NELLCO
NELLCO Legal Scholarship Repository

New York University Public Law and Legal Theory Working Papers

New York University School of Law

7-28-2008

The Significance of the Local in Immigration Regulation

Cristina M. Rodriguez
NYU School of Law, Rodrigue@exchange.law.nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, Immigration Law Commons, Law and Society Commons, Public Law and Legal Theory Commons, and the State and Local Government Law Commons

Recommended Citation
Rodriguez, Cristina M., "The Significance of the Local in Immigration Regulation" (2008). *New York University Public Law and Legal Theory Working Papers*. Paper 75.
http://lsr.nellco.org/nyu_plltwp/75

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

THE SIGNIFICANCE OF THE LOCAL IN IMMIGRATION REGULATION

*Cristina M. Rodríguez**

The proliferation of state and local regulation designed to control immigrant movement generated considerable media attention and high-profile lawsuits in 2006 and 2007. Proponents and opponents of these measures share one basic assumption, with deep roots in constitutional doctrine and political rhetoric: immigration control is the exclusive responsibility of the federal government. Because of the persistence of this assumption, assessments of this important trend have failed to explain why state and local measures are arising in large numbers, and why the regulatory uniformity both sides claim to seek is neither achievable nor desirable.

I argue that the time has come to devise a modus vivendi regarding participation by all levels of government in the management of migration. To do so, I provide a functional account of subfederal immigration regulation and demonstrate how the federal-state-local dynamic operates as an integrated system to manage contemporary immigration. The primary function of states and localities is to integrate immigrants into the body politic and thus to bring the country to terms with demographic change. This process cannot be managed by a single sovereign, and it sometimes depends on states and localities adopting positions in tension with federal policy.

Given these dynamics, I offer a reformulation of existing federalism presumptions in the immigration context. These will not be primarily for application by courts, though courts should abandon

* Associate Professor of Law, NYU School of Law. For their thoughtful comments on this piece, thank you to Matthew Adler, Ken Bamberger, Howard Chang, Adam Cox, Tino Cuéllar, Kevin Davis, Norman Dorsen, Barry Friedman, Patrick Garlinger, Heather Gerken, Clay Gillette, Craig Green, Jill Hasday, Roderick Hills, Bob Hockette, Dan Hulsebosch, Clare Huntington, Kevin Johnson, Olati Johnson, Tsvi Kahana, Hoi Kong, Stephen Legomsky, Serena Mayeri, Bernadette Meyler, Trevor Morrison, Jide Nzelibe, Rick Pildes, Jaya Ramji-Nogales, Jamie Raskin, Peter Schuck, Catherine Sharkey, Peter Spiro, Steve Sugarman, Mark Tushnet, John Yoo, and participants in the Boalt Hall Junior Administrative Law Scholars Conference, the Cornell Law School Junior Constitutional Law Scholars Conference, LatCrit XII, the University of Minnesota Law School Public Law Colloquium, and the faculty workshops at the American University Washington College of Law, the NYU School of Law, Queen's University Faculty of Law, Temple Law School, the University of Iowa College of Law, and the University of Pennsylvania Law School. My thinking has developed considerably as the result of conversations with Muzaffar Chishti, Kimberly Nortman, Alexa Silver, and Sirithon Thanasombat, with whom I am cataloguing these measures for the Migration Policy Institute. I also benefited from early conversations with Karen Tokarz, Margo Schlanger, and participants at the Washington University Law School faculty workshop. I am extremely grateful for the excellent research assistance of Xinying Chi, Erica Frank, Patrick Garlinger, Vinay Harpalani, Adam Perlman, Lisa Ross, and Elizabeth Seidlin-Bernstein.

constitutional or strong field and obstacle preemption theories in immigration cases. Instead, I offer a framework for federal and state lawmakers intended to restrain their impulses to preempt legislation by lower levels of government and to create incentives for cooperative ventures in immigration regulation.

Counterintuitively, the changes wrought by international economic integration demand strong institutions beneath the national level. Immigration highlights this convergence of the transnational and the local. Only by assimilating our understandings of immigration federalism to this realization can we explain and harness the value of state and local regulation.

TABLE OF CONTENTS

INTRODUCTION 569
I. THE EXCLUSIVITY LIE 574
A. *Conventional Wisdom* 575
B. *Emergent Reality* 576
1. *The Global City and its Shadow* 577
2. *The Ambivalent State* 579
3. *Embracing Diversity* 580
II. STATES AND LOCALITIES AS AGENTS OF INTEGRATION 581
A. *Integrating Lawful Immigrants* 582
1. *Illinois* 582
2. *North Carolina* 584
3. *Iowa* 588
B. *The Particular Problem of Unauthorized Migration* 590
1. *A Restrictionist Typology* 591
2. *Day Labor Centers* 596
3. *Sanctuary Laws* 600
4. *In-State Tuition* 605
III. REIMAGINING THE FEDERAL-STATE-LOCAL RELATIONSHIP 609
A. *The Rise and Fall of Federal Exclusivity* 611
B. *Toward a New Power-Sharing Theory* 617
1. *Division of Labor* 618
2. *Preemption and Judicial Restraint* 620
3. *Preemption and Lawmaking* 630
4. *Preemption and the City* 636
C. *Confronting Externalities and the Value of Interstate Competition* 638
CONCLUSION 640

INTRODUCTION

The processes of global integration are changing how governments do business. Nowhere is this change more apparent than in the mechanisms lawmakers at every level of government are employing to respond to the ways in which immigration is reshaping American society.[1] Among the most notable regulatory trends of recent years is the rise of state and local efforts designed to control immigrant movement, define immigrant access to government, and regulate the practices of those with whom immigrants associate in the private sphere, namely employers and landlords. In the first six months of 2007 alone, more than 1400 bills addressing immigration and immigrants in some capacity were introduced in state legislatures across the country, and nearly 200 of those bills became law.[2] The so-called "Illegal Immigrant Relief Acts" ("IIRAs"), passed by small towns across the country and made famous by Hazleton, Pennsylvania,[3] have generated particular media scrutiny and given rise to high-profile lawsuits, two of which have resulted in the invalidation of ordinances that would regulate employers and landlords in their dealings with unauthorized immigrants.[4]

States have always been active in immigration regulation, of course. In the early republic, state inspection laws and the imposition of duties on migrants' entrance functioned as immigration law.[5] In the twentieth century,

---

1. Since 1990, more immigrants have entered the United States than at any other point in the nation's history. For a representative sample of the literature documenting this trend, see RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION (2003), and Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANN. REV. SOC. 105 (2005).

2. For an account of measures passed in 2007, see Nat'l Conference of State Legislatures, 2007 Enacted State Legislation Related to Immigrants and Immigration, http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm (last visited Oct. 19, 2007).

3. The Fair Immigration Reform Movement has compiled a representative list of local ordinances considered since the movement began in San Bernardino, California, whose City Council ultimately rejected an ordinance intended to crack down on unauthorized migration. *See* Overview of Recent Ordinances on Immigration, Fair Immigration Reform Movement (2006), *available at* http://immigrantsolidarity.org/Documents/Nov06OverviewLocalOrdinances/OverviewofRecentLocalImmigrationOrdinancesandResolutions.pdf. As of September 2007, at least eight lawsuits against these ordinances were active around the country.

4. Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (striking down a local ordinance on preemption grounds); Reynolds v. City of Valley Park, No. 06-CC-3802 (Mo. Cir. Ct. Mar. 12, 2007), *available at* http://www.aclu.org/pdfs/immigrants/valleypark_opinion.pdf (holding that a city ordinance imposed penalties not authorized by state law, including a Missouri state law that prohibited landlords from evicting tenants without at least thirty days notice and required landlords to use "judicial process").

5. *See, e.g.*, The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (invalidating New York and Massachusetts laws that imposed landing fees on alien passengers to pay for support of foreign paupers); Mayor of the City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding a New York state law requiring masters of vessels arriving in New York from another country or state to provide a detailed list of every passenger on board, to post security for maintenance of immigrants who became wards of city, and to remove any noncitizen deemed likely to become a ward, on grounds that it constituted police power regulation, not regulation of interstate commerce). For a discussion of state practice in the nineteenth century, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 23 (1996), which notes that

states made occasional attempts to crackdown on employers who hired unauthorized workers[6] and restricted immigrant access to public benefits.[7] But, as this Article reveals, the trend in state and local immigration regulation in the twenty-first century has been dramatic, and Congress's inability to pass comprehensive immigration reform in recent years likely means that states and localities will continue to be highly active in this area.

These current trends, despite having historical antecedents, are in significant tension with a doctrine articulated by the Supreme Court in the late nineteenth century—that immigration control is the exclusive responsibility of the federal government, or that the Constitution assigns exclusive and nondevolvable power over immigration to the federal government. This exclusivity principle has become deeply entrenched in constitutional and political rhetoric. Indeed, proponents and opponents of current state and local measures agree on one thing: the federal government should be managing migration. Proponents of crackdown measures claim to be compensating for the federal government's failures, and opponents excoriate state and local officials for exceeding the bounds of their regulatory authority.

With this Article, I set out to resolve this contradiction between rhetoric and reality by calling for a modus vivendi regarding immigration regulation by all levels of government. To achieve this working compromise, we must move beyond federalism debates as they are currently framed. Scholars who have addressed immigration federalism largely have focused on whether the national government or the states will be better at protecting or advancing immigrants' interests—empirical claims on which the evidence is mixed.[8]

"[p]erhaps the most fundamental function of immigration law has been to impede the movement of the poor."

6. *See* De Canas v. Bica, 424 U.S. 351 (1976) (upholding California employer sanctions laws).

7. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1976) (striking down state laws restricting immigrant access to welfare benefits); LULAC v. Wilson, 997 F. Supp. 1244 (S.D. Cal. 1997) (striking down California's Proposition 187, which would have eliminated access for unauthorized immigrants to almost all public services, including public schooling).

8. Peter Spiro has done the most work developing a conception of immigration federalism. He has articulated a steam-valve theory, according to which states "desiring stricter enforcement of immigration laws could pursue that objective without imposing their preference on states in which immigration might be considered a neutral or positive factor," which would "pose a net benefit for aliens as a group," because it would be better "to be driven from a hostile California to a receptive New York than to be shut out of the United States altogether." Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635–36 (1997). For other examples of these sorts of empirical claims regarding the benefits to immigrants of immigration federalism, see Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 363–64 (2003), which notes that "we might just as plausibly view federal authorization of divergent state policies as creating laboratories of *generosity* toward immigrants;" Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 389 (2002), which notes that, after 1996 welfare reforms, a race-to-the-bottom did not occur; and Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California's Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345, 367 (2004), which underscores the importance of advancing immigrants' welfare interests at the state level in light of successes in California, which were attributed to the state campaign's "smaller scope" and "the ability of advocates to re-

Missing from the discussion is a functional account that explains why state and local measures have arisen with increasing frequency over the past five to ten years, and how this reality on the ground should reshape our conceptual and doctrinal understandings of immigration regulation.

In the pages that follow, I provide that missing functional account. I argue that the federal government, the states, and localities form part of an integrated regulatory structure that helps the country as a whole to absorb immigration flows and manage the social and cultural change that immigration inevitably engenders. The primary function states and localities play in this structure is to integrate immigrants, legal and illegal alike, into the body politic. By demonstrating how states play this role, I establish the simple proposition that immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest.

The federal exclusivity principle, on its surface, is not inconsistent with the proposition that states help immigrants integrate, to be sure. But I demonstrate that the integration challenge sometimes requires states and localities to take steps that resemble immigration controls.[9] In fact, the process of immigrant integration sometimes depends on entities like states and localities adopting positions in tension with federal immigration policy, particularly in relation to unlawful immigration. In other words, managing migration writ large depends on policy experimentation that sometimes produces contradictory results. The uniformity called for by actors on both sides of the debate is not only difficult to achieve, it is also often counterproductive. Once we see state and local regulation in the perspective I provide, it becomes clear that the federal exclusivity principle obscures our structural need for federal, state, and local participation in immigration regulation.[10] Today's realities suggest different structural imperatives—

spond to the unique political environment within the state." For claims to the contrary, see Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1436–37 (1995), which notes "[l]ocal anti-foreign movements may have difficulty enlisting the national government in their crusades, in part because emotions are not running so high in other states at the moment, and in part because aliens have some virtual representation in Washington by means of the foreign affairs establishment." *Cf.* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 558 (2001) ("[H]istorical accounts of most restrictionist federal legislation do not reveal frustrated states seeking an outlet for their anti-immigrant bias. History simply does not support reliance on 'steam valve federalism' as a reason to celebrate the claimed new state freedom to discriminate against immigrants.").

9. When states and localities act in their integrative capacity, they sometimes produce measures that affect immigrant movement and therefore resemble immigration controls. In some instances, state and local measures that facilitate immigrant integration will attract immigrants across national, state, and local borders. In other instances, state and local measures force immigrants from communities by making it impossible for immigrants to live and work there.

10. *Cf.* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Include the Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) ("[T]heories of preemption need to accept the truisms that the federal and state governments have largely overlapping jurisdictions, that each level of

namely the need for subfederal regulation. The persistence of the exclusivity principle, however, keeps the integrated system I bring into view from functioning to its potential, precludes us from understanding how and why power over immigration should be shared, and prevents us from harnessing the value of the federal-state-local dynamic on immigration matters.[11]

Of course, even if state and local participation in immigration regulation performs a valuable function, such participation could still be constitutionally preempted. But my account of current regulatory reality actually helps to undermine the federal exclusivity principle as a doctrinal matter. Federal exclusivity was neither a matter of original practice, nor is it specified in the Constitution. Rather, the concept of exclusive federal control over immigration emerged through Supreme Court doctrine for functional, structural reasons: the perceived need to have a single, strong sovereign manage foreign affairs. Even if those functional concerns were valid when declared, their foundations have eroded since, and federal exclusivity has become a formal doctrine without strong constitutional justification.

Neither abandoning federal exclusivity nor accepting the integrated system I describe means that the federal government should not exercise strong leadership on aspects of the immigration issue or that uniformity on some matters is not essential. Under a functional analysis, efficiency and coherence require *federal* control over the formal admissions and removal processes. Strong federal leadership also may be necessary to prevent states and localities from imposing externalities on their neighbors that only the federal government can remedy.[12] Though I will argue that the "sorting" produced by these policies has value, and that immigrants are distinct from other externalities,[13] the federal government still may have an interest in preventing these effects and may rightfully choose to displace state regulatory authority by operation of the Supremacy Clause. What is more, some state and local immigration-related activity may come into conflict with generally applicable federal (and state) civil rights laws and constitutional protections,

government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other.").

11. Other scholars also have challenged federal exclusivity in recent work. *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (calling for greater state involvement in enforcement and in setting visa policy); Spiro, *supra* note 8; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. (forthcoming 2008) (manuscript at 5–6, on file with author), *available at* http://ssrn.com/abstract=968716 (acknowledging that federal exclusivity is an "accurate description of immigration law" while challenging its constitutional basis). *But see* Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, *in* 12 BENDER'S IMMIGRATION BULLETIN 901, 904–05 (2007) (defending federal exclusivity for immigration because "[s]hifting immigration enforcement powers to sub-federal levels will more likely lead to weaker federal enforcement . . . ."); Wishnie, *supra* note 8, at 527–66 (arguing for federal exclusivity).

12. *Cf.* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368–69 (2006) ("[S]tates can neither export costs onto their neighbors nor compromise the ability of other states to have a reasonable set of regulations.").

13. *See infra* Section III.C.

including the Equal Protection Clause,[14] the First Amendment,[15] and landlord and tenant laws;[16] I do not suggest relaxing these limitations.

But the functional account I provide, in addition to undermining the article of faith that state and local immigration regulation is constitutionally preempted, should occasion some shifts in the doctrine governing statutory preemption, primarily by leading courts to assess potential conflicts between federal and state law without giving extra weight to an overriding national interest in immigration regulation. Even more important, my functional account should give rise to new lawmaking norms, giving lawmakers incentives to engage in federal-state-local cooperation in the immigration field and restraining Congress from explicitly preempting much state and local legislation that may seem counter to federal objectives at first glance. What is more, my functional account should restrain Congress from overregulating with respect to integration issues, such as the rights and benefits states can accord immigrants within their jurisdictions. Finally, my account will help mediate the state-local relationship on immigration matters—a relationship clearly at stake in migration management but also undertheorized.

In addition to changing the terms of the immigration debate, the integrated system I describe highlights several crucial features of federalism generally. It reveals the vital sorting function federalism performs—a function crucial to managing demographic change in a country as large and diverse as the United States. Relatedly, my account demonstrates how federalism can help manage the effects of globalization and economic interdependence. My immigration story thus highlights that federalism serves as a crucial mechanism for shaping and managing national identity—that the process of forging such identity is not a top-down, but a bottom-up process. In the end, the story I tell reveals why our understandings of the allocation of constitutional powers within the federal system must be responsive to facts on the ground, or to the arrangements that the various levels of government have devised to manage the challenges that cross their jurisdictions.

---

14. Pursuant to the Supreme Court's alienage jurisprudence, state laws that distinguish between citizens and noncitizens are subject to strict scrutiny. Scholars such as Linda Bosniak have shown, however, how alienage law sometimes collapses into the law of immigration control. *See generally* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006). Regardless, equal protection scrutiny is relaxed when state laws deal with unauthorized immigrants. The Court has only once found distinctions involving unauthorized immigrants unconstitutional. *See* Plyler v. Doe, 457 U.S. 202 (1982) (declining to treat the unauthorized as a suspect class but holding that a Texas state law authorizing public schools to charge unauthorized children tuition violated the Equal Protection Clause). For further discussion of the difficulties in keeping these measures separate, see *infra* Section III.B.

15. Several federal district court judges have struck down antisolicitation ordinances adopted by local governments to prevent day laborers, many of whom are unauthorized, from congregating. *See, e.g.*, Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520 (S.D.N.Y. 2006); *see also infra* Section II.B.2.

16. *See* Reynolds v. City of Valley Park, No. 06-CC-3802, slip op. at 3–4 (Mo. Cir. Ct. Mar. 12, 2007), *available at* http://www.aclu.org/pdfs/immigrants/valleypark_opinion.pdf.

To develop my functional account, I divide this Article into three parts. First, I establish the disconnect between reality and rhetoric with respect to immigration federalism. In Part II, I take a close look at various forms of state and local immigration regulation to highlight the substance of the de facto integrated regime. I begin by looking at actual integration programs adopted by a few innovating states, but I focus as well on how different sovereigns have dealt with the phenomenon of unauthorized migration, considering the IIRAs, as well as city sanctuary laws, state-level college tuition policies, and controversies over local day labor centers. In Part III, I consider how this functional account of state and local participation should affect our conceptions of the federal-state-local relationship, with an analysis of the constitutional and statutory preemption doctrine that should result, as well as the shift in lawmakers' attitudes we should pursue.

I. THE EXCLUSIVITY LIE

Lawmakers today face three primary trends, each of which is contributing to the heightened lawmaking in the immigration area. First, since 1990, immigrants have been arriving in the United States in record numbers, primarily from Asia and Latin America.[17] Our country is in the midst of a demographic reordering similar in scope to the heavy Italian and Eastern European influx from 1890–1920.[18] Second, the Pew Hispanic Center has estimated that, in 2006, approximately 11.5 million of these immigrants were unauthorized,[19] and two-thirds of unauthorized migrants have entered the country in the last ten years[20]—factors that are contributing to the intensity of current debate. Finally, the distribution of migrants today differs from that in the past. Migrants are bypassing traditional urban centers and gateway states,[21] heading for destinations—namely the Southeast—whose past

17. Marcelo Suárez-Orozco, *Right Moves? Immigration, Globalization, Utopia, and Dystopia*, *in* THE NEW IMMIGRATION 13 (Marcelo Suárez-Orozco et al. eds., 2005) (citing Current Population Survey data from 2002).

18. ALBA & NEE, *supra* note 1, at 9–10. Though immigrants at the turn of the twentieth century comprised a larger percentage of the total U.S. population than they do today, the absolute numbers of immigrants are at an all-time high. Sociological data suggest that immigrant communities are likely to be replenished for the foreseeable future, thus ensuring continuation of current debates. Waters & Jiménez, *supra* note 1, at 107 ("[O]ngoing replenishment of new immigrants . . . is likely to be a defining characteristic of American immigration for years to come.").

19. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 1 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf. Nearly seventy-eight percent of that population comes from Mexico or Latin America. *Id.* at ii.

20. *Id.* at 1.

21. Traditional gateway destinations include California, Texas, New York, Florida, New Jersey, and Illinois, and major American cities such as Los Angeles, Houston, New York, Miami, Chicago, and San Francisco. *See* ALBA & NEE, *supra* note 1, at 8–9. Prior to 1995, three-quarters of immigrants to the United States remained in six states. Greg Anrig, Jr. & Tova Andrea Wang, *Introduction* to IMMIGRATION'S NEW FRONTIERS: EXPERIENCES FROM THE EMERGING GATEWAY STATES 1, 1 (Greg Anrig, Jr. & Tova Andrea Wong eds., 2006). Today, that percentage is down to two-thirds. *Id.*

exposure to immigration has been limited and whose experience coping with linguistic and cultural diversity is virtually nonexistent.[22]

Both the sheer scope and novel distribution of immigration today compound the extent to which immigration implicates the interests of localized political communities. State and local lawmakers are responding to this shifting demography by attempting to exert control over immigrant movement. These efforts, however, collide with the conventional legal wisdom of exclusivity, thus setting up a relationship of antagonism among the different levels of government. In other words, regulatory reality and standard legal presumptions are not aligned. The first step in figuring out how to negotiate this contradiction is to see it in full.

A. *Conventional Wisdom*

The federal exclusivity principle is embodied in the Supreme Court's strong statements that the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[23] and that exclusive federal control over immigration "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."[24] This principle has been repeated and elaborated in countless federal court decisions. In the order that ended litigation over California's Proposition 187, for example, the trial court declared that "[t]he State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws."[25]

The continual judicial invocation of federal exclusivity, in turn, has encouraged the now-familiar rhetoric from state legislatures emphasizing that the federal government has failed to do its job controlling illegal immigration. Following the script laid out by the Supreme Court, state and local officials, who presumably consider their actions to be constitutional, nonetheless cite the failure of the federal government to enforce immigration controls as the justification for their legislative activity, simultaneously calling on the federal government to perform its duties and stepping into what they have identified as the breach. As one member of Virginia's House of

22. Waters & Jiménez, *supra* note 1, at 105, 161; *see also* Marcelo Suárez-Orozco et. al., *Cultural, Educational, and Legal Perspectives on Immigration: Implications for School Reform*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 160, 162–63 (Jay P. Heubert ed., 1999).

23. De Canas v. Bica, 424 U.S. 351, 354 (1976).

24. Galvan v. Press, 347 U.S. 522, 531 (1954).

25. League of United Latin American Citizens v. Wilson, 908 F.Supp. 755, 786 (C.D. Cal. 1995) (permanently enjoining most of Proposition 187). As Peter Spiro has noted, this injunction had the perverse effect of motivating the California Delegation to Congress to "federalize its preferences" and lobby for the Illegal Immigration Reform and Immigrant Responsibility Act, which funded immigration enforcement, dramatically expanded the grounds of removability, cut noncitizens off from a range of public benefits, ended judicial review of a wide variety of agency decisions in the immigration context, and heightened penalties for immigration law violations. Spiro, *supra* note 8, at 1633–34.

Delegates put it while discussing the issue of in-state college tuition for unauthorized immigrants, "'[w]e feel like the federal government has not stepped up and accepted its responsibility for a federal issue . . . [which] is unfortunate because what you end up with are laws in one state that don't conform to laws in other states.'"[26]

The exclusivity doctrine also shapes the arguments made by defenders of immigrants' rights, who argue that state and local officials regulating immigration are exceeding the limits of their powers because immigration regulation is a field wholly occupied by the federal government.[27] As the plaintiffs in the current litigation over the Hazleton, Pennsylvania, ordinances explain, "The regulation of immigration is constitutionally reserved to the federal government, such that even if Congress had not legislated on the same subject matter, the Ordinances would be invalid. State or local laws that encroach on this exclusive federal power can be described as 'constitutionally preempted.'"[28] Parties at all points on the immigration policy spectrum thus echo the Supreme Court's longstanding assumption that when it comes to immigration, the country should speak with one voice.

B. *Emergent Reality*

The federal exclusivity principle, in all of its legal and rhetorical permutations, does not map well onto reality on the ground. State and local officials are reacting to our shifting demography in extraordinarily varied ways, particularly when it comes to how best to deal with the reality of unauthorized immigration. Lawmakers have turned both to political and administrative processes to devise strategies for managing these trends. Whereas some actors have sought to abate immigration by assisting federal enforcement efforts and penalizing employers and landlords who associate with unlawful immigrants, others have decided to learn to live with the new demography. These lawmakers have taken bold steps to integrate even unauthorized immigrants, through policies such as issuing identification cards, making in-state college tuition available to unauthorized immigrants, declaring cities to be sanctuaries from immigration enforcement, and setting up centers where day laborers can gather to find employment. In Part II, I explore the content of these measures. For now, it is simply important to take note of the breadth of activity and to venture an explanation for the de facto obsolescence of federal exclusivity.

---

26. Elizabeth Redden, *An In-State Tuition Debate*, INSIDE HIGHER EDUC., Feb. 28, 2007, http://insidehighered.com/news/2007/02/28/immigration (last visited Oct. 6, 2007) (quoting Republican lawmaker John S. Reid).

27. *E.g.*, Memorandum of Law in Support of Plaintiffs' Opposition to Hazleton's Motion to Dismiss and Cross Motion for Summary Judgment at 32, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv1586), 2007 WL 856626.

28. *Id.*

1. *The Global City and Its Shadow*

Cities such as New York, Los Angeles, and Chicago, like other "global cities"[29] around the world, have a strong interest in recruiting and incorporating immigrants at both the high end and the low end of the labor market. These cities serve as international financial hubs and points of convergence for transnational elites,[30] and they also depend heavily on low-skilled immigrant labor in sectors such as the hotel and restaurant industries and construction. As a result, global cities have become focal points for immigrant diasporas of various types and from around the world.[31] All of these immigrants, who may lack power at the national level, have de facto power in the cities they constitute.[32] The nation-state's resulting "loss of monopoly" over the determination of rights[33] has generated a need for new forms of power to be exercised beneath the national level.[34]

Consequently, policymakers in urban settings often take stronger pro-immigrant positions than do lawmakers at the national level. New York City mayor Michael Bloomberg, for example, has been a strong proponent of legalization programs and increasing the supply of immigrant visas. In the summer of 2006, Bloomberg emphasized in testimony before the Senate Judiciary Committee that immigration is inevitable and produces economic dynamism.[35] He criticized proposals by the House of Representatives that would penalize localities for adopting sanctuary laws that limit the extent to which local public officials may cooperate in enforcing federal immigration law.[36]

This pro-immigrant posture is re-enforced by the cosmopolitan character of places such as New York, Miami, and Los Angeles, which has resulted from their status as cities of the world rather than just cities of the United States. This cosmopolitanism is, in turn, compatible with a concept of citizenship disassociated from thick forms of cultural identity, and it allows

---

29. SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS 315 (2006).

30. *See id.*

31. *See id.*

32. *See id.*

33. Yishai Blank, *Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411, 411–12 (2007).

34. *See* SASSEN, *supra* note 29, at 314; Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1564 (2006) ("America's federalist structure also serves as a path for the movement of international rights across borders.").

35. *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Field Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Michael R. Bloomberg, Mayor, City of New York), *available at* http://judiciary.senate.gov/testimony.cfm?id=1983&wit_id=5493 (last visited Oct. 20, 2007) ("Although they broke the law by illegally crossing our borders or overstaying their visas, our City's economy would be a shell of itself had they not, and it would collapse if they were deported.").

36. *See id.* ("Members of the House of Representatives want to control the borders. . . . But believing that increasing border patrols alone will achieve that goal is either naïve and short-sighted, or cynical and duplicitous."). For an extended discussion of the sanctuary law issue, see *infra* Section II.B.3.

residents of global cities to conceive of citizenship in broadly inclusive terms. It is at least plausible, for example, to imagine New York following the practice of Amsterdam and granting local citizenship, complete with voting rights, to foreign nationals who meet certain qualifications.[37]

But the celebration of the global city as the site of new forms of participation for immigrants obscures, perhaps unwittingly, the spin-off effects of economic integration into the suburbs and beyond the major financial centers. The immigrants who are increasingly bypassing traditional gateway cities and states often have no apparent *direct* connection to the enterprises of the world's financial capitals; the jobs they fill, as construction workers, meatpackers, and domestic workers, and the towns they populate, in suburban areas and in the new immigration states, are far removed from the global city. But these jobs exist as the simultaneous result of integrated markets and of domestic labor shortages in the United States. These shortages reflect the increasing participation of U.S. workers in the service and information economies, which also arises from changes wrought by globalization. In addition, large cities' support of immigration, both legal and illegal, imposes costs on other localities by creating migration networks that do not correspond directly to economic demand and therefore result in geographic dispersal.[38]

Without the cosmopolitan zeitgeist and deep immigrant history that characterizes the global cities, however, the new immigration destinations are not well equipped to adapt without friction to the cultural and environmental changes this migration is producing. The interests of these localities differ markedly in kind from the interests of the global city, and the needs of the two locales are difficult to reconcile. Indeed, there is considerable evidence that localities within states, when left to their own devices, converge on different strategies for managing migration.[39] But to which interests should the national government, or a state government, for that matter, give preference?

The accommodationist impulse does, of course, exist beyond the global city. New Haven, Connecticut, is at the experimental forefront, but with in-

37. SEYLA BENHABIB, TRANSFORMATIONS OF CITIZENSHIP: DILEMMAS OF THE NATION STATE IN THE ERA OF GLOBALIZATION 63 (2001); *see also* Richard T. Ford, *City-States and Citizenship*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 253, 226–27 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) (discussing the city as a supplemental site of citizenship because its cosmopolitanism and limited geographical scope promotes "identity and inspire[s] esprit de corps").

38. Migrants may initially move in pursuit of economic opportunity, but because migrants create social networks, migration often outlasts economic necessity. Immigrants also do not necessarily travel to the city or state with the most available jobs. Instead, they often follow the migrants who preceded them from their hometown. *See* ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA 24 (2006).

39. *E.g.*, Stephanie A. Bohon, *Georgia's Response to New Immigration*, *in* IMMIGRATION'S NEW FRONTIERS, *supra* note 21, at 67, 69 ("The resultant policies are often quite different from county to county and city to city, with some localities working to make life easier for newcomers, while others seek to minimize potential disruptions by banning practices viewed as foreign."). Connecticut also offers a case in point. *See* Jennifer Medina, *New Haven Welcomes Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, at B1.

tentions exactly opposite those of Hazleton. The city recently adopted a municipal identification card that is available to all New Haven residents, including the unauthorized, and helps unlawful immigrants access certain city and private sector services, thereby encouraging immigrants to trust public officials and helping immigrants live safe and healthy lives.[40] Though the move has been met by derision from some corners, New Haven is serving as a model for larger cities like New York, whose city council is now considering such a measure.[41] New York, it seems, shares New Haven's interest in reaping the public health and safety benefits of universal identification. In a similar vein, Cambridge, Massachusetts, has taken a position as a sanctuary city and regularly files home-rule petitions with the state on issues of immigrants' rights, including seeking voting rights for noncitizens in local elections.[42] The "shadow" of the global city thus includes people of diverse preferences, and sometimes gives rise to novel integration strategies.

2. *The Ambivalent State*

Given this divergence in preferences among localities, it is not surprising that state-level policies reflect ambivalence about immigration, underscoring that responses to high levels of immigration demand difficult negotiation that must be attuned to Americans' very mixed feelings regarding immigration. A recently released study of five "new immigration" states reveals a similar pattern of adjustment in each location: states and localities initially approach the immigrant influx in an accommodationist manner, in some cases actively recruiting new immigrants.[43] The willingness to accommodate eventually gives way to more restrictionist measures, such as denying immigrants access to public benefits.[44] Today's status quo in most of these states is ultimately characterized by ambivalence: legislators and administrators make regular efforts to reconcile the commitment to accommodation with the fear of existing residents that their communities are becoming unrecognizable, and even dangerous.

This cycle of acceptance, followed by restrictionism, culminating in ambivalence, is not an innovation of the new immigration states. Both

---

40. *See* Caitlin Carpenter, *New Haven opts to validate its illegal residents*, CHRISTIAN SCI. MONITOR, July 17, 2007, at 2 (noting the adoption of a card to serve as identification for bank services, municipal libraries, beaches, and parks, and as a debit card to pay for parking meters and for goods at certain shops).

41. N.Y. City Council Introduction No. 0602-2007 (N.Y. 2007), *available at* http://webdocs.nyccouncil.info/textfiles/Int%200602-2007.htm?CFID=1... (last visited Oct. 20, 2007); Nina Bernstein, *Bill for New York City ID Card To Be Introduced by Councilman*, N.Y. TIMES, July 24, 2007, at B3 (noting that the bill was inspired by a "pioneering program" in New Haven).

42. MICHAEL CASTAGNA ET AL., SECURING NON-CITIZEN VOTING RIGHTS: DETERMINING THE FEASIBILITY OF ENABLING LEGISLATION IN MASSACHUSETTS 1–2 (2005), *available at* http://ase.tufts.edu/uep/academics/field_project_reports/2005/4-securing_noncitizen_voting_rights.pdf.

43. *See* Anrig & Wang, *supra* note 21, at 2; *see also infra* notes 87–88 and accompanying text (discussing proposals by Governor Tom Vilsack of Iowa to recruit new immigrants to the state).

44. *See* Anrig & Wang, *supra* note 21, at 1–5.

traditional gateway states and the federal government cycle through these same stages, with measures like Proposition 187 and Congress's 1996 immigration overhaul representing the peak of restriction. The examples of local ambivalence and resistance in the new immigration states simply highlight that local players are making key decisions with respect to whether and how to integrate immigrants. Our social coping mechanisms are being developed by disaggregated entities or by state and local actors that sometimes (but not always) coordinate with one another. Eventually, states may reach equilibrium, accepting immigrants' presence and choosing to adapt rather than resist, much as traditional gateway states arguably have done.

3. *Embracing Diversity*

One way to address the demographic pressures that have given rise to this spectrum of activity would be to call for strong federal intervention to obviate the need for state and local regulation. But placing all of our eggs in the federal basket would be misguided and counterproductive. The appearance of state and local measures is not simply (or even primarily) a symptom of the federal government's failure to reform the immigration system. Instead, it reflects the *unsuitability* of a strictly federal response to immigration. The continued mobilization of the exclusivity principle demonstrates that lawyers and legal scholars, who can be adept at devising new institutional forms to mediate certain aspects of transnational markets, have only just begun to discuss what Saskia Sassen identifies as the globalization processes that "take place deep inside territories and institutional domains that have largely been constructed in national terms."[45]

In the meantime, states and localities are addressing the question of how to handle the internal effects of globalization for themselves. Their activity suggests that though we may be able to identify a nationally optimal level of immigrant admissions, participation by national subentities in determining how best to sort and integrate these admissions is essential. This observation should be of particular interest to the immigrants' rights advocates who readily invoke preemption principles. Much of the pro-immigrant activity I describe in Part II actually depends on a robust conception of local authority over immigration matters and on embracing diversity in regulations—principles that are vulnerable in the face of a strong theory of preemption.[46] More important, the diversity of state and local regulation underscores how subfederal entities have developed their own particular interests in large-scale, cross-border phenomena—interests our constitutional law doctrine should take into account.

---

45. SASSEN, *supra* note 29, at 3; *see also* Ford, *supra* note 37, at 209 (observing that global cities serve as magnets for immigration and international commerce and offer a rich vantage point from which to explore the interaction of disintegration and internationalization); *cf.* BOSNIAK, *supra* note 14, at 126–29 (emphasizing how the border crosses into U.S. territory through laws that differentiate between the rights of citizens and noncitizens).

46. *See infra* Part III.

II. STATES AND LOCALITIES AS AGENTS OF INTEGRATION

I now turn to assess the substantive coping mechanisms various governments have adopted to respond to demographic developments, with a view to developing an understanding of the actual function state and local measures play in migration management. Existing scholarship on state and local regulation tends, understandably, to focus on the outcomes of local political processes, where populist and sometimes nativist reactions to immigration find their most vivid expression. But much less attention has been paid to what state and local officials, working through administrative processes and other mechanisms of governance, have produced. In this Part, I consider both forms of state and local decision making and demonstrate that the primary function state and local governments play is to facilitate the integration of immigrants into public life. As the discussion will reveal, this integration function coincides with, but does not completely overlap, the primary federal function of immigration control, or the setting of standards for admissions and removal.

Prominent voices in the current immigration debate have called for greater national-level attention to integration issues.[47] President Bush has convened a Task Force on New Americans,[48] and in testimony to Congress, the Secretary of Commerce has offered up the standard lines about encouraging assimilation.[49] A more thoughtful federal integration policy certainly would be a welcome development, particularly to the extent that it involves information sharing and performs coordination functions. But the impulse to federalize integration policy should be tempered with the recognition that state and local governments have been developing integration expertise, including through strategies that involve direct substantive involvement in immigration regulation or control. After all, state and local officials are either in control of or closest to the public structures most directly affected by immigrant presence: schools, civic associations, the workplace, and public health and safety institutions.

It would be impossible in the scope of one Article to canvas the full range of recent state and local activity related to immigration. But I have chosen to make a first cut between policies that address legal immigrants and those that address illegal immigrants, though I recognize that reactions to legal and illegal immigrants cannot be separated completely and that responses to each type of immigrant often form part of integrated schemes. On the subject of legal immigration, I focus on programs adopted by various states and localities to integrate immigrants affirmatively into local institu-

47. *See, e.g.*, SPENCER ABRAHAM ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER xix—xx (2006), *available at* http://www.migrationpolicy.org/task_force/new_chapter_summary.pdf.

48. Exec. Order No. 13,404, 71 Fed. Reg. 33,593 (Jun. 7, 2006).

49. *Comprehensive Immigration Reform: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 144–48 (2007) (statement of Carlos M. Gutierrez, Sec'y, Dep't. of Commerce of the U.S.) (emphasizing the importance of immigrants learning English and adapting to American culture).

tions and networks while helping existing populations adjust to the influx of newcomers. These programs are generally not in danger of being preempted, but their existence is relevant to the preemption question because it puts in perspective the relationship of states and localities to immigration.

On the subject of illegal immigration, I first consider the most common restrictionist measures adopted of late and explain how they (counterintuitively) represent a necessary piece of integration policy. I then consider how states and localities have responded to unauthorized immigration through measures intended to promote those immigrants' integration in some form or another—measures such as financing day-labor centers, adopting sanctuary or noncooperation laws, and providing in-state tuition for unauthorized high school students. I acknowledge that the federal government has a role to play in the sorting process that demographic change requires. But I emphasize that it is important not to cut short the processes by which states learn to integrate immigrants by employing aggressive preemption strategies or by presuming that immigration and integration issues should be channeled up to the national level.

A. *Integrating Lawful Immigrants*

Below, I focus on the integration strategies of three states that occupy different points on a spectrum of experience with integrating immigrants: Illinois, a state that has absorbed waves of immigration throughout its history and that has a self-conscious immigrant identity; North Carolina, one of the so-called "new immigration states," with minimal post-colonial immigration history but with the fastest-growing Latino population in the country; and Iowa, a state with a declining population that has considered turning to immigration as a possible means of invigorating its population.

1. *Illinois*

Governor Rod Blagojevich made headlines in December 2006 when he announced his intention to fund a multidimensional immigrant integration program via public–private partnerships in Illinois.[50] This public commitment followed from his "New Americans" Executive Order, issued in November of 2005, which (according to state documents) "create[d] a first-in-the-nation coherent, strategic, and proactive state government approach to immigrant integration."[51] The Executive Order proclaimed the governor's

50. *See, e.g.*, Kari Lydersen, *Ill. Governor to Announce New Benefits for Immigrants*, WASH. POST, Dec. 12, 2006, at A11.

51. ILL. COAL. FOR IMMIGRANT & REFUGEE RIGHTS & OFFICE OF NEW AMS. ADVOCACY & POLICY, FOR THE BENEFIT OF ALL: STRATEGIC RECOMMENDATIONS TO ENHANCE THE STATE'S ROLE IN THE INTEGRATION OF IMMIGRANTS IN ILLINOIS, JOINT SUMMARY, YEAR ONE ISSUES OF CITIZENSHIP, EDUCATION, HUMAN SERVICES AND HEALTH CARE 1 (2006). Governor Corzine of New Jersey recently issued a similar executive order, providing that "[t]he Advisory Panel shall develop recommendations on how the State can better prepare immigrants to become fully productive and self-sufficient members of society by addressing the need for greater access in the following areas: civil rights, citizenship status, education, employment/workforce training, fair housing, [and]

goal of identifying areas where the "[s]tate can strategically and cost-effectively act to enhance immigrant integration and social cohesion" by complementing the integration efforts of families, faith institutions, and local community and service organizations.[52] To this end, the Order created a new office within the governor's office, which convened an inter-agency task force comprised of the state agencies that oversee health care, education, and human services. The governor endowed the task force with the mandate to make state services more accessible to immigrants. To complement this state-based planning process, the Order also convened the "New Americans Policy Council," a public–private partnership charged with developing recommendations for accelerating immigrant and refugee integration.

In the December 2006 report that resulted from this process, the Policy Council framed the integration program as a matter of destiny as well as necessity. An Executive Summary begins by noting that the state's growth has always been fueled by immigrants from around the world, and that successive waves of immigrants have made Illinois a "great economic power."[53] Today, of the state's 12.4 million people, 1.7 million are foreign born, and 1.5 million are the citizen children of the foreign born. As in the past, immigrant workers are fueling the growth of the state's labor force; though they constitute 12.6% of the population, immigrants represent 17% of the state's workers. They represent 27% of workers with doctorate degrees and 26% of low-skilled workers, confirming that the hourglass pattern of immigration identified by economists and demographers as a national phenomenon obtains in Illinois.[54]

The report then sets out a series of recommendations, some of which are quite ambitious and call upon Illinois residents to take their own steps toward adapting to immigrants' presence. Take, for instance, the report's recommendations concerning linguistic adaptation, which represent a key component of the state's integration plans. The required adaptation is bidirectional, meaning that it requires immigrants, government, and the residents of Illinois each to adapt in different ways. Illinois thus has adopted an integration strategy different in kind from the approach taken by states and localities that have adopted English-only rules, which place the burden of linguistic adaptation exclusively on immigrants.

On the one hand, the Policy Council recommends launching a well-funded "We Want to Learn English Campaign." The initiative would require dedicating resources to provide accessible and high-quality English language instruction "centered in the communities and institutions where immigrants live and work."[55] It recognizes that state agencies, working with

healthcare . . . ." Exec. Order No. 78 (N.J. Aug. 6, 2007), http://www.state.nj.us/infobank/circular/eojsc78.htm (last visited Oct. 20, 2007).

52. ILL. COAL. FOR IMMIGRANT & REFUGEE RIGHTS & OFFICE OF NEW AMS. ADVOCACY & POLICY, *supra* note 51, at 3.

53. *Id.* at 2.

54. *Id.*

55. *Id.* at 4.

local governments, are likely to be in the best position to identify such sites. The Council's recommendations complement this service-provision approach with economic incentives that would tie advancement in certain areas of the service industry (such as hotels, restaurants, health care facilities, and tourism) to immigrants' participation in English-language instruction and vocational training programs.[56] But in addition to calling for the implementation of these mechanisms for English-language acquisition, the Policy Council also recommends developing the capacity of state agencies and state contractors to deliver adequate interpretation and translation services to ensure access to state-funded services.[57] And on top of enlisting the state to ease the transition of immigrants into an English-speaking mainstream, the Council recommends experimenting with dual-language pilot programs that would "encourage children of immigrants and refugees to retain their parents' languages and develop fluency in non-English languages for other [non-immigrant] children."[58] Illinois is thus contemplating a model of linguistic adaptation that challenges directly a widespread public perception—reflected in congressional, state, and local debates—that the best way to ensure that immigrants learn English is to create an exclusively English-speaking public sphere and divorce the second generation from any meaningful connection to the languages of their parents.[59]

2. *North Carolina*

Unlike Illinois, North Carolina had a negligible immigrant population and a small population of Latinos before 1990.[60] In 1970, 43,414 Latinos lived in North Carolina.[61] But by 2000, that number had climbed to 383,465. And by 2004, the number was at 506,206—a 394% increase from 1990 levels and a 1066% increase from 1970 levels.[62] North Carolina has the fastest-growing Latino population in the South today, due in large part to immigra-

56. The recommendations of the Inter-agency Task Force mirror these proposals. For example, the Task Force recommends that state agencies develop "comprehensive linguistic and cultural competency training for state staff" that extends beyond "typical customer service to a service delivery system that is culturally and linguistically sensitive." *Id.* at 6.

57. *Id.* at 5.

58. *Id.* I have discussed the democratic and experimental value of these dual-language programs at length elsewhere. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 762–65 (2006).

59. As I have emphasized in previous work, programs that might work in Illinois, either because they cohere with the immigrant identity of much of the state, or because the state has come to accept the economic and cultural benefits of promoting integration, may not have legs elsewhere. *See* Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1756 (2006).

60. Paula D. McClain, *North Carolina's Response to Latino Immigrants and Immigration*, *in* IMMIGRATION'S NEW FRONTIERS, *supra* note 21, at 7–8.

61. *Id.*

62. *Id.*

tion.[63] Latinos account for 7% of the state's population, and they live in every North Carolina county.[64]

The response by state and local officials to this phenomenon has been mixed. State and local agencies both have adopted a range of coping mechanisms that have included traditional immigrant benefits programs as well as innovative strategies designed to train agency officials to understand the Latino immigrant experience by exposing officials to aspects of the aesthetic and political cultures of the immigrants' home societies. The Center for International Understanding at the University of North Carolina, for example, has launched the "Latino Initiative," which aims to assist public policy and civic leaders in North Carolina understand how best to meet the cultural challenges of the new immigration.[65] The Initiative encourages policymakers and agency officials to understand the reasons for immigration to North Carolina and develops a network of interdisciplinary professionals who can act on that understanding to help immigrants integrate.[66]

Among other projects, the Initiative sponsors trips to Mexico for state and local officials. These exchanges have been credited with changing at least one formerly restrictionist public official's focus from a fixation on preventing illegal immigration to finding ways to help immigrants adjust to life in the United States.[67] The Latino Initiative also has given rise to training programs for Mexican nurses and changed law enforcement's strategy for interacting with immigrants, based on the recognition that Mexicans tend to have a general suspicion of police that stems from the pervasive corruption among Mexican law enforcement.[68] The Initiative targets local communities in North Carolina and seeks to incorporate a range of public actors—including law enforcement, state service providers, and local public school teachers—into the Initiative's training programs.

But as a recent study of integration initiatives in North Carolina reveals, the responses to immigration by legislative and executive officials have diverged, perhaps in part because legislators feel compelled to respond to decidedly mixed public opinion on this question.[69] In her study of official

63. *See id.*

64. *Id.* Shifts in the Southern labor economy have required large numbers of unskilled workers to man plants in the poultry industry, as well as in meat processing, carpet manufacturing, oil refining, agriculture, and forestry. *Id.* at 9. These factors have been complemented by the "push" of an ongoing economic crisis in Mexico. *Id.*

65. For information on the Initiative, see UNC Charlotte, The Latino Initiative, http://www.provost.uncc.edu/LatinoInitiative/index.htm (last visited Oct. 20, 2007).

66. *See id.*

67. Ned Glascock, *Mexico trip "humbling" for official: Leader in Chatham vows to aid newcomers*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 16, 2000, at A1. In 2000, Chatham County Commissioner Rick Givens wrote to the Immigration and Naturalization Service demanding better enforcement of immigration laws. After participating in the Latino Initiative, however, he expressed regret about his earlier position and declared "I'm man enough to admit when I'm wrong." *Id.*

68. Media coverage of the Latino Institute has been mostly positive, though some critics have questioned the need to travel to Mexico to understand the immigrant experience when immigrants live in every county in North Carolina.

69. *See* McClain, *supra* note 60, at 14, 16–18.

responses to immigration in North Carolina, Paula McClain quotes an anonymous state official who notes this discrepancy: "The state has responded at different levels, at different speeds. More specifically, the response differs between the executive and legislative branches. The response . . . to Latinos in the legislature has been a lot more combative. . . . The response at the executive has been more about helping Latinos navigate the system."[70]

Executive agencies, for example, have taken more concrete steps to address challenges posed by large immigrant populations, including developing translation and interpretation capacity, particularly in health care.[71] In 1998, Governor James B. Hunt issued an executive order creating a state Office of Hispanic/Latino Affairs along with an Advisory Council on Latino Affairs to coordinate and develop state and local programs to address issues of concern to the Latino community across a range of issues, including education, health care, workers' rights, licensing and documentation, political representation, and immigration. Though it is not clear whether this Council amounts to anything more than window dressing, the Council has issued some recommendations, again with an emphasis on improving the cultural literacy of public health professionals through training and ensuring health care service delivery through the creation of federally and state-funded clinics for migrant farm workers.[72]

The legislative response to immigration in North Carolina has been simultaneously more varied and more extensive in scope. Between 2001 and 2004, lawmakers adopted a number of measures addressing the rise of immigrant children in schools. They allocated money for English classes that they had been reluctant to dedicate before; encouraged schools to hire bilingual teachers and support staff, ensuring that schools would be able to communicate with non–English-speaking parents in the parents' native language; and adopted measures that would prevent notary publics and landlords from taking advantage of language barriers to exploit immigrants.[73]

But as the debate over comprehensive immigration reform began to heat up, some lawmakers with an apparent eye to the national stage began introducing legislation intended to regulate unauthorized immigrants. These measures included a bill that would have authorized state and local law enforcement to enforce federal immigration law to the extent authorized by federal law, a bill that would have required proof of citizenship to vote and proof of legal residency or citizenship to obtain public benefits, and a bill

70. *Id.* at 18 (quoting Interview by Victoria M. DeFrancesco Soto with anonymous North Carolina executive official (Feb. 27, 2006)).

71. *Id.* at 22–23.

72. *See id.* at 23. McClain's account of the health care issue highlights how states and localities bear much of the cost of absorbing immigrants, and it makes clear that some local hospitals in North Carolina will find themselves facing something of a fiscal crisis in the near future if problems such as uncompensated (through Medicaid) care are not squarely addressed. *Id.*

73. *Id.* at 26.

that would have urged Congress to adopt English as the official language.[74] In addition, an effort to make in-state tuition available to non-legal residents of the state who had graduated from state high schools floundered in the face of strong public resistance. The more restrictionist measures have yet to pass, and legislators in North Carolina thus far have been restrained compared to their counterparts in Georgia and Virginia, where some of the most extreme measures have been adopted.[75] But with the collapse of immigration reform in Congress, North Carolina seems like fertile ground for more legislation of this type.

This divergence, both between the executive and legislative responses and the legislature's posture in 2001–2004 as compared to 2005–2007, reflects the public's ambivalence[76] in North Carolina. In 1999, a survey on Hispanic newcomers to the state revealed that 42% of respondents "were uncomfortable with the increasing presence of Latinos," and approximately 55% of respondents were "uncomfortable being around people who did not speak English," though fewer blacks than whites expressed such discomfort.[77] An April 2006 survey produced similar responses: 63.7% of respondents felt too many immigrants lived in North Carolina, and 44.2% of respondents felt that Latino immigration has been bad for the state.[78] These surveys thus suggest that a policy that is uniform across all issues, including enforcement, provision of services, and integration pilot programs in the vein of the nurses training initiative, is unlikely to address adequately the complex concerns that swirl around this issue. Permitting and even embracing conflicting responses may be a way to reconcile two inevitabilities: that immigration is likely to continue for the foreseeable future,[79] and that ongoing population shifts will produce complicated points of view. Importantly, the ability to experiment and to calibrate state initiatives with public opinion may require federal support, but it also requires freedom from federal interference—a consideration I explore in more detail in Part III.

---

74. *Id.* at 28.

75. Georgia, for example, passed in 2006 "the most sweeping immigration reform bill ever passed by any state." Stephanie A. Bohon, *Georgia's Response to New Immigration*, *in* IMMIGRATION'S NEW FRONTIERS, *supra* note 21, at 67. Among other things, the law requires proof of citizenship to access state services and to vote. *But see id.* at 68 ("[I]t is difficult to disentangle which policy responses are prompted solely by immigration and which are reactions to challenges posed by the shifting population dynamics. . . . In the case of Latinos, they are often viewed suspiciously as unauthorized immigrants, regardless of their actual legal status.").

76. North Carolinians who are concerned about the impact of immigration express familiar reasons for their anxiety: perceptions that immigrants are taking jobs from Americans, causing crime, and overburdening public services. McClain, *supra* note 60, at 17.

77. *See id.* at 14 (citing James H. Johnson, Jr. et. al., *A Profile of Hispanic Newcomers to North Carolina*, 65 POPULAR GOV'T 2, 9 (1999)).

78. *Id.* at 16.

79. McClain notes that "[t]here are few signs that [Latino immigration into North Carolina] will let up." *Id.* at 32.

3. *Iowa*

Iowa as a case example offers yet another set of circumstances. Initially sparsely populated, Iowa grew in size in the late nineteenth and early twentieth centuries through the aggressive encouragement of mass migration, primarily of people from Northern Europe. As several studies have pointed out, Iowa today is again in need of a population revival.[80] One recent study released by the University of Northern Iowa identifies the state's "[n]eed for New Iowans," which has resulted from an aging population, a declining workforce, and the fact that more people, particularly university graduates, are leaving than entering the state.[81] The study thus calls for immigrant recruitment to reenergize the state's population, characterizing immigrants as productive, motivated, eager to work, and entrepreneurial.

This call is essentially for an acceleration of existing trends. Though its numbers do not compare to North Carolina's, Iowa has experienced an immigrant influx of sorts in recent years, primarily from Mexico, Africa, and the Balkans. As of 2000, approximately 97% of Iowa's population was U.S.-born,[82] but the state's population of immigrants in general[83] and Latinos in particular has been on the rise since 1990, and Latinos now represent the state's largest minority group.[84] Indeed, the fact that Iowa's population has remained relatively stable despite its rapid aging and the significant loss of young people is owed in large part to increased immigration to the state.[85] This infusion of immigrants is, in turn, leading to the diversification of settings, such as workplaces and schools, that traditionally have been quite homogeneous.[86]

In 1998, these two trends of declining native population and rising immigrant population gave rise to some extraordinarily bold integration policy proposals. Governor Tom Vilsack convened a Strategic Planning Council to draft an "Iowa 2010 Plan" that would lay out a policy course for the state across a range of issues. To address the state's declining population, the Council's *Iowa 2010* report recommended recruiting and incorporating new

---

80. *E.g.*, Mark A. Grey, *State and Local Immigration Policy in Iowa*, *in* IMMIGRATION'S NEW FRONTIERS, *supra* note 21, at 33.

81. IOWA CTR. FOR IMMIGRANT LEADERSHIP & INTEGRATION, UNIV. OF N. IOWA, NEW AMERICANS, NEW IOWANS: WELCOMING IMMIGRANT AND REFUGEE NEWCOMERS 20 (2006).

82. *Id.* at 5–6.

83. Iowa's foreign born population more than doubled from 1990 to 2005, from from 43,316 to 103,143. *Id.*

84. Estimates based on the 2000 Census put the Latino population of Iowa in 2004 at approximately 104,119. Grey, *supra* note 80, at 36.

85. *See id.* at 35.

86. *Id.* at 36–37. Grey notes that

> [t]he vast majority of rural Iowans are white descendants of European settlers, but the new Iowans come mostly from non-European and developing regions . . . . Iowa communities . . . are now integrated into a global labor market in which Iowans no longer compete with each other for jobs but with people from literally around the world.

Id.

immigrants to the state, in addition to encouraging Iowans to come home or stay put in the first place. Among the big ideas initially embraced by Vilsack were the declaration of Iowa as an "immigrant enterprise zone," through which Iowa would seek an exemption from federal quotas on immigration in order to attract immigrants to the state, and the creation of three model cities for new Iowans, each of which would receive a $50,000 grant from the state and resources to create programs to attract and integrate immigrants.[87]

Needless to say, reaction to these proposals was swift, and reelection pressures (and thoughts of a future presidential campaign, perhaps) led Vilsack to scale back his ambitions. Though 59% of respondents to one poll believed immigrants were performing jobs that might otherwise go unfilled, and 61% of respondents to another supported the idea of recruiting immigrants,[88] the particular methods recommended by the Council apparently pushed the idea too far. The immigrant enterprise zone idea never got off the ground, and though the model cities plan was initially implemented, the projects were abandoned a few years later. By 2002, Vilsack's vision had been reduced to the Iowa English Language Reaffirmation Act, which declared English the official language of the state and encouraged the assimilation of immigrants.[89] Vilsack signed the bill without ceremony, and though the law had virtually no teeth due to a long list of exceptions attached to it, its passage seemed to mark a decisive end to Iowa's short-lived immigration experiment.[90]

Though the immigrant enterprise zones never became policy (and it's not clear they could have without difficult-to-obtain authorization from Congress), the state continues to chart its own course on the immigration issue. The original report of the Strategic Planning Council provides a template for state action that could be viable in a distinct political climate. Since 2005, the legislature appears to have adopted a more middling course. Lawmakers have encouraged the funding of language services in various sectors and further amended the state's official language law to remove restraints on the publishing of non-English-language advertising in English-language papers.[91] They also have considered ways to streamline the process by which legal immigrants can obtain professional licenses in the state and contemplated permitting unauthorized students to pay in-state tuition at the state's public schools.

At the administrative level, efforts to improve state services to immigrants, primarily by expanding capacity to deliver qualified translation and interpretation, have continued.[92] To address the fact that federal law renders unauthorized children ineligible for Medicaid, which in turn imposes costs

87. *Id.* at 38–40.

88. *Id.* at 40–41.

89. *Id.* at 44–46.

90. *Id.* at 46.

91. *See id.* at 61–63.

92. *See id.* at 56, 61, 64–65.

on the hospitals where they inevitably seek treatment, the state supports a network of health care clinics outside the state system to provide care for unauthorized children. The state's Hawk-I program, which initially targeted low-income children not eligible for Medicaid, has been expanded to include all children regardless of status.[93] And state officials have continued to implement some of the Iowa 2010 plan's provisions; eight "New Iowans centers" designed to help immigrants integrate into local communities have opened. Though they are minimally funded, the rules that govern the centers are part of the state's administrative code.[94] And, perhaps most important, "many community leaders have recognized that they cannot wait for state policymakers and therefore must fend for themselves in making the new Iowa work."[95] In other words, not only do the processes of integration continue in the absence of bold state initiatives, the politics of immigration may well be such that centralized initiatives, whether at the state or federal level, sometimes elevate the ideological above the practical, to the disadvantage of all parties whose interests are at stake.

B. *The Particular Problem of Unauthorized Migration*

The question of what to do about the presence of twelve million unauthorized immigrants in the United States dominates the current immigration debate at all levels of government. The conflicting interests that tie public officials in knots are most apparent in this context, as are the limits of federal control over immigration. The federal government, in policing unauthorized immigration, is essentially trying to perform two functions: to police borders and enforce the law while facilitating efficient labor markets and economic development, which depend on the inexpensive labor that unauthorized immigrants provide. The federal government is therefore walking the line between giving full effect to the limitations it has set on immigrant admissions and thwarting the decisions and preferences of U.S. consumers, whose market preferences have helped give rise to the unauthorized population.

The federal government has the power to ameliorate this conflict by expanding the legal channels through which unskilled labor can enter the United States. But as recent events have shown, such reform efforts are politically fraught. Comprehensive immigration reform tends to occur once in a generation, if at all. In other words, the inability of the federal government to "solve" the unauthorized problem is not so much a failure as it is evidence that comprehensive immigration reform is elusive. The interests in play are too diverse to produce even a minimally acceptable consensus policy.[96] At the end of the day, national policy cannot capture the preferences of

93. Anrig & Wang, *supra* note 21, at 3–4.

94. Grey, *supra* note 80, at 64.

95. *Id.* at 66.

96. Even if Congress could pass reform, illegal immigration is likely to persist on some level. *See, e.g.*, GORDON H. HANSON, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 30 (2007),

a large and diffuse population. We cannot escape the need for a mechanism that enables people to express their diverse positions on unauthorized migration.[97]

These "diverse positions" are reflected in the range of measures states and localities have adopted to address the unauthorized phenomenon. High-profile attention has been paid to the IIRAs. But local reaction to unauthorized immigration has been taking shape for years, and the nature of the response has been much more varied than the current national media coverage suggests. In contrast to the IIRAs, which attempt to solve a problem by making it disappear, some state and local governments proceed from the premise that the presence of some unauthorized immigrants is inevitable and therefore must be accommodated. Local governments, in particular, have public health and safety concerns that have led some to adopt policies, such as noncooperation laws, that could be characterized as facilitating illegal immigration and thus as inconsistent with federal policy. In this Section, I consider the variety of responses states and localities have adopted, with a view to capturing the diverse ways similarly situated communities approach this critical aspect of the immigration question.

1. *A Restrictionist Typology*

State and local measures designed to prevent or diminish unauthorized immigration can be broken down roughly into three categories: direct enforcement, indirect enforcement, and benefits restriction. Direct enforcement measures include decisions by state and local law enforcement to cooperate with the federal government pursuant to section 287(g) of the Immigration and Nationality Act,[98] which authorizes states and localities to enter into agreements with the federal government, which in turn authorize local and state officials to arrest and detain individuals for immigration violations and to investigate immigration cases.[99] Direct enforcement also includes measures—such as those passed in Georgia,[100] Oklahoma,[101]

available at http://www.cfr.org/publication/12969/economic_logic_of_illegal_immigration.html (follow "download the full text of the report here" hyperlink) (last visited Oct. 20, 2007).

97. This tension is by no means limited to the immigration context. *See infra* notes 289–292 and accompanying text for discussion of diverse local preferences in the environmental and human rights contexts.

98. According to information publicly available, ICE has entered into 287(g) agreements with thirteen entities: the Alabama Department of Public Safety/State Police, the Arizona Department of Corrections, the Florida Department of Law Enforcement, and the counties of Maricopa, Arizona; Los Angeles, Orange, Riverside, and San Bernardino, California; Cobb, Georgia; Alamance, Gaston, and Mecklenberg, North Carolina; and Davidson, Tennessee. U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority: Section 287(g) Immigration and Nationality Act, http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm (last visited Oct. 20, 2007).

99. 8 U.S.C. § 1357(g) (2000). There is a considerable literature on the wisdom of entering into these agreements. *See, e.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

100. The language of the Georgia Security and Immigration Compliance Act is as follows:

Colorado,[102] and Prince William County, Virginia[103]—requiring state and local police to verify the status of those who have come into their custody, usually for committing a felony or a driving-under-the-influence offense. And direct enforcement involves the least common and most legally suspect measures to have appeared of late[104]—state laws that criminalize illegal entry into the state or authorize state and local police to enforce immigration laws directly, even in the absence of an agreement with the federal government, which legislators in Arizona have contemplated passing.[105]

Indirect enforcement measures are exemplified by the provisions in the IIRAs, which would penalize landlords, up to $5,000 per violation, for renting to unauthorized immigrants. These laws would require landlords to perform enforcement functions by verifying the immigration status of would-be renters.[106] Though the ordinances do not require landlords to report unauthorized immigrants or give landlords power to arrest and detain immi-

---

> (a) When any person charged with a felony or with driving under the influence . . . is confined, for any period . . . a reasonable effort shall be made to determine the nationality of the person so confined.
>
> (b) If the prisoner is a foreign national, the keeper of the jail . . . shall make a reasonable effort to verify that the prisoner has been lawfully admitted to the United States. . . . through a query to the Law Enforcement Support Center (LSEC) of the United States Department of Homeland Security . . . . If the prisoner is determined not to be lawfully admitted to the United States, the keeper of the jail or other officer shall notify the United States Department of Homeland Security.

S.B. 529 § 5(a)-(b), 2006 Gen. Assem., Reg. Sess. (Ga. 2006).

101. H.B. 1804 § 5, 51st Leg., Reg. Sess. (Okla. 2007) (requiring that police make a "reasonable effort" to determine the status of persons in custody charged with driving under the influence or with a felony).

102. S.B. 90, § 1, 2006 Gen. Assem., Reg. Sess. (Co. 2006) (requiring officers to report suspected unlawful immigrants to ICE).

103. Res. Offered by Supervisor John T. Stirrup (Prince William County, Va. June 26, 2007) (text on file with author) ("County Police Officers shall inquire into the citizenship or immigration status of any person detained for a violation of a state law or municipal ordinance . . . the Police Department shall verify whether of [sic] not the person is lawfully present in the United States . . . .").

104. In 2002, controversy erupted when an Office of Legal Counsel memo finding that state and local police had inherent authority to enforce immigration law came to light. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Attorney General John Ashcroft (Apr. 2, 2002), *available at* http://www.aclu.org/FilesPDFs/ACF27DA.pdf. Though full treatment of the inherent authority issue is beyond the scope of this Article, my claim that exclusivity is not constitutionally justified supports the conclusion that states and localities are not constitutionally precluded from enforcing immigration law, but that Congress may preempt or circumscribe their authority to do so. *Cf.* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Policy to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2006) (arguing that states have inherent authority to enforce immigration laws, regardless of federal authorization).

105. S.B. 1157, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (criminalizing unlawful entry into the state); H.B. 2582, 47th Leg., 2d Reg. Sess. (Ariz. 2006) (authorizing officers to "investigate, apprehend, detain or remove aliens").

106. *See, e.g.*, Hazleton, Pa., Ordinance 2006-18 §§ 5, 7.B (2006) (prohibiting landlords from harboring unlawful immigrants); Hazleton, Pa., Ordinance 2006-13 § 7b (2006) (requiring landlords to check potential tenants' occupancy permits issued by city indicating citizenship or lawful status).

grants, the ordinances are designed to make it untenable for unauthorized immigrants to remain in the communities that adopt them, thereby ensuring their migration elsewhere. Similarly, the IIRAs and similar laws passed by states such as Arizona target employers in an attempt to reduce the labor market incentive the draws illegal immigrants to the United States. These indirect enforcement measures would deny licenses or government contracts to employers who hire unauthorized migrants, thereby using state benefits to discourage employers from providing unauthorized migrants with the jobs that keep them settled in the communities in question.[107]

Finally, the public benefits statutes would deny immigrants access to a range of services and institutions, including health care benefits and in-state college tuition. To accomplish this objective, several states have passed laws requiring public officials across a range of agencies to verify the citizenship or residency status of those seeking services.[108] Even these measures operate as forms of indirect enforcement, because they discourage immigrant settlement and prompt what restrictionists call "self-deportation," or movement to other communities or to the home country.[109]

I address the legality of these measures in Part III. Here, I consider what might be motivating states and localities to pass them. Obvious fiscal

---

107. In June 2007, Janet Napolitano, governor of Arizona, signed perhaps the most severe of the state laws targeting employers, authorizing the revocation of an employer's business license after a second finding that the employer knowingly hired an unauthorized worker. *See* H.B. 2779 § G(C), 48th Leg., 1st Reg. Sess. (Ariz. 2007). A lawsuit against the statute based on preemption grounds has been filed by the Arizona Contractors Association. Complaint, Ariz. Contractors Ass'n, Inc. v. Napolitano, No. CV 07-1355-PHX-NVW (D. Ariz. July 13, 2007) (on file with author).

Colorado, Georgia, and Oklahoma have passed similar laws. H.B. 06-1343, 2006 Gen. Assem., Reg. Sess. (Ga. 2006) (requiring state contractors to participate in the E-Verify program and authorizing termination of contracts and damages awards upon findings of unlawful hiring); S.B. 529 § 2, 2006 Gen. Assem., Reg. Sess. (Ga. 2006) (requiring state contractors and subcontractors to participate in E-Verify); H.B. 1804 §§ 7, 9, 51st Leg., Reg. Sess. (Okla. 2007) (requiring enrollment in E-Verify as a condition of contracting with the state).

108. *See* COLO. REV. STAT. § 24-76.5-103 (2006) (requiring every "agency" or "political subdivision of this state" to "verify the lawful presence in the United States of any natural person 18 years of age or older who has applied for state or local public benefits," except in cases where services are needed to treat emergency medical conditions, for short-term, non-cash emergency disaster relief, for assistance for immunizations, and for services such as soup kitchens, crisis centers, and short-term shelter"); S.B. 529 § 9(a) & (c), Gen. Assem., Reg. Sess., GA. CODE ANN. §50-36-1 (2006) (same); COLO. REV. STAT. 24-76.5-103 (2006) (same).

Voters in Arizona passed similar initiatives, known as Proposition 200 and 300, which require proof of citizenship for voting and access to a range of public services and deny in-state tuition to those who cannot prove their documentation, respectively. In Arizona and Colorado, the state attorneys general have issued opinions indicating how to implement the laws consistent with federal law. In Arizona, the Attorney General has interpreted the law not to apply to federal programs and certain emergency benefits. Op. Att'y Gen., No. I-04-010 (R04-036) (Ariz. Nov. 12, 2004), *available at* http://www.azag.gov/opinions/2004/I04-010.pdf; Op. Att'y Gen., No. I05-009 (R04-0400) (Ariz. Dec. 29, 2005), *available at* http://www.azag.gov/opinions/2005/I05-009.pdf.

For the Colorado AG opinion, see Memorandum Regarding the Implementation of House Bill 1023 from Cynthia Coffman, Chief Deputy Att'y Gen. & Jason Dunn, Deputy Att'y Gen., Colo. Office of the Att'y Gen., to Jon Anderson, Chief Counsel of the Governor, State of Colo. (July 19, 2006), *available at* http://www.ago.state.co.us/pdf/Implementation%20of%20HB%201023.pdf.

109. *See* Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, BACKGROUNDER (Ctr. for Immigration Studies, Wash., D.C.), May 2005, at 1, 3, *available at* http://www.cis.org/articles/2005/back605.pdf.

concerns, fueled by the perception that unlawful immigrants overly burden state and local institutions, such as hospitals and schools, without paying taxes are clearly in play. Communities are also jumping on the enforcement bandwagon because they seek control over their rapidly changing environments. When state and local legislators defend these measures, they tend to adopt the "rule-of-law" pose, contending that they are opposing only illegal immigration.[110] They thus seek a mechanism through which they themselves can address what their constituents perceive to be health and safety concerns.

But these measures also reflect a desire for a different sort of control—a control over cultural evolution. In fact, it would be a mistake to characterize the state and local regulatory trend solely as a response to unauthorized immigration and therefore as a trend that would be abated were Congress to solve the illegality problem. The IIRAs reflect a pronounced reaction to the three significant immigration trends outlined in Part I, representing part of a larger struggle to adapt to and resist immigration-related change more generally. Indeed, the fact that many of the local ordinances include official English declarations suggests that localities are concerned with more than illegal immigration. The declarations not only proclaim the need for commonality but also claim that "in today's modern society, [the city] may also need to protect and preserve the rights of those who speak only the English language."[111] Whether the issue is day laborers congregating on street corners, the perception of overburdened public hospitals, or the dramatic rise of non-English-speaking students in local schools, localities are reaching for ways to handle what many people perceive to be threats to their way of life. In the same way that immigrants often seek to insulate themselves from the challenges of life in a new society by relying on networks of co-ethnics, local communities are attempting to insulate themselves from demographic changes that feel overwhelming.

Elsewhere I have written about the importance of burden-shifting in the immigration context—of ensuring that our laws, in addition to requiring that immigrants adapt to their new environments, also encourage and expect current residents to adapt to a changing world.[112] But the tricky aspect of this burden-shifting idea is that it also requires buy-in on the part of participants. Immigrants, in a sense, have already accepted the need to adapt. Acceptance is inherent in the act of migration in most instances, and immigrants, almost by definition, are self-starting and adaptable. But the buy-in of members of the receiving society is typically more difficult to secure: receiving societies

110. *See, e.g.*, Louis Barletta Testimony at 57:24-58:12, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (2007) (No. 3:06cv1586) ("when I give testimony how I welcome and have welcomed the new immigrants, I am talking about legal immigrants. Illegal aliens are an entire different group of individuals.").

111. Hazleton, Pa., Official English Ordinance 2006-19 (2006), *available at* http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf.

112. Rodríguez, *supra* note 59.

persist in viewing immigration as something that happens *to* them, as opposed to a bidirectional process in which they participate.

Securing this buy-in ultimately requires permitting discussion over these issues to unfold. Because of the diversity of interests at stake in the immigration issue, it is impossible to have this conversation mediated solely through national institutions, which are structurally incapable of reflecting distinctly different community values. Local political processes are crucial to developing the receiving society's coping mechanisms, even if those processes are connected to one another through national activist networks.

My instinct is that the IIRAs represent a temporary and actually quite limited outburst brought on by unusually high levels of unauthorized immigration and a hyperactive media during a period of heightened national awareness of immigration.[113] But many states and localities, when faced with the consequences of their measures—namely, high legal fees, the disappearance of immigrant populations that had revitalized dying former industrial towns, and the high administrative costs of enforcement[114]—will start reconsidering the extremity of their policies. Once the national debate has subsided (particularly if Congress passes meaningful immigration reform in the next two years) most local communities will revert to compromise positions of some sort, perhaps participating in 287(g) agreements while abandoning city-led enforcement measures such as landlord penalties.

The acrimonious public debate that this wave of local ordinances has engendered is alarming, to be sure. The IIRAs are arguably the contemporary manifestations of California's infamous Proposition 187, which would have excluded unauthorized immigrants and their children from most state benefits and institutions (including the public schools). Like Proposition 187, the IIRAs reflect growing unease with unauthorized immigration. And like Proposition 187, the supporters of the IIRAs have used the illegality issue as a disquieting cover for the expression of hostile and even nativist sentiments.[115] But if immigration history teaches us anything, it is that this sort of controversy is a perennial feature of American life, even when litigation is successful in temporarily stopping some initiatives, as it was in preventing the implementation of Proposition 187.[116]

Permitting the local debate to continue and take shape through lawmaking processes may well be the better strategy for changing attitudes than

113. Valley Park, Missouri, has jettisoned the landlord provisions of its ordinance. Though this move required a state court's intervention, city officials chose not to adjust the ordinance to conform to state landlord-tenant law.

114. Colorado's strict law requiring proof of citizenship to access public services has gone unenforced, largely due to cost. *See* Mark P. Couch, *Immigration laws stymied*, DENVER POST, Aug. 6, 2007, at B1; *see also* Jill P. Capuzzo, *Town Pulls Back on Immigration Law*, N.Y. TIMES, Sept. 19, 2007, at B2 (noting that Riverside, New Jersey, repealed its IIRA in light of "mounting legal costs and declining public outcry," and quoting a local business owner who observed that the law cost the town $50,000 per week in lost business from Brazilians and Latinos).

115. For a discussion of the anti-Mexican sentiment behind Proposition 187, see Kevin R. Johnson, *Racism, Nativism, and Proposition 187*, 70 WASH. L. REV. 629, 641 (1995).

116. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786 (C.D. Cal. 1995) (permanently enjoining most of Proposition 187 on preemption grounds).

aggressive preemption-based litigation strategies that stop this negotiation process *in medias res*.[117] In advocating such dialogue, I do not mean to suggest that courts have no role to play. In fact, the litigation in Valley Park and Hazleton has been invaluable for a number of reasons. First, the lawyers have developed an extensive factual record on the municipal processes that produced the ordinances, testing the empirical claims on which the ordinances are based. Through witness testimony, the court battles also have helped reveal how complex policing immigration can be. And the litigation has highlighted the significant potential costs of the ordinances, not only for the economies of the local communities, but also for the broader Latino community.

My claim, instead, is that court decisions that reject state and local efforts outright as *ultra vires*, instead of approaching potential preemption questions narrowly, thwart what should be an ongoing dialogue about these issues at the state and local levels.[118] Tolerance of some disharmony is required for the various moving parts of our immigration system to function. Accepting the costs of some of these local ordinances may be necessary to negotiate effectively the deep ideological divisions on this issue.[119]

2. *Day Labor Centers*

At least since the late 1990s, localities have been grappling with how best to handle the rise in the number of day laborers congregating on street corners and in Home Depot parking lots awaiting the arrival of employers offering them a day's work, usually in construction or landscaping. In a recent and groundbreaking study on the day laborer phenomenon, Abel Valenzuela found that day laborers are not all desperate, recently arrived job seekers. They are, instead, diverse in terms of their family structures, prior education,[120] length of time they have been in the United States (almost a quarter have been in the United States for more than eleven years), and

117. A test of this local political process approach came in May 2007, when voters in Farmers Branch, Texas, a suburb of Dallas, voted to retain the IIRA passed by the city council. Alongside the litigation of this ordinance's constitutionality, a group of citizens had organized a campaign to have the issue put to a referendum. The ordinance was approved with widespread support: clearly, the political process will not always win out for immigrants. But there may still be long-term benefit to letting local political processes grapple with these issues.

118. *Cf.* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=990968 (rejecting critiques of Court decisions such as *Roe v. Wade* on the grounds that they produce backlash and arguing instead that courts play an important role in an ongoing constitutional dialogue).

119. Howard Chang has argued that if we permit local communities to close themselves off to immigrants, it might serve the interest of opening up the country as a whole to immigration, though he also emphasizes that closure is morally wrong. Howard F. Chang, *Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation*, 2007 U. CHI. LEGAL F. 93, 97–99.

120. Abel Valenzuela, Jr., *Working on the Margins: Immigrant Day Labor Characteristics and Prospects for Employment* 7 (Ctr. for Comparative Immigration Studies, Univ. Cal., San Diego, Working Paper No. 22, 2000) (noting that more than a third of day laborers surveyed had nine to twelve years of education, but more than half had fewer than six years and five percent had none).

amount of time they spend working as day laborers.[121] Day laborers are almost entirely male, with a median age of thirty-three, predominantly Latino (and from Mexico), and overwhelmingly unauthorized.[122] They earn on average $6.91 an hour—$1.75 higher than the federal minimum wage, $1.15 more than the California minimum wage, and just below the Los Angeles living wage.[123]

Though the day labor phenomenon is not new—in the late nineteenth and early twentieth centuries, day labor markets existed on waterfronts and in warehouses[124]—the current manifestation of the phenomenon is of a piece with the convergence of the global and local. Economists have connected the emergence of this informal economy to global economic activities and to the massive migration to cities such as New York and Los Angeles.[125] But though day laborers are prevalent in cities, their presence has become a political issue in the suburbs, where proximity to immigration centers and a housing boom have conspired to attract large numbers of day laborers.

According to those who have studied the phenomenon in detail, local governments essentially have three options in the face of day labor. Governments can ignore day laborers' impacts on the community—generally a short-term strategy, given that the public is quickly animated by the appearance of immigrant men gathering in public spaces.[126] Some governments have attempted to repress the phenomenon by harassing day laborers, fining and jailing them for loitering, and reporting contractors who hire day laborers to the IRS and ICE.[127] Finally, many localities have chosen to regulate day laborers. Though the informal market in which day laborers participate is characterized by its separation from regulated institutions,[128] some localities have attempted to impose formal structures on the market through the creation of day labor centers or hiring halls.

According to one estimate, as of January 2006, approximately sixty-three day labor worker centers existed in the United States, in addition to hundreds of informal hiring sites.[129] Two types of regulated worker sites have appeared. In some instances, private home improvement stores such as

---

121. *Id.* at 6, 10–11.

122. *Id.* at 6–7.

123. *Id.* at 12.

124. Gregory M. Maney et al., *Protecting Human Rights in a Global Economy: The Impact of Government Responses to Day Labor Markets* 5 (Ctr. for Study of Labor & Democracy, Hofstra Univ., Working Paper No. 11, 2006).

125. Valenzuela, *supra* note 120, at 1.

126. Maney et al., *supra* note 124, at 14.

127. *Id.*

128. *See* Manuel Castells & Alejandro Portes, *Introduction* to THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES 1, 3 (Alejandro Portes et al. eds., 1989).

129. Abel Valenzuala, Jr., et al. ON THE CORNER: DAY LABOR IN THE UNITED STATES 6 (2006), http://www.uic.edu/cuppa/uicued/Publications/RECENT/onthecorner.pdf. *See also* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 3 (2006) (discussing the larger phenomenon of immigrant worker centers).

Home Depot, sometimes aided by the city, provide workers with a slight shelter under which to stand and charge a standing fee to workers who use it. In other instances, advocacy organizations combine with local governments and nongovernmental organizations to provide a social services–type operation or to create centers that provide bathrooms, sponsor self-help workshops, and set rules by which day laborers and employers must abide when accepting or offering work.[130]

Both types of centers have emerged in communities where the public health and safety costs of having groups of men congregating in parking lots waiting for contractors, who in turn run unregulated construction sites, seem greater than the cost of admitting that unlawful hiring is occurring. But the social service–type centers also reflect a desire to integrate a population that Valenzuela has shown is not necessarily transitory. Like the larger phenomenon of immigrant worker centers that has emerged in recent years, these day labor centers are a modern-day version of the nineteenth-century settlement houses that provided immigrants with social services and civic education.[131] Among the services the most developed worker centers offer are legal representation for unpaid wages (a common phenomenon for day laborers), English-language and civics classes, workers' rights education programs, access to health clinics, and assistance opening bank accounts and securing loans.[132] The centers also serve as bases for advocacy and for organizing and instructing immigrants in how to engage in collective action to defend their interests.[133] Indeed, the rise of immigrant worker centers generally is partially explained by the decline of organized labor and the "institutional narrowness" of the current labor movement.[134]

These centers, in a sense, regularize and even formalize a labor market that operates in the shadow of federal law, developing the citizenship capacity of workers with no legal status. The centers and the communities that sponsor them thus create tension with a federal legal regime that has defined the workers who participate in the centers as unlawful. Not surprisingly, the centers have generated extraordinary controversy, precisely because they are perceived as legitimating illegal conduct.[135] Some centers have lost their

130. Valenzuela, *supra* note 120, at 9.

131. *See, e.g.*, LOUISE W. KNIGHT, CITIZEN: JANE ADDAMS AND THE STRUGGLE FOR DEMOCRACY 275 (2005) (describing Hull House in Chicago, which included a coffee house selling food, a gym, and showers, as well as observing that Jane Addams "saw in the buildings an expression of the settlement's conviction that 'education and recreation ought to be extended to the immigrants' ").

132. FINE, *supra* note 129, at 2.

133. *Cf. id.*

134. *Id.*

135. Day laborers are also routinely subject to hostile action, sometimes by local governments. In late 2006, the Southern District of New York held that the town of Mamaroneck had violated the federal Equal Protection Clause by excluding day laborers from a public park, finding that the debates surrounding the city's decision demonstrated that the city's intent was racially discriminatory. Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520 (S.D.N.Y. 2006). Local government officials (on Long Island, in particular) make it a habit of fining and arresting day laborers. Some advocates claim that this practice sparks physical assaults, robberies, and threats by merchants and strangers. *See* Maney et al., *supra* note 124.

funding and others have never gotten off the ground, due in large part to the issue's political sensitivity.

The experience of Herndon, Virginia, provides a case in point. In December 2005, Herndon's city council decided to fund a day labor center, which became one of the first such centers to attract national media attention. In 2006, approximately 100 workers signed in each day looking for work. The workers studied English and volunteered at community social events while waiting for jobs or in their time off.[136] The 2006 annual report of the not-for-profit entity that ran the site documented that the workers who used the site agreed upon a minimum wage among themselves, and that nonpayment of workers was virtually nonexistent, in contrast to the treatment of day laborers in other parts of the country. But though the publicly funded site functioned well for several months, political pressures eventually led to the ouster, in May 2006, of the city officials who had spearheaded the idea.[137] Once in office, the new town council resolved to hand over the site to a private employment company who would be required to check the documentation of workers who appeared at the site.[138] But on September 14, 2007, the city closed the center's doors, preferring to end the experiment than comply with a Fairfax County court order requiring the center to be open to all workers.[139]

Litigation against the center, based primarily on a preemption theory, also has been filed, though it is now presumably moot in light of the closing. A group of taxpayers challenged the legality of Herndon's allocation of public property to establish the day labor site, arguing that the measure was not a garden-variety land-use regulation, but rather a measure intended to enable, facilitate, aid, and abet illegal immigrants in procuring unlawful employment.[140] According to their complaint, by "inducing" illegal immigrants to come to Herndon and by facilitating their hire, the city was frustrating the purposes of the comprehensive immigration regulation that Congress adopted in the Immigration Reform and Control Act ("IRCA").[141] In other words, federal law preempted the city's actions.

Day labor centers thus may not represent an alternative form of organization that will help facilitate the rise of a social movement—a role some of their advocates have claimed for them. In highlighting the day labor center, I therefore do not mean to celebrate the trend. Rather, I seek to underscore

136. Karin Brulliard, *Herndon Day Labor Center Declares Its First Year a Success*, WASH. POST, Feb. 25, 2007, at T05.

137. *Id.*

138. *See id.*

139. Karin Brulliard, *'What We had Here Was a Family'; As Herndon's Day-Laborer Center Closes, Job Seekers Band to Find Another Site*, WASH. POST, Sept. 15, 2007, at B01.

140. Plaintiffs' Memorandum in Opposition to Defendant Town of Herndon's Demurrer to Amended Bill of Complaint at 2, Karunakaram v. Town of Herndon, Chancery No. 2005-4013, 2006 WL 408389 (Va. Cir. Ct. Feb. 10, 2006).

141. Second Amended Bill of Complaint for Declaratory and Injunctive Relief at ¶¶ 72–76, Karunakaram v. Town of Herndon, Chancery No. 2005-4013, 2006 WL 408389 (Va. Cir. Ct. Feb. 10, 2006).

that the emergence of day labor centers represents a decision about how best to integrate a population that local governments cannot help but engage, regardless of the workers' status under federal law. The centers have arisen as a response to a public safety need, and to facilitate a form of labor that has benefits for everyone involved. They also help prevent worker exploitation by bringing hiring activity into a public and regularized setting.

Even in Herndon, it is unlikely that the debate is over. Laborers seeking jobs are likely to continue to congregate in public spaces, recreating the conditions that gave rise to the center in the first place. Not only will the needs of the labor market ensure the persistence of this congregation, the Fairfax County court, along with courts elsewhere in the country, have held that the First Amendment restrains localities from passing ordinances that prohibit the solicitation of work in public places, unless the municipality provides an adequate alternative forum for the protected communication.[142] Municipalities like Herndon may find themselves with no other choice but to open hiring halls. The opening of hiring centers is only a compromise measure: it cannot solve the underlying legality issue. But the centers address the inevitability of an informal, unauthorized economy and attempt to ameliorate some of the more serious costs of this market to the community and the workers.

3. *Sanctuary Laws*

For decades, major cities and a few small towns across the country have adopted various so-called sanctuary laws, or statutes, resolutions, and executive orders that limit the authority and ability of local and state authorities to cooperate with federal officials in the enforcement of immigration laws.[143] The sanctuary movement took shape in the 1980s, when churches and other affiliated private organizations began providing safe havens for nationals of El Salvador and Guatemala, who had fled brutal civil wars and were thought

142. *See* Town of Herndon v. Thomas, MI-2007-644 (Va. Cir. Ct. Aug. 29, 2007) (striking down an antisolicitation law on grounds that the temporary hiring site adopted by the town was not an adequate alternative forum for communication because of its temporary nature); *see also* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952, 962 (C.D. Cal. 2006) (finding that private parking lots were not an adequate channel of communication for soliciting employment); Comite de Jornaleros de Glendale v. City of Glendale, No. CV 04-3521-SJO (C.D. Cal. May 16, 2005) (permanently enjoining an antisolicitation ordinance on First Amendment grounds).

143. *See generally* Huyen Pham, *The Constitutional Rights not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–95 (2006). Los Angeles, for example, has had some type of sanctuary policy since 1979. The current version of the law is embodied in Special Order 40, under which police officers are authorized to communicate information regarding immigration status to federal authorities when the alien in question has been involved in a felony or a high grade misdemeanor. In May 2006, Judicial Watch brought a suit against this policy, which remains pending in Los Angeles Superior Court. Among the organization's claims is that the sanctuary policy is unconstitutional, because the Supreme Court has made clear that "the federal government bears the exclusive responsibility for immigration matters," and that state laws that stand as an obstacle to the enforcement of federal law are a nullity. Complaint at ¶¶ 15–31, Sturgeon v. Bratton, No. BC351646 (Cal. Super. Ct. May 1, 2006).

to have been denied asylum wrongfully.[144] Cities and states supported these efforts with resolutions declaring that such asylum seekers need not fear arrest in their jurisdictions.

In some quarters, these laws evolved into more general ordinances that prohibited local law enforcement from conveying information about individuals' immigration status to federal officials.[145] Eventually, cities with no ties to the original sanctuary movement began passing similar generalist resolutions prohibiting information disclosure by public authorities. Many of these resolutions served as direct legislative and administrative responses to the federal government's expanding efforts to enlist state and local police voluntarily in the enforcement of immigration laws in the years after the attacks of September 11, 2001.

In the midst of these developments, and as part of the 1996 immigration reforms, Congress passed two provisions[146] that prohibited local governments from preventing their employees from voluntarily conveying information regarding any individual's immigration status to federal authorities.[147] The enforcement issue thus highlights the tension between federal, state, and local approaches to managing migration. On the one hand, localities that have adopted sanctuary laws have sought to define for themselves the parameters of their law enforcement authority and the duties of their workforce, particularly those civil servants who perform public health and safety functions.[148] On the other hand, the federal government has increas-

144. For a discussion of the ideology and foreign policy goals of this movement, see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1206–07 (4th ed. 2005).

145. See, for example, developments in the city of San Francisco. The city adopted a sanctuary ordinance in 1985, declaring the city a refuge for Salvadoran and Guatemalan refugees and prohibiting city officials from discriminating against Salvadorans and Guatemalans on the basis of immigration status. Pham, *supra* note 143, at 1387 n.68. This ordinance eventually took on a more general form in 1989 when the city prohibited its employees from "[r]equesting information about, or disseminating information regarding" immigration status, unless legally required to do so. SAN FRANCISCO, CAL., ADMINISTRATIVE CODE § 12H.2(c) (2005) (approved Oct. 24, 1989). The city reinforced this ordinance after September 11, 2001 by reminding police officers of the ordinance's existence. Pham, *supra* note 143, at 1387 n.68.

146. Section 434 of the Welfare Reform Act, 8 U.S.C. § 1644 (2000), provides that "[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States," and section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1373(b) (2000), provides that governments may not prevent their employees from "[e]xchanging such information with any other Federal, State, or local government entity." The report accompanying the Senate version of the bill noted: "[A]cquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S. REP. NO. 104-249, at 19–20 (1996).

147. Because these federal provisions do not require states and localities to report information to the federal government, seeking only to remove state and local restraints on voluntary cooperation, they do not appear to represent unconstitutional commandeering under the terms of *Printz v. United States*, 521 U.S. 898 (1997). *See also* Reno v. Condon, 528 U.S. 141 (2000) (upholding a federal law that prohibited states from disclosing personal information of drivers license applicants because the law did not require state officials to help enforce federal laws).

148. *See, e.g.*, City of New York v. United States, 971 F. Supp. 789, 797–98 (S.D.N.Y. 1997) (noting New York City's claims to this effect), *aff'd*, 179 F.3d 29 (2d Cir. 1999).

ingly sought to remove state and local obstacles to its immigration enforcement and information-gathering goals. Each entity has clearly legitimate objectives that are nonetheless difficult to reconcile.

The nature of this conflict is perhaps best highlighted by the evolution of New York City's position on this issue. On June 6, 2003, Michael Bloomberg, under pressure from interest groups and facing potential litigation, repealed the City's sanctuary policy, which had been in effect since then-mayor Ed Koch introduced the measure in 1989.[149] The 1989 sanctuary law had prohibited city police, public school teachers, welfare workers, health care professionals, and other public employees from giving information about a person's immigration status to federal officials unless that person was accused of a crime[150]—a prohibition that to Mayor Bloomberg appeared to directly conflict with the 1996 federal immigration reforms. In an effort to bring city policy in line with federal law, Mayor Bloomberg issued Executive Order 34,[151] which launched what was quickly dubbed a "Don't Ask, Do Tell" policy, instructing city employers not to ask about an individual's status but permitting (though not requiring) employers to transmit status information to federal authorities if that information came to their attention.

Mayor Bloomberg defended the order on the seemingly unobjectionable ground that it reconciled city and federal law, noting that his predecessor, Rudolph Giuliani, had unsuccessfully challenged the federal law as an unconstitutional interference with the city's right to regulate the conduct of its own workers.[152] Nonetheless, the Executive Order, by upending longstanding city policy, sparked a vociferous outcry from immigrant advocates and members of the City Council. Opponents objected to the policy shift, in part because the new order appeared to give law enforcement authorities permission to inquire into immigration status, and because many public employees in performing their duties would inevitably be required to inquire into status (despite the policy's "don't ask" protection), which critics feared would lead to an upswing in reporting to federal officials.[153]

In response to local opposition, Mayor Bloomberg issued Executive Order 41,[154] which sets out a general city privacy policy and limits the extent to which city officials can gather and report information regarding immigration

149. City of N.Y. Exec. Order No. 124 (Aug. 1989), *available at* http://courts.state.ny.us/library/queens/PDF_files/Orders/ord124.pdf.

150. *See* Alisa Solomon, *Don't Ask, Do Tell: Outcry Over New City Policy on Reporting the Undocumented States Stuns the Mayor*, VILLAGE VOICE, July 15, 2003, at 46, *available at* http://www.villagevoice.com/news/0328,solomon,45387,1.html (last visited Oct. 20, 2007).

151. City of N.Y. Exec. Order No. 34 (May 13, 2003) (on file with author).

152. *See City of New York*, 971 F. Supp. 789 (holding that a federal statute was not a violation of Supreme Court's commandeering doctrine because it did not require city officials to provide information to the federal government), *aff'd*, 179 F.3d 29 (2d Cir. 1999). After the decision, Mayor Giuliani declared that the City would keep its policy in place, in defiance of federal law.

153. *See* Solomon, *supra* note 150.

154. City of N.Y. Exec. Order No. 41 (Sept. 17, 2003) *available at* http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

status. According to the order, city officials and employees are instructed not to disclose confidential information unless the law requires disclosure.[155] In the case of information relating to immigration status, the order erects a presumption against disclosure, unless "the individual to whom such information pertains is suspected . . . of engaging in illegal activity, *other than mere status as an undocumented alien.*"[156] The order further restrains city employees, other than law enforcement, from inquiring into immigration status and authorizes law enforcement to inquire into immigration status only when investigating illegal activity, other than mere status as an unauthorized alien.[157] And thus the tension with federal law has been reintroduced by a city administration aware of the potential conflict but also highly responsive to the interests of immigrants who feed its economy.

The sanctuary phenomenon, both in its original form and in the form of the anti–information sharing measures, thus underscores the complex dynamic presented by immigration enforcement.[158] When understood in contrast to the willingness of some police departments to enter into 287(g) agreements to cooperate with federal officials to enforce immigration laws, the existence of sanctuary laws highlights the range of views held by public officials and local communities on the subject of how best to interact with unauthorized populations—a judgment that goes to the heart of a city's ability to promote public health, safety, and welfare, and to govern its residents.[159] Indeed, in affirming the district court's rejection of Mayor Giuliani's constitutional challenge to the 1996 federal restrictions on non-cooperation laws, the Second Circuit acknowledged the interests of state and

155. *Id.* § 2(b).

156. *Id.* § 2(e) (emphasis added).

157. *Id.* §§ 3–4.

158. This conflict of objectives takes on further complexity when we consider the state laws that would preempt local sanctuary laws. Mirroring the 1996 federal reforms and federal efforts to enlist state and local officials since September 11, 2001, some states have passed statutes that require their local subentities to cooperate in immigration enforcement. *See, e.g.*, S.B. 90 § 1, 2006 Leg. (Colo. 2006) (prohibiting state or local government from enacting legislation that impedes cooperation with federal officials); S.B. 2771, 84th Leg., Reg. Sess. (Minn. 2006); S.B. 9, 2006 Leg. (Ohio 2006); S.B. 2716, 224th Leg., Reg. Sess. (N.Y. 2001) (prohibiting state and local governments from impeding law enforcement cooperation with federal authorities); *see also* H.B. 2386, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (declaring that the police shall (or may) cooperate with the Department of Homeland Security or Immigration and Customs Enforcement to enforce immigration laws); Ariz. Proposition 200 (2004) (requiring enforcement officers to report suspected immigration law violations to the federal government); S.B. 529, 2006 Leg. (Ga. 2006); H.B. 1383, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006); H.B. 855, 47th Leg., 2d Reg. Sess. (N.M. 2006).

159. Some cities have begun to resent the ways in which Immigration and Customs Enforcement has ramped up its enforcement tactics since late 2006. *E.g.*, Leslie Berestein, *Immigration operation draws complaints*, SAN DIEGO UNION-TRIB., Mar. 28, 2007, at B3 ("Some say the randomness of who gets questioned or detained is enough to paralyze some neighborhoods with fear."); *Immigration Vigils* (Latino USA podcast Mar. 23, 2007), *available at* http://www.utexas.edu/coc/kut/latinousa/stationservices/podcast/2007/03/0323_01_lusa_podcast.mp3 (last visited Oct. 7, 2007). The fallout from these raids, which includes children left without guardians, heightened anxiety in immigrant communities of mixed status resulting in further retreat into the so-called "shadows," and drop-off in commerce in immigrant-dominated communities, underscores how federal enforcement objectives and the integration, health, and safety goals of local communities are often at odds.

local governments in protecting the confidentiality of the public by regulating the information gathering conducted by its officials. The court suggested that were the City to adopt a generally applicable confidentiality policy—the policy Mayor Bloomberg ultimately adopted—it might be able to substantiate its claim that federal preemption amounts to an unconstitutional intrusion on the city's power to regulate the duties of its officials.[160]

The cities that have passed sanctuary laws appear to be motivated by at least three concerns. First, the laws reflect localities' desire to reduce immigrant suspicion of the police, for obvious public safety reasons, and to ensure that immigrant communities cooperate with law enforcement. As the Los Angeles sanctuary order declares, "The [LAPD] is sensitive to the principle that effective law enforcement depends on a high degree of cooperation between the Department and the public it serves."[161] The order thus concludes that "it is the [determination] of the Los Angeles Policy Department that undocumented alien status in itself is not a matter for police action."[162]

Second, and in a similar vein, the anti-information sharing laws reflect the determination that ensuring effective delivery of services requires promoting trust in the government generally. New York's Executive Order 41, for example, emphasizes the city's need to interact with all of its populations, observing that its capacity to gather information and perform the functions of government depend on resident trust.[163] The preamble to the order begins as follows: "[I]ndividuals should know that they may seek and obtain assistance of City agencies regardless of personal or private attributes, without negative consequences to their private lives . . . ."[164]

Finally, woven into these policy objectives are political judgments that reflect a broader kind of ideological conflict expressed across the federal-state-local axis: sanctuary laws represent instances of local officials staking out political positions in some tension with federal intentions. In the case of the original sanctuary movement, for example, local officials expressed opposition to U.S. foreign policy in Central America and dissatisfaction with the government's failure to grant asylum to the victims of that policy. And in the case of the noncooperation laws, the laws reflect a general desire to make government institutions accessible to all people, regardless of their legal status, by reducing the perception among immigrants that interaction with public officials always raises the specter of deportation. As the Los Angeles executive order frames the issue, sanctuary measures are required because "the Los Angeles community has become significantly more diverse over the past several years, with substantial numbers of people from

160. *See* City of New York v. United States, 179 F.3d 29, 36 (2d Cir. 1999).

161. Los Angeles, Cal., Special Order 40 (Nov. 27, 1979).

162. *Id.*

163. City of N.Y. Exec. Order No. 41, pmbl. (Sept. 17, 2003).

164. *Id.*

different cultural and sociological backgrounds migrating to this City."[165] This phenomenon makes it incumbent upon the city, whose goal is to promote public health, safety, and social cooperation, to adjust its policies to reflect changing demographic realities, which include the rise of mixed legal and illegal communities.

Sanctuary laws thus represent critical integration measures. Not only do they promote integration as a matter of policy, but by prioritizing delivery of services, sanctuary measures also make expressive claims. Indeed, the fact that many of the cities that have passed such anticooperation laws, such as San Francisco, New York, Los Angeles, and Seattle, possess and promote a self-conception as immigrant-friendly underscores that immigration enforcement, though primarily a federal responsibility, implicates the interests of a range of actors whose political processes inevitably produce challenges to centralized immigration directives.

4. *In-State Tuition*

As of 2007, at least ten states had passed laws that permit unauthorized students to pay in-state tuition at public colleges, including major immigrant-receiving states such as Texas, California, New York, and Illinois, as well as some states not normally considered to be solicitous of unauthorized immigration, such as Utah and Nebraska.[166] The City University of New York, which trumpets its historical role of making higher education available to generations of immigrants, many of whom (namely Jews) were once excluded from more elite institutions, also permits unauthorized students to qualify for its subsidized tuition rates. Section 505 of the Illegal Immigration Relief and Immigrant Responsibility Act, however, provides that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or political subdivision) for any post-secondary education benefit unless a citizen or national of the United States is eligible for such a benefit."[167]

After Congress passed this provision, lawmakers in some states concluded that it denied them authority to establish a policy or regulation granting in-state tuition to unauthorized immigrant students.[168] But most of

165. Los Angeles, Cal., Special Order 40 (Nov. 27, 1979).

166. NAT'L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS (2006), *available at* http://www.nilc.org/immlawpolicy/DREAM/in-state_tuition_basicfacts_041706.pdf (last visited Nov. 2, 2007). For a more comprehensive discussion of the states that had adopted and considered in-state tuition laws as of 2004, see Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 455 (2004). By April 2006, at least thirty states had considered legislation that would allow unauthorized immigrants to pay in-state tuition, and legislators in six states had tried unsuccessfully to pass legislation banning unauthorized immigrants from receiving the benefit. Carl Krueger, *In-State Tuition for Undocumented Immigrants*, STATENOTES, Aug. 2006, http://www.ecs.org/clearinghouse/61/00/6100.htm (last visited Oct. 20, 2007).

167. 8 U.S.C. § 1623(a) (2007).

168. *E.g.*, Op. Att'y Gen. 06-01 (Colo. Jan. 23, 2006), *available at* http://www.ago.state.co.us/AGOpinions/AGO_PDFs/AGO06-1.pdf.

the states that have offered in-state tuition benefits have taken this step since 1996—if not outright defying the federal government, then at least rejecting the principle unmistakably animating section 505: unauthorized immigrants have no claim to public benefits. The tuition-benefit states have negotiated around section 505 by making the benefit available to anyone who has attended two to three years of high school in-state, thus conditioning the benefit not on residency, but on school attendance.

This maneuver around federal law has been met with challenges in a variety of (as-yet unsuccessful) lawsuits in California and Nebraska.[169] As the litigation proceeds, debate continues in Congress over the long-languishing Development, Relief, and Education for Alien Minors Act ("DREAM Act"), which may still pass on its own, despite the collapse of comprehensive immigration reform.[170] The Act essentially would repeal section 505, authorizing states to make the in-state tuition benefit available to unauthorized students who meet certain criteria and providing a path to legal status for students who complete two years of college or military service.[171]

This ongoing debate—unfolding in state houses, Congress, and the federal courts—powerfully underscores that communities reach different conclusions on whether and how to incorporate unauthorized immigrants into the political community. The interests of certain immigrant-receiving states clearly diverge from the conclusion that emerged from the last national political debate on this subject in 1996. This divergence can be explained by the mutually reinforcing imperatives of economic and political integration. As the Urban Institute estimated in 2003, at least 65,000 unauthorized students graduate from American high schools each year[172]—a phenomenon that stems in part from the Supreme Court's 1982 decision in *Plyler v. Doe*,[173] which essentially restrains states from denying public education to unauthorized immigrants. And as the American Association for State Colleges and Universities has observed, given the reality that "[a] large portion of unauthorized alien students are likely to remain in the United States, whether or not they have access to postsecondary education,"[174] it is

169. *E.g.*, Day v. Bond, No. 04-CV-4085-RDR, 2007 WL 2452681 (Kan. Ct. App. Aug. 30, 2007) (holding that plaintiffs lacked standing to bring equal protection claim and lacked cause of action for statutory preemption claim).

170. *See, e.g.*, Nicole Gaouette, *Congress Quietly Returns to Immigration*, L.A. TIMES, Sept. 17, 2007, at A1; Julia Preston, *Measure Would Offer Legal Status to Illegal Immigrant Students*, N.Y. TIMES, Sept. 20, 2007, at A18.

171. NAT'L IMMIGRATION LAW CTR., DREAM ACT: BASIC INFORMATION (2007), *available at* http://www.nilc.org/immlawpolicy/DREAM/dream_basic_info_0406.pdf. The same groups that have filed lawsuits against current in-state tuition policies also campaign against the DREAM Act. In other words, their concern is not exclusively for the integrity of statutory interpretation.

172. In 2003, 65,000 unauthorized students had lived in the United States for at least five years. Jeffrey S. Passel, Further Demographic Information Relating to the DREAM Act, Memorandum from the Urban Institute to the National Immigration Law Center, at 1 (2003), *available at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

173. 457 U.S. 202 (1982).

174. Access for All: Debating In-State Tuition for Undocumented Alien Students (2005), http://www.aascu.org/policy/special_report/access_for_all.htm (last visited Oct. 20, 2007).

in the fiscal and economic interests of states to enable unauthorized immigrants to acquire some post-secondary education, for the obvious reasons that students who have graduated from colleges are more productive and less likely to rely on government assistance.[175] In addition, many states acknowledge that the parents of unauthorized students pay taxes to the state, justifying extension of the benefit on simple fairness grounds.

But embedded within this pragmatism is also a series of judgments about how adult illegal immigrants differ from their children in their moral stature and how broad a scope a liberal society should give to the status "unlawful." The states that permit unauthorized immigrants to pay in-state tuition could be said to advance at least three ideas in their decision making. First, in-state tuition states have concluded that unauthorized students who have attended state high schools are not foreign students and are unlikely to return to their countries of national origin. Second, these states have determined that unauthorized students, by virtue of their education in the public schools, have been assimilated into American life. Third, some states have concluded that it is illiberal to permit the condition of illegality and the disabilities associated with unlawful status to be passed from parents to children, or that we should prevent the emergence of the inherited castes that would result from the failure to break the chain of illegality.[176]

In the end, the fact that some states have reached these judgments, whereas the federal government and many other states have not, underscores both the inevitability and value of federal-state conflict and dialogue on the subject of immigrant integration. The fact that states have found a clever route around the language of section 505, whose intent to deny unauthorized immigrants in-state tuition benefits seems clear on the face of the statute, highlights the willingness of some states to challenge federal authority on matters that pertain to immigrant integration. The willingness in particular of states such as Utah and Nebraska to extend tuition benefits underscores that different aspects of the immigration phenomenon will yield different state and local policies. In other words, states and localities that take a hard line on employing unauthorized immigrants might nonetheless come to a different conclusion when addressing back-end concerns, or the question of how to treat the second generation.

Perhaps most importantly, the in-state tuition issue demonstrates that clearly integrative action can be easier to achieve at the state or local level than at the federal level, where much broader consensus must be forged. This fact has redounded to the benefit of immigrants, particularly in states where immigrants tend to concentrate. The space left open by section 505 has ensured that states who have reached pro-integration judgments do not

175. Of course, no matter how cheap college tuition is for unauthorized students, unless the federal government takes action to regularize or legalize these students' statuses, college-educated unauthorized immigrants will still be ineligible to work lawfully in the United States.

176. *Cf.* Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) ("Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . [H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice . . . .").

have to wait for federal authorization to accomplish what the states have determined to be crucial integrative goals.

In the end, a consensus in the states that develops over time through state-by-state debate may well prod the federal government to revisit its own laws by passing the DREAM Act. This move would free states to make key integration judgments without having to resort to creative readings of federal statutes and face the threat of litigation. And, it would provide the benefit that only the federal government can—the legal status that would enable once unauthorized university graduates to live and work as full members in the society they call home.

* * *

Each of the debates just discussed highlights not only the inevitability of conflict between the federal government and states and localities on immigration-related matters, but also the possibility of a relationship between the levels of government that is based on dialogue and compromise. Though the institution of the nation-state and conceptions of national citizenship provide us with a vocabulary for understanding the effects of immigration, this discussion makes clear that the middling structures of the nation-state cannot capture the diverse forms of membership needed to assimilate the effects of global trends—particularly effects that come in human form, with families. As Saskia Sassen has pointed out, globalization's challenge to the national is creating new political subjects that national citizenship constructs cannot assimilate: political subjects who do not take the traditional form of voter, juror, and officeholder.[177] Unauthorized immigrants who have the "right" to own homes, hold mortgages, and send their children to public schools offer an example.[178] Their participation is facilitated through the market and through local communities, not through the national government, which has erected barriers to participation in the form of its admissions system.[179]

Considering the possibility of diversity through the lens of some of the traditional justifications for federalism helps make the need for new ways of thinking about migration management clear. First, state and local participation in integration matters can promote efficiency. The federal government is not well positioned to engage in integration work—at best, it can play a co-

177. SASSEN, *supra* note 29, at 278–79, 321. Sassen notes that it has always been the case that "narrow formal definitions [of citizenship] are increasingly inadequate" to capture the relationships that exist, and that recent "scholarship points to the notion that current conditions—globalization, growing diversity, claims by the excluded—are sharpening this dynamic." *Id.* at 286; *see also* Blank, *supra* note 33, at 412 ("Alongside the dwindling yet still powerful nation-state, other entities—local authorities, religious orders, economic corporations, international and global organizations—have been . . . acquiring control over [citizenship] matters . . . .").

178. SASSEN, *supra* note 29, at 279. Through raising families, holding jobs, and participating in civic activities, Sassen notes, "[u]ndocumented immigrants' daily practices . . . can earn them citizenship claims in just about all developed countries, including the United States." *Id.* at 294.

179. These workers are not cosmopolitan, however, because they are embedded in local contexts. *Id.* at 300.

ordinating function. The effects of immigration are felt differently in different parts of the country, and the disruption immigration causes, as well as the viability of different immigration strategies, will vary, in part, according to the health of local economies and the existence of ethnic social networks. Second, state and local participation is critical for expressive and democratic reasons, including securing the involvement of the immigrants themselves in the solutions devised—an involvement more likely to occur at the local level.[180] And perhaps most importantly, local experimentalism will be of tremendous value in this context.[181] The need to strike certain compromises or enter into agreements unlikely to be tolerated if presented as part of a national debate on immigration will require strong municipal action—and perhaps strong municipal authority.

The question now becomes how we go about reformulating the constitutional doctrines and lawmaking presumptions that structure the immigration debate to accommodate how states and localities themselves have been adjusting to a changed world. To be sure, accepting the exclusivity principle would not mean invalidating all of the measures I have outlined. Programs such as the New Iowans Centers, funding for language education and job training for legal immigrants, and other similar integration programs constitute immigration regulation or enforcement in only the most attenuated sense. But most state and local efforts to manage unauthorized immigration (including restrictive ordinances, day labor centers, and sanctuary laws) would be vulnerable, because they all could be characterized as immigration enforcement or priority setting. The purpose of discussing these initiatives in tandem is to put the more aggressive forms of state and local regulation into a broader context, which in turn highlights that integration measures sometimes resemble immigration controls. This overlap is given little thought in a world of federal exclusivity, but the success of immigrant integration depends on it.

III. REIMAGINING THE FEDERAL-STATE-LOCAL RELATIONSHIP

By now it should be clear that the management of today's immigration depends on the involvement of all levels of government. Contrary to the conventional wisdom, immigration control occurs through a de facto multisovereign regime. This de facto regime has four important features. First, though federal law controls who may enter the United States, states and localities play a crucial role in integrating those who cross our borders, whether immigrants cross with or without the formal legal blessing of the federal government. Second, this integrative role is not wholly independent from federal law and policy; rather, the mechanisms states and localities

180. Even if anti-immigrant sentiment is stronger at the local level, immigrants are more likely to have local voting rights and the ear of local officials, particularly in cities heavily dependent on immigrants. New York City offers a case in point: members of the city council pay attention to the economic and social concerns of immigrants, despite the fact that few are voters.

181. I discuss the value of theories of local experimentalism in addressing cultural and linguistic diversity in another article. Rodríguez, *supra* note 58.

develop to promote integration are responsive not only to direct federal mandates, but also to the effects of the federal government's enforcement priorities. Third, the mechanisms states and localities adopt to manage the absorption of immigrants into their communities sometimes resemble immigration control or enforcement, or measures that attract or deter the settlement of immigrants. And finally, the work of integration that states and localities ultimately perform clearly requires flexibility and tolerance of policies in tension or conflict with one another. In other words, lawmakers need freedom to calibrate their integration efforts to the vagaries of an ambivalent public opinion on the one hand and market realities and public health and safety demands on the other.

This multi-sovereign regime inevitably produces conflict among the various subentities involved. Cities and towns within the same state may take distinct positions. Different actors within state governments may speak with different voices when they address different constituencies. And, particularly when it comes to unauthorized immigration, the officials who run governmental subentities, in cooperation with private partners, may take positions in tension with federal objectives.

This contemporary state of affairs, on its own, should be sufficient to undermine the notion of federal exclusivity insofar as that principle is based on assumptions about structural imperatives in a federal system. When it is understood in historical context and in light of the nineteenth-century practice of state regulation of immigration, the de facto multi-sovereign regime powerfully underscores Gerald Neuman's conclusion that the current formal division of authority in the immigration context is "neither natural nor inevitable in United States federalism or in federalism generally."[182]

But the regulatory reality contrasts sharply with the doctrinal and public rhetoric of exclusivity. In light of this disconnect, constitutional and immigration law scholars should be asking themselves the question I take up in this Part: how should the integrative function played by states and localities change our doctrinal and conceptual understandings of immigration federalism? My answer is that the particular ways in which the functional foundations of the federal exclusivity principle have been eroded require that we develop legal doctrines and lawmaking presumptions that simultaneously facilitate power sharing by the various levels of government and tolerate tension between federal objectives and state and local interests.

I flesh out this conclusion in four stages. First, I consider how the de facto multi-sovereign regime should change our understandings of the constitutional validity of the federal exclusivity principle based on what the regime reveals about the structural relationship between the federal government and the states. Second, I explore how our conceptions of preemption should respond to the rise of de facto power sharing between the federal government and state and local entities—what it would mean to "normalize" the immigration power, or to accept concurrent federal/state authority. Doc-

182. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1840 n.34 (1993).

trinally, it would mean that courts would take an ordinary view of preemption in the immigration context, accepting concurrent federal and state authority. It also would mean that features of alienage law must be rethought, and that federalism doctrines might limit Congress's authority to regulate in some areas. Third, and more important, I argue that the regime I describe should lead state and federal lawmakers to employ antipreemption presumptions in their immigration-related decision making. Finally, I grapple with the potential negative side effects of permitting forms of state and local participation in immigration regulation and argue that these side effects perform a valuable sorting function.

A. *The Rise and Fall of Federal Exclusivity*

The principle of federal exclusivity is based not on constitutional text or original understanding, but on a historically contingent structural conception of the relationship between the federal government and the states. Nowhere in the Constitution is the federal government explicitly given exclusive power over immigration. Article I, Section 8, Clause 4 gives Congress the power to "establish a uniform Rule of Naturalization," and courts in articulating federal exclusivity begin and end their textual analysis with this clause.[183] As scholars have noted, however, the other areas of law in which federal power is understood to be exclusive, namely patent, copyright, and bankruptcy, are specifically enumerated as federal powers.[184]

As scholars such as Stephen Legomsky and Gerald Neuman have recounted in detail, the idea of federal exclusivity also is not consistent with original practice. Throughout the nineteenth century, states used their police powers to regulate migration across their borders.[185] States employed inspection and quarantine laws to limit movement indirectly, and they passed measures explicitly prohibiting the entry of criminals and restricting the movement of free blacks into their jurisdictions.[186]

The federal courts began limiting the states' authority to regulate in the 1840s,[187] in part on the ground that certain of these state laws impermissibly burdened interstate commerce. But the courts' concern was not to protect the federal government's immigration power, per se, but to draw more general lines between governments to delineate the regime of dual sovereignty. The

183. *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 601 (E.D. Va. 2004) (upholding a Virginia state law denying unlawful immigrants access to a range of state benefits, including entrance to public institutions of higher education).

184. *See* Huntington, *supra* note 11 (manuscript at 15).

185. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 180–83, 189–90 (1987).

186. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 21–22 (2006); NEUMAN, *supra* note 5, at 21–23, 31–37.

187. Among the reasons the federal government did not assert exclusive control over migration before the Civil War was that this power would have implied the ability to control the transportation of slaves and to preempt state laws that regulated the entry of free blacks.

Court imposed its first limitation in the *Passenger Cases* of 1842, striking down laws in Massachusetts and New York that levied fees on arriving immigrant passengers to offset the cost of caring for foreign paupers.[188] The five justices in the majority could not agree on a rationale, however.[189] Some considered the state laws to be unconstitutional regulations of foreign commerce and others viewed them as taxes on imports in violation of Article I, Section 10 of the Constitution.[190] The notion that the states had some authority concurrent with the federal government's over commerce-related matters that intersected migration remained alive for a few decades,[191] largely because a strong statement regarding the federal government's control over the migration of people among the states would have suggested federal authority to regulate (and perhaps prohibit) the domestic slave trade.

By the 1870s, with the slavery issue essentially settled by the Civil War and Reconstruction amendments, the doctrine of federal exclusivity began to take shape, taking off on the Commerce Clause grounds articulated by the plurality in the *Passenger Cases*.[192] In *Henderson v. Mayor of New York*,[193] the Court struck down New York and Louisiana laws that required shipmasters to pay fees or post bonds to indemnify states if immigrants ended up on public assistance, on the ground that the laws interfered with Congress's power to regulate commerce with foreign nations. And in *Chy Lung v. Freeman*,[194] the Court struck down a California law that gave inspectors discretion to deny entry of immigrants (namely Chinese) absent payment of some kind, on the ground that the law interfered with the federal government's efforts to conduct its foreign affairs.[195] But even after it decided these cases, the Court continued to recognize the states' police authority to adopt inspection and quarantine laws, and states continued to enforce their own public health laws and to help enforce the new federal immigration laws that Congress had passed in the 1880s.[196]

The foundation of the current federal exclusivity principle, therefore, did not solidify until the Court decided *Chae Chan Ping v. United States* and

188. The Passenger Cases, 48 U.S. (7 How.) 283, 447–50, 453 (1849).

189. *Cf.* LEGOMSKY, *supra* note 185, at 190 (noting that four of the Justices in these cases were unwilling to recognize a federal power to exclude aliens, demonstrating that it was not clear that the framers intended to assign immigration power exclusively to the federal government).

190. *The Passenger Cases*, 48 U.S. (7 How.) at 453.

191. Note that in *The Passenger Cases*, the majority appeared sympathetic to the states' interests, and every justice agreed that states retained some power to regulate immigration. Justice Grier, for example, wrote that the "sacred law of self-defence" justified the states excluding "lunatics, idiots, criminals, or paupers" as well as free blacks. *Id.* 457. As Gerald Neuman has noted, many states still required bonds in place of the automatic head taxes struck down by the Court. NEUMAN, *supra* note 5, at 23–30.

192. *See The Passenger Cases*, 48. U.S. (7 How.) at 393–464.

193. 92 U.S. 259 (1876).

194. 92 U.S. 275 (1876).

195. For a more extended discussion of these cases, see MOTOMURA, *supra* note 186, at 23–24, and NEUMAN, *supra* note 5, at 48–49.

196. MOTOMURA, *supra* note 186, at 24; *see* NEUMAN, *supra* note 5, at 49.

Fong Yue Ting v. United States, in 1889 and 1893, respectively.[197] These two decisions affirmed the constitutionality of complex federal regulatory schemes that provided for the exclusion and deportation of Chinese laborers. In these cases, the Court announced the so-called plenary power doctrine, which holds that the government has plenary power over immigration admissions and removals (virtually unrestrained by the Constitution), and that this power is exclusively federal.

A mountain of scholarly commentary exists critiquing the so-called plenary power,[198] and its plenary nature has eroded over time, as the Supreme Court has interpreted due process protections and other constitutional provisions to apply to federal procedures governing the removal of noncitizens.[199] Indeed, this aspect of the doctrine is arguably now no more than a theory of judicial review over immigration decisions, where courts police process, but substance is considered a political question. But the focus of almost all of this critique and modification has been on the absence or weakness of constitutional limitations on the federal government's admissions and removal laws, or on the claim that due process and equal protection should apply to most if not all of the government's actions in the immigration sphere. Substantially less work has been done challenging the federal exclusivity prong of the plenary power doctrine,[200] and the notion of federal exclusivity, as a doctrinal matter, has only strengthened over time, largely because of an understandable reluctance to unleash the discriminatory powers of the states on immigrants.[201] But the reality of migration management today demands that we reconsider the doctrinal foundations of the federal exclusivity principle, and ask: does the presumption of exclusivity persist for good reason?

In *Chae Chan Ping*, Justice Field connects immigration control to the pursuit of foreign affairs and national security, the protection of which represents "the highest duty of every nation" and trumps all other con-

197. Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

198. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 3; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Peter J. Spiro, *Explaining the End of the Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 341 (2002).

199. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001) (interpreting detention pending removal provision to include a six-month limitation in order to avoid the possibility of indefinite detention); Landon v. Plasencia, 459 U.S. 21, 23 (1982) (holding that a lawful permanent resident seeking readmission was entitled to due process protections); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that noncitizens subject to deportation are entitled to fair procedures). For a discussion of this erosion, see MOTOMURA, *supra* note 186, at 108–13.

200. Peter Schuck also has made this point recently. Schuck, *supra* note 11, at 58–59.

201. For a strong argument against state and local participation in immigration enforcement on civil rights grounds, see Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102–15 (2004) (discussing the threat of racial profiling by state and local enforcement); Wishnie, *supra* note 8, at 526 (discussing the danger of devolving federal authority because such devolution might compromise the equal protection rights of immigrants).

cerns.[202] Defending national security, in Field's view, requires repelling encroachments of any kind, including the encroachments of the "vast hordes" of other nation's peoples on the United States—hordes that come not just in the form of invading armies, but also of immigrants.[203] Justice Field thus characterizes immigration as related to two interests thought to be quintessentially national in scope: foreign affairs concerns, because immigration involves the United States' interaction with citizens of other sovereign states, and national security, largely for the same reasons.[204] Exclusive federal control is therefore necessary to ensure that foreign affairs and national security policy are uniform. On immigration and like issues, the "American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union."[205]

The federalism component of the plenary power doctrine is thus based on an external conception of sovereignty that emphasizes the power and status of the nation-state as one among many in an international world. Justice Field does not point to any particular provision of the Constitution enumerating the federal power to control immigration, nor does he cite *Henderson v. New York* for the proposition that Congress's power to regulate interstate commerce includes the power to regulate migration.[206] Instead, Justice Field describes the power over immigration as a function or "incident" of the United States' sovereignty in and of itself.[207] This external, unenumerated conception of sovereignty, "delegated in trust to the United States," endows the government with the right to exercise its immigration power "at any time when, in the judgment of the government, the interests of the country require it"; in other words, without restraint.[208]

Without a doubt, immigration regulation continues to implicate the United States' relations with foreign powers. In the early months of 2007, for example, the intersection between foreign policy and immigration appeared in mainstream news cycles. The connection has been highlighted by the debate over how many and through what processes Iraqi refugees should

202. 130 U.S. at 606.

203. *Chae Chan Ping*, 130 U.S. at 606.

204. *Id.* at 606–10.

205. *Id.* at 604 (quoting Cohens v. Virginia, 19 U.S. 264, 413–14 (1821)).

206. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 405 (5th ed. 2006).

207. *Chae Chan Ping*, 130 U.S. at 603–04. For a critique of this theory of sovereignty as a source of the immigration power, see LEGOMSKY, *supra* note 198, at 184–87 (arguing that an external conception of sovereignty is inconsistent with the theory of enumerated powers and that it cannot be justified as a necessity today because of the scope of the modern Commerce Clause).

208. *Id.* at 604, 609 ("While . . . the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects . . . are one nation, invested with powers which . . . can be invoked for the maintenance of its absolute independence and security throughout its entire territory."); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (2d ed. 1996) (discussing the relative authority of the executive, Congress, and courts in managing U.S. foreign affairs).

be settled in the United States,[209] as well as by the growing distress in Mexico and other Latin American countries over the United States' failure to adopt an immigration reform that would eschew wall building in favor of freer legal migration across the U.S. southern border.[210] But the continued intersection between immigration and foreign affairs does not lead inexorably to federal exclusivity for at least two reasons.

First, it is no longer clear that it is possible or even desirable to exclude states and localities from activities that implicate foreign affairs. Peter Spiro, who has encouraged scholars and advocates to "learn to live with immigration federalism," has made a convincing case that the foreign affairs underpinnings of the plenary power no longer make sense.[211] Spiro emphasizes that states and localities today "enjoy international personality" and have "routine dealings with foreign governments (both national and subnational)."[212] Many of these dealings do not, of course, interfere with the federal government's foreign affairs objectives, and as such would not be preempted under a dormant foreign affairs theory. But the fact that states regularly engage in economic and cultural exchanges with foreign powers *and their subentities* underscores for Spiro that the rationale behind foreign affairs preemption—that when states act, foreign powers will blame and retaliate against the national government because they will not be able to identify the states as actors—no longer describes the knowledge horizons of foreign governments.[213]

This move is of a piece with a growing body of legal scholarship that describes and defends the ways in which state and local governments engage in foreign policy or do business with inevitable implications for foreign affairs. Judith Resnik, for example, has explored the "law's migration," or the proliferation of local action aimed at "bypassing the nation-state to make transnational precepts local law."[214] The conditions of globalization "changed the definition of what constitutes 'local issues,'" motivating local

209. *See, e.g.*, George Packer, *Betrayed: The Iraqi translators who helped America*, NEW YORKER, Mar. 26, 2007, at 52.

210. *See, e.g.*, James C. McKinley, Jr., *From Mexico Also, the Message to Bush Is Immigration*, N.Y. TIMES, Mar. 14, 2007, at A12 ("At nearly every turn, the American president has been faced with anger over what is perceived as the United States' neglect of the region and frustration with its tougher border-security policies in the wake of the 2001 terrorist attacks.").

211. *See* Spiro, *supra* note 8.

212. Peter J. Spiro, *The States and Immigration Law in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 153, 161 (1995).

213. *Id.* at 162–63. Spiro points out that the Court has begun to retreat from the one-voice requirement in foreign Commerce Clause and foreign affairs preemption cases. *Id.* at 164. In *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), the Court upheld a California taxation scheme that has a disparate impact on multinational corporations on the ground that the law was not preempted by federal tax law, moving the doctrine away from broad-based foreign affairs preemption arguments and into the framework of standard domestic preemption analysis. *See id.* at 163–65. Spiro also emphasizes that in the controversy over Proposition 187, it was clear to the government of Mexico that California, and not the federal government, was behind the measure. In response, the Mexican government boycotted a trade exhibition in California and citizens in Tijuana organized a two-day boycott of San Diego businesses. *Id.* at 165–66.

214. Resnik, *supra* note 34, at 1634.

governments to become involved in broad-ranging debates on matters global in scope,[215] such as climate change and, I would add, the attraction and settlement of migrants.[216] For better or worse, states and localities are interacting with international entities and legal processes in norm-generating ways that diverge from and may ultimately influence federal policy.[217] Congress may still have reason to shape immigration policy to address foreign affairs concerns in ways that preempt state law. But the foreign affairs rationale no longer supports *exclusive* federal control, particularly in the wake of increased state and local involvement in external matters.[218]

Second, and more to the point, though the national security and foreign affairs dimensions of immigration are inescapable, immigration is neither exclusively nor primarily a national security or foreign relations issue. The justification for greater state and local participation in immigration regulation stems from the fact that transnational phenomena are increasingly bearing down on states and localities in ways that a single, central government may not be best suited or able to manage.[219] Immigration has direct implications for state and local institutions and their fiscal well-being, as well as for the public health, safety, and welfare of the communities that state and local entities govern. In other words, immigration is not just about the United States' relationship with the world and the definition of national sovereignty; immigration implicates the definition of localized political communities as well as divergent local interests in the pace and scope of integration and social change.

What is more, the developments discussed in Part II render the assumption that the United States must speak with one voice on immigration an anachronism. In fact, public discourse on immigration must involve multiple voices. Attempts to sustain a persistent national conversation on immigration law and policy are not only excruciating but also destroy precisely the value such nationalization is meant to advance: unity. The difficulty of passing immigration reform—the fact that major reforms happen only every ten to twenty years—highlights that, as a nation, we are not capable of sustain-

215. *Id.* at 1644 (quoting WILLIAM B. STAFFORD, GLOBALLY COMPETITIVE REGIONS: WHAT SEATTLE IS LEARNING FROM THE REST OF THE WORLD 1 (1999)).

216. For direct overlap between foreign affairs issues and local government resolution drafting, see *supra* Section II.B.3, which describes the origins of the sanctuary movement in the foreign policy context.

217. *See, e.g.*, Resnik, *supra* note 34, at 1639–43 (discussing efforts by local governments and states to secure the ratification of the Convention to End Discrimination Against Women, most of which are hortatory calls to the federal government to ratify the treaty, but some of which include efforts by local governments to implement precepts of the treaties into their own laws).

218. *See id.* at 1647 (discussing participation by state and local officials in national and international organizations, such as the National League of Cities, the United States Conference of Mayors, the National Governors' Association, and the National Commissioners on Uniform State Law, as "conduits for border crossings, state to state and internationally").

219. *Cf. id.* at 1653 (noting that the climate programs adopted by mayors who support the Kyoto Protocol "collapse the global into the local, turning problems that could have been dealt with as foreign policy by the national level . . . into domestic policies about how cities run themselves").

ing the immigration conversation for very long.[220] The complexity of the issue demands supple and sometimes contradictory responses, and a one-voice approach is likely to produce both over- and underinclusive policies. These risks may be present when it comes to a wide variety of issues, but they are particularly salient in the immigration debate, which is always uncomfortably proximate to a deep nativist strain in American culture.

In the end, we need not indiscriminately fear local participation and variation in the evolution of immigration law and policy. As scholars have recognized in other contexts, we should see local governments as playing an important role in the development of American constitutional identity and in negotiating the potentially explosive consequences of nascent civil rights and social movements.[221] Local participation in matters thought to be of national significance can have generative effects, helping to resolve issues incrementally in the absence of national consensus, and therefore protecting the varied interests of parties who have yet to see their way to national consensus.[222] Against this normative defense of local variation, it is not enough to say that the absence of a federal solution itself reflects a national consensus because issues are likely to be salient for some parts of the country earlier and more frequently than for others. In other words, the "one voice" rationale for the federal exclusivity principle sets too high a decision-making hurdle on the immigration issue, whose manifestations are extraordinarily varied, and whose practical consequences local communities must face every day.

B. *Toward a New Power-Sharing Theory*

Recognizing immigration as a state and local concern would not displace federal authority to regulate in the area, nor would it be mutually exclusive with the recognition that the federal government should either occupy significant stretches of the immigration field or exert strong leadership in certain areas. Taking account of the multi-sovereign regime would only challenge the federal exclusivity conclusion. Once we accept that the appropriate structural relationship between the states and the federal government is more complicated than exclusivity admits or that state

220. As a structural matter, it is difficult for the federal government to come to consensus on immigration-related questions. Indeed, the immigration debate provides us with an acute version of "Madison's nightmare." *See* Hills, *supra* note 10, at 10 (defining "Madison's nightmare" as a situation where "heterogeneity of interests could prevent the majority coalition from doing anything at all—even just and useful things—while simultaneously facilitating the ability of self-interested minorities to loot the federal fisc").

221. *See, e.g.*, David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2221 (2006) (examining San Francisco's challenge to California's same-sex marriage ban and arguing against the conventional view that cities' interpretations of the Constitution should be considered suspect and that cities have no independent role in constitutional interpretation).

222. *See, e.g.*, Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1783, 1749 (2005) (noting that "federalism can be understood at least in part as a strategy for allowing would-be dissenters to govern in some subpart of a system," which in turn contributes to the marketplace of ideas, and facilitates self-government and self-expression).

participation in immigration regulation is not constitutionally preempted, the question becomes: how should we conceptualize the distribution of power between the federal, state, and local governments in this area?

1. *Division of Labor*

It may be tempting to hang on to something of the federal exclusivity principle and try to separate immigration control and integration policy. We could think in terms of a division of labor among the levels of government. The federal government handles admissions, removals, and enforcement, and states and localities can choose different methods of integrating immigrants admitted by the federal government.

But this division is conceptually unstable, if not incoherent. As Part II makes clear, because immigration control and immigrant integration mutually reinforce one another, it can be quite difficult to separate control measures from integration measures once we move beyond the obvious cases of setting visa policy on the one hand and providing affirmative integration assistance to legal immigrants on the other. The difficulty of this conceptual separation already bedevils constitutional law, where doctrines attempt to distinguish between immigration law, which deals with the comings and goings of migrants, and alienage law, which is concerned with how immigrants are treated once they arrive. But as a number of scholars have noted,[223] this line has been impossible for courts to draw clearly. Alienage classifications shade into immigration controls because policies that dole out relatively negative or positive treatment to immigrants will inevitably induce immigrants to move across state (and possibly national) borders. It thus will be impossible to police the line between integration and control without displacing a great deal of important state and local regulation targeted at integration.

The concern for integration as a function of immigration control was already apparent in *Henderson*.[224] The Court, in addition to finding that a state immigration regulation burdened foreign commerce, noted also that the state law interfered with federal policy, acknowledging that "immigrants . . . come among us to find a welcome and a home," bringing with them "the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture."[225] Contained within the terms of immigration control is control over the terms of the relationship between immigrants and the body politic.

The Court most explicitly conflates integration and control in *Graham v. Richardson* and *Mathews v. Diaz*, the 1970s Court decisions that helped solidify the federal exclusivity principle. In *Graham*, the Court ties questions

223. *E.g.*, Huntington, *supra* note 11 (manuscript at 9) ("The categories of immigration law and alienage law are not perspicuous."); Wishnie, *Laboratories of Bigotry*, *supra* note 8, at 526 (noting that the alienage/immigration distinction is not dispositive).

224. Henderson v. Mayor of the City of New York, 92 U.S. 259, 271 (1876).

225. *Id.* at 270.

of integration (the relationship of the individual to the state) to the power to decide who can and cannot enter.[226] In *Mathews*, the Court notes, "[t]he decision to share [our] bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."[227] *Graham* in particular demands of the state seeking to withdraw public benefits from noncitizens a justification linked to national interests or citizenship—a justification the state cannot possibly give. The Court is thus suggesting that the status and treatment of immigrants are matters of national identity and national citizenship.[228]

There are good reasons for the Court to advance this assumption, namely the nationalization of citizenship by the Fourteenth Amendment[229] and the interest in enabling freedom of travel within the boundaries of the United States—an interest justifiable in rights and citizenship terms[230] as well as in commerce-promotion practical terms. But this analysis simply emphasizes that the line between immigration control and immigrant integration can be difficult to draw, particularly if we conceive of citizenship as a legal status and therefore a national construction.

To the extent that we think states should have freedom to devise immigrant integration policies that suit their present conditions and histories, creating a doctrinal distinction between immigration control and integration policy will not be of great use. Some states will be more parsimonious than the federal government. And some state and local communities' desires to integrate a population that is de facto present, even if not de jure present, may run counter to federal objectives. To enable states and localities to

---

226. 403 U.S. 365, 376–80 (1971) (striking down an Arizona law that made noncitizens eligible for welfare only if they had lived in the United States for fifteen years, on grounds that the law violated equal protection and exceeded state authority).

227. Matthews v. Diaz, 426 U.S. 67, 80 (1976).

228. *Cf.* MOTOMURA, *supra* note 186, at 82–83 (discussing the Supreme Court's decision in *Matthews v. Diaz* and the distinct federal and state roles in constructing citizenship through welfare policy).

229. Recognition of freedom to travel, of course, predates the Fourteenth Amendment. *See* The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849). The *Passenger Cases* court noted,

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id.

230. *Cf.* Saenz v. Roe, 526 U.S. 489 (1999) (striking down a California law that imposed a one-year residency requirement on receipt of certain public benefits, on grounds that the law interfered with the right to travel, a privilege and immunity of citizenship); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (striking down a state statute limiting welfare benefits to those who have resided in state for a year or more, observing that "[t]his Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land").

perform the integration work essential to the management of migration, then, we need a theory of power sharing.

2. *Preemption and Judicial Restraint*

Devising a power-sharing framework requires immigration preemption analysis to be normalized. Courts must jettison the obfuscating overlay of the exclusivity principle and treat immigration regulation as subject to the standard Supremacy Clause preemption inquiry. There is no reason to fear that abandoning exclusivity will compromise federal power over immigration; general, albeit contested, doctrines exist to manage the federal-state relationship and to ensure that state and local laws do not thwart the federal government's ability to implement or enforce its laws. Abandoning exclusivity instead would bring precision to the doctrinal assessment of state and local immigration regulations and shift the focus of the debate over state and local participation in a productive direction, toward debates over the extent to which Congress *should* preempt state and local activity that impinges on immigration-related matters.

Courts, without saying so, have moved in this direction over the years. Federal exclusivity is really more bark than bite. Courts often begin their analysis with strong statements of exclusivity but then strike down state laws on a conflict-preemption basis.[231] The fact that the federal government has regulated so comprehensively in the immigration field means that a statutory basis for preemption is not difficult to find, and so few, if any, litigation outcomes hinge on a constitutional holding. Indeed, courts typically rely on the preemption framework as articulated by the Supreme Court in *De Canas v. Bica*, which resembles a standard preemption inquiry: has the federal government occupied the field, and if not, does state law nonetheless present an obstacle to the achievement of the federal objective or frustrate the purposes of the federal scheme? And, as the Court made clear in *De Canas* when it upheld a California statute penalizing employers who hired unauthorized immigrants, "[not] every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by [the federal government's] power, whether latent or exercised."[232] Though

231. *E.g.*, Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (striking down a state law after finding that it could not be enforced given the existing federal statutory scheme for alien registration and noting that state law in this area "is restricted to the narrowest of limits"); League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1253–56 (C.D. Cal. 1997) (applying statutory preemption principles to find that California's Proposition 187 conflicts with federal law after noting that "the '[p]ower to regulate immigration is unquestionably exclusively a federal power.' " (quoting De Canas v. Bica, 424 U.S. 351, 354, 356 (1976)); Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 601, 607 (E.D. Va. 2004) (citing *De Canas* for the proposition that immigration regulation is a federal power while rejecting broad field preemption theory, noting that "Congress' failure to act in this regard has not ousted states' authority to regulate in this area; instead, it is clear that Congress has left the states to decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions").

232. *De Canas*, 424 U.S. at 355.

the Court seemed to recognize the possibility of constitutional preemption,[233] it also contemplated state authority to issue immigration-related regulations consistent with federal law.

But the availability of constitutional preemption, and its statutory corollary of field preemption, leads courts to define conflict between state and federal laws broadly and to put a thumb on the scale in favor of preemption. Because it has become so enmeshed in the courts' doctrinal rhetoric, exclusivity has given rise to very strong versions of obstacle and field preemption according to which states are not regarded as having meaningful interests in controlling immigration. In offering this thumb-on-the-scale theory of courts' preemption analysis, I echo then-Justice Rehnquist's dissenting opinion in *Toll v. Moreno*,[234] a case in which the Court struck down a Maryland statute defining different college tuition rates for differently situated aliens. The Court found that because the federal government had admitted a certain class of aliens to the United States and afforded the aliens significant tax exemptions, the Court could not conclude that Congress ever contemplated a state imposing discriminatory tuition charges solely on the basis of the federal alienage classification.[235] But as Justice Rehnquist contends in dissent, the Court interferes in an area of traditional state autonomy based on speculative conclusions about the effects of federal tax treaties and without any direct evidence that Congress intended to supplant the type of regulation in which Maryland was engaged.[236]

This tendency to over-read congressional objectives is evident in the district court decision striking down the Hazleton ordinance. In conducting its implied conflict preemption analysis of the ordinance's employment provisions (after finding the provisions expressly preempted and field preempted

---

233. *Id.* at 356 ("Even when the Constitution does not itself commit exclusive power to regulate a particular field to the Federal Government, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause."). The court went on to note that

> we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship . . . in a manner consistent with pertinent federal laws. 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 that conclusion.' "

Id. at 357.

234. 458 U.S. 1 (1982).

235. *Toll*, 458 U.S. 1.

236. *Id.* at 25–27 (Rehnquist, J., dissenting). Rehnquist does acknowledge that "federal power over immigration . . . is plenary and exclusive," but he rejects the extension of that idea to cover regulations of aliens once they have been admitted, apparently limiting the idea of exclusive immigration control to admissions decisions. *Id.* at 26. For further evidence of these distortions, see *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Hines* struck down a Pennsylvania law, requiring aliens over eighteen years old to register with the state, on conflict preemption grounds, while implying that concurrent authority does not exist. The Court observed that "[l]egal imposition of distinct, unusual and extraordinary burdens . . . upon aliens . . . bears an inseparable relationship to [foreign affairs]." *Id.* at 62–65. In dissent, Justice Stone noted that even if Congress could constitutionally establish an exclusive program for alien registration, "it has not done so and . . . it is not the province of the courts to do that which Congress has failed to do." *Id.* at 75 (Stone, J., dissenting).

by IRCA),[237] the court emphasizes that IRCA "leaves no room for state regulation," that immigration is a "national issue," and that allowing states to legislate with regard to employment of unauthorized workers would interfere with congressional objectives.[238] But the court adverts to no strong evidence that the Hazleton ordinance actually prevents the federal government from enforcing IRCA. Instead, the court emphasizes two weaker forms of conflict.

The court first points to differences in the details of the regulatory schemes, noting, for example, that IRCA requires employers to verify workers' status themselves, whereas the Hazleton ordinance requires employers to send workers' papers to a municipal office, where an official determines, in consultation with the Department of Homeland Security ("DHS"), whether the worker is unlawful under federal law. With this move, the court defines an arguably irrelevant procedural difference as a conflict. It then emphasizes that the differences in detail between the two schemes demonstrate that Hazleton and Congress have struck a different balance between the two goals of protecting the rights of workers and businesses and preventing illegal immigration, with Hazleton presumably placing more emphasis on the latter, at the expense of the federal government's emphasis on the former. The court thus treats a speculative and general tension between the two schemes as an actual conflict, reaching a conclusion that ultimately sounds in field more than conflict preemption. With each of these moves, the court reinforces the assumption that immigration is a federal domain, even absent demonstrable conflict.[239]

But what would it mean for courts to apply standard preemption doctrine?[240] Their analysis may initially be muddy, if only because the

237. For an in-depth doctrinal analysis of the express and field preemption claims against the employment provisions of the IIRA's, see CRISTINA M. RODRÍGUEZ ET AL, THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES 8–20 (2007), *available at* http://www.migrationpolicy.org (last visited Dec. 19, 2007).

238. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 523 (M.D. Pa. 2007).

239. *See id.* at 530. This capacious view of the federal interest in immigration control is arguably reflected in other doctrinal areas, as well. For example, the Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), in which the Court held that the NLRB's decision to award back pay to unlawfully discharged unauthorized workers was counter to the goals of IRCA, arguably reflects an overprioritization of Congress's objective of preventing the employment of the unauthorized over the goal of preventing unfair labor practices.

240. Relaxing preemption doctrines would not free states and localities to have their way with immigrants and immigration. As the Valley Park lawsuit has made clear, some forms of state and local immigration regulation conflict with generally applicable state law (in that case, with Missouri landlord tenant law). *See* Reynolds v. City of Valley Park, No. 4:06CV01487-EWR, 2006 WL 3331082 (E.D. Mo. Nov. 15, 2006). As *Graham v. Richardson*, 403 U.S. 365 (1971), makes clear, the Equal Protection Clause may constrain states from adopting measures that discriminate against immigrants. Of course, the Court has drawn exceptions to the *Graham* rule, holding that states sometimes can impose restraints on aliens and exclude aliens from certain state benefits, namely certain public employment opportunities. *See* Ambach v. Norwich, 441 U.S. 68 (1979) (upholding a state law requiring noncitizen public school teachers to declare intent to naturalize); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) ("We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'" (quoting Dunn v. Blumenstein, 405 U.S. 330, 344 (1972))). Another way to think about this issue is to consider the possibility that the federal government might

overarching question of whether Congress has intended to oust state powers is not a question that makes a lot of sense to courts in the immigration context, given that immigration control has not been explicitly recognized as a state power. "Ordinary" preemption doctrine, moreover, is itself something of a contested hash. But in broad outlines, accepting my account of concurrent authority would mean recognizing that states and localities have legitimate interests in immigration regulation, which in turn would require courts to abandon robust field preemption and malleable frustration of purpose obstacle preemption, both of which elide legitimate state interests and assume Congress intends to regulate broadly. To be sure, Congress has been legislating for over a century against a backdrop of federal exclusivity, and so this assumption is not without foundation. But it is time to require more specificity and discipline from Congress and the courts alike in this area.

a. *Field Preemption*

Leaving aside the relatively clear-cut case of express preemption, which nonetheless raises interpretive difficulties (as the employer sanctions, in-state tuition, and noncooperation law debates underscore), courts in an immigration case would begin with a field preemption inquiry. Normalizing the inquiry in this area would require courts to define the relevant field without resort to the jargon of exclusivity. Given that courts have "grown increasingly hesitant"[241] to read implicit field preemption into statutes in general, applying standard preemption doctrine in the immigration context is ultimately likely to result in a move away from field preemption.

Of course, Congress has legislated expansively in the immigration area, and so courts will generally confront a regulatory regime that they might easily deem "so pervasive" that "Congress left no room for the States to supplement it."[242] But the analysis in Part II demonstrates the importance of keeping the definition of fields narrow—to avoid displacing altogether legitimate state interests in passing regulations that affect immigrants who have entered the country, including regulations that may affect immigrant movement. Defining a field that does not cut too wide a swath through the territory of state and local regulation I have outlined would mean defining the field of regulation with some specificity.[243] "Immigration" is a capacious

authorize states to draw distinctions in their distribution of welfare and other benefits, if the federal government determines that such variation is an appropriate way to manage the relationship of immigrants to the body politic. This view would accept the basic premise of *Graham* that the federal government should be driving the train, but would recognize the functional analysis I offer here.

241. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000).

242. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted).

243. As Caleb Nelson has pointed out, "[t]he Court has grown increasingly hesitant to read implicit field preemption clauses into federal statutes." Nelson, *supra* note 241, at 227; *cf.* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 145 (1963) (upholding a California standard for avocado maturity and defining the field of federal superintendence as avocado maturity for purposes of introduction of Florida fruit into interstate commerce, and not all interstate shipment of avocados).

term that consists of many subsets, and delineating those subsets precisely is the only way to ensure that state interests are not trampled.

The district court's invalidation of the Hazleton landlord regulations arguably reflects a misuse of field preemption. The court explicitly invalidates the ordinances on conflict preemption grounds, but its holding is based on the presumption that Hazleton intends the housing ordinance as a mechanism of removal, or to force unlawful immigrants out of the United States.[244] The fact that the federal government has set exclusive standards for who has a right to remain and sometimes permits unlawful immigrants to stay—which in turn means that a proceeding before a federal immigration judge is the only official means of determining whether an alien may be removed—justifies the court's invalidation of the ordinance. In other words, it is Congress's occupation of the field of status determinations that preempts Hazleton's efforts to regulate landlords.

But actual removal is at best an ancillary consequence of the landlord ordinances. The ordinances set up no removal procedures or even any requirements that landlords report unlawful immigrants to ICE, and no evidence is offered to show that those affected by the statute are not just moving to another town or state. The court is thus using a legitimate claim of federal field occupation—the field of status determinations—to reach state regulation clearly outside that field. Indeed, the court's holding is arguably inconsistent with *De Canas v. Bica*.[245] There, the Court upheld a California employer sanctions scheme that penalized employers for hiring unauthorized workers[246]—a scheme that could have had the same consequences of forcing aliens to leave the country. Despite the fact that the federal government had constructed an enforcement scheme of its own (that at the time did not include employer sanctions), state measures that related to state interests, such as the regulation of the terms of employment, remained valid.[247] As Justice Rehnquist explains in his dissent in *Toll*, *De Canas* rejects the idea that the federal government's immigration power "either unexercised" or in existing law "preempts the field of regulations affecting aliens once federal authorities have admitted them into this country."[248] Federal power may be exclusive over whom to admit and remove, but this power does not extend to cover every manner of enforcement-related activity that might induce voluntary departure by immigrants.

b. *Conflict Preemption*

In conducting conflict preemption analysis, the goal in the immigration context, as in preemption generally, should be pursuit of neutrality, or per-

244. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527–29 (M.D. Pa. 2007).

245. 424 U.S. 351 (1976).

246. *Id.* at 355–56.

247. *Id.* at 356–57.

248. Toll v. Moreno, 458 U.S. 1, at 26 (Rehnquist, J., dissenting).

forming an analysis that favors neither the state nor the federal interest in regulation, but instead determines whether the state law genuinely interferes with the effectuation of federal law. Some scholars suggest that courts should require Congress to adopt a clear statement of its intent to preempt. Others have suggested that a finding of conflict should be made only if it would be physically impossible to comply with the federal and state statutes at issue.[249]

Whereas the former places too high a burden on Congress—it is unrealistic to expect Congress to anticipate every situation in which state laws might undermine its efforts to regulate—the latter is effectively a thumb-on-the-scale in favor of the states, as impossibility may well be itself impossible to demonstrate. It is not surprising, then, that impossibility preemption is a "vanishingly narrow" area.[250] Indeed, it is hard to imagine a state law that would make it impossible for ICE to enforce the immigration laws, and applying a strict impossibility test would be tantamount to giving states carte blanche to thwart federal regulatory objectives.

If impossibility need not be shown, then the next inquiry is whether the state law presents an obstacle to the enforcement of the federal scheme. Scholars have criticized the sort of obstacle preemption used in some immigration cases.[251] According to the skeptical point of view, the fact that a state law's practical effects might obstruct certain broad federal purposes, such as controlling the flow of illegal immigrants, does not mean that the state law is invalid.[252] This conclusion follows, in part, because assessing those effects requires speculation and, in part, because a preemption doctrine that is understood to cover this sort of tension between the effects of state laws and federal purposes would subsume a wide swath of state legislation, particularly if a court defines the federal interest at a high level of generality.

Instead, the touchstone for conflict analysis should be whether the state measure unduly interferes with an existing federal regulatory scheme, such that it makes the effective implementation of that scheme substantially more costly or inefficient than it would be absent the state regulation. Focusing on the federal government's ability to superintend an area it has chosen to regulate means focusing on outcomes, not on vaguely defined notions of purpose. This approach would require courts to identify an actual conflict, as opposed to a general incompatibility, before preempting a state law.[253]

---

249. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963). For a discussion of the various scholarly views on the subject, see Nelson, *supra* note 241, at 229–31.

250. Nelson, *supra* note 241, at 228.

251. Caleb Nelson has argued that "constitutional law has no place for the Court's fuzzier notions of 'obstacle' preemption." *Id.* at 231.

252. *See id.* at 231–32 (noting that the mere fact that federal law serves a purpose does not mean that it contradicts all state laws that get in its way).

253. For an example of this sort of approach, see *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 241 (2d Cir. 2006) (upholding award of workers' compensation to an unauthorized alien post-*Hoffman Plastic* and noting that "[t]he mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power" and "only where the repugnance or

How might these principles be applied to some of the federalism controversies of today? The principles would justify state laws that advance the same objectives as federal laws with means that do not thwart (or are not inconsistent with) the processes of federal enforcement.[254] This approach makes the preemption question fact dependent. With respect to the laws that would deny employers who knowingly hire unlawful workers business licenses or contracts, if the state adopts federal standards for who is unlawful, such laws would not appear to frustrate the federal scheme at first glance.[255] Assuming these schemes depend on states or employers using the federal government's E-Verify program to verify status, however, if a high volume of state and local requests would become overly burdensome for the system, or if a high error rate were to result, then perhaps the mechanisms chosen by the states to enforce their schemes could be said to be interfering with the ability of the federal government to enforce its own regulations.[256] A similar analysis could be applied to the landlord ordinances, as well as to state laws that require proof of citizenship or eligibility for public benefits. In other words, whether the means chosen by a state to pursue ends consistent with those set out in the Immigration and Nationality Act ("INA") will thwart federal regulation will depend on the particularities of the state law and the current state of the federal bureaucracy. A court attempting to decide this question might look to statements by federal officials, or consider expert witness testimony.[257] Short of an official policy statement from DHS embodying empirical data, it will be impossible to eliminate the courts' need to speculate about the potential conflict. But by eschewing the malleable frus-

conflict is so direct and positive that the two acts cannot 'be reconciled or consistently stand together' " should preemption be found). The many cases decided by state courts upholding workers' compensation awards to unauthorized immigrants emphasize the traditional and important state interest in regulating the terms of employment—an emphasis I argue should be permitted in the direct immigration context as well.

254. Peter Schuck calls for a test according to which state laws "mirror" or "mimic" federal laws. Schuck, *supra* note 11, at 80, 84–85.

255. The district court in *Lozano v. Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), saw this differently, holding that not only must a decision to deny a business license be based on a finding that an employer has hired an unlawful immigrant as defined by federal law, it must be based also on a preexisting federal determination of that violation. *Id.* at 518–21. This holding is consistent with (though not explicitly supported by) legislative history, H.R. REP. NO. 99-682, pt. 1, at 58 (1986) ("[Penalties] are not intended to preempt . . . state or local processes concerning . . . a license to any person who has been found to have violated the sanctions provisions . . . ."), but not with the text of the statute, which does not expressly limit states' use of their licensing powers to instances where federal sanctions have been imposed. *Lozano*, 496 F. Supp. 2d at 523–24. For a detailed discussion of this issue, see RODRÍGUEZ ET AL, *supra* note 237, at 8–20.

256. Given that the federal government seeks broad participation in its E-Verify program, it seems unlikely that this conflict actually would occur. That said, a state law that requires employers to enroll in E-Verify may well disrupt the federal scheme by making a program mandatory that the federal government intended to be voluntary and experimental. *Cf.* Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000) (finding state tort suit seeking to establish a duty to install airbags was preempted by DOT regulation making adoption of air bags voluntary, on the grounds that the agency sought "a gradually developing mix of alternative passive restraint devices").

257. *Cf.* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 242 (2007) (discussing the recent trend of courts looking to federal agencies for data to determine whether uniform federal rules are appropriate).

tration of purpose approach in favor of an outcome-oriented inquiry, this speculation can be kept in check.

With respect to the question of state and local police participation in law enforcement, rejecting constitutional exclusivity would mean accepting that states and localities are not constitutionally barred from enforcing immigration laws.[258] But as a matter of statutory preemption, it seems clear that the federal government has contemplated and expressly defined the route for states to follow: the 287(g) agreement and the explicit authorization of state and local police enforcement of the criminal smuggling and reentry provisions of the INA. Any other attempts at immigration enforcement that are not ancillary to standard law enforcement or otherwise expressly authorized by federal law arguably have been preempted based on Congress's determination that the federal government should supervise state participation in this area. The legality of the measures that would require police to verify the status of those who come into their custody might depend on what follows from officers' attempts at verification.[259] As with the employer sanctions provision, if the state and local requests for status verification overtax the system by which these determinations are made, or result in a high error rate, thus compromising efficient and effective enforcement of immigration law, then a conflict preemption argument could be made.

As for the state and local policies arguably inconsistent with the federal goal of preventing illegal immigration—the day labor centers, the identification authorization laws, the noncooperation provisions, and the in-state tuition provisions—a preemption approach that eschews frustration of purpose would require more than an inconsistency with the federal objective of enforcing immigration law to find these measures invalid (absent express preemption, which arguably exists in the latter two cases). At the very least, those challenging such laws should be required to provide evidence or reasoned argument that the measures thwart the ability of the federal government to enforce its laws.[260]

---

258. *See supra* note 104.

259. For a discussion of these measures, see *supra* notes 100–103 and accompanying text.

260. Whether local policies lead immigrants to illegally enter is an empirical question. I am not aware of any evidence other than of the anecdotal variety demonstrating cross-border movement as a result of local policies. My intuition is that workers move for jobs, not in response to accommodationist policies. The fact that there are large numbers of unauthorized immigrants in localities that do not adopt accommodationist measures suggests that day labor centers and the like do more to ameliorate hardship than induce movement. But we would expect policies that assist in the process of locating employers and that make life as an unlawful immigrant easier to manage will make some immigrants more likely to take the risk of living illegally in the United States. It is also likely that unauthorized workers are more willing to risk living illegally in communities that help them find work and provide other means of integration. Absent empirical study, it is probably safe to assume that the integrationist policies I describe are not causing the unlawful immigration problem, but that they may affect how unlawful immigrants sort themselves out in the United States and may also lead to some marginal increase in unlawful immigration. But we do face a chicken and egg problem here: are there a lot of unlawful immigrants in New York because the city is a hospitable place for them, or has the city become a hospitable place for them because the unlawful population is sizable as a result of the city's need for immigrant labor?

For example, though a day labor site might indirectly facilitate illegal immigration by enhancing unauthorized workers' ability to secure employment, public funding of such a site does not prevent the federal government from enforcing immigration laws, nor does it attempt to regulate directly who can and cannot enter the country. With respect to the sanctuary laws, because Congress under the *Printz* commandeering doctrine cannot compel state governments to assist in enforcing federal law, it would be hard pressed to make the claim that the mere existence of the noncooperation laws conflicts with the general purpose of regulating and enforcing immigration laws, particularly if those laws only prohibit city officials from inquiring into immigration status, as opposed to forbidding information sharing with federal authorities.

c. *Beyond Preemption*

Abandoning the exclusivity principle would have potentially radical implications in doctrinal contexts beyond preemption. First, the exclusivity principle has had an important influence on the development of equal protection doctrine as it applies to noncitizens. Putting the principle aside would cure the much-lamented inconsistency in that area of the law—that whereas state distinctions between citizens and noncitizens are subject to strict scrutiny, such distinctions drawn by the federal government are subject only to rational basis review. In *Mathews v. Diaz*,[261] federal exclusivity is arguably doing a significant amount of work below the surface of the opinion in justifying the relaxed standard of review in the alienage context. The notion that federal alienage classifications are inherently rational, whereas state classifications might not be, is hard to explain without the backdrop of federal exclusivity, given that no other federal power is treated in the same way.

This assumption is also present in opinions such as Justice Kennedy's decision in *Nguyen v. INS*.[262] Though Justice Kennedy purports to be applying intermediate review to the gender classification present in the derivative citizenship law being challenged, Justice O'Connor rightly eviscerates the Court's reasoning in the case as wholly inconsistent with the Court's gender equal protection cases.[263] Though Justice Kennedy claims not to address whether the plenary power should continue to modify the scrutiny given to

261. 426 U.S. 67, 84–85 (1976). The court notes that

> [S]tate statutes that deny welfare benefits to resident aliens . . . encroach upon the exclusive federal power over the entrance and residence of aliens. . . . [This] ground of decision actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens. The equal protection analysis also involves significantly different considerations because it concerns the relationship between the aliens and the States rather than between aliens and the Federal Government.

Id. (citing Graham v. Richardson, 403 U.S. 365 (1971)).

262. 533 U.S. 53 (2001).

263. *Id.* at 74 (O'Connor, J., dissenting).

the federal government's classifications, it is difficult to accept his equal protection analysis without a suspicion that the special context of immigration is influencing the outcome.[264]

If we understood the immigration power like all other federal powers—if we normalized it—it would become conceptually incoherent to hold the federal government to a different standard than the states. The fear that shifting to a regime where states and the federal government are held to the same standard would mean diluting equal protection scrutiny of state laws is misguided, however.[265] In a world without federal exclusivity, federal alienage distinctions would lose their presumptive rationality, but the reasons for treating aliens as a suspect class would remain the same: aliens are outside the political process and cannot protect their interests, yet they pay taxes and are members of our society—factors that exist as much in the federal context as in the state context. The difference that justifies the disparate standards today is that the federal government has a special relationship to and routinely deals with alienage classifications—a function of federal exclusivity. To be sure, the nature of the federal interest in an alienage distinction may well be different from a state's interest,[266] given the federal government's primary and pervasive involvement in immigration regulation. But that difference would be reflected properly in the articulation of compelling interests justifying alienage classifications, not in the decision about which standard of review to apply.

The second radical doctrinal implication of my shift in approach is that it would bring the Court's decision in *United States v. Lopez*[267] into the picture, arguably requiring Congress to limit the extent to which it regulates certain aspects of the immigration field. If we were to treat the immigration power like the commerce power, then the former would not justify regulating every matter conceivably connected to the core of the power—controlling who crosses our borders. In a world without exclusivity, Con-

264. For a discussion of the covert work being done by the plenary power in Kennedy's opinion, see Nina Pillard, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002).

265. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding state and federal government to the same standards with respect to racial classifications and maintaining the strict scrutiny standard articulated in *Croson v. Virginia*).

266. An additional implication of my analysis is that *Graham v. Richardson*, 403 U.S. 365, may also have been wrongly decided. In *Graham*, the Court dismissed the state's interest in protecting the public fisc as a compelling justification for its welfare restrictions, in part based on the default assumption that states have no interest in regulating immigration—that the relationship between noncitizens and the state is a function of the federal immigration power. Concluding that the states have a compelling interest in mediating the effects of immigration on their population may justify upholding more alienage distinctions than would be permitted under *Graham* as it now stands. But in reality, this result would not stack the deck against immigrants any more than it is now. This form of equal protection scrutiny has proven to be of limited value in protecting the interests of noncitizens; fears of races to the bottom have not materialized in instances in which Congress has devolved authority to the states to draw alienage distinctions, *see infra* Section III.B.3; and strict scrutiny does not apply to unlawful immigrants, who are the subject of much state legislation, in any case.

267. 514 U.S. 549, 567 (1995).

gress's act forbidding states to make in-state tuition benefits available to unlawful aliens would look like blatant overreaching into the prerogatives of the states to administer their own institutions, as would Congress's 1996 requirement that states wanting to provide benefits to unauthorized immigrants had to enact new laws to that effect after 1996. To connect a state's decision to make public benefits available to unauthorized immigrants to the control of movement in and out of the United States would be regarded as engaging in the kind of piling of "inference upon inference" that the Court has rejected in its recent federalism decisions.

Of course, applying *Lopez* in the immigration context ultimately may not have far-reaching doctrinal implications. Even if *Lopez* were to apply, immigration, unlike education, is not primarily or traditionally a realm of state concern—an important dimension of the Lopez holding [268] In addition, in light of *Gonzalez v. Raich*,[269] the Rehnquist-O'Connor revolution arguably has run its course. It could be argued that in-state tuition rules and the like are components of an integrated regulatory scheme, in the vein of *Raich*. Rules governing the rights and benefits to which immigrants can claim entitlement represent considered, though perhaps marginal, components of a larger regulatory structure designed to control immigrant movement.

That said, *Lopez* federalism still represents a judicial articulation of a larger political principle: Congress should recognize the limits of its own powers and thus restrain itself from interfering with or thwarting state regulation or decision-making. Abandoning the exclusivity principle in the immigration context would mean that federalism-based limitations on Congress's power to regulate aliens could be articulated and therefore invoked to justify some congressionally applied restraints on federal regulation of noncitizens. The state interest in immigration need not be reframed as a traditional state concern to advance the claim that states have immigration-related interests that congressional overregulation often elides and sometimes tramples.

3. *Preemption and Lawmaking*

The doctrinal reorientations outlined above might lead some cases to come out differently, but the comprehensiveness of federal regulation in this area makes conflict preemption relatively easy to establish, and courts will resist limiting the federal power to regulate immigration and immigrants. Instead, the more significant shift I am advocating is a conceptual one that would support a new structural framework for congressional decision-making. The functional understanding of state and local immigration regulation supports the advancement of new lawmaking norms that emphasize two strategies: congressional restraint and cooperative federalism. This conceptual aspiration reflects what Roderick Hills has described as the proper understanding of federalism, according to which "the benefits of federalism in the

268. Lopez, 514 U.S. at 565–67.

269. 545 U.S. 1 (2005).

present and in the future will rest on how the federal and state governments interact, not in how they act in isolation from each other."[270]

a. *Restraint*

The federal exclusivity principle can be used as a club against state and local activity, including integration-related policies,[271] not just by courts, but also in lawmaking. The principle abets an aggressive assertion of congressional authority in the immigration area, establishing a presumption of federal primacy that then pervades policy discourse, which emphasizes that Congress can and should step in to preempt explicitly state and local policies that diverge from Congress's overarching objectives. Though such legislative action may be appropriate as a matter of constitutional authority, it flattens out the contradictions that I emphasize in Parts I and II we must tolerate to absorb immigrants effectively.

Instead of jumping to preempt or occupy territory, Congress should adopt a presumption against preemption, or direct prohibition of state authority in this area. Whereas such a presumption is arguably inappropriate when applied by courts because it favors the state interest over the federal, requiring the federal government to anticipate every conceivable conflict through express preemption provisions,[272] it would be appropriate for Congress to think twice before preempting state laws. Congress should refrain not only from preempting state actions in areas that might seem to be in tension with federal objectives, but also from requiring state and local officials to participate in immigration enforcement activities, either directly (which would raise commandeering issues) or indirectly, through Spending Clause–type incentives. The presumption should have particular purchase when measures through which states and localities are working to secure the trust and integration of immigrant communities are at issue. In other words, Congress should recognize the states' interest in adopting a range of integration measures that help states and local communities deal with the practical and human implications of immigration. These interests will include responding to unauthorized immigration and will require the federal government to tolerate a certain amount of deviation from federal baselines when determining how much immigration-related territory to occupy.

---

270. Hills, *supra* note 10, at 4.

271. *Compare Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 538 (M.D. Pa. 2007) (holding that an ordinance which requires proof of legal citizenship or residency to obtain an occupancy permit violated due process), *with* Second Amended Bill of Complaint for Declaratory and Injunctive Relief, at 17–18, Karunakaram v. Town of Herndon, Chancery No. 2005-4013, 2006 WL 408389 (Va. Cir. Ct. Feb. 10, 2006) (arguing that the city's decision to fund a day labor site frustrates the purposes of the Federal Immigration Regulation and Control Act).

272. Caleb Nelson makes a strong claim that this presumption, according to which courts seek narrowing constructions of federal statutes to avoid preempting state law, is misguided. Nelson, *supra* note 241, at 232. He argues that the Supremacy Clause is a *non obstante* clause through which the Framers directed courts not to apply traditional presumptions against implied repeals. *Id. But see* Hills, *supra* note 10, at 5.

The INA already reflects this willingness by letting states use their licensing authority to penalize employers who hire the unauthorized and in giving states authority to provide benefits to the unauthorized above and beyond what federal law permits.[273] At the same time, Congress repeatedly has stepped in to preempt state measures with integrative designs.[274] Members of Congress also have tried unsuccessfully to preempt day labor centers,[275] and proposals to make law enforcement and other sorts of funding contingent on states and cities assisting federal immigration enforcement appear in public debates, most recently in an amendment to a homeland security funding bill[276] and a campaign promise by Republican presidential candidate Mitt Romney.[277]

In claiming that these forms of preemption should be resisted, I am not arguing that Congress can never conclude that such state and local efforts interfere with national interests. Rather, my claim is that Congress's deliberations on these issues should be informed by awareness of the ways in which the states' interests diverge from its own, and of the need for that divergence in light of the difficulties of managing migration.

b. *Cooperation*

In addition to resisting preemption, Congress should actively promote power-sharing or cooperative activity between state and local officials and the federal government. A model for federal-state consultation can be found in the Canadian system, where the federal and provincial governments have concurrent jurisdiction over immigration policy.[278] Though Canada's federal government has exclusive jurisdiction over naturalization, and the provinces cannot obstruct immigrant travel among the provinces, the British North America Act gives the provinces the power to "make Laws in relation to . . . Immigration into the Province," insofar as those laws "are not repugnant" to

273. *See* 8 U.S.C. § 1621(d) (2005) ("A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) . . . only through the enactment of a State law . . . .").

274. *See, e.g.*, *id.* § 1623(a) (limiting state authority to charge in-state tuition at public colleges); *id.* § 1373(a) (prohibiting certain local noncooperation laws).

275. During the 2007 comprehensive immigration reform debate, Johnny Isakson, senator from Georgia, introduced the so-called Home Depot amendment, which would have prohibited state and local laws that required home improvement stores to provide shelter for day laborers—a measure the Los Angeles City Council has considered but has not yet passed. *Home Depot Amendment*, N.Y. TIMES, June 22, 2007, at A20.

276. Press Release, Immigration Reform Caucus, House Passes Drake Amendment to Eradicate Sanctuary Cities (July 27, 2007), *available at* http://www.house.gov/apps/list/press/ca50_bilbray/morenews/drakeamend.shtml (last visited Oct. 20, 2007).

277. Michael D. Shear & Dan Balz, *Romney, Giuliani Escalate Their Immigration Fight*, WASH. POST, Aug. 17, 2007, at A02.

278. JULIUS GREY, IMMIGRATION LAW IN CANADA 5 (1984); *see also* Kevin Tessier, *Immigration and the Crisis in Federalism: A Comparison of the United States and Canada*, 3 IND. J. GLOBAL LEGAL STUD. 211 (1995).

any act of Parliament.[279] To negotiate the potential for conflict in this arrangement, Parliament passed an Immigration Act in 1976, which it later amended in 2001, to create a framework for federal-provincial cooperation. The Act authorizes the federal government to consult and enter into agreements with the provincial governments on immigration and refugee policy, in order to capture the particular and varied effects of immigration on the different regions of the country.[280] But not only does the Act permit cooperation generally, it also requires specific forms of cooperation. The federal government must consult the provinces on the subject of the number of immigrants to be admitted each year in the various categories set by law.[281] The purpose of this requirement is to ensure that the federal government takes into account regional economic and demographic needs and considers provincial views when contemplating what measures should be adopted to "facilitate [immigrants'] integration into Canadian society."[282] In other words, though Parliament remains supreme, the provinces have an explicit role in the constitutional structure to help manage "immigrant settlement" in response to "regional demographic requirements," to which the provinces are presumably best attuned.[283]

To be sure, a coherent immigration system must begin by assuming primary federal control over admissions limits and removal standards, largely because such control performs a critical coordinating function. The one-voice argument, at least from the perspective of efficiency, still has purchase in this context: the system would be chaotic if individual states could set visa limits and create their own standards for removal. In the United States, this centralization has made direct enforcement of federal immigration standards extraordinarily complex, because the federal government has adopted intricate admissions and visa standards over time. Centralization thus supports tight congressional control over state-federal enforcement collaboration through mechanisms such as 287(g).[284]

---

279. Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 95 (U.K.), *as reprinted in* R.S.C., No. 5, § 95 (Appendix 1985).

280. Immigration and Refugee Protection Act, 2001 S.C., ch. 1–2.5 (Can.). Section 10 of the Act provides that

> (1) The Minister may consult with the governments of the provinces on immigration and refugee protection policies and programs, in order to facilitate cooperation and to take into consideration the effects that the implementation of this Act may have on the provinces. (2) The Minister must consult with the governments of the provinces respecting the number of foreign nationals in each class who will become permanent residents each year, their distribution in Canada taking into account regional economic and demographic requirements, and the measures to be undertaken to facilitate their integration into Canadian society.

Id. § 10(1)–(2).

281. *Id.* at § 10(2).

282. *Id.*

283. It of course must be noted that this arrangement reflects and facilitates Quebec's unique role within the Canadian federation, a role for which there is no equivalent in the United States.

284. *See, e.g.*, Professor Stephen Yale-Loehr Testimony at 111:8–139:25, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv1586) (noting the wide variety of lawful statuses recognized by the federal government and the numerous ways in which unlawful immi-

But cooperation should nonetheless be possible. As I have shown throughout this Article, the federal government depends on the states to manage migration, but the federal exclusivity principle blocks efforts to leverage this relationship because it supports the assumption that the power Congress would cede in these cooperative ventures is exclusively federal and therefore not capable of being devolved. But cooperation can provide states with an avenue to deal directly with the consequences of immigration that clearly implicate state interests, while providing a form of federal supervision that creates an extra check to ensure that a state's action is not motivated by animus, or is consistent with federal objectives.

The cooperation I envision could take several forms. First, Congress could expressly authorize states to adopt measures that state officials might otherwise worry are outside their power or that are politically unpalatable without some cover from Congress, as with the DREAM Act. Similarly, Congress could devolve authority to states to exercise decision-making capacity in areas that might otherwise be off limits to the states under current law, such as state implementation of federally funded programs like Medicaid.[285] The touchstone for congressional policymaking in this area should be not whether Congress is authorizing states and localities to do positive or negative things vis-à-vis immigrants, but whether the policy enhances or shuts down state decision-making capacity over how best to approach immigrant populations and whether the policy ultimately balances the competing goals of the system.

In its most productive form, cooperation would involve enlisting the states in immigration-related policy, as Congress already has with the 287(g) agreements.[286] Though Governor Vilsack's "immigrant enterprise zones" never got going in Iowa, his plan could serve as a model for direct state involvement in setting labor admissions standards.[287] States could provide their relative preferences and expertise directly to an administrative policy process, rather than indirectly through representation in the Congresses that

---

grants are permitted to adjust status, which produces lag time in the process of transitioning from unlawful to lawful status).

285. *See* Soskin v. Reinertson, 353 F.3d 1242, 1255 (10th Cir. 2004) (upholding a Colorado restriction on welfare coverage authorized but not mandated by state law, noting that "a state's exercise of discretion can also effectuate national policy"); *but see* Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085 (N.Y. 2001) (holding that federal authorization cannot insulate state law from strict scrutiny review).

286. *Cf.* Printz v. United States, 521 U.S. 898, 916 (1997) (citing Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882)). The court took note of a federal law that enlisted state officials

> "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a "convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation," [but on a voluntary basis by empowering the Secretary of the Treasury] "to *enter into contracts* with such State . . . officers as *may be designated* for that purpose *by the governor* of any State".

Id. (omission in original).

287. For recent academic advocacy of this type of arrangement, see Schuck, *supra* note 11, at 68–71.

set visa limits. This form of collaboration would involve state governments and bureaucrats, who are likely to have expertise related to the challenges facing state governments that is quite distinct from the expertise of their state's federal delegates.

It may be the case that some of these cooperative ventures will prove to be misguided. It is possible that the states will not act as faithful agents of the federal government.[288] Little is known, for example, about how the 287(g) agreements are functioning. Because state and local police are far more likely to come into contact with individuals through quotidian interactions, such as traffic stops, the possibility of racial profiling of Latinos and mistaken identity rises substantially with state and local involvement. Moreover, as police chiefs around the country have cautioned, state and local engagement in immigration enforcement may seriously undermine the confidence and trust of immigrant communities in law enforcement.[289] At the same time, anecdotal evidence suggests that federal-state-local collaboration in this area helps to restrain state and local enforcement that may occur in an ad hoc manner anyway. Because public pressure to crack down on criminal aliens, in particular, is powerful, federal-state-local law enforcement partnerships may help restore public confidence in law enforcement while ensuring that state and local enforcement efforts are overseen by the federal government.[290]

Because cooperation has the potential to produce a variety of benefits, it should be pursued. As the regulatory trends discussed in Part II make clear, states have a strong interest in federal success when it comes to enforcement, and so cooperation may well enhance federal capacities. In addition, in the face of federal inaction and resource constraints, states can act as a kind of clean-up crew for the federal government.[291] Of course, some of these states may be more invested in successful enforcement than the federal government, which has an arguable interest in underenforcement. But cooperation would not diminish the federal government's discretion with respect to whether to pursue removal of an unlawful alien apprehended by a state official. And when it comes to immigrant admissions, some states may seek more immigrants with different statuses than the federal government. But presumably a collaborative admissions-setting process would enable the federal government to develop both a more accurate assessment of the labor

288. *See* AMERICAN INTERGOVERNMENTAL RELATIONS (Laurence J. O'Toole, Jr. ed., 4th ed. 2007). If the federal government responds to this possibility by focusing on administrative as opposed to political partnerships, then the expressive and democratic value of federal-state cooperation will be lost, though the efficiency and expertise value may still be served.

289. *See, e.g.*, Letter from Charlie T. Deane, Chief of Police, Prince William County, Va. to Craig S. Gerhart, County Executive 3 (July 10, 2007) (on file with author).

290. *See, e.g.*, David Alire Garcia, *Close Enough: Police policy on immigrant arrests nears completion*, SANTA FE REP., at 8 (Sept. 19, 2007) (describing the city's compromise policy on notifying ICE about apprehension of aliens suspected of identity theft, violent crime, drug trafficking, and gang activity).

291. For a discussion of the "Madison's nightmare" problem, see Hills, *supra* note 10, at 10–12.

market, as well as a clearer picture of how much immigration particular pockets of the country are willing to tolerate.

State immigration-related action also might serve as a catalyst for federal reform by heightening awareness of crucial issues that might not enter the federal government's purview otherwise. That is, a legislative trend in the states might pressure the federal government to address an issue that has become national in scope or to revisit a law that clearly buts up against states' judgments with respect to integration policy. States, through their regulatory efforts, also can help make the federal government aware of the costs of the latter's policies, thus helping to set the agenda for federal reform by bringing notoriety and perhaps infamy to an issue.[292]

The current and accelerating trend of state and local regulation in the enforcement vein, for example, is highlighting to federal lawmakers the need to reconsider their policy of underenforcement, which has resulted in stepped-up enforcement and may eventually produce more comprehensive reform.[293] The same dynamic is at work with the in-state tuition issue. Despite the federal government's attempt in 1996 to prevent states from making in-state tuition rates available to unauthorized students, several states persisted in creating this option, making clear to the federal government the importance of the measure for long-term integration objectives. The appeal of the in-state tuition measure may yet lead Congress to pass the DREAM Act, which would not only authorize what states are already doing, but also take the crucial next step of giving certain unauthorized students legal status—a move that only the federal government can make.

In the end, the flattening tendency of exclusive federal regulation lends credence to the belief that we must have a national or uniform policy on matters concerning the regulation and status of immigrants in this country. The principle also prevents us from effectively channeling the powerful tendency toward decentralized decision making and thus from exploring the potential benefits of federal-state-local cooperation. Federal exclusivity in the lawmaking context must therefore be set aside as well.

4. *Preemption and the City*

Though a number of scholars have engaged the federal-state preemption question in the immigration context, few if any have addressed the relationship between states and cities.[294] In part because immigration federalism has been off the conceptual table for so long, this particular relationship is not

292. *See* J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1500–38 (2007) (discussing state environmental initiatives, their potential to spark interest-group lobbying for federal reform, and the possibility that some states intend to provoke federal action).

293. *Cf.* Spiro, *supra* note 8, at 1630 (discussing the steam-valve effect).

294. Scholarly work on state preemption of local laws is developing. *E.g.*, Clayton P. Gillette & Leila K. Thompson, Pre-empting Interest Groups: Conflicts Between State Statutes and Local Ordinances (unpublished manuscript, on file with author) (characterizing the preemption question as a matter of institutional design concerning the best forum for resolution of particular issues).

well thought out. But state preemption of local law is even more effective in flattening out diverse preferences than the immigration preemption sometimes employed by courts, because state preemption is not constrained by functional parallels to the constitutional doctrines that protect states' interests, particularly as I have reformulated them. What is more, the line between measures that resemble immigration control and measures that simply have an impact on immigrants (which limits immigration preemption in the federal-state relationship) is not available to police the state-locality relationship. After all, as scholars of local government law point out, cities do not have independent constitutional status and "can exercise power only within the legal frameworks that others have created for them,"[295] or within frameworks created by the states in which they are located.

But throughout this Article, I have emphasized the role not only of states but also of localities in absorbing the effects of immigration. Indeed, local governments truly man the frontlines when it comes to absorbing migratory flows: cities are primary agents of integration because they run the schools, hospitals, and other institutions through which integration occurs. But subentities within states will want to manage immigration differently; within a single state, one locality might adopt an IIRA, and another might pass a sanctuary law. Of course, in some instances, cities might exert considerable power over state processes. Statehouses are likely to avoid preventing their large metropolitan centers from taking steps to attract immigrants and facilitate their integration, regardless of legal status. But among the laws considered and enacted by the newly active states are those that would preempt certain forms of local action on immigration-related matters, particularly the noncooperation provisions.

At the end of the day, the functional account I have offered depends on the autonomy not just of states but also of cities. But an antipreemption norm at the state level may favor cities over small towns, in that it frees cities to take steps to attract immigrants in ways that will have collateral consequences for towns that might prefer to keep their immigrant population small or nonexistent. But an antipreemption norm nonetheless opens up the possibility of intrastate diversity, which is essential to the integrated, three-tiered framework I have argued the immigration issue requires. How to foster this antipreemption norm to mediate the state-local relationship is less apparent than in the federal-state relationship. It might be appropriate in some circumstances for the federal government to immunize localities from the power of their states, or at least to facilitate state-local cooperation by giving states incentives to provide localities with room to maneuver, perhaps through funding to assist in managing immigration-related costs. The point ultimately to recognize at this stage is the value of the antipreemption norm in the state-local context.

295. Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

C. *Confronting Externalities and the Value of Interstate Competition*

If courts, lawmakers, and scholars were to reorient their understanding of immigration preemption along the lines I describe, we immediately would confront the possibility that states and localities might impose externalities on their neighbors. Cities and towns that adopt policies facilitating integration, thereby attracting immigrants to their communities, inevitably produce spillover effects on surrounding areas: immigrants attracted to New York City, for example, may well create networks that become part of larger metropolitan areas with impacts on the northern suburbs and Long Island. Even more acutely, when ordinances push immigrants and related parties out of their communities, they force immigrants onto other cities and states. The IIRAs, for example, have motivated (or forced) immigrants out of towns such as Hazleton and presumably to other U.S. communities (and perhaps to the immigrants' home countries).[296]

As the Court's analysis in *Graham v. Richardson* makes clear, however, an important aspect of the federal exclusivity principle is that it helps ensure that all states bear the burden of immigration evenly, or that no one state can force the consequences of immigration onto another—a peculiar argument, to be sure, given that immigrants do not distribute themselves evenly across the country. Still, the construct is that the federal government, by setting admissions policies and enforcement priorities, determines who can enter and remain in the United States, and states and localities are therefore precluded from adopting their own policies to control immigrant movement. Add to this assumption the cases that have recognized a right to travel within the United States,[297] and the corresponding norm in favor of freedom of movement within the territories of nation-states, and the destructive potential of regulations designed to prevent immigrants from entering particular communities becomes clear.

Though this externality problem would not arise, at least as a legal problem, in cases in which state and local action has been authorized or facilitated by federal policy (though federal policy could and does impose disproportionate burdens on some states), the possibility of such state-to-state burden-shifting provides strong support for doctrines that promote federally generated uniformity in certain areas.[298] Indeed, one way to conceptualize state regulation of immigration is through a kind of "dormant immigration power" analysis parallel to the dormant Commerce Clause doctrines that protect interstate commerce from certain burdens imposed by

296. *See* Jose Lechuga Testimony at 124:3–135:21, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (2007) (No. 3:06cv1586) (noting that the city ordinance generated a climate of intolerance against Latinos, which prompted both legal and illegal immigrants to leave town); *see also* Michael Rubinkam, *Grocer: Pa. Town's Laws Scared Customers*, Mar. 13, 2007, http://abcnews.go.com/US/WireStory?id=2946425&page=1)(last visited Nov. 2, 2007)("Lechuga . . . testified that his grocery store once attracted customers from throughout northeastern Pennsylvania. After the immigrant measures were approved, he said, customers stayed away, intimidated by a police car often parked nearby.").

297. *E.g.*, Saenz v. Roe, 526 U.S. 489 (1999).

298. *Cf.* Issacharoff & Sharkey, *supra* note 12, at 1368–69.

state regulation.[299] That said, policing state laws that impose such burdens on other states or on interstate commerce has proven to be a fraught enterprise, given the shaky textual foundations of the dormant Commerce Clause and the highly integrated nature of our economy.[300] But even assuming such cost-shifting should be policed as a general matter, the argument for federal uniformity in the immigration context dissolves under close scrutiny.

Immigrants are different in kind from the paradigmatic externality example of pollution, largely because the presence of (even unauthorized) immigrants may be welcomed (or at least tolerated) in some communities but not in others. There is thus a strong argument that immigration is itself a good (in contrast to pollution, which is the inherently negative byproduct of processes that advance a good). It follows that the processes of absorbing this good into the body politic may ultimately benefit from a bit of regulatory competition or from population sorting in which immigrants settle in welcoming communities. Such competition might make for better integration in the long run: immigrants, like citizens, will sort themselves out, settling where they are more likely to fit in and be welcomed into public institutions.

What is more, preempting local laws that aim to exclude immigrants will not make for a better integration environment, because the sentiments behind the preempted ordinances are likely to remain and fester. As I suggest in Part II, whatever is motivating the IIRAs—whether it is a fit of pique, fear of cultural change, or genuine concern about lawlessness—that motivation is likely to give way over time to acceptance. But this transition from fear to acceptance is more likely to occur not only if the local debate over immigration is permitted to run its course (subject to generally applicable laws), but also if the localities that adopt these ordinances come to feel the consequences of excluding immigrants from their communities—namely, the economic consequences of pushing immigrants out of places they helped revitalize.

Given the nature of the immigrant-as-externality, then, the assumption that state measures designed to control immigrant movement conflict with and undermine federal admissions and enforcement decisions must be based on the fear that state regulation will promote a race to the bottom. When the IIRAs passed by towns in Pennsylvania force immigrants to Ohio, perhaps Ohio will respond to this "burden" by passing laws designed to discourage illegal immigrants from seeking housing and employment in that state—measures that inevitably will affect legal immigrants, as well, by creating

299. Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. (forthcoming 2007).

300. For a critique of the dormant Commerce Clause along these lines, see *Tyler Pipe Indus. v. Wash. State Dept. of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., dissenting) ("[T]he language of the Commerce Clause gives no indication of exclusivity. . . . Now that we know interstate commerce embraces such activities as growing wheat for home consumption . . . it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded.").

climates hostile to immigrants generally.[301] This race eventually will result in the de facto expulsion of immigrants from the United States, despite the federal government's determination that immigrants are entitled to remain here.

But it seems clear that we can afford some regulatory competition in this area, for a variety of reasons. First, given the size and diversity of the United States, there is no reason to believe that most jurisdictions will feel impelled to follow the lead of towns such as Hazleton. Indeed, as many localities have passed "pro-immigrant" measures as have passed IIRAs. Though a number of these measures are hortatory, they suggest that many localities are prepared to absorb immigrant populations, whether for economic or ideological reasons.[302] This prediction is reinforced by the events that followed the 1996 immigration reforms, when the predicted race-to-the-bottom to deny immigrants all forms of public services did not occur.[303]

The difficulty, of course, is that allowing measures like the IIRAs to stay on the books would effectively declare certain communities off limits to immigrants. This consequence interferes with the right to travel noted above[304] and recalls the poor laws of the nineteenth century, through which states limited the movement of the poor across state borders.[305] But once we understand the IIRAs in broader perspective and couple that understanding with an awareness of the limitations of the right to travel argument—that most of the states' social welfare policies will affect citizens and noncitizens alike—then the limitations that restrictive local ordinances impose on noncitizens' mobility seem like a less glaring concern.

CONCLUSION

Immigration is a federal issue. Controlling the admission of immigrants implicates core functions of the national sovereign. Controlling who crosses its borders is an act of both self-definition and security-promotion for a nation-state. Managing migration requires strong federal leadership, and

301. For a discussion of these effects and testimonial evidence that the Hazleton ordinance has contributed to a climate of discrimination and anxiety for Latinos generally, see *All Things Considered: Hazleton's Immigration Law Brings Suspicions* (NPR radio broadcast Mar. 16, 2007).

302. *See, e.g.*, *supra* Section II.B; *see also* Miriam Jordan, *Bourbon, Baseball Bats and Now the Bantu*, WALL ST. J., Sept. 18, 2007, at B1 (quoting Mayor of Louisville Jerry Abramson as saying "[c]ommunities that embrace diversity are going to be the most successful" and noting that the mayor "avoids distinguishing between legal and illegal immigrants").

303. *See, e.g.*, Schuck, *supra* note 8, at 389 (observing that expected race to the bottom did not occur in 1996); *see also* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (challenging the conventional wisdom that assumes races to the bottom are always predictable when regulation is left to the states in the environmental area).

304. I am reluctant also to dismiss the right to travel claim on alienage grounds, in part because it seems as though once the federal government has admitted someone, that person should be able to move freely within U.S. territory. (In my view, the unauthorized immigration issue raises an easier constitutional question but an equally difficult moral question.)

305. *See* MOTOMURA, *supra* note 186, at 129.

uniform rules governing who may enter and who forfeits the right to remain are crucial for administrative efficiency and to sustain an integrated national economy.

But immigration regulation is not a zero-sum game. Questions of who should belong to a political community, and who should be allowed to cross borders, are also both global and local in scope. In the immigration context, the form of sovereignty that is understood to control as a matter of doctrine comes from sources external to our Constitution and is connected to a conception of the nation-state as one among many in an international world. But immigration also implicates the sovereignty of organized political communities—sovereignty that emanates not from international law, but from the people who comprise the nation-state. It is time to inject conceptions of popular sovereignty into the discourse on immigration regulation, or to capture in our immigration federalism doctrine the basic idea that those affected by immigration controls must have a say in the design and implementation of those controls, which will require including not only the residents of states and localities but also the voices of immigrants themselves.[306]

If we consider the rise of state and local immigration regulation from a functional perspective, it becomes clear that a de facto multi-sovereign regime that captures these various interests has emerged in practice, demonstrating that the federal government cannot manage contemporary migration on its own. Instead, strong local institutions and local power have become necessary—both to integrate immigrants into the body politic and to manage the human and social consequences of a federal immigration policy full of contradictions. States and localities, through their efforts to manage migration, are thus contributing to the process of defining the political and cultural identity of the United States by sorting people and their preferences.

But to develop and make adequate use of the de facto integrated system that has emerged, we must abandon the federal exclusivity principle—which is not constitutionally required in any case. This reformulation would not authorize states and localities to adopt measures inconsistent with generally applicable law, but it would restrain courts, as well as the federal government and the states, from preempting efforts by lower levels of government to manage the convergence of the global and the local that today's immigration represents. This move would also harness the possibilities for federal-state-local cooperation in immigration regulation.

To emphasize the roles being played by states and localities is not to suggest that national sovereignty is a mirage, that national citizenship is no longer relevant,[307] or that the national is disappearing in the face of the

306. In *Sugarman v. Dougall*, 413 U.S. 634 (1973), the Supreme Court struck down a New York state law that required all of its civil service employees to be U.S. citizens, but created an exception: "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'" *Id.* at 642 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

307. In other work, I discuss the importance of maintaining a robust conception of national citizenship, even in a world of transnational migration. Cristina M. Rodríguez, *Guest Workers and*

global. Rather, global forces, as exemplified by the migration of people across borders, are putting pressure on the national in ways that require multiple forms of disaggregated decision making. The center of gravity in the immigration context has shifted, revealing that the level of government we might choose to deal with certain issues is historically and politically contingent. It is time we adapt to the contingencies of today and rethink immigration federalism.

Integration: Toward a Theory of What Immigrants and Americans Owe One Another, 2007 U. CHI. LEGAL FORUM 219 (2007).