiency, who are mostly either immigrants themselves (legal or illegal) or the children of some. Federal funds appropriated to this program are divided using a

[61] Ibid., 10.

formula that divides 80% of the funds between students participating in English-proficiency programs including English as a Second Language, bilingual education and immersion education. The formula then divides the remaining 20% of funds proportionally between students who are immigrants, legal or illegal.

The states received $621 million through this program in fiscal year 2006.[62] California public schools received slightly over $50 million for state fiscal year 2009-2010, at a rate of $104.62 per English learner.[63] But although these grant programs help offset the costs incurred from the education of illegal immigrants, they are not directed at full reimbursement. "Although those grant programs offset some of the costs that unauthorized immigrants impose on state and local governments," notes the Congressional Budget Office, "The available funding is targeted only to language education and does not cover costs for general education."[64] Also, the federal programs authorize spending based on the formula, but the actual amount of money that is appropriated each year to the program varies and thus is not a constant ensured by the program. This is a problem states face in securing funding under the State Criminal Alien Assistance Program (SCAAP), as well.

Health Care

Congress has recognized the burden on state healthcare systems and on occasion has sought to reimburse the states for these costs. In 1997, Congress passed the Balanced Budget Act which provided $25 million annually to impacted states through 2001.[65] In

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[62] Ibid., 10-11.
[63] California Department of Education, "English Language Acquisition Program: Funding Profile State Budget Year 2009-2010," at http://www.cde.ca.gov/fg/fo/profile.asp?id=1565.
[64] Ibid.
[65] FAIR, "The Cost of Illegal Immigration to Californians," 9.

2003, Congress appropriated $1 billion for payment to impacted hospitals and emergency health service providers for fiscal years 2005 through 2008.[66] The Medicare Prescription Drug, Improvement and Modernization Act of 2003 included Section 1011 which authorized $250 million in reimbursement per year to be divided proportionally between the states and District of Columbia based on the estimated size of their illegal population. California receives the largest share of the allocation, which in 2007 was $68.5 million.[67] Similar to SCAAP and education grant programs, the reimbursement program under Section 1011 is disbursed through claims. Hospitals and healthcare providers file claims after providing covered medical services to an illegal immigrant and may claim as much as allotted to them by Congress, an amount inadequate to cover all costs. It is often difficult for hospitals and healthcare providers to ascertain a patient's immigration status, because they are prohibited from asking directly. Furthermore, the types of treatments covered by Section 1011 do not include all of the treatments hospitals are obliged to provide. For example, reimbursement covers patients from when they arrive at the emergency room until they are stabilized, but according to the Texas Hospital Association, hospitals "often keep the patient for longer than the stabilization period, and the rest of the inpatient stay is usually uncompensated."[68] Furthermore, the $65 million allotment for California does not come close to fully reimbursing the estimated costs.

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[66] "Undocumented Aliens: Questions Persist about Their Impact on Hospitals' Uncompensated Care Costs," *Government Accountability Office*, May 2004.
[67] Anna C. Spencer, "Federal Law Reimburses Hospitals for Treating Undocumented Immigrants: A Primer on Section 1011," *National Conference of State Legislatures,* Volume 28, Issue 489, April 16, 2007 at http://www.ncsl.org/default.aspx?tabid=14201.
[68] Spencer, "Federal Law Reimburses Hospitals for Treating Undocumented Immigrants."

The program was not reauthorized after FY 2008[69] but in February 2011 Congressman Bob Filner of California's 51st Congressional District introduced H.R. 541 to make the Section 1011 reimbursement program permanent.[70] The bill, titled "Pay for all your Undocumented Procedures [*sic*] (PAY UP!) Act of 2011," would indefinitely authorize "such sums as may be necessary for such purpose."[71] If the bill is successful, it does not guarantee funding will be appropriated to the authorized program. Any funding will be determined by appropriators and divided proportionally based on the terms of the 2003 Medicare Law.

Law Enforcement

Without making assumptions as to the criminality of the illegal immigrant population, one can examine the costs incurred by states for law enforcement associated with criminal illegal immigrants. Some illegal immigrants commit crimes against state law, and punishing offenders of state law is a cost borne by state and local authorities.

In response to complaints by states that they are forced to bear the costs of illegal immigrants' arrest, charge, and punishment, Congress created the State Criminal Alien Assistance Program (SCAAP) in 1994 to cover the costs associated with criminal aliens, which states argue is properly understood as a federal problem. To receive reimbursement from SCAAP, state and local agencies must determine the immigration status of offenders and apply for funding based on the formula. Unfortunately, the identification system used is limited practically from determining the immigration of all

[69] Heidi Rowley, "Feds to End Funding of ER Care for Migrants," The Tucson Citizen, August 28, 2008.
[70] H.R. 541, 112th Congress, 1st Session, 2011.
[71] Ibid., 2.

offenders in a timely manner, and the funding does not make up all of the associated costs.

Current law prohibits state and local police officers from determining a person's legal status for the purposes of detention, although they may do so in the course of their duties enforcing state or local law.[72] Since illegal immigrants are illegal per the terms of federal law, only a federal officer can arrest or detain one suspected of violating immigration law. However, after police make an arrest for a state or local infraction they are then permitted to ask for the suspect's place of birth. If the suspect indicates a birthplace other than the United States, the suspect is recorded in the Automated Justice Information System as "foreign-born."[73] The system automatically files a query with Immigration and Customs Enforcement (ICE) which searches for any of the suspect's available immigration information.

If the system identifies the suspect as a deportable alien, immigration agents may lodge an immigration detainer, which requires the state or local law enforcement to release the immigrant to federal authorities when he or she is no longer in custody.

This system faces many practical constraints. In California, the Los Angeles County Jail may have thousands of foreign-born bookings at any given time. The identification system can take between hours and days to determine immigration status, if it can determine it at all. State and local officials are prohibited from holding a suspect any longer than their scheduled release without a warrant, and they cannot obtain a

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[72] Blas Nunez-Neto, Michael John Garcia and Karma Ester, "Enforcing Immigration Law: The Role of State and Local Law Enforcement," Congressional Research Service, August 30, 2007, 3.
[73] Barbara Raymond, Laura J. Hickman, Elizabeth Williams and K. Jack Riley, "Identifying Deportable Aliens in the Los Angeles County Jail: Implementing the HI-CAAP Federal-Local Partnership," (Santa Monica, Calif.: RAND Corporation, 2004.

warrant to wait simply for the suspect's immigration status. Jails are understaffed with federal agents, further exacerbating the inefficiency of this system. Federal agents are not present 24 hours a day or on weekends, but suspects can be released at any time from jail.[74] Los Angeles County and other counties are actively trying to streamline this process and solve some of its associated problems.

ICE has difficulty determining immigration status conclusively, further compounding the problem. The most reliable method ICE has for identifying illegal immigrants is through matching the immigrant's self-reported name with its database of previously deported aliens. This is problematic for several reasons. With no papers, the immigrant could provide a false name or birth date. If the immigrant's name is known, it could falsely match a duplicate record in the system. The absence of a suspect's name in the system is not proof that the suspect is legal, it only proves that the suspect has never been deported in the past. Policymakers acknowledge these problems and try in many cases to get a fingerprint match, but resources for fingerprint matching are limited. For example, in 2001 Los Angeles's INS office discontinued the practice of submitting fingerprints to the Department of Justice, citing a lack of resources for the change.[75] Los Angeles County has since received federal funding to use electronic identification, but not every county enjoys this luxury. As computer technology gets less expensive, identification success rates will likely improve.

Without effective identification, the state cannot make all of the claims it is entitled to based on the terms of SCAAP. One study found that the INS was unable to

[74] Los Angeles County has implemented a federal-local partnership with federal funding in order to address this problem.
[75] Raymond, et al., "Identifying Deportable Aliens," 14.

determine the legal status of 48% of those flagged as potential illegal immigrants when booked.[76] To account for the likelihood that at least some of those with missing or unknown statuses are illegal immigrants, SCAAP allows state and local law enforcement agencies to submit these numbers for partial reimbursement.

SCAAP only reimburses incarceration terms that both last longer than four days and are for felony offenses. SCAAP counts 100% of per diem costs for those identified as illegal, and a portion of costs for those with unknown immigration status, based on a sliding scale: 60% of costs on the city level, 65% of costs on the state level, and 80% of costs on the county level. The amount of funds authorized for this purpose is as much as lower governments claim, but Congress has yet to appropriate matching funds. Whatever Congress appropriates is divided equally between claimants. For example, if Congress appropriates half the amount that cities, counties and states claim, each jurisdiction receives half of its claim. On average, Congress has funded the program between 30% and 40%. In FY 2009, the factor was 35.15% of claims.[77] The program cannot address the full cost of illegal immigrants to criminal justice systems until federal agencies devise a more effective identification method and Congress fully funds claims.

Revenue Sources

Although a sizeable amount of illegal immigrant labor occurs under the table, some illegal immigrants do pay income taxes by virtue of securing work eligibility by using a fraudulent Social Security Number. Studies estimate that more than half of illegal

[76] Rebecca Clark and Scott A. Anderson, "Illegal Aliens in Federal, State and Local Criminal Justice Systems," (Washington, D.C.: The Urban Institute, June 30, 1999).
[77] "SCAAP Guidelines, 2010," *Bureau of Justice Assistance, State Criminal Alien Assistance Program*, at http://www.ojp.usdoj.gov/BJA/grant/2010_SCAAP_Guidelines.pdf.

immigrants file income tax returns or have income withheld.[78] If one uses a Social Security Number to secure work eligibility, the Social Security Administration withholds taxes for that number when the person is paid. The Social Security Administration reports that about half of the illegal immigrant workforce contributes to the Social Security account, although it is unlikely that they can collect benefits.[79] Additionally, illegal immigrants make purchases just like everyone else, and thus cannot avoid excise taxes, sales taxes or motor vehicle fees.

It is interesting to note the positive effect legal and illegal immigrants have on the Social Security Account. A report by the Social Security Advisory Board noted that "The Social Security Administration's (SSA) Office of the Chief Actuary estimates that an increase in legal immigration of about a quarter of a million would reduce the 75-year actuarial deficit of the Social Security Program by about 5 percent under the current set of assumptions."[80]

Conclusion

The studies examined thus far have reached a consensus that on the state level, illegal immigrants receive more from government than they pay in. This frustrates voters who see illegal immigrants as a unique drain on the state's economy. But what would change if illegal immigrants suddenly were legalized? Based on their low-income status, illegal immigrants take advantage of programs that they would still take advantage of if they were legal, assuming their income level did not increase with legalization. Researchers refer to the difference between benefits one receives minus revenue one

[78] Orszag, "The Impact of Unauthorized Immigrants."
[79] Joel Feinleib and David Warner, "Social Security Advisory Board, Issue Brief No. 1, *The Impact of Immigrant on Social Security and the National Economy,"* 3.
[80] Feinleib and Warner, "Issue Brief No. 1," 2.

contributes as the "deficit." Many studies support the claim illegal immigrants' "deficit" is larger than that of native-born citizens, but this finding "merely reflects the higher average income…estimated for native-borns."[81] In other words, public services exist to supplement the economically disadvantaged, and that would not change if everything remained constant when an entire population of illegal immigrants was legalized. In that case, the federal, state, and local governments would have to make serious decisions whether or not to offer the same benefits at the same funding levels.

The takeaway point from this chapter and the previous chapter is not that the state should devise a way to cut illegal immigrants out of funding altogether. Whether the government should continue to subsidize services for the economically disadvantaged and in what level is the subject of another debate and outside the scope of this paper. Rather, this chapter objects that it is inequitable for the federal government to exclude illegal immigrants from federal level benefits while simultaneously prohibiting states and local governments from doing the same, then insufficiently reimbursing states for the costs of a problem which the federal government claims it is its exclusive responsibility to control. The inequitable distribution of costs and benefits gives states good arguments that they are unfairly held accountable for the costs associated with a problem the federal government is exclusively responsible for causing. Under current conditions, illegal immigration arguably poses a threat to the state sovereignty protected by the Constitution.

[81] Vernez and McCarthy, "The Costs of Immigration to Taxpayers: Analytical and Policy Issues."

CHAPTER 3: THE BIRTH AND EVOLUTION OF AMERICAN IMMIGRATION LAW

The states currently face a problem with illegal immigration that is unlike any other immigration problem in American history. The concept of large-scale "illegal immigration" did not exist for most of American history. "Illegal immigration" -- crossing United States borders without detection or apprehension -- was impractical throughout most of American history, because most immigrants came from overseas through easily controlled ports of entry. If there was illegal immigration, it was on a small and insignificant scale.

When the nature of immigration changed following World War II, policymakers found that traditional legal controls on immigration were insufficient to address the new form of labor-driven immigration. Congress needed to establish many laws above and beyond the "Rule of Naturalization" and existing federal regulations to effectively address the problems posed by labor demands and an unsecured border.

Over the years, some things have remained constant. One of the chief goals of immigration policy has always been to restrict entry of public charges while permitting entry of productive immigrants. But with an increase in public welfare spending on an increasing number of possible domains, the definition of a "public charge" has widened and now costs more than it ever did in the past. Americans' debates over growth in public welfare are specially related to debates regarding immigration policy. With every decision to allocate increasingly scarce federal resources to a new federal program to assist the needy, lawmakers often include a ban on spending the fund on illegal (and sometimes even legal) immigrants. To exclude immigrants from federal public services,

the federal government uses the justification that it is in their interest to reduce incentives for immigration. But this justification does not extend to states that may want to do the same thing.

As will be discussed in a later chapter, the federal government has an undisputed exclusive power to determine the "Rule of Naturalization" – the terms under which people may receive citizenship. Over the years, the Supreme Court has interpreted this clause to include an implied exclusive power over some areas of immigration regulation. This chapter will show how the nature of immigration and immigration law has changed, and why the assumptions as to the scope of exclusive federal immigration authority might be overblown considering history and the changing nature of immigration.

Objectives of Immigration Law

Legal limits on immigration derive from two general concerns. Americans are concerned that immigrants will affect their material well-being. To prevent such burdens, they support immigration laws to prevent the entry of those with criminal records, those who pose health risks and those who might rely excessively on public resources, among other considerations. Policy tends to restrict entry of immigrants with similar skills and prioritize entry for those with special or complementary skills. Second, American citizens are concerned with making sure immigrants will be good future citizens: committed to similar "American" values. To this end, Americans support cultural safeguards in immigration law and citizenship qualifications, which have varied based on the reigning values of the times. Cultural safeguards have manifested in citizenship tests, English-proficiency exams, and racial or national quotas aimed at stemming flows of immigrants from groups deemed less assimilative than other more cohesive cultures.

The history of American immigration policy can be divided into three broad eras. Beginning in the colonial period, extending through the Founding and ending in the late 19th century, the first era was characterized by a cooperative federal-state relationship in developing a very open immigration policy. Throughout this era, immigration laws did not change substantially from a residency requirement for citizenship and prohibitions on immigration for those likely to become public charges. Congress established a baseline standard for naturalization, but states were free to pursue their own regulations in terms of admitting them to residence in the states.[82] The Fourteenth Amendment altered the relationship between states and the federal government on issues of citizenship and immigration, such that the states could not deny state citizenship to any United States citizen residing within its borders.

The second era mirrors the great waves of immigration beginning in the late 19th century and leveling off in the mid 20th century. Concerns with immigrants' assimilation and preservation of cultural values defined this era. The second era also saw an increased nationalization of immigration regulations. Federal regulations began to include national origin quotas, reflecting added concern with the values and traditions new immigrants brought to the country. States lashed back against perceived incursions from foreign groups with un-American values by enacting racial or national origin exclusion laws. In defense of the rights of newly admitted immigrants, the Court needed to step in to make sure that individual states did not implicitly prohibit the free movement of new immigrants between states or abridge the rights afforded to new immigrants. To remedy the emerging patchwork of regulations and incentives, Congress began to assert itself

[82] Michael C. LeMay, *Anatomy of a Public Policy*: *The Reform of Contemporary Immigration Law* (Westport, Conn.: Praeger, 1994), 20-21.

over these laws and through preemption attempted to streamline state regulations into a more uniform, national policy, eventually cumulating in the end of national quotas in the Immigration and Nationality Act of 1965.

The end of national origin quotas coupled with the end of the temporary guest worker "Bracero" program in 1964 ushered in an entirely new type of immigration wave, beginning the third era of immigration policy. The third era is characterized by increasing concern with immigrants' effect on wages, unemployment, the economy, and public service usage, and concerns about the proper roles of the state and federal government in addressing immigration issues. All levels of government offer much more public assistance than they did in the first two eras, so every immigration debate is colored heavily by concerns with how much each additional immigrant will cost taxpayers. The states dispute the depth of federal control asserted in the second stage, and with increasing frequency the immigration debate devolves into a finger-pointing game between levels of government rather than a deliberative discussion between different interest groups. For the first time in history, the country faced a reality of illegal immigration on the large scale and failed to adequately address it.

American Immigration, Part I

In the first part of American immigration history, Congress determined a rule of naturalization but spoke minimally on issues of immigration regulation. Congress left wide latitude to the states to regulate the flow of immigration.

The history of American immigration law starts before the formal foundation of the country. The very first settlers in the 17th century established policies for incorporating or excluding potential newcomers to the settlements. For the large part of

American history, policymakers regulated immigration easily by regulating ship transportation. Local and provincial laws required ships' captains to provide a list of passengers landed in the country. On March 12, 1700 Massachusetts' early settlers established that "Every master of ship or other vessel arriving in any port within this province, from any other country…at the time of entering his ship or vessel with the receiver of impost for the time being, shall deliver to such receiver a perfect list or certificate in his hand of the Christian sir [*sic*] names of all passengers…and their circumstances so far as he knows, on pain of forfeiting the sum of five pounds."[83] Failure to do so was punished by a fine or mandatory return passage at the shipper's cost. "When it shall happen any passenger so brought to be…likely to be a charge to the place, in such case the master of the ship or vessel in which such person shall be and here by is obliged and required to carry or send him or her out of this province again."[84]

The laws restricted the passage of people who might become public charges. The Province of Massachusetts enacted the "Act to Prevent Charges Arising by Sick, Lame or Otherwise Infirm Persons Not Belonging To This Province, Being Landed and Left Within the Same" on June 8, 1756. "No master or commander of any ship or vessel whatsoever, coming into, abiding in or going forth of any port, harbor or place within this province, shall cause or suffer to be landed or put on shoar [*sic*] within the same, any sick or otherwise impotent and infirm person, not being an inhabitant of this province, either belong to or brought in such a ship or vessel, unless the consent of the selectmen of the town where such sick or infirm person shall be landing be first had and obtained

[83] *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Wright and Potter, 1869) Vol. 1, 244-53.
[84] *Acts and Resolves,* 1869.

thereof."[85] To keep the province free from financial burden arising in case of such a charge, the law fined violators one hundred pounds. By charging shipping companies for violations of the laws, the provinces ensured that companies would take a careful look at prospective immigrants before selling them a ticket to the New World.

Federal Regulation under the "Rule of Naturalization"

The framers of the Constitution included the power "to establish a uniform Rule of Naturalization" among Congress's enumerated powers listed in Article 1, Section 8. There was little debate over the inclusion of this power at the Constitutional Convention.[86] Since it was not a controversial addition, quotes on its intent are sparse. Connecticut's Roger Sherman described the framers' intentions to "prevent particular States receiving citizens, and forcing them upon others who would not have received them in any other manner. It was therefore meant to guard against an improper mode of naturalization, rather than foreigners should be received upon easier terms than those adopted by the several States."[87] Clearly at least some framers feared that if states had their own naturalization schemes, a state could be forced to admit a new citizen that wouldn't have met its higher standards to begin with.

The Constitution contains no guidelines for establishing the "Rule of Naturalization." Congress established its first naturalization law on March 26, 1790 in "An Act to Establish a Uniform Rule of Naturalization." The act provided that "any alien, being a free white person, who shall have resided within the limits and under the

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[85] *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay, 1692-1786* (Boston: Albert Wright, 1879) Vol. 3, 982.
[86] John R. Vile, *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding* (Santa Barbara, Calif.: ABC-CLIO, 2005), 520.
[87] Vile, *The Constitutional Convention of 1787,* 520.

jurisdiction of the United States for the term of two years, may be admitted to become a citizen."[88] It also included a form of hereditary citizenship: "The children of such persons so naturalized…shall also be considered as citizens…and the children of citizens of the United States, that may be born …out of the limits of the United States, shall be considered natural born citizens."[89] America's form of *jus sanguini* citizenship, or citizenship by blood, has remained largely unmodified since the founding.

The framers did not mean to preclude any supplementary state immigration regulation by vesting the exclusive power to establish a "Rule of Naturalization" in the national sphere. They wanted to ensure that the country agreed on a minimum standard of citizenship so that one state could not lower the bar to standards others would find objectionable. Congress passed its first regulation of immigration in 1819, establishing procedures for the collection of immigrants' information, thus beginning formal American immigration law. Under this law, ship captains were required to deliver a detailed manifest of passengers landed in the United States, which customs officers were to give to the Secretary of State and Congress.[90]

Both before and following this minimal federal action, states pursued their own immigration regulations. In the first hundred years, Congress played a negligible role in immigration regulation.[91] State law restricted immigration of criminals and the poor, regulated public health and slavery, and promoted racial subordination.[92]

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[88] 1 Stat. 103 (1790).
[89] 1 Stat. 103 (1790).
[90] Manifest of Immigrants Act of March 2, 1819, 3 Stat. 489 (1819).
[91] Mark S. Grube, *Preemption of Local Regulations Beyond* Lozano v. City of Hazelton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010).
[92] Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833, 1841 (December 1993).

Massachusetts and New York, the states that received most of the country's immigrants during this era, had strong incentives to restrict immigration. In 1820, Massachusetts enacted a law designed to create a state immigration agency that would levy fees on immigrants, employ immigration officials, and restrict the ill or infirm from landing by fining shipping companies.[93] In 1837, Massachusetts passed the Alien Passengers Act which provided that "no alien passengers…shall be permitted to land until the master…of such vessel shall pay….the sum of two dollars for each passenger so landing."[94] New York required ships to provide an extensive record of those landed and required "the sum of one dollar for every person or passenger."[95] Congress did not challenge the states' regulations in these regards. Limiting the entry of immigrants was not an affront to their exclusive authority to determine the rules for citizenship.

Congress passed its first law restricting immigration in 1875. In California, an increasing influx of Chinese laborers spurred virulent anti-Chinese sentiment, leading the federal government to enact national restriction of "immoral" immigration from China and Japan. The law forbade "importation into the United States of women for the purposes of prostitution," and provided that "whoever shall knowingly and willfully import…[such women]…shall be deemed guilty of a felony."[96] Congress followed this law with more regulations in the Chinese Exclusion Act in 1882. The Act imposed fines or prison sentences on ships' captains who landed Chinese laborers, and similarly punished those who would "aid and abet the landing…of any Chinese person not lawfully

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[93] *Laws of the Commonwealth of Massachusetts, 1818-1822.* Vol. 8 (Boston: Russell and Gardner, 1822) Chap. CCXC, 428-429.
[94] *Laws of the Commonwealth of Massachusetts,* 1837 (Boston: Dutton and Wentworth, 1837) Chap CCXXXVIII, 270-71.
[95] *Laws of the State of New York, 1847.* Vol. 1 (Albany: Charles Van Benthuysen, 1847) Chap. 195, 182-88.
[96] 18 Stat. 477 (1875).

entitled to enter."[97] Furthermore, "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came."[98] A few months later, Congress passed a more comprehensive scheme of regulation, which levied a tax of 50 cents per immigrant and charged the Secretary of the Treasury to supervise "the business of immigration to the United States." To this end, "he shall have the power to enter into contracts with such State commissions, board or officers as may be designated for that purpose by the governor within said State."[99] The act also prohibited the landing of "any convict, lunatic, idiot or person unable to take care of himself or herself without becoming a public charge." Shipping companies were obligated to provide return passage for persons not permitted to land, giving shipping companies strong incentives to selectively sell tickets.

The enactment of the Chinese Exclusion Act triggered a challenge from one of the excluded Chinese, Chae Chan Ping. Ping questioned the constitutionality of federal power to restrict immigration, which up until this point had more traditionally been a state power. In the *Chinese Exclusion Case* (1889) the Supreme Court held that Congress's right to restrict the movement of immigrants fell under its sovereign power. Justice Stephen Field, writing for the majority, argued that "the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution, the right to exercise at any time when, in the judgment of the government, the interests of the country

[97] Chinese Exclusion Act, § 11, 22 Stat. 58 (1875).
[98] Chinese Exclusion Act, § 13, 22 Stat. 58 (1875).
[99] Act of August 3, 1882, Regulation of Immigration,§ 2, 22 Stat. 214, (1882).

require it, cannot be granted away or restrained on behalf of any one."[100] Even though Congress still permitted state-level immigration regulation, the decision hinted that this could change. "The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interest, has been happily solved," wrote Field, "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

Congress followed up with more comprehensive restrictions on immigration with the Immigration Act of 1891, triggering another challenge that the regulations were unconstitutional since the power to regulate immigration was not listed in the enumerated powers of Congress. In *Nishimura Ekiu v. United States* (1892) the Court found that these powers derived from other legitimate powers. "The supervision of the admission of aliens into the United States may be entrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce," wrote Justice Horace Gray for the majority, "Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the executive of these acts to the Secretary of the Treasury."[101] Importantly, none of these decisions claim that Congress's power to regulate immigration stems from federal exclusivity on naturalization issues.

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[100] *Chae Chan Ping v. United States (Chinese Exclusion Case),* 130 U.S. 581, 609 (1889).
[101] Opinion by Gray, J., *Nishimura Ekiu v. United States,*142 U.S. 651, 659 (1892).

At the same time Congress passed and the Court upheld the Chinese Exclusion Act, Congress asserted its right to supersede state immigration regulations. In *Henderson v. Mayor of City of New York* (1875) the Court overturned an 1824 ruling that said that state-level port regulation of immigration entry was authorized under state police powers. In *Henderson,* the Court found that New York's immigration tax was invalid, although it aimed at legitimate state interests of providing for the costs of potential public charges, because it intends "to regulate commercial matters which are not only of national but of international concert, and which are also best regulated by one uniform rule applicable alike to all the seaports of the United States."[102]

"We are of 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 or national," wrote Justice Miller for the majority. He acknowledged the state's legitimate interests in regulating immigration and suggested the state could regulate by other means. "Whether, in the absence of such action, the States can…protect themselves against *actual* paupers, vagrants, criminals, and diseased persons, we do not decide. [Those] portions of the New York statute are not properly before us," he wrote.[103] Subsequent decisions affirmed this position, including *Chy Lung v. Freeman* (1875).[104]

Birthright Citizenship and Consent

Another development during this period has had major long term consequences for American immigration policy. The Fourteenth Amendment, adopted in 1868, includes

[102] *Henderson v. Mayor of City of New York,* 92 U.S. 259, 274 (1875).
[103] *Henderson v. Mayor of City of New York,* 92 U.S. 259, 276 (1875).
[104] *Chy Lung v. Freeman,* 92 U.S. 275 (1875).

a clause that reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[105] The Court interpreted this clause to establish "birthright citizenship" for persons born within the United States, regardless of their parents' immigration status.

In *Slaughterhouse Cases* (1873), the Supreme Court first interpreted the newly-enacted Amendment and articulated a definition of the parameters of birthright citizenship implied in the law. Justice Samuel Miller, writing for the majority, noted that "subject to its jurisdiction" was intended to exclude "citizens or subjects of foreign States born within the United States."[106] Under this interpretation, the children of foreign nationals, whether their parents were ambassadors or illegal immigrants, would not automatically receive citizenship by virtue of the location of their birth.

The Court would later revise this interpretation. The decision in *United States v. Wong Kim Ark* (1898) interpreted the Citizenship Clause of the Fourteenth Amendment as supreme over acts of Congress prohibiting citizenship to members of specific groups despite their birth in the United States.[107] *Wong Kim Ark* established precedent for *jus soli* citizenship—"right of the soil" or birth in a territory as qualification for citizenship. In the 1850s, California's Gold Rush attracted immigrants to the state from other states and abroad, including many from China. Chinese laborers worked in mining towns and later on dangerous railroad construction operations. The Chinese were often targets of racism, but when the economy slumped in the Panic of 1873 depression, lawmakers in California

[105] U.S. CONST. amend. XIV, § 1, cl. 1.
[106] *Slaughterhouse Cases,* 83 U.S. 36 (1873).
[107] *United States v. Wong Kim Ark,* 169 U.S. 649 (1898).

and Washington called for Chinese exclusion.[108] In 1882, Congress passed the Chinese Exclusion Act specifically barring immigration for the Chinese labor class. It also prohibited Chinese naturalization in one short clause: "That hereafter no State court or court of the United States shall admit Chinese to citizenship."[109] Wong Kim Ark, a Chinese man born in the United States to immigrant parents, claimed his right to citizenship was protected by the Fourteenth Amendment, and the court upheld his claim. Justice Horace Gray, writing for the majority, redefined the *Slaughterhouse* definition of "subject to the jurisdiction thereof" by stating: "The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, 'All persons born in the United States,' and by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words, the two classes of cases – children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State – both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exception to the fundamental rule of citizenship by birth within the country."[110]

The Court relied on the definition of birthright citizenship as it was understood by British common law. Gray argued that the common law principle of citizenship by birth was "in force in all the English Colonies upon this continent down to the time of the

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[108] Michael C. LeMay and Elliott Robert Barkan, *U.S. Immigration and Naturalization Laws and Issues: A Documentary History,* (Westport, Conn.: Greenwood Press, 1999), 42.
[109] 22 Stat. 58, (1882).
[110] The opinion takes for granted also that Native Americans are excluded: "Besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law." *United States v. Wong Kim Ark,* 169 U.S. 649 (1898).

Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established."[111]

Gray sharply criticized the decision in *Slaughterhouse Cases*, calling Justice Miller's definition of "subject to its jurisdiction" "unsupported by any argument … [and] that it was not formulated with the same care and exactness…is apparent from its classing foreign ministers and consuls together."[112] The court finally held that considering the authorities, common law, and intent, the Fourteenth Amendment "affirms the ancient and fundamental rule of citizenship by birth within the territory…including all children here born of resident aliens."[113]

To some contemporary critics, *jus soli* citizenship as understood by *Wong Kim Ark* and subsequent cases is too broad since it does not consider the legal status of the new citizen's parents. The definition in *Wong Kim Ark* does not make distinctions based on the parents' statuses as legal or illegal aliens, perhaps because no such distinction was understood at the time. Although the decision says that no Act of Congress can limit a constitutional definition of birthright citizenship, it is possible that the constitutional definition of birthright citizenship could have other exceptions other than those for the children of Native Americans, alien belligerents, or foreign ministers.

In light of a perceived emerging problem with "anchor babies," some scholars and lawmakers in the United States have criticized the expansive definition of *jus soli* citizenship. John C. Eastman, a professor of law at Chapman University School of Law,

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[111] *United States v. Wong Kim Ark,* 169 U.S. 649, 658 (1898).
[112] *Wong Kim Ark,* 678. Gray explains the distinction between foreign ministers and consuls: Consuls are "not considered as entrusted with authority to represent their sovereign" while foreign ministers act in a representative diplomatic capacity. Failure to distinguish the two was a clear mark to Gray that Miller's reasoning was unfounded.
[113] Ibid., 693.

argues that the Supreme Court improperly interprets "subject to the jurisdiction thereof" clause within the Citizenship Clause.[114] The intent of this phrase, he argues, is narrower than it has been interpreted. When considering American Indians, certainly under the commonsense definition of civil and military jurisdiction of the United States, the framers of the Fourteenth Amendment regarded them outside the "complete" jurisdiction. Justice Gray relates this to a principle of "reciprocal consent" articulated in the decision in *Elk v. Wilkins* (1884).[115]

In *Wong Kim Ark*, the Court does not take up the subject of parents who reside in the country unlawfully. Professor Edward J. Erler at California State University, San Bernardino, argues that *Wong Kim Ark* does not necessarily extend birthright citizenship to the children of illegal immigrants, although it has been assumed to do so. "Any language in *Wong Kim Ark* that suggests the majority reasoning could be expanding to include the children of illegal immigrants would of course be *mere dicta* since Wong Kim Ark's parents were in the country legally. Even if the logic is that Wong Kim Ark became a citizen by birth with the permission of the United States when it admitted his parents to the country, no such permission has been given to those who enter illegally."[116]

Rightfully or wrongfully, *jus soli* citizenship as understood by the Supreme Court removes a powerful tool of control for Congress to use in determining who can stay and who can leave. *Wong Kim Ark* continues to define American public policy on immigration.

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[114] John C. Eastman, "Legal Memorandum: From Feudalism to Consent: Rethinking Birthright Citizenship," *The Heritage Foundation*, March 30, 2006.
[115] *Elk v. Wilkins,* 112 U.S. 94 (1884).
[116] Edward J. Erler, John Marini and Thomas J. West, *The Founders on Citizenship and Immigration: Principles and Challenges in America* (Claremont, CA: Claremont Institute, 2007), 67.

American Immigration, Part II

Meanwhile, the turn of the 20th century saw the peak of immigration to the United States. By World War I, Americans increasingly grew concerned with possible threats from immigration. In the era of *Wong Kim Ark,* Americans permitted relatively unlimited immigration but attempted to impose strict conditions on naturalization. Due to court intervention and hesitant leadership, naturalization restrictions weakened. In the early 20th century Americans began to seek limits on immigration outright. Opponents of immigration generally had one of two motives for their stance. First, some were concerned with cultural or racial purity and the potential deleterious effects of foreigners on American civic or religious culture. Opponents reiterated some familiar arguments, including that laws should require immigrants to learn English, but advanced other absurd ones, including a claim that Zionist Jews were secretly plotting to establish the Jewish homeland in the United States, not the recently relinquished British Mandatory Palestine.[117] The rhetoric was, by modern standards, antithetical to political correctness. From a statement by a Ku Klux Klan Grand Dragon: "America has within her borders many of the so-called hyphenated Americans. They call themselves Hungarian-Americans, French-Americans, Irish-Americans, Italian-Americans, Russian-Americans, Polish-Americans and German-Americans. Such a class of people do not deserve the respect of any decent, loyal, patriotic, red-blooded, pure and unadulterated American citizen. There is but one kind of American. One who would not for one moment tolerate

[117] "The Regulation of Immigration—A Statement by the Grand Dragon of the Ku Klux Klan, South Carolina, 1924," *Papers Read at the Meeting of Grand Dragons, Knights of the Ku Klux Klan* (New York: Arno Press, 1977), 69-74.

any prefix to 'America.'"[118] Second, others were concerned with the effects of immigrant labor on competitive wages. Politics makes strange bedfellows, and the combination of these two interests led the Ku Klux Klan and the American Federation of Labor to back immigration restriction bills together on several occasions.

The states tried to enact further regulations of immigration in response to these concerns, but they could not escape the Fourteenth Amendment. In *Yick Wo v. United States* (1886), the Supreme Court found that a facially-neutral law applied in a racially discriminatory manner violated the Equal Protection Clause of the Fourteenth Amendment.[119] In *Truax v. Raich* (1915) the Court upheld the rights of legal aliens to seek employment without impediment, similarly based on their rights under the Equal Protection Clause. In *Truax,* the state of Arizona enacted a regulation that made it illegal to employ more than a specific percentage of aliens. The Court invalidated laws on the grounds that it violated aliens' rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment, but the decision also reaffirmed federal authority over immigration. "The authority to control immigration – to admit or exclude aliens – is vested solely in the Federal Government," wrote Justice Charles Evans Hughes for the majority, "The assertion of an authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode or in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred

[118] "The Regulation of Immigration."
[119] *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

by the admission, would be segregated in such of the States as chose to offer hospitality."[120] The courts invalidated many state regulations other grounds before they were challenged as a state usurpation of federal powers.

But the Equal Protection Clause could not prevent Congress from enacting racially restrictive immigration laws. Under Congress's sovereign powers, conceivably any class of immigration restriction is constitutional. Responding to the confluence of pressure, Congress enacted quota laws limiting immigration based on national origin. In 1921, Congress enacted the first comprehensive national origin immigration quota law.[121] National origin quotas would dominate immigration regulation until 1965. In 1924, Congress created the Border Patrol to restrict the flow of illegal immigrants crossing both its Mexican and Canadian borders.[122] Apprehensions remained relatively low following its creation through the end of World War II. Labor demands caused an increase in the flow of illegal immigrants in the 1950s, leading to an increase in apprehensions as well.[123]

American Immigration, Part III

During World War II, demand for agricultural labor led Congress to enact emergency immigration exceptions for guest agricultural workers from Mexico. In 1942, Congress began the Bracero program, temporarily legalizing migrant labor for agricultural work in order to supplement a labor shortage caused by the war. The program

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[120] Opinion by Hughes, J., *Truax v. Raich,* 239. U.S. 33, 42 (1915).
[121] Emergency Quota Act, Act of May 19. 1921: The Quota Act of 1921, 42 Stat. 5, 8 U.S.C. 229 (1921).
[122] Act of February 27, 1925: Relating to the Border Patrol, 43 Stat. 1049-1050, 8 U.S.C. 110 (1925).
[123] Thomas G. Espenshade, "Unauthorized Immigration to the United States," *Annual Review of Sociology* 21 (1995): 195-216, 198.

continued through the end of the war and the agricultural industry grew to depend on it for low-cost, experienced farm labor.[124]

By the end of World War II, the demographic and political landscape of the United States had changed. Americans began to question the national origin quota immigration policy for several reasons. First, the nation's attitudes on race and the law had changed. Where racial restrictions on immigrants were more popular in the 1920s, they were out of vogue and politically incorrect in the 1960s considering Congress's attention to civil rights and race relations within the country's borders. Second, in the early 1960s Americans enjoyed a period of economic growth, after suffering a long string of recessions during the Eisenhower administration. Americans are more amiable to renegotiation on immigration and labor issues when the economy is healthy, and this contributed to the success of immigration reform. Furthermore, the quotas left the Northeast with demands for labor that immigrants could fill to everyone's advantage. Even organized labor supported a more open immigration policy.

The John F. Kennedy administration was openly interested in immigration reform. As Senator, Kennedy authored a book, *A Nation of Immigrants,* in which he expressed support for more liberal immigration policies. With Kennedy in the White House and a confluence of the other factors that made Americans amenable to immigration reform, the stage was set to do away with national origin quotas. Kennedy sent a bill to Congress in July 1963 that prioritized immigration based on the immigrant's labor skills and family reunification while removing the primary emphasis on national origin characteristic of the existing policy. "[The policy] should be modified," he wrote to Congress, "so that

[124] Espenshade, "Unauthorized Immigration," 198.

those with the greatest ability to add to the national welfare, no matter where they were born, are granted the highest priority. The next priority should go to those who seek to be reunited with their relatives."[125]

But Kennedy's assassination in November 1963 put a hold on the legislation and it did not survive in the 88th Congress. In 1965, Senator Ted Kennedy took up his brother's fight with the help of President Lyndon B. Johnson. Senator Kennedy reintroduced a form of the bill which was successfully passed as the Immigration and Nationality Act of 1965. The bill phased out the national origins quota system over a period of three years. "We no longer will ask a man where he was born," Kennedy commented, "Instead we will ask if he seeks to join his family, or if he can help meet the economic and social needs of the nation."[126] The new bill still contained a maximum national quota. Upon signing the bill on October 3 at Liberty Island, New York, Johnson stated that the old system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man."[127]

The end of the Bracero Program in 1964 and the overhaul of American immigration law with the Immigration and Nationality Act in 1965, combined with changes in global economic and political conditions, dramatically changed immigration to the United States.[128] Similarly to the way policies in the previous era addressed the cultural assimilation concerns with quotas based on natural origin, the policies of the modern era address the reigning economic concerns.

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[125] John F. Kennedy, "Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws," July 23, 1963.
[126] "Senator Edward Kennedy's Comments on the Kennedy Immigration Bill, 1965," *Congressional Record,* 89th Congress, 1st sess., 1965. Vol. III, pt. 18: 24225-29.
[127] Lyndon B. Johnson, "Remarks at the Signing of the Immigration Bill, Liberty Island, New York," October 3, 1965.
[128] LeMay and Barkan, *U.S. Immigration and Naturalization Laws and Issues,* 15.

Beginning in the 1960s and continuing up to the present day, the most recent wave of immigrants differs significantly from historical waves. For the first time, a majority of immigrants are from Latin America and Asia, in contrast to past waves under the quota system that overwhelmingly preferred immigrants of European origin. And for the first time, the country is confronted illegal immigration on a mass scale. Although illegal immigration was technically possible prior to the 1960s, because most immigrants came from overseas, illegal immigration did not occur in significant numbers and was not considered as problem for public policy. Furthermore, the cessation of the Bracero Program ended a guest worker program before demand for those workers had subsided. During World War II, the Bracero Program filled an agricultural labor shortage with temporary guest workers from Mexico. During the war, American workers shifted to production in urban areas. Although the program was proposed as a temporary war measure, the post-war economic boom continued to support the larger labor force. The economy sustained agricultural industry demand for Mexican labor even after organized labor and immigration restriction interest groups pushed Congress to end the program in 1964.[129] The population of temporary farm workers was replaced with an illegal immigrant workforce, largely from Mexico. They were essentially the same population that had worked under the Bracero program.

Considering the results, ending the Bracero program did nothing to allay the fears of the organized labor and immigration restriction interest groups that had pushed for its cessation in the first place. Rather, its termination highlighted a larger problem: considering the relative ease of entry to the United States, fighting the natural incentives

[129] LeMay, *Anatomy of a Public Policy*, 22.

for immigration would be difficult to do with immigration and naturalization law alone. Americans had never faced an immigration problem of this nature. Historically, policymakers limited immigration by regulating ports of access international travel. In order to secure the border, Congress would have to address physical border security and also reduce labor incentives that attracted illegal immigrants.

By the mid-1980s, there was a growing sense that immigration policy was out of federal control.[130] Thousands of illegal immigrants crossed the border annually without INS detection, and the INS also had difficulty keeping track of even those who entered legally. Coupled with this fear was the controversial question of the economic effect of illegal immigrants on jobs and public welfare programs. Academics tried with difficulty to determine whether immigrants' effects on average wages, tax revenue and public services. Respected economists came down in opposition to one another on questions such as whether immigrants lowered the average wage and working conditions.

As argued in previous chapters, illegal immigrants bring a small net benefit to the national economy but change the sizes of the slices of the economic pie such that employers get a larger slice and labor gets a smaller slice. Pro-business and pro-labor interest groups recognized this and pushed for reforms that would benefit their members. Pro-business groups wanted to secure their labor source by legalizing the labor arrangement, while pro-labor groups sought sanctions on employers who continued to hire illegal immigrants. The pressure wore on until "Congress felt compelled, as it periodically did, to confront anew the need to revise immigration laws. The nature of how those immigration problems were perceived, moreover, meant the approach taken to

[130] Ibid., 25.

'reform' immigration laws would involve a radically new approach to immigration policy."[131]

On November 6, 1986, President Reagan signed the Immigration Reform and Control Act of 1986 into law as a serious attempt to address border security and employer demands on illegal immigrant labor. The act first imposed sanctions on employers who hired illegal immigrants or failed to verify a worker's eligibility based on a definition of worker eligibility also contained within the law. The law granted legal status to illegal aliens who met certain requirements and applied for this status. In deference to those concerned with the effects of illegal immigrants on public welfare spending, the law disqualified "newly legalized aliens"[132] from receiving public welfare assistance, with exceptions, for five years and extended this authority to subnational governments, providing that "a state or political subdivision therein may…provide that an alien is not eligible for the programs of financial assistance…furnished under the law of that subdivision."[133]

IRCA proved to have few teeth. The flow and employment of illegal immigrants remained largely unabated. Critics claimed the law did not sufficiently reduce demands on illegal labor. The one-time amnesty provisions under IRCA were extremely controversial. Some argued that the amnesty provisions undercut the effectiveness of IRCA's other provisions designed to reduce the incentive to immigrate illegally.

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[131] Ibid., 27.
[132] 100 Stat. 3360 (1986).
[133] 100 Stat. 3360 (1986).

Although well-intentioned, IRCA's "immigration reforms have proved to be a case of good intentions gone awry."[134] IRCA granted legal status to two categories of illegal immigrants, those who had resided in the United States since 1982, and those who had worked in agricultural industries for at least 90 days within 1985-1986. The rationale behind the second criteria was that this provision would narrowly target illegal immigrants that the agricultural industry depended upon. But without stronger protections at the borders, illegal immigrants still were able to compete with recently legalized workers, and wages did not increase. Arguably, the restrictions created a market for false work authorization documents, making even easier for illegal immigrants to obtain the necessary documents to compete on a larger scale. The employer sanctions and regulations proved to be easily evaded.

Soon, states with large illegal immigrant populations began to complain about the massive costs they shouldered as a result of a failed federal policy. Not content to sit idly by, the states pursued legislation of their own designed at regulating illegal immigration in defense of state sovereignty. In 1994, Californians adopted the "Save Our State" initiative that controversially excluded illegal immigrants from many state-funded programs.

In a statement aimed at reasserting state sovereignty, the "Save our State" initiative began with findings that "The People of California…have suffered and are suffering economic hardship by the presence of illegal aliens in the state…They have suffered and are suffering personal injury and damage by the criminal conduct of illegal

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[134] Philip L. Martin, "Good Intentions Gone Awry: IRCA and U.S. Agriculture," *Annals of the American Academy of Political and Social Science,* Vol. 524, Strategies for Immigration Control: An International Comparison (Jul., 1994), 44-57.

aliens in the state…they have a right to the protection of their government from any person or persons entering this country unlawfully." They expressed a willingness to move towards a cooperative federal-state relationship on immigration issues: "The People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."[135]

Proposition 187 enlisted state law enforcement officers to control immigration and attempted to control illegal immigrant public service usage. To the first end, it criminalized the manufacture of citizenship or residence documents punishable by a prison sentence or fine, and criminalized the use of false documents to conceal true citizenship or resident status. It required all law enforcement agencies in California to comply with the INS. For every person arrested, Proposition 187 required the law enforcement agency to attempt to verify the person's legal status through questioning and demanding documentation, to notify any apparent aliens of their status as such and of the federal immigration laws they are violating, and to notify the state Attorney General and the INS of the apparent illegal status of the arrested person.[136] Any policies enacted by lower governments or law enforcement agencies to prevent or limit such action were limited. Furthermore, the Attorney General would be held accountable for coordinating cooperation between lower governments, the states, and federal agencies.

To the second end, illegal aliens were excluded from state publicly-funded healthcare programs, save for emergency medical care as provided by federal law. Illegal

[135] California Proposition 187, (1994).
[136] See California Proposition 187, § 4, adding § 843(b) to California Penal Code.

immigrants were also excluded from primary and secondary public education as well as all public institutions of postsecondary education. Perhaps in anticipation of a court challenge, the proposition included a severability clause providing that if any portion of the act were declared invalid that they other provisions would stand. Proposition 187 was approved with 59% of the vote.

Proposition 187 was challenged in federal court and following an extensive delay, in 1998 District Court Judge Marianne Pfaelzer ruled that most of its provisions were unconstitutional.

Spurred by the action in California, Congress included immigration exclusions within the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). "The federal restrictions on immigration benefits in the bill duplicated many of the provisions of Proposition 187."[137] The relevant provisions of welfare reform to state and local programs prohibited "states from providing state or local benefits to most illegal aliens, unless a state law was enacted after August 22, 1996…that explicitly made illegal aliens eligible for the aid." It also allowed states to "deny benefits from the welfare block grant, Medicaid and social service block grants to most legal immigrants.

Congress followed PRWORA with the passage of an immigration reform bill, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), on September 30, 1996. With this bill, Congress tried to address the inefficiencies in IRCA with respect to border enforcement and employer sanctions. The bill authorized increased funding for border security and charged the Immigration and Naturalization Service with creating a better form of identification for legally admitted aliens, "that include a biometric

[137] Kent A. Ono and John M. Sloop, *Shifting Borders: Rhetoric, Immigration and California's Proposition 187* (Philadelphia: Temple University Press, 2002), 5.

identifier, such as a fingerprint, that could be read by machine, and for future cards that could use such devices as retina scanners."[138] The law raised penalties for various immigration-related crimes, including document fraud, smuggling, and false attestation of citizenship.[139]

Although the law addressed state complaints like those forwarded by Proposition 187, not all were pleased with its restrictive measures. The 1996 laws spurred another round of legislation at the local and state level designed to compensate for what was perceived as unjust exclusions. "Cities cited the new federal laws as having produced or aggravated fears among resident immigrants about seeking health care and reporting crimes."[140] Some decried what they perceived as increasingly invasive INS behavior, including raids on groups of legal and illegal immigrants indiscriminately. In the name of maintaining public order and trust of law enforcement officials, many cities enacted ordinances in protection of immigrants, declaring their jurisdictions "immigrant safety zones" or "sanctuary cities" and committing to disregard immigrant status for local social services eligibility.

Immigration Today

Today, American is still well within the third era of immigration. The country is still pressured by large numbers of potential immigrants. But public policy has failed to reduce incentives for illegal immigrants to cross the border. Congress has attempted to address the problem with new innovations in public policy. Federal agencies are

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[138] *1996 Congressional Quarterly Almanac,* vol. 52, (Washington, D.C.: Congressional Quarterly, 1997) 5-8-5-10.
[139] Ibid.
[140] Miriam J. Wells, "The Grassroots Reconfiguration of U.S. Immigration Policy," 38 *International Migration Review* 4, (Winter 2004), 1308-1347, 1318.

experimenting with electronic verification systems that will help apprehend those who overstay their visas and also prevent the hiring of illegal immigrants.

This problem unduly affects a few states that have a greater stake in the resolution of the illegal immigration problem, but the federal government has thwarted state action through preemption. No one has addressed the issue at the root of the problems and complaints voiced by Governor Wilson and the state of California when they passed Proposition 187. The state of Arizona made a similar argument with the passage of SB 1070 in 2010. It is inconceivable that this argument will stop resurfacing until the federal government takes responsibility for illegal immigrants, and it is unlikely they will be pressed to do so any time soon.

To better address the problem, there needs to be cooperative federal-state action. The history of immigration regulation and rationale used to preempt decisions show that it is not as clear as it has been suggested that the framers wanted to preclude all state action with respect to immigration matters by vesting Congress exclusively with the power to establish a "Rule of Naturalization." But the federal government's justifications for nationalizing immigration laws and preempting state regulation were so powerful that their precedent carried over into the third era, where the nature of immigration fundamentally changed.

The regulations that states offer in the third era differ profoundly from those offered in the second era. They are aimed at addressing the same ends of federal policy—namely, enforcing border security and reducing incentives for illegal laborers to come in the first place by restricting immigration. By prohibiting state regulations on these

traditional state matters, the Courts have unnecessarily sacrificed state sovereignty to the federal government, violating federalism principally.

But what is the constitutional nature such that an appeal could be made for intervention based on states' rights? The next chapter will consider the structural and rights-based protections of federalism in the Constitution.

CHAPTER 4: THE FEDERALISM DISPUTE

The preceding chapters define a conflict between the states and the federal government on illegal immigration. On the national level, illegal immigration is both an economic and fiscal benefit, and Congress has nearly exclusive control over admission and deportation. In a few affected states and localities, a minority in the federal system, illegal immigrants substantially cost public services, and the courts have thwarted most state efforts to take control of the situation locally through enacting immigration regulations.

In a backwards way, federal jurisdiction over illegal immigration has passively imposed an unfunded mandate on the states. In principle, unfunded federal mandates on the states violate state sovereignty, which is supposedly protected under the terms of constitutional federalism. When the federal government mandates costs on lower governments, political accountability is diminished. In the case of illegal immigration, voters often hold state and local officials responsible for the associated costs of illegal immigrants. For example, if a state government decides not to increase law enforcement proportionally to the increase in population, and crime goes up, voters will hold state lawmakers accountable for increased crime in their neighborhoods. But if the state government decides to increase the law enforcement budget, it has fewer resources to spend on other state functions. While voters hold state officials responsible for the effects of illegal immigrants on public services, the federal government has exclusive control over the source of the problem. When states bring their concerns to Washington, they confront an ambivalent nation that stands to lose by removing illegal immigrants and

little to gain by legalizing them. The affected states' minority representation in relation to the rest of the country makes it challenging to override the majority's ambivalence.

If this is only a minor problem such that Americans nationally have not acknowledged it, what is at stake by not fixing it? Some would argue that the cost-benefit disjunction arising from illegal immigration is a political question that will be resolved naturally if it becomes a more serious problem. But the problem could be analogous to other issues that fall under Congress's exclusive jurisdiction, so in that sense it is important to consider a solution to this problem as an analogy to future passive threats to the federal balance.

The Constitution contains structural and rights-based safeguards that protect state sovereignty. Although it appears that this situation violates federalism principally, is it possible to make a legal argument that it also violates federalism constitutionally? One needs to consider the Supreme Court's opinions on analogous issues and apply past reasoning on federalism and preemption to this case.

It may very well be that there is no justiciable solution to the problem. The Court does not exist to remedy every perceived deficiency in our system of government. A great deal of tugging on the political level is important, and the Court should not step in to unilaterally define every aspect of government. The solution to the problem, incidentally, may be to argue that the Supreme Court should restrict itself to the narrowest interpretation of federal power over immigration, in respect of state sovereignty. Such a move would be consistent with the Court's more recent interest in limiting federal power following two centuries of expanding federal power in each opportunity for interpretation.

Federalism in the Constitution

In the mid-1990s, several affected states sued the federal government for reimbursement for the costs of harboring illegal immigrants. Florida sued for relief in *Chiles v. United States,* but the appellate court dismissed the case on the grounds that the state lacked standing.[141] *California v. United States* met a similar fate in appellate court in 1997.[142] Texas, Arizona, New Jersey and New York were equally unsuccessful.[143]

Regardless of their outcome, these cases raised interesting arguments for justiciable states' rights. The states argued that "the federal government's failure to enforce immigration laws resulted in the affected states incurring disproportional costs in educating, incarcerating, and providing emergency medical services to undocumented aliens, [which] amounts to a 'commandeering of state legislative processes."[144] In part, the states based their claims on their rights under the Tenth Amendment and claimed that the federal government's failure to reimburse them would violate principles of federalism.

If one wants to argue that the scheme of immigration laws burdens constitutional federalism, it is important to define what federalism actually means in the Constitution and whether its preservation is something justices should actively defend when making decisions that put its structures at risk. The nature of constitutional federalism is subject to considerable debate. Is it simply a structural component of the Constitution, or does it manifest in justiciable states;' rights, as Florida, California and others claimed?

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[141] *Chiles v. United States,* 69 F.3d 1094 (1995).
[142] *California v. United States,* 104 F.3d 1086 (1997).
[143] Tony Perry, "State's Immigration Suit against U.S. Dismissed," *Los Angeles Times,* February 14, 1995.
[144] Timothy W. Hagedorn, *Illegal Immigration and the State Predicament: Has the Federal Government Commandeered State Legislative Processes?* 8 MD. J. CONTEMP. L. ISSUES 271 (Spring/Summer 1997).

"Federalism," wrote influential legal scholar Herbert Wechsler, "was the means and price of the formation of the Union. It was inevitable, therefore, that its basic concepts should determine much of our history."[145] The framers wrote the Constitution specifically to address the problems of the Articles of Confederation. The Articles had failed to define the balance of powers and authority between the state and the national government. The Articles' structural inadequacy, according to James Madison, led to problems ranging from "encroachments by the States on the federal authority" to "trespasses of the States on the rights of each other."[146] It is clear that reducing the power of states was a priority of the framers when they wrote the Constitution. To this end, the vehicle for limiting their power would be a strong but limited federal government. Yet the founders faced the problem of convincing the states to agree voluntarily to give up some autonomy. The states certainly would not agree to become auxiliary arms of a central government, and thus required some guarantee they would be protected before they agreed to ratify the new Constitution.[147] James Madison, in Federalist 45, described the balance of powers: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects…The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people,

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[145] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 4, 543-560, 543 (Apr. 1954).
[146] James Madison, "Vices of the Political System of the United States," April 1787.
[147] John Choon Yoo, "Federalism and Judicial Review," in Mark R. Killenbeck, ed., *The Tenth Amendment and State Sovereignty: Constitutional History and Contemporary Issues,* (Lanham, MD: Rowman & Littlefield, 2002), 132.

and the internal order, improvement, and prosperity of the State."[148] The powers of Congress were limited by enumeration in Article 1, Section 8, while Article 1, Section 10 expressly prohibits certain powers to the States, including the powers to enter into treaties, coin money, or levy taxes on imports and exports.[149] Subsequent amendments to the Constitution would expand congressional power. But which state powers, if any, did the framers seek to defend or preserve?

The framers did not seek to consolidate all state power into a national government. In Federalist 39, Madison emphasizes that since the new government would be ratified in -state ratifying conventions as opposed to a majority of the nations' voters, the Constitution's authority would be defined by its federal nature. In terms of the structure outlined, the Constitution contained institutions that would represent different constituencies. The House of Representatives would be elected from districts divided among the states on the basis of equal population, so its representation would be national. Conversely, the Senate is comprised of two representatives each elected by state legislatures. The states' participation in the Senate defines a federal aspect of the new government. The government also has an operative characteristic—if it were to be fully national, state and local governments would be administrative arms of the national government. But since the government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residual and inviolable sovereignty over all other objects," the government has a serious federal operational character. Thus,

[148] James Madison, *Federalist* 45 in Clinton Rossiter, ed., *The Federalist Papers,* (New York, NY: Signet Classic, 2003).
[149] U.S. CONST. art. 1, § 10.

Madison concludes, the Constitution is "neither a national nor a federal Constitution but a composition of both."

It is generally acknowledged that the Constitution of 1787 included structural components of federalism and that these arrangements demonstrate that the framers valued the principle of federalism. Whether the Supreme Court can or should invalidate state or federal laws on the grounds that they are in conflict with the principles of constitutional federalism, however, is a contentious question. In addition to the procedural protections of federalism, the framers included the Tenth Amendment in the Bill of Rights, which would imply to some future constitutional interpreters that the courts could actively defend states' rights to reserved powers on these grounds. Others contend that the amendment exists to provide justification for limiting excesses of national power taken by Congress or the president, while even others argue that the amendment is a truism under which no claims to rights can be rightfully made.

Changes in Structural Federalism

The framers of the Constitution protected the states' authority by requiring their consent to the new government through ratification, by ensuring the states' representation and participation in the new government expressly through representation in the Senate, and by limiting the federal government by enumerating powers and reserving the balance of powers back to the states. But since the founding, the first of the two original safeguards have been changed and the court's defense of the third is contentious. Because of this, some argue the Constitution has become stronger nationally and weaker federally.

After the states ratified the Constitution, the Constitution gained legitimacy by taking some of their authority and binding them to its terms. The Civil War ended the

debate as to whether the states could legitimately rescind their prior agreement to abide by the terms of the Constitution. The resolution of the war proved that the Constitution bound the states to the terms they agreed to at the founding, which was crucial to the continued life of the Constitution. However, it eliminated any possibility of states defending their rights by exercising a check of secession on an overly powerful federal government. If states' rights were to continue to exist, the states would have to defend them according to the terms of the original agreement.

The states' representation in the Senate was fundamentally altered from a strictly federal component to a federal-popular hybrid component with the ratification of the Seventeenth Amendment in 1913. The ratification of the Seventeenth Amendment represented victory for Progressives in an 86-year battle to change the method of election for senators from selection by state legislatures to direct election by the people of the state.

Interestingly, there is little evidence that proponents and opponents seriously debated the amendment's effects on federalism. Debate transcripts, published articles, and party platforms dealing with the issue do not address issues of altering federalism. A few senators spoke of the amendment's detrimental effects on states' rights, but proponents did not respond to their concerns. The Seventeenth Amendment directly changed one of the Constitution's federal functions to a more national, populist function, thereby making the federal government increasingly accountable to the national will rather than the states' interests.

With original federalism watered down, Congress began to pass laws that arguably expanded federal power at the expense of the states, and the states challenged

the laws, making arguments for an existing protection of states' rights via the Tenth Amendment. The Tenth Amendment reserves unenumerated powers to the states as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[150]

Madison made no mention of the necessity of the Tenth Amendment in Federalist 39.[151] He considered federalism and the division of power effects of the structural provisions of the Constitution, not "rights." Importantly, Madison did not think a Bill of Rights was necessary at all. He believed that the rights were only as protected as Congress was willing to protect them, which they would be if they were genuinely representative of the people and the states. He also believed it would be impossible to fully define the boundary between the two levels of government "in such a manner, as to be free…even from ambiguity in the judgment of the impartial."[152] But he also recognized the political necessity of including the Bill of Rights in order to secure votes necessary for ratification. He acknowledged that the amendments might "over time serve a valuable purpose if the inculcation of the principles it embodied worked to brake not the arbitrary impulses of the rulers but the factitious passions of the people themselves."[153]

The Tenth Amendment addressed Anti-Federalists' fears that the new structure of government would soon swallow all state authority into a consolidated national

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[150] U.S. CONST. amend. X.
[151] James Madison, *Federalist* 39, in Rossiter, ed., *The Federalist Papers.*
[152] 5 The Writings of James Madison 26 in Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: the Dispensability of Judicial Review*, 86 YALE L.J. 8, 1552-1621, 1555 (1977).
[153] Jack N. Rakove, "American Federalism," in Mark R. Killenbeck, ed., *The Tenth Amendment and State Sovereignty: Constitutional History and Contemporary Issues,* (Lanham, MD: Rowman & Littlefield, 2002).

government.[154] But does the amendment have any special significance besides articulating a value that ratifying states shared? According to Professor Jack N. Rakove, under the conditions of its ratification in 1791, it is difficult to consider the Tenth Amendment more than a truism "endorsing Wilson's basic position on the nature of the essential grant of power…that stopped short of further explication of the actual division of authority."[155] By this understanding, the amendment did not guarantee or reserve any powers, but instead simply made a statement that accounted for any powers not claimed by the new government and reaffirmed that the source of authority for those powers ultimately resided in the states and the people.

But by other understandings, even in 1787 many worried that the state legislatures' election of senators was not enough to protect federalism, and the Anti-Federalists' insistence upon the Tenth Amendment was designed to add an additional safeguard when senators strayed too far from the state's constituency. Some argue that the framers recognized that the Senate would not be an institution devoted solely to defending state sovereignty. Madison wrote that the Senate's longer terms would let cooler heads prevail and guard it against the faction of sudden electoral impulses, which would ideally suit it for stability in dealing with the collective affairs of the nation in foreign relations and other matters. The Senate would have multiple roles in the new government, including the preservation of state sovereignty. But this caused Anti-Federalists to worry that the Senate would turn a blind eye to its state responsibilities in favor of its national ones. By this understanding, the Constitution charged the federal judiciary to keep the boundary between federal and state power in place.

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[154] Rakove, "American Federalism," in "The Tenth Amendment and State Sovereignty."
[155] Ibid.

States' Rights and the Supreme Court

Since the founding, nearly every part of the Constitution has been tested in the Supreme Court, requiring the Court to interpret the extent and terms of power under those provisions. For a large part of the Court's history, when confronted with a question of limitation, the justices generally interpreted the Constitution in a way which expanded federal power. In a system where unenumerated federal powers are reserved to the states, every expanded understanding of federal power comes at the expense of state power. Only recently has the Court taken a more limited view of federal power in interpretation.

The Supreme Court's first significant expansion of federal power came in *McCullough v. Maryland* (1819) where Justice John Marshall defended a doctrine of implied federal powers in the Constitution. *McCullough v. Maryland* became the legal cornerstone for an era of an expansive understanding of federal power that would dominate Supreme Court history for most of the 19th century. The Supreme Court upheld the federal government's power to regulate state action under the Commerce Clause in *Gibbons v. Ogden* (1824). Following this decision, the Supreme Court expanded federal authority under the Commerce Clause at the expense of state authority. Toward the end of the 19th century, the Court stepped back from this position in *Kidd v. Pearson* (1888). With new conservatives on the bench, the Court held that Iowa manufacturing regulations were immune from federal regulatory powers, since manufacturing regulation was derivative of a traditional state power.[156] Following *Kidd,* the Court emphasized economic freedom and defense of states' rights in their decisions. When the country faced the Great Depression, however, the Court was forced to revise its position.

[156] Eric N. Waltenburg and Bill Swinford, *Litigating Federalism: The States Before the Supreme Court,* (Westport, Connecticut: Greenwood Press, 1999), 10.

President Franklin Delano Roosevelt and the "New Deal Congress" advocated an expansion of federal regulatory power to control the failing economy. Roosevelt and Congress passed regulations, claiming to derive authority from the Commerce Clause, but the conservative Court invalidated the laws almost immediately. Infuriated by the roadblock to his legislative agenda, President Roosevelt threatened to add more justices to the bench in order to balance opinions in favor of expansion. But the Court reversed its restrictive trend in *West Coast Hotel v. Parrish* (1937), which upheld the constitutionality of minimum wage legislation enacted by the State of Washington. Although this decision specifically did not expand federal power, it signaled a change in the attitude of the Court. Soon after, the changed Court would uphold the constitutionality of the Fair Labor Standards Act, which imposed a federal minimum wage standard. The post-New Deal Court would continue to expand federal power with little deference for states' rights for several decades.

The Court's most dramatic shift toward enforcing states' rights came in 1976 with *National League of Cities v. Usery,* which overturned an expansion of federal power under the Commerce Clause in *Maryland v. Wirtz* (1968). In 1966, Congress amended the Fair Labor Standards Act of 1938 to include minimum wage standards for public hospital and school employees. The State of Maryland challenged the amendments in 1966 claiming that federal commerce power was not enough to override the state's sovereign interests in determining its own employee wages. The Court in *Maryland v. Wirtz* found that Congress had a "rational basis" in regulating commerce that justified its incursion into state sovereignty. "It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests," wrote Justice John Harlan

for the 7-2 majority, "The Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce."[157] Writing in dissent, Justice Douglas claimed "what is done here is…such a serious invasion of state sovereignty protected by the Tenth Amendment that it is, in my view, not consistent with our constitutional federalism."[158] Douglas admitted that there are legitimate instances in which the federal government activities under the commerce clause may legitimately and justifiably affect state sovereignty, but these instances must be limited to non-essential functions of the states. Under an unlimited understanding of federal government's power under the Commerce Clause, the federal government could "virtually draw up each State's budget to avoid 'disruptive effect[s]…on commercial intercourse.'"[159]

This decision would not stand, and Douglas's position would get its day in court. The composition of the Supreme Court was a political issue in the 1968 presidential campaign. Republican candidate Richard Nixon charged the Court with, among other things, effectually "eroding the power of state governments."[160] As president, Nixon appointed conservative jurists with strict constructionist views in a bid to reverse the Court from its trend of activist judicial lawmaking.

The change in thinking on the Court is evident between its decision in *Maryland v. Wirtz* and its reversal in *National League of Cities v. Usery* (1976). In 1974, Congress further expanded the Fair Labor Standards Act to include minimum wage standards and

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[157] *Maryland v. Wirtz,* 392 U.S. 183 (1968).
[158] Douglas, J., dissenting in *Maryland v. Wirtz.*
[159] Douglas, J., dissenting and quoting from *Atlanta Motel v. United States,* 341 U.S. 241, 257 (1964).
[160] Eric N. Waltenburg and Bill Swinford, *Litigating Federalism: The States Before the Supreme Court* (Westport, Connecticut: Greenwood Press, 1999) ,16.

maximum hour limitations for nearly all state and local level public employees. It was challenged immediately and the court took opportunity to redefine its understanding of the Commerce Clause as articulated in *Maryland.* Justice William Rehnquist, writing for the majority, adopted a position akin to Douglas, arguing that the determination of wages and hours of state employees is function "essential to separate and independent existence" of states, therefore Congress is limited from controlling them. Rehnquist justified the decision on the Tenth Amendment and drew a line limiting the federal commerce powers. Dissenters complained that the court's involvement in drawing such a line based on perceived violation of a nebulous concept of "essential functions" would increasingly involve the courts in determining what should remain a political question. Indeed, the standards as applied from *National League of Cities* rendered regulation of ambulances, licensing, local airports, and waste disposal, among other things, unconstitutional, but permitted federal regulation of traffic, air travel, telephone communication, and natural gas sales.

Due to the excessive complications and entanglement in policy matters, the reversal was short-lived. The Department of Labor claimed in 1979 that the San Antonio Metropolitan Transit Authority was not immune from the applicable regulatory amendments to the Fair Labor Standards Act, in contrast to the ruling in *National League of Cities.* The dispute made its way to the Supreme Court in the form of *Garcia v. San Antonio Metropolitan Transit Authority* (1985). Justice Blackmun, writing for the majority and also switching from his position on the issue in *National League of Cities,* criticized the untenable standards set forth in the prior case: "Our examination of this 'function' standards applied in these and other cases over the last eight years now

persuades us[161] that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest."[162]

The states' defenders, now in the minority, expressed concerns that unlimited federal power in this regard would lead to an unconstitutional balance of state-federal powers that, in their opinion, the Tenth Amendment existed to preserve. Justice Powell, writing the dissent, stated ominously, "today's decision effectively reduced the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."[163] The Court would later find Powell's assessment less ironclad than originally stated.

After this block of decisions came a second wave of decisions defending states' rights, but this time the Court's involvement was more narrowly focused. If in the Fair Labor Standards cases the Court was concerned with invalidating laws based on their effects on state powers, then comparatively in this period the Court was concerned with invalidating laws because they violated federalism by definition, not by effect. The first of these decisions, *New York v. United States* (1992), concerned a federal law that in part forced states to "take title" to hazardous low-level radioactive waste. The law required states to either dispose of the waste or pay a fine for failing to remove it.

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[161] The reasoning that "now persuades us" might be better stated as the reasoning that "now persuades me." Blackmun reversed his position from the one he took in *National League of Cities,* joining the four dissenters of that case to reverse the decision.
[162] Blackmun, J., writing the opinion in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).
[163] Powell, J., dissenting, *Garcia v. San Antonio Metropolitan Transit Authority.*

Justice Sandra Day O'Connor, writing for the majority, found that the "take title" provision of the law impermissibly altered the federal structure. "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," she wrote.[164]

"States are not mere political subdivisions of the United States…The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," continued O'Connor. "Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentive to the States as a means of encouraging them to adopt suggested regulatory schemes."[165]

By blurring the lines of political accountability in political decision making, government undermines the safeguards that ensure government remains accountable to states' rights in the first place. This is why O'Connor argues that invalidation of the law is necessary under the Tenth Amendment. As long as political accountability is matched with political responsibility, the Court is free to leave all other disputes regarding federalism to the national political processes.

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[164] *New York v . United States,* 505 U.S. 144, 157 (1992).
[165] *New York v. United States*, 505 U.S. 144, 158 (1992).

Does Federalism Need a Defense?

Those who debate whether the court is right to actively defend states' rights on the grounds of the Tenth Amendment frequently refer to the framers' "original intent" and "original understanding." The terms are superficially related, but the nuanced distinction forms the root of disagreement on issues of constitutional interpretation. "Original intent" refers to the actions intended by the authors of the Constitution, while "original understanding" refers to the understanding of the text by the legislators and citizenry who assented to its terms.

The framers didn't intend for the courts to get involved in the minutiae of federalism disputes, but some argue the original understanding of the Constitution must be preserved through judicial action. Professor John Yoo argues that the Court is right to reinvigorate its role in defending federalism.[166] The original understanding of the importance of federalism in the Constitution should inform justices as to how to value federalism concerns when deciding cases. As mentioned earlier, Madison stated in Federalist 39 that the Constitution leaves to the states a "*residuary and inviolable* sovereignty."[167] The Anti-Federalists were not persuaded by the "political safeguards" arguments that the institutions would naturally check each other from becoming too powerful and the people would be the ultimate check on government power growing in expense of civil liberties. Anti-Federalist James Wilson argued that the political

[166] John Choon Yoo, "Federalism and Judicial Review," in "The Tenth Amendment and State Sovereignty."
[167] James Madison, *Federalist* 39 in Rossiter, ed., *The Federalist Papers.*

safeguards could not stop the government from taking unconstitutional actions, rendering the entire system of political safeguards defenseless.[168]

In response to this concern, Madison responded through the Federalist papers that if Congress exceeded its enumerated powers, it would be checked by the executive branch and the judiciary. "In the case that Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning…," wrote Madison, "the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts."[169] This statement represents the dominant view that the court should rarely, if ever, intervene on behalf on matters of federalism, which remains a political question.

One of the most influential defenders of this view, Professor Herbert Wechsler argues that the Constitution contains three separate safeguards of federalism. First, the structure of government defined in the Constitution includes a role for the states and preserves their existing structures. Second, the states have considerable representation in the electoral process of the federal branches of government. Finally, the Constitution defines and limits the powers of Congress while stating that the powers not enumerated nor prohibited to the states are reserved to the states, suggesting that there could be some legal process to protect federalism if violated. Wechsler argues that constitutional federalism is self-enforcing. The federal government needs to justify that its action would not be better served by a similar action on the state level. Wechsler finds it highly unlikely that the national government could coordinate in national action to trample on

[168] John Choon Yoo, "Federalism and Judicial Review," in "The Tenth Amendment and State Sovereignty."
[169] James Madison, *Federalist* 44 in Rossiter, ed., *The Federalist Papers.*

the rights of any one state because in his view it is a miracle that they coordinate together effectively at all, considering their distinct parochial interests. "The problem of the Congress is and always has been to attune itself to national opinion and produce majorities for action called for by the voice of the entire nation. It is remarkable that it should function thus as well as it does, given its intrinsic sensitivity to any insular opinion that is dominant in a substantial number of states."[170]

Following *National League of Cities,* Professor Jesse Choper took up Professor Wechsler's influential defense of the political safeguards of federalism to argue that the courts should not get involved in federalism questions or "states' rights". Choper advocates theory he calls the "Federalism Proposal" which states that "the federal judiciary should not decide constitutional question respecting the ultimate power of the national government vis-à-vis the states."[171]

The primary justification for judicial involvement in defending individual rights is that the individuals in need of defense do not have an alternative political means to rectify the damages done to their rights. But states, Choper argues, have other recourses for remedy save judicial intervention. His argument depends on the premise that a state cannot be a politically powerless minority akin to a minority group of individuals because the structure of government incorporates state input in several levels. Representatives of the state's population to the federal government consider the state's interest in their decision-making. Congress is elected from constituencies who also live in states. The framers designed the Senate to represent states directly in the federal sphere. Although

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[170] Wechsler, *Political Safeguards of Federalism*, 547.
[171] Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: the Dispensability of Judicial Review*, 86 YALE L.J. 8, 1552-1621, 1557 (1977).

the Seventeenth Amendment shifted the electoral method of senators from state legislatures to direct election by the states' populations, it is undeniable that senators still have consideration for the well-being of the people of their state. State populations can voice concerns regarding improper infringement on state power through their representation in the Senate, and by virtue of the rules in the Senate, they can all but ensure those concerns will be heard. Although less obviously, Members of the House of Representatives also bring federalism concerns on the table in Washington. Choper cites the involvement of state party organizations in the election of House members as a way in which they are attuned to the affairs of the state body as a whole. Furthermore, historically many bipartisan state delegations have coordinated to serve mutual interest.[172] Many members started their careers in local and state-level offices, making them familiar with the detrimental effects of excessive federal action on state and local governing ability. Congress is often criticized for its excessive concern with parochial matters and its inability to look past the next election, but rarely is it criticized for working in the national interest at the expense of abandoning the concerns of its constituents. In this way, Congress listens to worries from the people about the overreach of federal authority.

In the executive branch, the Electoral College serves to ensure the President does not overlook state issues including federalism concerns. The Electoral College elects the president in a way which magnifies the interests of states as a whole over the interests of a bare majority of individual voters. The president occasionally confronts Congress on behalf of a single state because he knows he or his party will need the support of the

[172] Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: the Dispensability of Judicial Review*, 86 YALE L.J. 8, 1552-1621, 1561 (1977).

people of that state in the next election. This is evident in presidential action. For example, President Carter created a White House unit for management of federal-state relations, and President Reagan demanded that every piece of legislation be submitted with a federalism impact report so he could weigh effects on state sovereignty before signing bills.

Limits of Political Safeguards

There is certainly some representation of state interests in the federal sphere, but one must consider whether the state government's interest is exactly aligned with the state's population's interests. One's opinion on the nature of "states' rights" depends on what one defines as the "state." Is the interest of the state the interest of its population, or is the interest of the state the interest of its governing body? "States often may have a temporary political interest in achieving a goal that may require them to sacrifice their rights as institutions," writes Saikrishna Prakash and John Yoo, echoing Justice O'Connor's point in *New York* that a state's population can have a short-term interest in a federal policy that improperly limits its powers in the long term.[173]

To illustrate this point, consider the differences in interests between the population of a state and its state legislature in states with direct democracy. A state's population can act in its interests on isolated issues, tying the hands of state government officials who have to make trade-offs between spending and taxing priorities. With weakened safeguards against excessive intrusion by the federal government, the states are vulnerable to shortsighted and irresponsible federal public policy limiting their powers in the long-term. For example, the law in question in *New York v. United States* regulating

[173] Saikrishna B. Prakash and John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories,* 79 TEX. L. REV. 1459 (2001).

low-level toxic nuclear waste was supported by "public officials representing the State of New York," and the state's senator, but this couldn't justify the federal government's direct control of the state government to achieve popular ends.[174] The example of the policy in *New York* highlights the need for at least minimal intervention limiting federal action.

Advocates of the "Federalism Proposal" inconsistently claim to support intervention in name of protecting federal powers when they are abridged by the states and also in defense of individual liberties, but do not support intervention when federal powers impinge upon the powers of the states. Furthermore, if one concedes that the Constitution protects federalism by representing states' interests politically, it logically follows that since individuals are represented politically, their liberties need no defense through judicial intervention. Although it is much more likely that individuals would be in a politically powerless position to address violations of their rights, it is similarly possible, though less likely, that states could be in a position where the political safeguards fail to act in a way that protects their rights.[175] As Justice Sandra Day O'Connor writes in the majority opinion in *New York v. United States,* "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an

[174] *New York v. United States,* 505 U.S. 144, 180-181, (1992).
[175] That is, if we agree that their rights are something distinct from the sum total of their interests expressed through the Senate, Congress, and the executive branch.

end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[176]

Furthermore, proponents of the Federalism Proposal support judicial intervention in the cases in which a state takes action that would infringe upon any federal power. Under the Federalism Proposal, the Court would not hesitate to invalidate a state law levying tariffs on imported goods for other states or establishing distinct immigration laws barring international crossings. Why do the political safeguards fail to ensure that this does not happen?

It is more consistent to admit that the political safeguards model has its flaws. In some occasions, political safeguards do not work as they should, and individual rights or the separation of powers are violated. In these cases the Court is justified in stepping in to defend the constitutional provision in question. Excluding the Court from doing so only in the name of federalism, even when there are admitted flaws to the political safeguards protection mechanism for other types of rights and powers, is arbitrary and absolute.

Illegal Immigration and Federalism

The way in which our legal system distributes authority for immigration regulation and the way in which the costs manifest only on the state level violates the principle of constitutional federalism. Justice Sandra Day O'Connor, writing for the majority in *New York v. United States,* succinctly articulated what it is to violate the constitutional principle of federalism: "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of

[176] *New York v. United States,* 505 U.S. 144, 181 (1992). O'Connor quotes Justice Blackmun's dissent in *Coleman v. Thompson,* 501 U.S. 722, 759 (1991).

the local electorate."[177] Illegal immigration creates a problem that states cannot regulate but that they must pay for, causing voters to hold them accountable for the effects of the problem. Whether the states can pursue a remedy to this problem is another question.

The nature of the problem has neutralized the reality of a possible political process solution. Immigration-affected states' senators and congressmen represent a small minority in Congress. Overall, Congress is ambivalent when it comes to immigration policy. By passively permitting a great deal of illegal immigration, the economy benefits overall from the induction of low-skilled labor, but existing law allows them to exclude illegal immigrants from federal disbursements. On the state side, the state too benefits from the economic boost but must provide public services with little federal assistance. The effect of this scenario is that voters tend to punish state elected officials for problems they are powerless to control.

Pursuing a judicial remedy to this violation of federalism is complicated by several factors inherent in the nature of the problem. First, although "the fiscal impact of immigrants …appears to be the classic example of an unfunded mandate,"[178] making the problem effectively similar to one identified in *New York v. United States,* it is not directly analogous. The federal government's ineffective immigration enforcement saddled states with the fiscal costs of illegal immigration, but it is not because the government has refused to take legislative action. If the Supreme Court gets involved, they may be excessively burdened with determining the effectiveness of the implementation of any federal law that adversely affects a state. The Court would have to

[177] *New York v. United States,* 505 U.S. 144 (1992).
[178] Peter Skerry, "Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?" 25 Publius: The Journal of Federalism 3, 71-85, 71 (Summer 1995).

develop a standard to determine the point at which state sovereignty was impermissibly violated. [179] Developing those standards could unduly involve the courts in the political processes, a prospect that neither the courts nor the other branches relish. Furthermore, the Court rejected this line of reasoning in *Garcia* after experimenting with a standard of "necessary governmental function" following *National League of Cities.*

Conclusion

The Court has struggled to get to a point in federalism jurisprudence that adequately represents what the framers had in mind when they created a government limited in powers with a judiciary to protect its form. The political safeguards created within the institutions of government created in the Constitution are the country's first line of defense against federalism violations. The built-in checks and balances and the representation of states' populations in the federal sphere naturally ensures that federalism disputes are usually solved within the political framework. Although the Seventeenth Amendment dealt federalism's safeguards a serious blow, one cannot say they have been erased entirely. However, as argued by Justice Sandra Day O'Connor in *New York v. United States,* it is possible for the political safeguards to fall short in some instances. O'Connor's decision represents a new type of thinking which incorporates judicial intervention as a secondary safeguard for addressing inadequacies in the political safeguards. In these instances, judicial intervention is warranted on behalf of state's rights, because the political safeguards that would ordinarily check such a violation of federalism are incapable of responding to the problem due to some disconnect of accountability and authority. When this happens, the Court should get involved to ensure

[179] *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism,* 108 HARV. L. REV. 7, 1643-1660 (May 1995).

that whoever is making the policy is appropriately accountable for its effects. By these grounds, for example, it is permissible for the Court to invalidate a law that forces a state to directly spend money by directive of the federal government, because it holds state officials accountable in part for an action that is not wholly theirs nor justified by some other provision of the Constitution.

Illegal immigration poses a problem for federalism, principally. The way the federal government handles illegal immigration issues holds state and local officials politically accountable for a federal problem. Although the problem is not close to being legally analogous to the problems articulated in other states' rights cases, and no intervention could be justified on the basis of Tenth Amendment rights, the emerging problem disrupts the scheme of political accountability that exists to defend federalism concerns. An alternate approach and potential solution to this problem will be explored in the next chapter.

CHAPTER 5: LIMITED PREEMPTION

As argued in the previous chapter, the political safeguards that exist in the Constitution to protect the constitutional structure of federalism are unlikely to reconnect political accountability with political responsibility when it comes to the causes and costs of illegal immigration.

The possibility of a political remedy is not above reach. The remedy will require the Supreme Court to weigh concerns for state sovereignty when interpreting the extent of federal exclusivity over the range of immigration regulation. By limiting structural preemption to the narrowest understanding of the exclusive implied federal powers under the Naturalization Clause in Article 1, Section 8 of the Constitution, states and Congress will share equal initial regulatory authority over the remaining field of immigration regulation.[180] The Courts will settle discrepancies between regulations through statutory preemption per the Supremacy Clause, which states that "the Laws of the United States…shall be the supreme Law of the Land."[181]

Constitutional scholars and lower court judges have too often taken for granted the extent of federal exclusivity over immigration. Although one does not frequently hear arguments that the power is more limited than assumed, there is little in way of original intent or precedent that prevents the Court from taking this interpretation. In fact, this interpretation has the force of history and precedent behind it, and best represents the existing federal-state cooperative approach to immigration regulation.

[180] U.S. CONST. art. IV, § 8, cl. 4.
[181] U.S. CONST. art. VI, cl. 2.

This limited view of Congressional power has a strong basis in American history. As mentioned in Chapter 3, the states have a long history of regulating immigration. The framers did not mean to preclude state immigration of regulation by vesting Congress with the exclusive power to establish the "Rule of Naturalization." This is not a historical point only – there are many examples of current state regulations related to immigration and immigrants that the federal government does not contest. The Court justified the expansion of federal power over immigration regulation based on national sovereignty, but there is no reason this should extend to preclude state regulation of immigration and immigrants following their admission to the United States.

Limiting preemption would not limit the federal government's authority on the matter. If the government disliked a state law or policy, it could simply pass one of its own contradicting and thus preempting the state level policy, or it could pass a law that included the express intent to preempt other state laws on this matter. The states would have an opportunity to legislate in areas in which the federal government has expressly preempted state action. Although statutory preemption would still allow Congress to limit state power, under statutory preemption Congress will have to pass legislation including preemptory language in the statute, forcing the nation to take a position on the issue instead of passively preempting laws with no action to the contrary, letting a few states pay for the consequences.

This view of immigration authority has several advantages for federalism. First, limiting federal exclusivity and relying more heavily on statutory preemption puts the federal balance of powers question back in the hands of the political processes. By passing statutes with preemption language, Congress will give the courts clear

instructions as to the extent of permissible state power. Without a broad structural restriction on initial regulatory authority, states can pursue the policies most advantageous to their situation and the federal government will be able to override that decision if it can justify nationally why the state law is adverse to national goals by passing legislation to the contrary. Permitting increased shared jurisdiction will give state lawmakers some responsibility to complement the political accountability they share for the costs of illegal immigration.

Second, giving states room to regulate will create competition and deliberation between levels of government, resulting in more effective legislation. States will experiment with different policies that can be adopted later by other states or overall by the federal government. Small state actions will increase deliberation and discussion of the issue. Limited preemption will increase communication between states and the federal government, and will raise the level of public discourse nationally regarding the states and the problems they face as a result of weakly-enforced immigration laws.

Third, state actions will increase responsiveness to local problems. The states are naturally faster at responding to immediate local needs. Furthermore, since the representation of affected states is in the minority in Congress, it is difficult for Congress to address their specific needs with national legislation. Over the last 30 years, the president has signed only two comprehensive immigration reform bills. The nature of the problem and the needs of both the states and federal government are fluid and changing. By allowing states more latitude in immigration regulation, policymakers can respond to local constituencies and their problems more quickly.

Immigration Law: A Patchwork of Regulations

One's interpretation of the extent of implied federal power under Article 1, Section 8 depends in part on one's interpretation of the role states should play in regulating immigration. "Immigration to this country is a federal problem," said New York Congressman James Scheuer during debates on the Immigration Reform and Control Act in 1983, "Immigrants cross national borders, they do not cross state borders. Thus, the solutions to problems generated by immigration, both legal and illegal, are quintessentially federal in nature and should be considered as such all times by Congress and the executive branch."[182]

Scheuer's comments illustrate the majority opinion of both Congress and state officials towards immigration responsibility since the 1980s. In the mid-1990s, Governor Pete Wilson frequently challenged the federal government to refund the states the costs of the "unfunded mandate" of illegal immigration. Republican Speaker of the House Newt Gingrich affirmed Wilson's claims and pinned the problem on ineffective implementation of federal law by the Clinton-controlled executive branch.

But others contended that effective immigration law would only come from cooperative efforts between the national and subnational governments. The misguided majority has proposed solutions which range from "assertions that Washington should write a blank check to cover traditional state and local services to all immigrants, to proposals that all benefits be cut off for legal and illegal immigrants alike," wrote a critical Office of Management and Budget Director Leon Panetta in a *Los Angeles Times*

[182] Quoted in Lin C. Liu, *IRCA's State Legalization Impact Assistance Grants: Early Implementation,* (Santa Monica, CA: RAND, 1991), 7.

editorial, "The answer lies at neither extreme but in a strong partnership between the federal and state governments."[183]

Today, the view that Congress possesses sole ownership of the immigration issue still dominates discussions of American immigration policy. But recent state actions suggest voters in affected states may welcome a greater role in regulation. Arizona's recently-enacted immigration law SB 1070 and the copycat efforts of at least 20 other states suggest that even though states vehemently claim that they should not be responsible for fixing a federal problem; they would take on additional regulatory responsibility if permitted.

Perhaps unsurprisingly, the primary defender of federal exclusivity today is the federal government. President Obama argues that immigration is the sole responsibility of the federal government. The Department of Justice has sued to prevent the Arizona law from taking effect. In a statement to the press, Attorney General Eric Holder said in defense of the suit: "Seeking to address the issue through a patchwork of state laws will only create more problems than it solves."[184]

However, there is evidence to suggest the fabric of American immigration policy already resembles the patchwork pattern Holder claims to fear. States and localities already regulate immigration in limited ways. Contrary to popular assumption, state and local immigration regulations are not always restrictive. In some places, immigration policy is more welcoming than the stated federal policy. "The disparity between the federal government's responsibility to regulate immigration and exclude illegal aliens and

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[183] Leon Panetta, "Perspective on Immigration: Funding Services is a 2-Way Street," *Los Angeles Times,* June 3, 1994.
[184] Jeremy Pelofsky and James Vicini, "Obama Administration Sues Arizona Over Immigration Law," *Reuters,* July 6, 2010.

the state and local governments' responsibility to provide for the welfare of all residentially-present persons creates an opening for local advocates to mobilize the powers of subordinate levels of the nation-state so as to protect immigrants' rights," writes Miriam J. Wells, analyzing the cooperative nature of the state and federal government in dealing with illegal immigrants once within national borders.[185]

For example, several American cities have adopted "sanctuary" policies that protect illegal immigrants. Sanctuary cities prohibit local law enforcement or public employees from inquiring about immigration status. Sanctuary cities first started appearing in the early 1980s. In the mid-1980s the California city of Santa Ana's police chief made it clear that local officials would not assist federal Immigration and Naturalization Service agents in their objective to identify and punish illegal aliens. A Santa Ana official rationalized the policy: "We never invited the undocumented alien population to settle in our city but now that they have, we are going to work with them. You can't afford to have 25 percent of the population hostile towards the Police Department."[186]

In response to the emergence of sanctuary policies, the state and federal governments passed laws to prohibit them by requiring cooperation from local governments. In California, the state legislature toyed with the idea of denying sanctuary cities state funding unless they cooperated with authorities on immigration enforcement. In Washington, lawmakers criticized the Obama administration for failing to recognize

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[185] Miriam J. Wells, "The Grassroots Reconfiguration of U.S. Immigration Policy," 38 *International Migration Review* 4, (Winter 2004), 1308-1347, 1318.
[186] Schuck "Transformation of Immigration Law," 80-81, quoted in Peter Skerry, "Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?" 25 Publius: The Journal of Federalism 3, 71-85 (Summer 1995), 79.

sanctuary cities as a breach of federal law while they eagerly challenge the Arizona laws. Southern California representative Congressman Duncan Hunter, whose congressional district runs the width of the state just north of the border, claims the Department of Justice's enforcement of federal law is scattered at best: "They're saying we don't want a patchwork of laws, and that's why they're suing Arizona, but at the same time they allow sanctuary cities…to passively impede federal law."[187]

Peter Skerry uses examples of state and local immigration regulation to argue that although we regard immigration as an exclusive federal responsibility, in practice we expect, permit, and rely on considerable involvement from state and local governments. Some state and local governments have implemented policies to accommodate illegal immigrants. For example, the state of Massachusetts passed a law guaranteeing that illegal immigrants would receive state benefits indiscriminately from other state residents.[188] Others have devoted public funds to job banks and employment offices for immigrants—legal and illegal alike.[189] Skerry concludes that state and local governments are clearly responsible for at least some of their immigrant burdens, although they are not "directly or primarily responsible."[190]

More recently, in March 2011 the state of Utah enacted a package of immigration legislation that defied all expectations of the conservative state. Part of the legislation included SB 1070-like enforcement measures, but it also included a state-level guest worker program and a path to legal state residency. Proponents of the law claim that the

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[187] Kara Rowland, "Lawmaker Pushes Holder on 'Sanctuary Cities,'" *The Washington Times,* July 21, 2010.
[188] Peter Skerry, "Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?" 25 Publius: The Journal of Federalism 3, 71-85 (Summer 1995), 80.
[189] Ibid.
[190] Ibid.

regulations helps the state move forward with a scheme of immigration reforms that mirror those President Bush was unable to push through Washington gridlock in 2006.[191] They anticipate a federal challenge to both parts of the law. "Something has got to break the gridlock on immigration policy in the United States," Republican Utah state Senator Curtis Bramble told the *Los Angeles Times,* "If we've done nothing more than push the debate further down the road than the year before, it's hard to say that's bad for the country."[192]

Interpreting Federal Power

Although many contend that these examples of state immigration regulations violate exclusive federal power over immigration, the Supreme Court has yet to interpret the Naturalization Clause of Constitution to include an implied exclusive federal power over all immigration regulation. As this thesis has argued, the framers certainly intended that the power to admit new citizens should reside exclusively in the federal government. Accordingly, Article 1, Section 8 of the Constitution charges Congress to "establish a uniform Rule of Naturalization."[193] The Supreme Court has interpreted this to mean that Congress has exclusive power over "pure" immigration law: the laws that govern citizenship, the laws that govern the admission, classification and deportation of new immigrants. But what constitutes pure immigration law and what lies outside this narrow protected realm is the subject of considerable debate—the resolution of which has tremendous implications for immigration federalism. Some argue that this exclusive power extends over regulations of immigrants once they are here per the terms of federal

[191] Nicholas Riccardi, "Utah Bucks Conservative Trend on Illegal Immigration," *Los Angeles Times,* March 19, 2011.
[192] Riccardi, "Utah Bucks Conservative Trend on Illegal Immigration."
[193] U.S. CONST. art. 1, § 8, cl. 4.

law, while others argue that following admission and classification, the states share equal initial regulatory authority.

To demonstrate this practically, consider all possible regulation of immigration on a spectrum. On one end of the spectrum is pure immigration law, under exclusive federal control. An illustrative example of pure immigration law is the Immigration and Nationality Act of 1965, which defines the qualifications for legal entry, residency, and citizenship. On the other end of the spectrum is alienage law. The realm of alienage law includes laws that make distinctions based on federal definitions of legal and illegal entrance with aims towards a legitimate state function, and also laws that make no immigration distinction but have to do centrally with issues that concern legal residency. An example of the first type of alienage law is a state law that punishes employers for hiring illegal immigrants. While the law makes a distinction, its aim is concerned with the legitimate state function of regulating employment in favor of legal state residents. An example of the second type of alienage law is a law that punishes people for the forgery of identification documents for the purposes of gaining employment. This law makes no immigration distinctions, but it is aimed at regulating the behavior of illegal immigrants. By definition those most likely to forge identification documents are those who don't have any legal means of obtaining them.

Importantly, few claim federal exclusive jurisdiction extends to the point of the far end of the alienage law spectrum. It would be unreasonable and impractical to assert that states had no legitimate interest in making distinctions for the purposes of state administration. One can consider many practical regulations that the federal government would not want to preempt solely on the basis that they make a legal distinction based on

immigration status. Legal scholar Clare Huntington, a proponent of limited preemption, highlights the importance of these two legal realms: "The distinction clarifies, consistent with the structural preemption view of federal exclusivity, that the federal government alone controls immigration law, whereas states and localities may play at least some role, consistent with the Equal Protection Clause, in the regulation of non-citizens once they are in the country."[194]

Defining the Line between Pure Immigration and Alienage Law

It is easy to acknowledge that there is a line between pure immigration law and alienage law, but that line is not easily defined. Arguably, alienage laws affect immigration incentives for potential immigrants, which affects the immigration policy of the United States, which includes its own set of deterrent punishments and accommodating incentives. Conversely, federal law and federal implementation of policy creates classes of people living within states that may necessitate alienage regulations on the state and local level. The Court has not definitively interpreted the Naturalization Clause in a way that easily defines the realms of power, but in certain instances the courts have stepped in to resolve disputes. This collection of cases makes up the whole of immigration federalism jurisprudence.

As shown in Chapter 3, states almost exclusively regulated immigration in the first era of immigration policy, but as immigration increased at the end of the 19th century through the early 20th, Congress began to take a greater role regulating immigration. With increased involvement in immigration matters, federal and state laws increasingly came into conflict.

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[194] Clare Huntington, *The Constitutional Dimension of Immigration Federalism,* 61 VAND. L. REV. 3:787-853, 799 (2008).

The Court addressed one such important conflict in *Hines v. Davidowitz* (1941).[195] This case was important precedent for future immigration preemption challenges and also for preemption more generally, because it was the first case to preempt a law on a theory of implicit preemption.[196] The State of Pennsylvania enacted the Pennsylvania Alien Registration Act, which required aliens to register with the state for a State of Pennsylvania identification card. Congress passed a similar law, the Alien Registration Act of 1940. Although the laws aimed at the same end, they were not mutually exclusive and it would be possible for an alien to comply with both. Since Congress had not expressly preempted the law and since there was no conflict, the Court invalidated Pennsylvania's law on the grounds that the federal government had already adopted a comprehensive scheme of immigration regulation in a way that intended to occupy the field of immigration regulation. "We have already averted to the conditions which make the treatment of aliens, in whatever state may be located, a matter of national moment," wrote Justice Hugo Black for the majority, "And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable."[197]

Justice Harlan Stone dissented, criticizing the expansive foray into what he saw as a legitimate exercise of state powers in alienage law: "It is conceded that the federal act in operation does not at any point conflict with the state statute, and it does not by its

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[195] *Hines v. Davidowitz,* 312 U.S. 52 (1941).
[196] Kenneth Starr describes the impact of *Hines* on the theory of implied preemption under the Supremacy Clause in *Reflections on* Hines v. Davidowitz*: The Future of Obstacle Preemption,* 33 PEPP. L. REV.1, (2005).
[197] Opinion by Black, J., *Hines v. Davidowitz,* 312 U.S. 52, 73 (1941).

terms purport to control or restrict state authority…But the government says that Congress by passing the federal act, has "occupied the field" so as to preclude the enforcement of the state statues and that the administration of the latter might well conflict with Congressional policy to protect the civil liberty of aliens against the harassments of intrusive police surveillance."[198] To Stone and those who joined in his dissent, the preemption excessively intruded into state police powers. "At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted."[199]

In *De Canas v. Bica* (1976), the Court dialed back from its position in *Hines* and recognized some room for state immigration regulation. The state of California enacted a regulation that prohibited employers from knowingly employing those unauthorized to reside in the United States if the employment would adversely affect legal workers. The law was challenged on two bases: first that it constituted an immigration law in violation of exclusive jurisdiction and second that it was preempted under the Supremacy Clause by the Immigration and Nationality Act.[200]

The court quickly dismissed the first claim. "Standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration," wrote

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[198] Stone, J., dissenting in *Hines v. Davidowitz,* 312 U.S. 52, 78 (1941).
[199] Stone, J., dissenting in *Hines v. Davidowitz,* 312 U.S. 52, 75 (1941).
[200] *De Canas v. Bica,* 424 U.S. 351 (1976).

Justice William J. Brennan in the unanimous opinion of the Court, "Even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, absent congressional action [California's law] would not be an invalid state incursion on federal power."[201]

In response to the second claim, the Court found that California's law fell "within the mainstream" of state police power to regulate health, welfare, safety and morals. "In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [the law] focuses directly upon these essentially local problems and is tailor to combat effectively the perceived evils," wrote Brennan. The Court found that it was not the express intent of Congress in passing the Immigration and Nationality Act to oust the state's ability to regulate employment. "Only a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was "the clear and manifest purpose of Congress" would justify [a conclusion to preempt the state's regulation]},"[202] Brennan reasoned in dismissing the second claim and upholding the state law.

De Canas laid out a three-tier test to determine the permissibility of any state regulation. The first tier tests the constitutionality of the exercise of state powers in contrast with federal exclusive powers. The second tier compares the regulation to existing federal regulations which expressly or implicitly preempt the state regulations. The third tier compares the state regulation to existing federal regulations which may

[201] Brennan, J., *De Canas v. Bica,* 424 U.S. 351, 356-57 (1976).
[202] Brennan, J., *De Canas v. Bica,* 424 U.S. 351, 357 (1976).

conflict with the state regulation. If the regulation represents a legitimate exercise of state power that does not impede on an exclusive power and does not contradict the statutory language or intent of any existing federal regulation, the state regulation of immigration is permissible.

Other Constitutional Questions

De Canas established a test to determine whether a state regulation is a permissible exercise of state power, but other constitutional provisions can invalidate state regulations even if they pass the *De Canas* test. Other Supreme Court cases affect and define American immigration law. The constitutional protections of individual rights limit exercises of power on all levels of government. Several key decisions protecting the rights of noncitizens place limitations on immigration regulation. In his dissent in *Hines v. Davidowitz,* Justice Harlan Stone mentions that the Equal Protection Clause would protect aliens' rights from state incursions, and therefore the "protection of rights" justification offered in favor of national preemption was not applicable.[203] Stone accurately predicted that the Court would step in when the rights of aliens are at risk.

In this area, several key cases limit governmental regulation of immigration based on individual rights. In *Graham v. Richardson* (1971), the Supreme Court found that laws excluding state funds to non-state residents and legal aliens violated the Equal Protection Clause of the Fourteenth Amendment, holding that aliens were "persons" granted equal protection. This decision made conditions discriminating based on alienage for the

[203] Stone, J., dissenting in *Hines v. Davidowitz,* 312 U.S. 52, 80-81(1941). Stone writes, "The Fourteenth Amendment guarantees the civil liberties of aliens as well as of citizens against infringement by state action in the enactment of laws and their administration as well…[In this case] there is to be found no warrant or saying that there was a Congressional purpose to curtail the exercise of any constitutional power of the state over its alien residents or to protect the alien from state action which the Constitution prohibits and which the federal courts stand ready to prevent.

purposes of public spending subject to strict scrutiny. For a state to discriminate on this basis it must first receive authority from a federal statute, as funding exclusions are not subject to strict scrutiny on the federal level. The Court found in *Mathews v. Diaz* (1976) that the federal exclusion of legal and illegal immigrants from public programs is justified on the basis of the law pertaining to immigration regulation and not to budgetary prioritization. The decision held that the requirement that an alien live in the United States for five years consecutively prior to receiving eligibility for Medicare benefits was constitutional. "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," wrote Justice John Paul Stevens writing for a unanimous majority, "The fact that an Act of Congress treats aliens different from citizens does not in itself imply that such disparate treatment is 'invidious.'"[204]

It is important to note that it is unclear whether *Graham* applies to illegal immigrants at the state level. Since *Graham,* some legislation excluding illegal immigrants from public services has been challenged and overturned based on equal protection, but the terms of the cases remain limited to isolated programs rather than declaring broad protections to illegal immigrants on the state level. For example, in *Plyler v. Doe* (1982)[205] the Supreme Court found that the state could not exclude illegal immigrant children from K-12 public schools on the basis of the Equal Protection Clause of the Fourteenth Amendment. In *League of United Latin American Citizens v. Wilson* (1995) Judge Marianna Pfaelzer suggested that it might be permissible for a state to exclude illegal immigrants from a fully state-funded program: "[The state] may serve to

[204] Opinion by Stevens, J., *Mathews v. Diaz,* 426 U.S. 67, 79 (1976).
[205] *Plyler v. Doe,* 457 U.S. 202 (1982).

deny state-administered public social services that are not part of any federal-state cooperative program and do not receive any federal funding. The Court is unable to conclude that such wholly state-funded programs in fact exist. If such programs do exist, it does not appear that section 5's denial of wholly state-funded benefits would conflict with and be preempted by federal law. That the state's denial of such benefits may be unconstitutional on other grounds is not a question before the Court at this time."[206]

Three Categories of State Immigration Regulations

The aforementioned national powers and civil liberties cases limit state immigration regulation. State regulation in accordance with the terms of these cases is classified broadly into three categories based on where the state derives its authority for the regulation. The first category is state regulation enacted directly with authority derived from federal statutory language. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) specifically authorized state action under federal authority in an effort to encourage cooperation between levels of government. Such programs include the 278(g) program which delegates authority to enforce federal immigration laws to specially trained state and local law enforcement officials. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) authorized states to use immigration status to restrict eligibility for federal programs including Medicaid and Temporary Assistance to Needy Families.[207] Without transfer of authority, the programs would immediately be subject to strict scrutiny based on the Supreme Court's decision in *Graham.*

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[206] *League of United Latin American Citizens v. Wilson,* 908 F. Supp. 755, 782-783 (1995).
[207] Clare Huntington, *The Constitutional Dimension of Immigration Federalism,* 61 VAND. L. REV. 3:787-853, 800 (2008).

The second category includes state regulation that enforces federal law without express delegation of authority. The legitimacy of this type of action is highly controversial. The Department of Justice's Office of Legal Counsel released an opinion in 2002 in which it claimed that state and local enforcement of federal immigration laws was permissible.[208] A recent Congressional Research Service report confirmed the legal norm: "Congressional authority to prescribe rules on immigration does not necessarily imply exclusive authority to enforce those rules. There is a notion that has been articulated in some federal courts and by the executive branch that states may possess 'inherent' authority to assist in the enforcement of federal immigration law, even in the absence of clear authorization by federal statute. Nonetheless, states may be precluded from taking actions that are otherwise within their authority if federal law would thereby be thwarted."[209]

Arizona's SB 1070 is an example of a law which contains provisions that arguably fall into this category, although some provisions contain penalties above and beyond those contained in federal law, subjecting them to a different standard of review. "The legal vulnerability of these provisions [above and beyond federal law] may depend on their relationship to tradition state police powers and potential frustration of uniform national immigration policies," writes the Congressional Research Service.[210]

The second category also covers state or local laws that direct law enforcement agents to actively not enforce federal policies, as in an example of sanctuary city policies.

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[208] Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney General, "Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 7-8," (April 3, 2002).
[209] Michael John Garcia and Kate M. Manuel, "Authority of State and Local Police to Enforce Federal Immigration Law," *Congressional Research Service,* September 17, 2010.
[210] Michael John Garcia, Larry M. Eig, and Yule Kim, "State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070," *Congressional Research Service,* May 3, 2010.

By the same logic that state and local agencies have authority to enforce federal laws, they also have the authority to not enforce federal laws provided federal law does not state otherwise.

The third category of state regulations covers those that the state enacts under state authority. One example of this type of law is California labor law upheld in *De Canas.* Although the law might have deterrent effects on illegal immigration, it is an exercise of state police powers and its primary purpose is directed at legitimate state ends. Legal scholars and policymakers frequently debate whether specific alienage laws are better understood at pure immigration laws. Since these regulations arguably affect the immigration policy of the United States, some contend their effects on immigration should classify them within the realm of pure immigration law.

Similar to laws in the second category, some laws in the third category restrict the actions of illegal immigrants while others accommodate them. For example, in the past few years some states and local governments passed regulations denying business licenses to businesses that violate federal law by employing illegal immigrants. Others passed laws criminalizing the transport of illegal immigrants for the purposes of smuggling them across the border. SB 1070 contained a provision of this nature, which federal judge Susan Bolton did not enjoin because "based on well-established precedent…the United States is not likely to succeed on the merits in showing that the [provision is] preempted by federal law."[211] On the other hand, many states permit illegal immigrants to qualify for in-state tuition rates at public institutions of higher education.

[211] District Judge Susan Bolton, Order No. CV 10-1413-PHX-SRB, *United States v. Arizona.*

Other states and local governments issue drivers' permits or identification cards to illegal immigrants.

A Constitutional Basis for Immigration Federalism

Constitutional doctrine on the preemption of the second and third category of laws is not fully fleshed out and thus far has been dealt with on a case-by-case basis in the lower courts. But many of the lower court decisions conflict. For example, a federal court ruled that the Pennsylvania city of Hazleton's business license employer sanction law was impermissible, while a different federal court in Missouri ruled that Missouri's version of the law was permissible. The Supreme Court recently heard *Chamber of Commerce v. Whiting,* a case that challenges a business ordinance employer sanction law in Arizona. The decision in this case will rectify the disagreements between the lower courts. Challenges to Arizona's immigration enforcement law SB 1070 will also likely reach the Supreme Court. How can the Court decide which issues reside "in the mainstream" of state police powers?

The Supreme Court's implicit acceptance of immigration federalism thus far makes it difficult states to know what types of public policy actions will be permissible and which will be preempted. A state only knows it has run afoul of federal constitutional grounds if its laws are challenged and invalidated. Furthermore, "analyzing implicit preemption issues can often be difficult in the abstract. Prior to actual implementation, it might be hard to assess whether state law impermissibly frustrates federal regulation."[212]

At this point, the extent of federal power under the Naturalization Clause is a matter for interpretation. The Supreme Court has two options. The first option is to

[212] Michael John Garcia, Larry M. Eig, and Yule Kim, "State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070," *Congressional Research Service,* May 3, 2010.

continue to interpret it narrowly, consistent with precedent. A narrow understanding of the Naturalization Clause limits federal exclusivity to a narrow but clear definition of pure immigration law including only those laws determining citizenship, admission and deportation. The state and federal government share equally initial authority on the remaining field of alienage law, permitting more state regulation in absence of an express federal preemption or contradictory law.

The second option is to interpret the Article 1, Section 8 more broadly to include more implied power over immigration regulation. Most lower courts have interpreted the power in this way, so a similar Supreme Court decision would legitimize lower courts' expansion of federal power over immigration. If it chooses this interpretation, the Court will automatically be skeptical of any state or local regulation of immigration.

To better account for state sovereignty and federalism concerns in immigration law, the Supreme Court should interpret Article 1, Section 8 as narrowly as it has in the past; leaving the states and Congress equal initial regulatory authority over the large remaining body of alienage law. On an initial equal footing, the federal government will lose none of its supremacy on the issue. Any federal statute can still preempt state regulation based on the Supremacy Clause, which elevates federal laws: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Unite States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding."[213] This interpretation is consistent with the framers' original understanding of the role states would play in immigration regulation. By vesting Congress with the power to establish a Rule of Naturalization, the framers did not mean to preclude any initial regulatory authority by states.

Advantages to Immigration Federalism

If the Courts reaffirm their commitment to the narrowest understanding of the Naturalization Clause, Congress would have to rely on statutory preemption to control immigration regulation. Forcing Congress to preempt through statute directly will reinvigorate the role of federalism in immigration policy. Congress retains its supremacy on immigration regulation, but they have to actively pass statutory language to do so. Until Congress takes action on an issue, states are free to regulate provided the regulation does not constitute a rule of naturalization, admission, or deportation. One can refer to this understanding of immigration law as a proposal for "immigration federalism."

Immigration federalism has several advantages for American public policy. First, reaffirming states' initial equal authority over immigration regulation, states and local governments can pursue policies that are narrowly tailored to the specific circumstances of their state or region. This will give states a greater ability to respond quickly to emerging administrative problems. Some communities may decide they stand more to gain by accommodating illegal immigrants, while others may conclude they will benefit from deterring them.

Immigration federalism best protects the federal-state cooperative effort in action today. States and local governments have already adopted many policies that could be

[213] U.S. CONST. art. VI, cl. 2.

invalidated through structural preemption if the Court interprets Congress's implied power more broadly. Many policies now are permitted that could be preempted under a structural understanding of preemption. Moving to statutory preemption would legitimize those state actions and also protect other actions from arbitrary challenges.

If a state enacts a policy Congress finds truly contrary to the national interest, it can pass its own law and preempt the state law. But to pass this law, Congress will need to convince a majority of representatives to invalidate the local law, a tough argument to make to representatives whose constituents are ambivalent on immigration policy. However, should the localized interest run contrary enough to the national interest, Congress could make persuasive arguments to adopt a contrary uniform national policy. Importantly, policy changes would have to garner a broad base of support before preemption of state regulation could occur.

Several scholars argue limiting preemption on any number of different issues will force the federal government to take action rather than passively preempt. Influential legal scholar Professor Erwin Chemerinsky has written extensively on the valuable role limited preemption has in reinforcing federalism. Although Chemerinsky focuses on corporate and tort preemption, the values ascribes to limited preemption also apply to immigration policy. "There should only be two situations when there is preemption of state law. One is express preemption. The other is when federal law and state law are mutually exclusive, so it is not possible for somebody to comply with both. This would then eliminate preemption based on states interfering with the achievement of the federal objective. It would eliminate implied preemption based on the intent of Congress…Narrowing preemption means that in all other instances the state and local

governments may regulate as they see fit. If Congress doesn't like what state and local governments are doing, Congress can always step in and expressly preempt state and local laws."[214]

Professor Matthew J. Parlow applies the immigration federalism argument in favor of permitting increased local regulation in the hopes that local ideas will spur higher government action. Letting states experiment with policy responses to illegal immigration could inspire Congress to adopt successful policy innovations on the national level. "Empowering local governments will stimulate more innovative policy-making in the immigration arena that may generate macro-level solutions for what is seen as an intractable problem," he writes.[215] Professor Clare Huntington's argument for immigration federalism sees increased competition between state policies in the marketplace of ideas as a benefit to federal policymakers. After seeing what works at lower levels, federal policymakers can better respond to the needs of the states when enacting comprehensive immigration reform. "A system that allows states and localities to express divergent views on the benefits and costs of immigration would permit the development of a variety of policies rather than a single national policy," Huntington argues, "Creating the proverbial laboratories from which the national government (or states and localities) can learn."[216]

Opponents of immigration federalism might object that permitting more state regulation will create an incoherent patchwork of laws that treats illegal immigrants

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[214] Erwin Chemerinksy, *Empowering the States: The Need to Limit Federal Preemption,* 33 PEPP. L. REV. 69, 75-75 (2005).
[215] Matthew J. Parlow*, A Localist's Case for Decentralizing Immigration Policy,* 84 DENV. U. L. REV. 4 (2007).
[216] Clare Huntington, *The Constitutional Dimension of Immigration Federalism,* 799.

unequally based on state or local preference. Opponents may also be uncomfortable with the disadvantages of federalism generally, preferring a national system for its tendencies to create laws that apply equally to all people no matter where they live. But although some public issues are best addressed through legal centralization, in this illegal immigration case decentralization better suits the nature of the problem. Illegal immigration and its associated costs are not uniform across states, and neither are existing regulations.

While statutory preemption would permit more regulatory "patchworking," it might spur more national legislation as well. If Congress knows that it cannot rely on a constitutional challenge to clear the field of regulation it opposes, it will have to create policy in the affirmative to preempt and obtain the results it desires that under structural preemption it could preempt without action.

Immigration federalism means that the political process will determine the balance of regulatory power between Congress and the states, consistent with the framers' preference for political solutions to federalism questions. The Court's limited view of exclusive federal power over immigration will restore deliberation to American immigration policy to the benefit of affected states and the country overall.

CONCLUSION

State sovereignty will be best preserved if the Supreme Court limits excessive federal preemption of state immigration regulation. The Court should narrowly interpret Congress's exclusive implied powers under the Naturalization Clause, leaving the states and Congress with equal initial regulatory authority over the large remainder of immigration law, empowering the states to address local issues with illegal immigration. Immigration federalism will allow states to take action where the federal government has not.

What are the stakes of inaction? Most importantly, inaction unjustifiably puts 12 million people in a legal gray area. For all the argument for shared federal-state responsibility for immigration policy, one cannot dispute that the federal government *exclusively* makes the ultimate determination of legal status. By permitting millions to reside in the United States illegally with few defensible rights and little access to competitive employment, good working conditions or public services, the federal government does more to subject illegal immigrants to poverty, discrimination and police scrutiny than any state government is legally capable of doing. "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy," wrote the majority in *Plyler v. Doe.* Both the states and the federal government, in their rhetoric, point to the federal government as the ultimate problem-solver and problem causer. "There is a pervasive ethos…that immigrants are the kind of 'insular minority' whose interests are best entrusted to the protection of the federal government," writes Peter Skerry, "To the contrary, recent

events, particularly Governor Wilson's crusade against illegal immigration, demonstrate that this issue has been brought to the fore not *in spite of,* but *on account of* the federal system."[217] Had Skerry written this analysis today, he would have likely considered Arizona's immigration law analogous to Governor Wilson's crusade—the subject of misplaced ire.

State sovereignty is also at stake. Few problems exist such that the federal government can cause them while the states must pay for them but are incapable to address them at the source. For those that do, the federal government must provide a powerful constitutional argument for impinging on state sovereignty. It is difficult to see what national justification the government can provide for permitting millions of people to live in the United States illegally and prohibiting any lower regulation. The disjunction between those who reap the benefits of illegal labor and those who bear the costs doesn't match up with who is responsible for the problem and who is ultimately held politically responsible for making tough budget decisions. The Supreme Court clearly fears that when political accountability and political responsibility are mismatched, the political safeguards that protect federalism are weakened. Although the Court does not claim the power to change this relationship on the basis of Tenth Amendment rights, they should appropriately weigh considerations of state sovereignty against federal justifications for broad federal exclusivity over immigration.

It is difficult for the federal government to advance such justification for broad federal exclusivity over immigration precisely because there is none. The federal government undoubtedly retains narrow federal exclusivity over pure immigration law,

[217] Peter Skerry, "Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?" 25 Publius: The Journal of Federalism 3, 71-85 (Summer 1995), 80.

but beyond that it is impossible to say why state regulation consistent with federal goals is either an action contrary to federal aims or an invalid exercise of state power. Precedent and history support a role for the states in immigration regulation.

If the Courts prioritize a system of immigration federalism by limiting federal preemption where appropriate, they will hasten the day when there will be no class of illegal immigrants within our borders. Empowering the states to enforce federal law and enact regulations that concur with the interests of federal law will ensure that states have some power to reduce the number of immigrants here illegally. If the federal government is uncomfortable with this outcome, it has every power to ensure that its aims are not misunderstood. After all, if the federal government is not interested in enforcing laws against illegal entry, residence, and employment, it could make any one of those things legal, thereby granting to newly-legalized residents the protection of equality under the laws.

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