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California Dreaming: The New Dynamism in Immigration Federalism and Opportunities for Inclusion on a Variegated Landscape[1]

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Executive Summary

Interactions between local, state and federal governments as regards immigration policies began to undergo a dramatic change with the passage of Proposition 187 in California in 1994. Seemingly settled issues over the relative prerogatives of different levels of government and even different branches of government have since been the subject of frequent contention in many venues and in many domains of immigration policy. During this period, especially in the last decade, a new dynamism has developed in immigration federalism that is evident in both policymaking processes and policy outcomes.

In policy processes, this dynamism is characterized by an increasingly broad distribution of powers and responsibilities across all levels of government. As a result, an ever-broader array of actors has gained a say over immigration policies. These include not only elected office holders and government officials but also advocates and activists from many sectors of civil society including immigrant communities themselves. Finally, the different levels of government and policy actors do not operate in isolation but rather in vigorous interaction across multiple levels of government and among advocates of different sorts both in the formulation and implementation of policy. This new dynamism is reflected in recent scholarship that describes models of federalism based on discourse, intermediation and collaboration among governments rather than resting primarily on the longstanding constitutional arguments over the balance of power between the states and the federal government.

The policy outcomes produced by this new dynamism are marked by highly divergent and varied results. The federal government devolved some powers over welfare and policing policies regarding immigrants, but implementation

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by state and local governments was largely dictated by local factors rather than Washington's intent. Meanwhile, many sub-federal governments have taken the initiative to assume powers on immigration matters. In some cases they have mitigated the punitive effects of being unauthorized under federal rules and have created pathways of civic inclusion for immigrants who otherwise suffer isolation from the body politic. Taking the opposite approach, other jurisdictions have adopted enforcement regimes meant to heighten the impact of federal exclusion. In effect, Washington still exercises exclusive power to determine an individual's immigration status, but many state and local governments have enacted policies that define the practical consequences of that status.

The paper concludes by positing the likelihood of heightened differentiation on immigration policy on a state and local basis, particularly if Washington remains unable to enact a new policy regime in this area. Instead of a single, dominant federal policy, many state and local jurisdictions will create policies that condition the immigrant experience sufficiently to influence the size and content of migration flows. Across a highly variegated landscape of immigration policies, some places will be welcoming while others will be inhospitable, even hostile, to newcomers. This new dynamism in immigration federalism and the resulting variety of outcomes are products of large, deeply rooted trends in American society that are unlikely to change in the foreseeable future.

Introduction: Two Messages from California

Twenty months after taking office as president of Mexico, Enrique Peña Nieto made his first official visit to the United States, but his destination in August 2014 was California not Washington, DC, and his first major event was not conducted in English. Rather, he addressed a roaring crowd of activists, advocates and businesspeople, representing the 1.7 million Mexican-born immigrants living in metropolitan Los Angeles, one out of every seven residents in the area. In the ballroom of the Biltmore Hotel on Pershing Square, once the castle keep of the Los Angeles establishment, Peña Nieto extolled his audience as "el otro México," the other Mexico (Sandoval 2014).

A day later Peña Nieto addressed a legislative body in the United States for the first time, and it was the California Legislature, not the US Congress. He noted, "it's no coincidence that my first visit to the United States is in California" (Bernstein 2014). The Mexican president then praised the California lawmakers for taking a number of steps to improve the condition of unauthorized migrants in the absence of action by the federal government. Specifically praising a California law to grant driver's licenses regardless of immigration status, Peña Nieto said, "the progress you have promoted not only benefits Californians because you have sent a very clear message to the US and the entire world" (Nirappil 2014).

Just 20 years earlier California loudly broadcast a far different message on immigration.

Voters enacted an initiative, Proposition 187, in 1994 that would have denied a wide range of social, health and education benefits to unauthorized migrants had it not been blocked by a federal court. Californians that year also reelected a governor, Pete Wilson, who broadcast an infamous television commercial which featured menacing grainy black and white pictures of migrants dashing through a border crossing near San Diego. "They keep coming," the announcer intoned, "Two million illegal immigrants in California. The federal government won't stop them at the border yet requires us to spend millions to take care of them. (Marelius 1994)"[2] In 1994, the California message blamed failed federal policies for leaving the state no choice but to act on its own to rid itself of unwanted illegal aliens before they broke the state budget with their abuse of benefits (Suro 1999).

In 2014, California's message again began with a claim of federal failure but to an opposite effect. Upon signing a package of bills that buffered unauthorized immigrants from federal immigration enforcement and extended a variety of privileges to them including the ability to practice law, Governor Edmund G. Brown Jr. said, "While Washington waffles on immigration, California is forging ahead. I'm not waiting" (govnews.ca 2013). This time, however, Washington was being faulted for being insufficiently inclusive versus the 1994 claim of failure to exclude. And, California's message included profitable ties with Mexico and the creation of welcoming civic spaces for Mexican migrants regardless of their status under federal law.

Between Then and Now

The distance between California in 1994 and 2014 marks a period of rapid evolution in immigration federalism. During that time battles over the balance of power between the states and the federal government, particularly those provoked by Arizona's claim on enforcement authority, rightfully captured much attention in the news media, in political debates, and in scholarship. Without diminishing the significance of those battles, however, this paper is focused elsewhere. Rather than portraying two sovereigns locked in a constitutional duel, this paper explores evidence of expanding interrelationships among federal, state and local governments on immigration matters. Through competition, collaboration and happenstance, both the making and the implementation of immigration policy has spread across all levels of government during this period. Diverse formulas of immigration federalism have arisen and with them diverse policy outcomes. Taken together, these developments suggest the emergence of a new dynamism in immigration federalism.

Looking to the formulation of policy reveals that lines of influence are operating in both directions in and out of Washington. Using laws, ballot box initiatives and litigation, various sub-federal actors have set out to pressure federal policymakers, sometimes with notable success. In other cases Washington has deliberately devolved authority to the states over matters related to immigrants or has chosen not to interfere with local initiatives. These kinds of interchanges have become typical for a number of domestic issues such as education and health care that increasingly involve bureaucracies, budgets, policies and politics that arc across all levels of government. Immigration policy was once a bastion

2 Pete Wison 1994 Campaign Ad on Illegal Immigration viewable at: https://www.youtube.com/watch?v=lLIzzs2HHgY.

of federal prerogatives because it related to borders, citizenship and foreign policy. But as issues related to matters like social services and law enforcement have moved to the foreground, federal preeminence has diminished.

In terms of policy outcomes, Washington alone can decide who gets into the country and under what circumstances. But, the enduring presence of a large unauthorized population suggests that authority is somewhat more hypothetical than real. Meanwhile, after four decades of substantial immigration flows, the foreign-born population is not only large but also well settled, and the integration of immigrants has become a policy concern in some ways broader and more contentious than the regulation of entry (Suro 1994b). Integration raises challenges for all levels of governments and the responses have been highly varied. In some places the interaction between state and federal agencies enhances federal policies that have an exclusionary intent, particularly as regards enforcement against unauthorized immigrants or limiting access to public services for legal immigrants. Elsewhere, the new federalism produces policies that mitigate exclusionary policies and create pathways for inclusion even for those considered out-of-status by federal rules. Some states offer driver's licenses to unauthorized immigrants while others require their contractors to verify the legal status of all employees. Some law enforcement agencies prohibit officers from asking about immigration status; others require it. Washington alone can determine immigration status, but increasingly state and local governments are shaping the practical consequences of status.

At the start of the 1990s, the context of immigrant settlement varied greatly across the country, but it was determined primarily by economic, social and demographic factors at the local level (Portes and Rumbaut 1990). Public policy was generally uniform under federal rules and state and local governments were largely silent on immigrants. Then, as Daniel J. Tichenor puts it, "all this seemed to change in the mid-1990s, as California politics became consumed by efforts to limit public benefits for aliens and a new set of congressional reformers pressed for sharp restrictions of immigrant admissions and rights" (Tichenor 2002). Some scholars depict this period as the beginning of a "new nativism" (Jacobson 2008). Others describe the passage of Proposition 187 as signaling the dawn of a new era of sub-federal activism, demanding that Washington toughen immigration enforcement or make good on alleged budgetary burdens caused by unauthorized migration (Filindra 2009).

Yet even as new relations between Washington and the states unfolded over policies of exclusion, other developments were underway. This paper demonstrates that in the past decade in particular the new dynamism of immigration federalism has also created spaces for welcoming policies undertaken by state and local governments. Policies emerging from the new federalism can create the conditions for engagement between newcomers and local institutions that would not exist otherwise. Cumulatively, that engagement can produce a new degree of inclusion in civil society, particularly for unauthorized immigrants.

The paper is divided into three major sections. The first reviews the policy developments that have produced the new dynamism in state-federal interactions over immigration. The next assesses how scholars have interpreted the potential for new forms of immigration federalism. The last section describes sub-federal initiatives that aim at mitigation and inclusion for unauthorized immigrants.

The 1996 Legislation and the Development of a New Immigration Federalism

At a press conference the day after 4.6 million Californians voted to deny public benefits to unauthorized immigrants in November 1994, Governor Wilson called Proposition 187, "the two-by-four we need to make them take notice in Washington" (Suro 1994a). Although litigation begun that same day prevented any element of the ballot measure from ever being implemented, over time it did indeed have a profound impact in Washington.

In trying to influence national policies by asserting state prerogatives, Wilson and the proposition's authors were using tried and true tactics that date back to debates over repayment of the Revolutionary War debt in the earliest days of the republic (Suro 1998). Proposition 187's significance, however, was magnified by two historical circumstances. First, it came after more than 100 years of federal dominance of immigration issues. Second, it came just when Washington politics favored ceding powers to the states as a means of producing policy change. In this regard, the Proposition 187 vote stands as an inflection point in the history of immigration federalism.

On Election Day 1994, voters nationwide gave Republicans a landslide victory that produced a 54-seat swing in the US House of Representatives. As Tichenor notes, the new Congress "was unmistakably caught up by the popular wave of anti-immigrant politics" so evident in California, leading eventually to federal legislation "cracking down on illegal immigration and cutting immigrant welfare rights" (Tichenor 2002).

A trio of bills inspired by Proposition 187 in their immigration provisions was enacted in 1996. The *Anti-terrorism and Effective Death Penalty Act* (AEDPA) expanded the lists of crimes that could result in deportation and limited both executive discretion and judicial review in handling removals.[3] The *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) tightened immigration enforcement on a number of fronts from border controls, to law enforcement partnerships, to expanded grounds of removal and mandatory detention.[4] Meanwhile, the *Personal Responsibility and Work Opportunity Act* (PRWORA) overhauled federal welfare programs and included new limits on the federal benefits available to noncitizens, including legal immigrants.[5]

Anti-immigrant sentiments were not the only political drivers behind these policy changes. The IIRIRA and PRWORA also reflected a central aspect of the ideology espoused by Representative Newt Gingrich who served as Speaker of the House from 1995 to 1999. Devolution, the shift of authority from Washington to the states, was central to his policy agenda, the so-called "Contract with America." Both Presidents Richard M. Nixon in the 1970s and Ronald Reagan in the 1980s had undertaken their own forms of devolution each with different tactics and objectives. Gingrich and his followers used devolution primarily in the form of new shared policy responsibilities and their goal was to advance conservative social and fiscal policies (Conlan 1998).

PRWORA justified the new restrictions on noncitizens access to social benefits on the

3 Pub. L. 104-132, 110 Stat. 1214

4 Pub. L. 104-208, 110 Stat. 3009

5 Pub. L. 104-193, 110 Stat. 2105

grounds that: "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."[6] But, Congress found an entirely new policy mechanism for achieving this very old objective of immigration policy. In PRWORA the federal government for the first time explicitly devolved to the states broad powers over a noncitizen's access to a range of health and welfare benefits. These powers include the ability to determine an individual's eligibility under certain circumstances as well as the power to determine whether whole classes of immigrants would be eligible for state-funded benefits. Moreover, the statute declared that these new state powers over the lives of immigrants met a compelling government interest thus greatly restricting potential judicial review for discrimination or other unconstitutional effects (Fix and Passel 2002). Many components of welfare reform have been revised since 1996, including federal eligibility requirements for legal immigrants. But the essential aspects of devolution in the immigration realm remain intact with some states taking advantage of their discretionary powers to create a wide variety of eligibility and benefit regimes for immigrants while other states deny access (Singer 2004; Hartley 2007; Wishnie 2001).

The other major federal immigration legislation enacted in the wake of Proposition 187, IIRIRA, took another tack on devolution by enlisting state and local governments as allies in the enforcement of federal laws that regulate entry and presence, an area of policy that had been a redoubt of exclusive federal power. Known by the section that was added to the Immigration and Nationality Act, the 287(g) program granted local law enforcement agencies for the first time the authority to screen people for immigration status, detain them and initiate charges that could result in removal (Capps 2011). But it wasn't just the scope of powers granted to sub-federal actors that made 287(g) a landmark in immigration federalism.

Each 287(g) agreement was negotiated individually with a local law enforcement agency program and was the subject of a signed memorandum with the federal authority in charge of immigration enforcement, initially the Department of Justice and then, following post 9/11 legislation, the Department of Homeland Security. Those agreements varied in both form and scope from one jurisdiction to another and required ongoing articulation between local and federal authorities over a variety of issues such as training and logistical arrangements for the transfer of detainees from local to federal custody.

Moreover, the program granted a high degree of discretion to local authorities, a feature that has proved one of its most controversial characteristics. Some critics see it as an opening to unfettered discrimination (Wishnie 2001). Others see it as an effective means to boost enforcement capacities while adapting policy to local circumstances (Kobach 2004). The program did undoubtedly produce a wide variety of local approaches, so much so that the Obama administration modified the program twice, in 2009 and 2012, attempting to produce greater consistency with its enforcement priorities (Smith 2013, Capps 2011). Research into the diverse outcomes of the 287(g) program suggests that highly localized concerns quickly trumped federal policy imperatives in determining the extent to which police became involved with immigration enforcement.

A 2011 study by the Migration Policy Institute (MPI) found variation by jurisdiction in

6 8 U.S.C. § 1601 (1)

whether they screened for immigration status primarily in jails or in the field or in both. It also found wide variation in whether the programs targeted serious criminals or simply tried to capture as many unauthorized immigrants as possible. The MPI study also concluded that jurisdictions signed 287(g) agreements for a variety of reasons, and that "these reasons usually reflect state or local pressures" often arising from specific incidents that created public perceptions linking unauthorized immigrants to crime (Capps 2011). Looking beyond 287(g) alone, research on what kinds of localities adopted restrictive immigration policies found a much more powerful association with ballot-box dominance by the Republican Party than with demographic factors like the rapid growth of the immigrant population (Ramakrishnan and Gulasekaram 2012).

A project supported by the National Science Foundation conducted two national surveys of law enforcement officials and three extended case studies to explain the variation in local police engagement with immigration enforcement. Unemployment, crime rates and the size or the pace of growth of the immigrant population had no relation with the severity of immigration enforcement. However, the presence of a Hispanic police chief was one of the most important correlations with less severe enforcement along with the presence of Hispanic elected officials. Codified policies aimed at reducing racial profiling were also associated with less intense immigration policing (Lewis et al. 2013). The researchers described the result as a "multilayered jurisdictional patchwork, in which overlapping and neighboring jurisdictions can, and do, adopt conflicting policies and practices vis-à-vis their immigrant populations" (Varsanyi et al. 2012).

All of this evidence points to a form of federalism in which federal undertakings such as the 1996 legislation produce a proliferation of policy outcomes determined largely by local factors. According to some interpretations, the significance of this variation goes far beyond the specific policy realms affected. Monica W. Varsanyi explains that "the partial devolution of welfare and immigration policy powers challenges rather strict jurisdictional lines in place for over a century, and gives state and local governments newfound and increasing powers to discriminate on the basis of alienage or non-citizen status" (Varsanyi 2008). The power to discriminate, Varsanyi argues, is tantamount to the ability to regulate membership in the nation-state such that the 1996 legislation produced a "rescaling" of one of the most fundamental functions of government that was once entirely a federal prerogative.

For the sake of this discussion, this paper is not concerned with the effectiveness, the desirability, or the constitutionality of the 1996 legislation. Those matters have been, and continue to be, debated elsewhere. Rather, the paper's intent is to make an argument about the historical significance of Proposition 187 and the federal statutes of 1996 and their ongoing influence today in the relationship between the states and the federal government on immigration.

Prior to Proposition 187 and the 1996 legislation, the federal government exercised virtually exclusive authority over policies that regulated immigrant flows as well as many aspects of immigrant life. That preeminence had been established first as the result of the Civil War and the imposition of federal authority over the states on the nature of citizenship. This was followed in the 1870s by a series of legislative acts, executive measures and judicial decisions through which Washington established its sole authority over the regulation of

immigrant arrivals in the face of state and local actions, particularly those in California attempting to curb Chinese immigration. By the beginning of the twentieth century, sub-federal governments had lost a variety of prerogatives over arrival, settlement, access to benefits, and education and other matters related to immigrants that they had exercised since the colonial era (Tichenor 2002; Zolberg 2006).

This paper contends that the mid-1990s marked the beginning of a new era of immigration federalism. This era is not characterized by a change in the balance of power, as was the case in the 1870s. Although states have gained important discretionary powers, Washington still makes the most important policy decisions and retains control over all the major institutions and budget authorities. Rather, the key characteristic of this new era is the dynamism in federal-state interaction on immigration issues. There are three major tendencies marking this dynamism.

First, lines of influence run in both directions between Washington and the states, sometimes simultaneously and paradoxically. Proposition 187 sent a political shockwave east that helped produce the 1996 federal legislation that devolved power back to the states. As Californians had demanded, Washington toughened enforcement and restricted access to benefits, but along the way it also involved state and local governments in the implementation of those policies. Regardless of where actual decisions are made, both the political and policymaking processes are shaped by initiatives and influence that skate back and forth between state and federal venues.

Second, the range of actors involved in making and implementing immigration policy has widened greatly, as have interactions among them, including across jurisdictional lines. Elected officials and government agencies at the state and local levels now have responsibilities over a wide range of polices regarding immigrants but are often required to engage in complex interactions with federal counterparts. Emergency room care, policing, higher education and many other governmental activities now involve some degree of inter-governmental interaction in a significant number of jurisdictions. Moreover, the increased immigration policymaking at the state and local levels has stimulated a burgeoning of civil society organizations providing services or advocacy in immigrant communities. And, simultaneously, advocacy groups supporting exclusionary policies have grown as well in response to the new opportunities beyond Washington. On both sides of the debate, civil society initiatives at the state and local levels are often intertwined with efforts to shape federal policies.

Third, policy regimes regarding immigrants are dynamic across time and space. The discretion available to state and local governments is broad enough and attitudes towards immigration vary sufficiently that wide variations are now appearing across the country, even in neighboring jurisdictions. This is also an evolving process with sub-federal initiatives multiplying and taking new directions. Meanwhile, federal policy has developed dynamism of its own with all three branches of government contributing sometimes-contradictory directives while engaging in repeated yet unresolved debates about the larger purposes and structures of the immigration system.

Examples of these tendencies—cross-cutting influences, administrative interaction, and dynamism across time and space—can be found prior to the mid-1990s, but each has

become more pronounced over the past two decades and together they are changing the nature of immigration federalism. More importantly for purposes of this analysis, these developments are changing the experience of being an immigrant in the United States and creating the potential for important forms of civic inclusion emerging out of state and local initiatives. Just as the devolution of powers to the states has created opportunities to discriminate against immigrants and to restrict their civic status (Motomura 2014; Schuck 2009; Varsanyi 2008; Wishnie 2001), it has also created opportunities to create new forms of welcome and portals to social membership.

Arizona and the Emergence of Civil Society Actors

The passage of Proposition 187 launched a narrative about immigration to the United States that features the states and the federal government as its protagonists and efforts to erect new policies of enforcement and exclusion as its plot. That narrative culminated in the 2012 US Supreme Court decision in *Arizona v. United States*[7] regarding the constitutionality of harshly restrictionist legislation generally known by its abbreviated designation, SB 1070.

But it is possible to construct a different narrative by seeing events through a wider lens that reveals a larger cast of characters and a more complex plot. That narrative begins on the evening of April 27, 1990 when more than 1,000 members of an *ad hoc* citizens group calling itself the "Light Up the Border Campaign" gathered along Dairy Mart Road in San Diego near the US-Mexico border to protest lax immigration enforcement. As they had on several previous occasions, the protestors lined up cars facing south and turned on the headlights in an effort to illuminate illegal border crossers. That evening, however, nearly 200 counter-protestors arrived, accusing the pro-enforcement group of being racist and anti-Mexican and holding up sheets of aluminum foil to reflect the car lights back on them (McDonnell 1990).

Activists on both sides of that confrontation and the sentiments they aroused continued to roil Southern California for years to come. The same kind of showy, loosely organized grassroots organizations joined forces with elected officials and more formal advocacy groups to launch the campaign that resulted in passage of Proposition 187 in 1994 (Martinez and Carvajal 1994; Oltman 2011). Meanwhile, student groups, unions and religious organizations formed an improvised campaign to oppose the ballot initiative with public protests and campaign advertisements (Gutiérrez 1999; Suro and Balz 1994).

Thinking back to Dairy Mart Road produces a narrative that goes beyond a clash of sovereigns to include a variety of civil society actors. Moreover, it reveals a counterplot of resistance to restrictionism that has accompanied every effort to boost enforcement. This broader perspective is essential to understanding how immigration federalism has developed into a debate not only over who controls immigration policies but their content as well and how that debate has expanded beyond campaign trails and halls of government to encompass the living rooms and church basements that are the purview of community activists.

The story of how SB 1070 came to be and how it was substantially overturned illustrates

7 *Arizona v. United States* 132 S.Ct. 2492 (2012).

this point. The bill's chief sponsor, Arizona State Senator Russell Pearce, had introduced similar legislation to boost the state role in immigration enforcement four times going back to 2003 before he succeeded in 2010 in getting the bill enacted (Nelson 2010). His efforts gained a key ally in 2007 when the former sheriff's deputy contacted a Kansas law professor, Kris W. Kobach, who had begun to develop a national reputation for helping draft state and local measures on immigration enforcement and then defending them in court (Rau 2010). Kobach recalls becoming interested in immigration by reading about Proposition 187 while in law school. He started work as a White House fellow in the office of Attorney General John Ashcroft just a few days before the 9/11 attacks. He was a junior but influential figure in promoting the idea of using local law enforcement agencies as "force multipliers" in the anti-terrorism fight by enlisting them to enforce immigration laws. Subsequently as a law professor, Kobach became affiliated with the Immigration Reform Law Institute (IRLI). Founded and financed by the Federation for American Immigration Reform (FAIR), one of the nation's oldest and best established restrictionist groups, IRLI served, in effect, as the Washington law firm for the forces favoring stricter immigration controls and lower immigration flows. FAIR and other national restrictionist groups such as Numbers USA pursued a political strategy that combined Washington lobbying and agitation at the local level. When Pearce came calling, they quickly recognized it as a golden opportunity (Pear 2007; Sterling 2010).

In addition to SB 1070, Kobach, with IRLI backing, helped produce copycat legislation in five other states. Working with IRLI, Kobach also co-authored municipal ordinances in Hazelton, Pennsylvania in 2006 and Farmer's Branch, Texas in 2007 that sought to bar unauthorized immigrants from renting housing. He penned another Arizona law meant to crack down on the employment of unauthorized immigrants as well as several other state and local immigration measures of similar ilk. Elected Kansas Secretary of State in 2010, Kobach briefly served as an advisor to Governor Mitt Romney's 2012 presidential campaign, and after the election he served as a favored expert for Congressional Republicans opposing legalization of the unauthorized on the grounds that the federal government had to toughen enforcement first.[8]

Arizona's SB 1070 has been characterized primarily as a confrontation between a state that is seeking to expand its authority over immigration enforcement and a federal government intent on maintaining its preeminence in that realm (Chin and Miller 2011; Guttentag 2013; Motomura 2014). But, Kobach serves as one highly visible manifestation of the intricate interconnections between immigration policy developments at the local, state, and federal levels and the extent to which civil society organizations have played an influential role. He very openly operated across the full spectrum simultaneously.

SB 1070 can hardly be described as a state-level initiative given Kobach's role and that of national advocacy organizations like IRLI in drafting and promoting the legislation, in duplicating the results in far-flung states and in carrying litigation to the Supreme Court. Moreover, the proponents of state-level initiatives also had policy goals in Washington. Arizona's Governor, Jan Brewer, was every bit as insistent as California's Wilson in 1994 that the overriding objective was to get the federal government to change its policies (Rough

8 On Kobach's career, ideas and influence, see, (Kobach 2004, 2005, 2008; Von Drehle 2013; Greenblatt 2012).

2011). And, when Alabama passed its hyped version of SB 1070, IRLI issued a statement declaring it not only the "most advanced state immigration law in US history," but also "an influential guide for nationwide reform by the Congress" (IRLI 2011).

Advocates for more generous immigration policies also took SB 1070 as a rallying cry. Although the Supreme Court eventually decided a case involving the federal government as Arizona's opponent, other legal challenges to SB 1070 and the copycat laws elsewhere were brought by the American Civil Liberties Union with a coalition of civil rights groups. The National Council of La Raza, a Latino civil rights organization, led a travel boycott of Arizona that produced significant drops in convention and hotel bookings as well as the cancellation of performances by a variety of musicians and cultural groups in the year after the law was enacted (Lacey 2011). Just as supporters of SB 1070 sought to leverage action at the state level into changes in federal policy, President Obama issued a statement when the law was struck down saying, "what this decision makes unmistakably clear is that Congress must act on comprehensive immigration reform" (whitehouse.gov 2012).

As Kobach and his allies sought to duplicate their success in Arizona, civil society organizations in other states mobilized to block legislation. In 2011, the Florida Immigrant Coalition, an umbrella of ethnic, labor, religious and advocacy groups, organized a campaign called "We Are Florida!" to oppose an SB 1070 copycat bill that was speeding through the Florida legislature. The campaign conducted a series of demonstrations in Tallahassee and Miami in March and April that drew media attention to the bill and eventually the intercession of the state's major business groups concerned about a boycott and the potential loss of immigrant labor. As the legislative session drew to a close in May, the bill died (Cotterell 2011; Kam 2011; Sanders and Mazzei 2011). The National Immigration Law Center, a legal advocacy organization favoring pro-immigrant policies, supported local efforts that helped block Arizona copycat laws in Texas, Colorado, Nebraska, Kentucky and Tennessee in 2011 (NILC 2012).

Civil Society, the New Dynamism and DREAMers

Immigration has been the province of civil society activities dating back to the days of the Know-Nothing Party in the 1850s and initiatives by the Roman Catholic Church to help settle newcomers in the early twentieth century (Higham 1988). As the current wave of immigration gained momentum, the long Congressional debate leading up to enactment of the *Immigration Reform and Control Act of 1986* (IRCA) created the first opportunity in decades for a wide range of interest groups—civil rights organizations, business groups, unions, faith communities and others—to take sides in a Capitol Hill slugfest on immigration policy (Tichenor 2008). Meanwhile, the implementation of IRCA, particularly the provisions that resulted in the legalization of nearly three million unauthorized immigrants, spurred the development of community-based organizations in major cities across the country, helping immigrants with the registration process and then providing services and acting as advocates for their socio-economic and political incorporation (Baker 1997).

The devolution of power over welfare and policing in the 1996 legislation created the first opportunity in more than a century for civil society groups to take part in debates on state and local action that directly influenced federal immigration policy and practice. As noted

above, the specific application of those laws varied greatly from one place to another, and one important factor influencing that variation was the work of policy entrepreneurs who were locally-based but were often affiliated with national organizations (Gulasekaram and Ramakrishnan 2013). Civil society efforts to shape local policies towards welcome got an important boost following the 1996 legislation when the Ford Foundation, the Open Society Institute, the Carnegie Corporation of New York and other major philanthropies created multi-million dollar funds to support efforts on a variety of fronts, including the creation of local immigrant rights coalitions, litigation strategies, naturalization campaigns and continued lobbying in Washington (Campos 2014). In the spring of 2006, immigrants themselves took to the streets of American cities in protest marches that became one of the largest mass demonstrations in US history and obliged Congress to take up immigration reform legislation (Voss and Bloemraad 2011). After those legislative efforts failed in 2007, the foundations launched another major funding initiative that, according to *The New York Times,* eventually saw more than $300 million dispatched to a dozen regional immigrant rights groups and a brace of national organizations for a strategy that operated both locally and in Washington to bring about new federal legislation (Preston 2014).

A brief examination of the development of policies towards early childhood arrivals illustrates the interaction between two key characteristics of the new dynamism in immigration federalism: civil society activism and policymaking that slides back and forth between federal and state venues.

A relatively small segment of the unauthorized population—about 1.7 million people or 15 percent of the total—is comprised of young adults who came to the United States as children (Passel 2012). They have received more than their share of attention from policymakers and advocates. In 1996, IIRIRA and PRWORA sought to bar unauthorized immigrants from receiving federally-funded financial aid or in-state tuition while attending public colleges or universities (NCSL 2011). Then in 2001, a large bi-partisan coalition in Congress introduced legislation that would have given childhood arrivals not just in-state tuition but a path to legalization if they met certain requirements. Versions of that legislation, which came to be known as the DREAM Act, were reintroduced repeatedly until the Act finally went down in defeat in December 2010 (Suro 2010).

While Washington remained stalemated, two parallel developments unfolded: several state governments weighed in on the issue and a new breed of activists gained national attention. Although they could not change the young people's immigration status, states passed legislation granting them in-state tuition, starting with California and Texas in 2001 and followed by another 16 states through June 2014 (NCSL 2014). Advocacy groups pressing for state and federal versions of the legislation organized the potential beneficiaries, who soon became known as "DREAMers," and who quickly launched their own brand of advocacy. For example, the Coalition for Humane Immigrant Rights of Los Angeles, a service and advocacy group launched amid the activism surrounding IRCA implementation, created an organization for undocumented high school students, Wise Up!, which in 2003 morphed into the California Dream Network. The organization claimed it was active on 38 college and university campuses as of 2011 (Mora 2011). As frustration mounted with lack of progress in Washington, similar groups from around the country formed a national umbrella organization in 2009, United We Dream, and adopted increasingly aggressive

tactics, including public demonstrations, sit-ins at the offices of elected officials and the disruption of political campaign events (Nicholls 2013).

In June 2012 DREAMers threatened to disrupt President Obama's reelection campaign and showed their resolve by holding a sit-in at the campaign's Denver office (Ingold 2012). Within weeks, the president used executive authority to create the Deferred Action for Childhood Arrivals (DACA) program that offers two years of temporary protection from deportation and a work permit to unauthorized young people who meet certain enrollment requirements (Preston 2012). DACA has offered substantial economic and educational gains for the eventual 587,366 enrollees (Perez 2014). However, states took widely different approaches to the benefits they granted young people with DACA credentials, ranging from an absolute bar on attending any state college or university (e.g., Alabama and South Carolina) to five states that adopted measures granting them admission with in-state tuition (e.g., Massachusetts and Colorado) (Luzer 2013). Congress meanwhile remained stalemated with the Democratic-led Senate passing a comprehensive reform bill in June 2013 and the Republican-led House refusing to act. In November 2014 President Obama issued a new set of executive orders broadening eligibility for the DACA program and creating a new program, Deferred Action for Parental Accountability (DAPA), for the parents of US citizens or legal permanent residents (Shear 2014). With the proverbial stroke of a pen Obama demonstrated the national government's sweeping power to determine immigration status. Meanwhile, state and local governments immediately began to consider how they could exercise their own powers to shape implementation of the program and its impact (Pew 2014).

With the policy action moving from Washington to the states, back to Washington and then back out into the states, and with immigrants themselves taking an activist role, the saga of the DREAMers demonstrates how the politics and process of immigration policymaking has evolved.

Immigration Federalism beyond *Arizona*

In the closing lines of his majority decision in *Arizona v. United States,* Justice Anthony Kennedy wrote, "the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse."[9] One can question the modifiers but the new dynamism in immigration federalism undoubtedly involves vigorous discourse among officials and activists at all levels of government. In the wake of the decision in *Arizona* there has been a wealth of thinking by immigration scholars about how to depict that discourse, looking beyond the drier, and now mostly settled, legal arguments over the balance of power in the realm of enforcement. A brief review of some of that literature helps frame an understanding of how immigration federalism is evolving.

Rejecting the notion that local and national policymaking are sequential, Pratheepan Gulasekaram and Karthick Ramakrishnan examine the recent history of immigration federalism and conclude that the two processes might work concurrently and at odds with one another. So, for example, restrictionist issue entrepreneurs like Kobach worked to stall

9 *Arizona v. United States* 132 S.Ct. 2492 (2012) (Kennedy J. for the court).

federal policymaking while pursuing their agenda in state and local venues that were seen as more favorable politically (Gulasekaram and Ramakrishnan 2013).

Despite the apparent conflict that has characterized state-federal relations over immigration, an emphasis on the potential for collaboration emerges out of much of the recent commentary. Cristina S. Rodríguez, for example, is a longtime proponent of a cooperative approach to immigration federalism in which all levels of government work together in an integrated system of policymaking rather than trying to claim exclusive prerogatives (Rodríguez 2008). More recently, Rodríguez has expanded the scope of her analysis to locate immigration within a framework of social issues such as marriage equality, drug control and health care, and describes a system in which all levels of government exercise influence on each other and some degree of decision-making powers. Rather than a fixed system of relationships, Rodríguez argues for a vision of dynamism in which the parameters of federalism "are subject to ongoing negotiation by the players in the system" (Rodríguez 2014).

A similar emphasis on the discursive possibilities comes from Rick Su who portrays states as uniquely capable intermediaries between national policies and immigration's highly local impacts. Regardless of federal court decisions coming down heavily in favor of federal preeminence, Su argues in favor of "affirmative steps to incorporate [states] directly into the discourse and promote them as a forum for conversation about immigration" (Su 2014). Moving towards operationalizing this concept, Ming H. Chen argues for a distinction between immigration regulation at the border, where federal law reigns supreme on matters of entry, and immigration policies "between the borders," where state and local governments should be given considerable latitude (Chen 2014).

In one of the most extensive post-*Arizona* analyses, Hiroshi Motomura argues in his 2014 book, *Immigration Outside the Law,* for distinguishing "direct" involvement in immigration law which refers to government decisions whether to admit or exclude aliens, an undisputed federal domain like Chen's "at the border" policies. By contrast, Motomura describes a realm of "indirect" involvement where state and local governments can play a role in several different ways. They can become involved in enforcement through cooperative agreements with federal authorizes or undertake their own efforts to make life difficult for unauthorized immigrants. Other forms of indirect involvement in Motomura's view are state and local policies that "neutralize" federal enforcement policies, effectively shielding the unauthorized from federal regulation and thus permitting them to integrate into local communities regardless of immigration status (Motomura 2014).

This paper now turns its attention to the latter kind of state and local policies and their potential to change life for the unauthorized and to eventually help change federal policy. After examining four different kinds of sub-federal activities, the paper concludes that state and local governments are doing more than neutralizing federal enforcement policies. Rather, they are *mitigating* federal laws and regulations that determine immigration status in the sense that they are reducing the penalty to be paid for violating those policies.

Moreover, the cumulative effect of the policies described below can be to create the potential for *inclusion* of immigrants regardless of status. A useful definition of the term in this context comes from Maria Lorena Cook:

> By inclusion I mean an individual or group's engagement with processes or organizations that *recognize* the individual or group either by conferring membership or by providing resources such as entitlements or protections. … Inclusion provides a sense of security, stability, and predictability, understood primarily as an ability to plan for the future. (Cook 2013)

Mitigating the Federal: Inclusion at the Local Level

As noted above, sub-federal jurisdictions have varied greatly in their willingness to cooperate with federal immigration enforcement ever since some policing powers were devolved in 1996. The Secure Communities program was launched in 2008 and identified unauthorized immigrants for removal by checking the fingerprints of persons arrested or booked into custody by local authorities. President Obama ended it as one of the executive actions announced in November 2014, saying federal agents should focus on deporting "felons, not families" (Linthicum 2014). During its short life span, Secure Communities provoked a variety of state and local governments to take actions that "neutralize" federal immigration regulations to borrow Motomura's expression. For example, in October 2014 the Catholic Legal Immigration Network, Inc. had counted three states, 26 cities, 233 counties and the District of Columbia as having restricted cooperation (CLINIC 2014). However, some state and local governments are doing more than that. Not satisfied with simply negating enforcement, they are taking proactive steps to welcome immigrants regardless of their status under federal law. These *mitigate* the condition of illegality.

On November 19, 2005, Illinois Governor Rod R. Blagojevich signed the "New Americans Executive Order," which launched a package of efforts to coordinate policies and programs that promote integration or otherwise provide services to immigrants and to help the state assert its voice on federal immigration policies. The Illinois initiative was the result of a public-private partnership that involved foundation funding, think-tank advice and an explicitly influential advisory role for local and national advocacy groups and civil society organizations from immigrant communities (illinois.gov 2005). Since then, the model of a coordinating office for immigrant services has been adopted in Michigan, New York, Massachusetts as well as a number of cities including Los Angeles, Philadelphia and Baltimore. In many of these cases the explicit intent has been to entice the settlement of immigrants as part of an economic development strategy (Turner 2012). A number of rustbelt cities like Columbus, Cleveland and Lansing that were facing population losses have recruited immigrants with packages of incentives and services, and in some of the most successful cases, like Dayton, which has attracted more than 3,000 Turkish newcomers, local citizens and business groups have joined municipal officials in developing detailed action plans for immigrant settlement (Altman 2014; Preston 2013).

While these welcoming programs were spurred by local concerns and local policy entrepreneurs, other inclusionary policies have echoed federal initiatives. For example, President Clinton issued an executive order in 2000 that requires any state or local agency receiving federal funds to bridge language barriers with beneficiaries who have limited proficiency in English. However, the federal government has not attempted to dictate how this requirement is to be met nor has it undertaken a significant accountability effort. As a

result, a remarkable variety of approaches have emerged from state and local agencies of all sorts, from schools to courtrooms to city halls, utilizing everything from the deliberate employment of bilingual staff, to the translation of printed materials, and the use of interpretation technologies (MPI 2014).

The two examples of sub-federal action described above attempt to exploit federal immigration policies for maximum local benefit. These efforts certainly are not contravening federal intentions, but they are creating conditions not necessarily envisioned by the framers of federal policy. Dayton, for example, has made unique uses of federal policies in order to welcome a stateless ethnic Turkish population, the Aishka, first finding spaces through refugee admissions and then through both family and business visas, and specifically facilitating real estate investments that have rejuvenated declining parts of the city (Navera 2014). Compliance with the federal language access requirement has varied enormously as some jurisdictions and agencies have embraced it energetically while others have ignored it to the point that the Justice Department in a 2011 memorandum complained about the "uneven" response even within the federal government.[10]

All of these local initiatives have two other characteristics in common. To varying degrees they all create points of interaction between immigrants and government offices, local business, civil society organizations and ordinary citizens. The welcoming initiatives in particular have also often stimulated the creation of civil society organizations within immigrant communities to mediate interactions with the host community. The second common characteristic is that these sub-federal initiatives erase, or at least blur, the many levels of immigration that are at the heart of federal policies. Virtually all of these local initiatives have deliberately adopted a "don't ask, don't tell" approach to immigration status. In some cases this has been a matter of publicly announced policies not to inquire about an individual's status unless it is explicitly required by a state or federal law. In other cases government agencies contract out all services and do not require the contractors to conduct status verification (Montalvo 2014). So, for example, an individual might receive advice on opening a small business, get directed to training classes, and complete forms in her native language, but she will be advised that obtaining a federal small business loan will require proof of status while a loan from a local bank might not.

For an unauthorized immigrant, the sub-federal policies described above begin to *mitigate* the status of illegality. This word is used here to mean an action that lessens the severity of a negative condition, or reduces the penalty for an offense. These policies actively encourage interactions between unauthorized immigrants, public officials, and community institutions that might not happen otherwise. As a matter of public policy, they create safe spaces where some of the harshest negative consequences of federal illegality are alleviated if not erased. Self-ostracism from public agencies even when interactions are permissible and social isolation from the civic institutions of a host community are not explicit aspects of federal policy, but they are undoubtedly one of the effects and often have devastating results on households (Yoshikawa 2011). The policies described above create specific

10 Memorandum from Attorney General Eric Holder to Heads of Federal Agencies, General Counsels, and Civil Rights Heads, *Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166*, 17 February 2011. http://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

venues where the effects of federal immigration status are mitigated. Sub-federal policies that give documents to the undocumented go a step further.

The issuance of a driver's license has traditionally been the purview of state government. The federal government entered the field with enactment of the REAL ID Act of 2005 which sets standards for driver's licenses and other identity documents that federal agencies recognize for purposes such as boarding a commercial airplane or entering a federal facility.[11] Under those standards no unauthorized immigrant can obtain a driver's license. Due to various controversies, the full implementation of the REAL ID Act has been repeatedly postponed, but many states nonetheless have adjusted their driver's license laws and regulations to produce federally compliant documents. By 2013, however, 10 states and the District of Columbia had passed legislation to create parallel licenses that would not be valid for federal use, but that also would not require the documentation of immigration status delineated in the REAL ID Act (TRPI 2014).

Holding a driver's license can have important practical consequences for an unauthorized immigrant. It can improve employment possibilities and lower exposure to the penalties of driving without a license, a crime in all but a handful of states. Along with municipal identity cards of the sort to be issued by New York City, a license can facilitate check cashing, the use of a credit card, enrollment in school and myriad other day-to-day activities. In all of these ways an identity document issued by a sub-federal government further mitigates the federal status of being an unauthorized immigrant. Moreover, it has an important intangible effect by conferring the most basic form of recognition on an individual. Through the issuance of a driver's license or identity card, an unauthorized immigrant regains the use of their own name which otherwise might have to be dissembled in the false documents which are essential to life out of status.

The process of obtaining this identification can itself create further points of engagement that reduce the social isolation of an unauthorized immigrant. In the final months of 2014, as California prepared for implementation of its new driver's license law at the start of the New Year, thousands of unauthorized immigrants attended training sessions at churches, community organizations, schools, and public libraries. Meanwhile, the state Department of Motor Vehicles engaged in a massive outreach effort and added 900 employees and four new processing centers to speed the effort (Gonzalez 2014). With each training session unauthorized immigrants are encountering volunteers or state employees who are making a positive effort to include them in a formal governmental process. And in many instances, immigrants themselves are organizing to prepare their compatriots for the application process.

When all of the policies described in this section are applied together as is the case in some major concentrations of the immigrant population such as New York, Chicago and large parts of California, the cumulative effect can be the creation of a new kind of civic status that permits an unauthorized immigrant to engage openly with schools, hospitals, police departments and other government agencies. This can open up encounters as significant as reporting a crime to the seemingly trivial such as a call to an animal control agency about a stray dog which might otherwise be fraught. Moreover, the implementation of

11 P.L. 109-13, Div. B.

welcoming policies and the process of registering for benefits such as a driver's license can involve interactions with civil society organizations of all sorts and the formation of stronger community organizations among immigrants themselves.

Conclusion

At the start of 2015 in California, home to a quarter of all the foreign-born in the United States including some 2.5 million unauthorized immigrants, an individual regarded as out-of-status by federal standards can get a driver's license, apply for a number of health and welfare programs, go to a state university and pay in-state tuition, and practice law. Meanwhile, across the state line in Arizona that same person would be subject to the "show-me-your-papers" provision of SB 1070 which the Supreme Court let stand. They would also be subject to state regulations that could turn any contact with a state agency into an encounter with a federal agent, and any prospective employer would be obliged to check the individual's identity against a federal database.

The United States now has dozens of immigration policies that are determined by a mix of local, state and federal directives rather than just one federal policy set in Washington. This patchwork is the result of two decades of continuous exchanges across all levels of government over immigration policies, particularly those related to unauthorized immigrants, and the actions of newly-empowered advocates in civil society. At the sub-federal level this has produced such a variety of policies that the meaning of being unauthorized can vary greatly from one place to another. At the federal level, political stalemate has blocked Congress from passing reform legislation, but President Obama in 2012 and 2014 deployed executive actions to create new protected classes of individuals. The net effect has been to move the issue away from the black and white delineations of statutory provisions and towards a proliferation of grey areas that invite still further action by sub-federal governments to define the practical consequences of status. Meanwhile, the judiciary has set limits on how far state and local governments can go to restrict the activities of the unauthorized or how aggressively they can funnel them into the federal enforcement system. But, within those limits many sub-federal jurisdictions remain explicitly hostile to unauthorized immigrants while others offer various forms of welcome and even shelter.

In principle, a system of federalism that is so dynamic and that leads to such divergent results might seem unlikely to survive its own instability and ineffectiveness. Yet over the past 20 years the combination of practices described in this paper have become so ingrained that it seems unlikely that strict uniformity could be imposed even if Washington enacted the most sweeping immigration reform. In this regard immigration has become more like several other major issues that are defined by wide policy variations among states, like abortion, or variations between states and the federal government, like the sale and possession of marijuana. This is more than a matter of process, which is Rodríguez's emphasis. It has become a matter of facts on-the-ground that have acquired a hardened permanence. Leaving aside the constitutional questions, it is hard to imagine how a national government, even under the united rule of one party, would impose on New York the same abortion regulations that apply in Texas or require Mississippi to adopt Colorado's laws on marijuana. Similarly, it is hard to imagine how any combination of federal laws could

impel California and Arizona to adopt the same policies towards unauthorized immigrants.

Lack of uniformity is the price for the kind of federalism that has developed on immigration, and after two decades it may be time to start considering policy diversity the norm rather than an aberration. State and local governments have been given important roles on immigration by federal actions, and they have taken on roles by their own initiative. Immigration policy operates as a dynamic interaction among governments at all levels, and it is subject to the influence of a wide spectrum of policy actors ranging from the two established political parties to political mobilization by communities of newcomers with no civic status. These are accomplished facts. They reflect several processes that have hardened over the past two decades: the growth of a large and well-established immigrant population; the establishment of a federalist arrangement that involves extensive interaction between state and federal government over major domestic policies such as health, education, law enforcement, *and* immigration; and steadily intensifying partisan and ideological polarization. These circumstances do not seem likely to change any time soon.

It was not the intent of this paper to draw judgments about the worthiness or the workability of these developments. After all, one of the prime characteristics of the new dynamism in immigration federalism described here is a diversity of policies, processes and outcomes. By its very nature such diversity is difficult to judge. Anyone with strong views on the subject is likely to find some developments to favor and others to oppose. And given the fact that this is a highly dynamic situation, any such judgments may only be valid until an election changes control of a state house or a governor's mansion, Congress or the White House. The United States has a long but not felicitous history of regionalism characterized by the differential treatment of groups by race, national origin and economic class. Over the course of that history the federal government has a mixed record of guaranteeing national norms of social or economic justice or even simply assuring that minimum human rights standards are met. Arguably, we are at a low ebb in Washington's abilities to homogenize regional differences on social issues and immigration potently provokes heterogeneous responses across the country.

Now, and for the foreseeable future, the experience of being an immigrant in the United States will vary significantly from place to place, and that variation will include the quality of an immigrant's interaction with public agencies of all sorts. Some places will be welcoming and inclusive and other places will be inhospitable and exclusionary. These differences will be most notable for unauthorized migrants but will apply to legal immigrants and even naturalized citizens to some extent. But, immigrants will not be passive objects of the climates they inhabit. The devolution of decision making over immigration policy to states and localities has greatly increased the potential influence of civil society over those decisions, including civil society generated by immigrant communities themselves.

President Obama is fond of saying that we are both a nation of laws and a nation of immigrants. He may be remembered for having overseen the enshrinement of a dynamic immigration federalism marked by a great diversity of laws and a great many different ways of being an immigrant in the United States.

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