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The Devolution of Immigrant Policymaking in the USA and Its Implications

Abstract: The growing trend of state and local-level policymaking for undocumented immigrants in the USA since the passage of the federal Illegal Immigrant Responsibility and Immigration Act (IIRIR) in 1996 raises some important questions. While states and localities have moved in different directions in terms of policy liberalism or restrictionism toward undocumented immigrants, this paper considers whether a patchwork of quilt-like immigration policies across the country is acceptable.

Keywords: devolution; federalism; localities; state policymaking; undocumented immigrants

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South Carolina recently found itself at odds with a federal judge who struck down some parts of that state's strict 2011 legislation that targeted the presence of undocumented immigrants in that state (Brown 2011). Arizona passed a more publicized legislation in 2010 to address the presence of undocumented immigrants by requiring all noncitizens to carry immigration documents on their person at all times.¹ Arizona's legislation, while unique for the severity of its sanctions against undocumented immigrants, is not unique in its role in making immigration policy. In fact, the first half of 2011 saw the introduction of 40 state legislatures enacting 162 laws and passing 95 resolutions addressing immigration (National Conference of State Legislatures [NCSL] 2011).²

The undocumented immigrant population in the USA has grown in size since the previous legalization legislation, the Immigration Reform and Control

1 SB 1070 passed in 2010 makes it a crime for a noncitizen to not carry immigration documents on her person and gives powers to state law enforcement officials to detain anyone suspected of being in the country without proper documentation (Archibold 2010).

2 In early and mid-2011, several states in the Southeast such as Georgia and Alabama moved to consider and pass laws more restrictive than Arizona's immigration bill (Severson 2011).

Act (IRCA) passed by the federal government in 1986. As of March 2009, the Pew Hispanic Research Center recorded the approximate number of undocumented immigrants at 11.1 million individuals (Passel and Cohn 2010). The growth in the population of undocumented immigrants is in part due to federal inaction in this policy area, while others (e.g., Massey et al. 2002) have argued that the growth in the undocumented population is due to flawed federal intervention in immigration.³

The role of states and localities in immigration policymaking is not new. Currently, state and local involvement has been attributed by some to the immigration policy paralysis in Washington, DC (e.g., Cornelius 2010). The most recent effort at federal immigration reform was President Bush's Comprehensive Immigration Bill introduced in 2006 and again in 2007. Among its provisions included a pathway to legalization for the then approximately 13 million undocumented immigrants in the country and aimed to create a guest worker program. The bill passed the Senate, only to be held back in the House.⁴

This article addresses the policy implications of subnational immigration policymaking in the USA. De facto policymaking at subnational levels has led to an undesirable outcome of a quilt-like patchwork of immigrant treatment policies across the country. This work overviews the current trends in subnational immigration policymaking, while also presenting a brief discussion of the historical role of states in immigration policymaking. The article also examines some of the explanations for varying immigration policy directions at the subnational level. The article concludes by addressing the implications of the current system of fragmented and decentralized immigration policymaking in the USA. In sum, a policy process allowing for varied policies across the country is undesirable, and the larger question for the country is not whether states

³ Massey et al. (2002) argue that periodic federal interventions in immigration policy have made a formerly well-functioning organic system of cross-border (mostly circular) migration by Mexican migrant workers into a phenomenon that has now become a more permanent migration and one that has expanded beyond the old migration states. Massey and Singer (1995) estimate that, between 1965 at the end of the Bracero program and 1986 when IRCA was passed, approximately 28 million undocumented Mexicans entered the USA and about 23.4 million left the country, with about 4.6 million settling in the USA.

⁴ In the past several years, the US Congress has also considered a legislative proposal titled, the DREAM Act. Originally introduced by Republican Senator Orrin Hatch and Democratic Senator Edward Kennedy in 2005, this act would legalize the status of undocumented immigrant students younger than 30 years who have completed 2 years of college or provided 2 years of community service. In the waning days of 2010, this legislation passed one of the two chambers in Congress, only to fall short in the other house (Preston 2010).

and localities ought to legislate in one way or another, but whether it is acceptable to have differing policies for the same population in different parts of the country.

1 Current Trends in State and Local Immigration Politics and Policy

Subnational policymaking is found at both the state and local levels in the USA. At the state level, there has been significant activity in terms of legislative proposals toward undocumented immigrants. In particular, there has been a sharp upward trend in state-level policies addressing undocumented immigration since around the mid-2000s. Table 1 shows proposed and enacted legislation between 2005 and June 30, 2011, as compiled by the Immigrant Policy Project at the NCSL (2011). These bills include legislation for immigrants, some of whom are undocumented, legal, or refugees. Table 1 includes legislative activity from all 50 states. Substantively, the bills include legislation regulating disbursement of funds for immigrant education, naturalization programs, in-state tuition eligibility for undocumented immigrants, regulation of employment eligibility programs, immigrant eligibility for state health-care programs, laws to penalize human traffickers, regulation of state and local law enforcement in cooperating with federal immigration law enforcement officials, regulation of voter eligibility requirements, and other immigrant or immigration-related issues. Table 1 also includes resolutions passed yearly in the states, which commemorate or memorialize various ethnic immigrant groups or recognize programs that serve various immigrant populations (NCSL 2011).

Year	Number of Bills Introduced	Number of Bills Enacted	Number of Resolutions Adopted
2005	300	38	n/a
2006	570	84	12
2007	1562	240	50
2008	1305	206	64
2009	1500	222	131
2010	1400+	208	138
2011 (up to June 30)	1592	162	95

Table 1: State-level Immigration and Immigration-related Bills (2005 to June 2010).

Source: NCSL, Immigrant Policy Project (2011).

Although the data in Table 1 do not show what percentage of these bills are favorable or unfavorable to undocumented immigrants, a significant majority of bills introduced in state legislatures seek to impose some restrictions on the undocumented immigrant population. A small number of bills aim to give this group some rights or benefits such as in-state tuition or access to health care. More to the point, the data in Table 1 reveal a trend in states picking up the mantle of immigration policymaking more aggressively. Forty states in the first half of 2011 considered legislation pertaining to immigrant populations (NCSL 2011).

The trend in state-level policymaking has followed another trend in the movement of migrants beyond traditional immigrant destinations such as Texas, California, and Florida to new destinations in the Southeast such as the Carolinas, Georgia, Louisiana, and elsewhere in the country (Donato et al. 2008). There are several reasons for migrants seeking out new destinations: the availability of work in the new destinations and also stricter federal migration policies, particularly more intensive border policing, have created disincentives for migrants to return to their homelands (Massey et al. 2002). The new destination states such as those in the Southeast and the Midwest are also undergoing some challenges of their own in integrating the newcomers, most of whom are Hispanic.⁵ Other states with more homogeneous White populations such as those in the Midwest (e.g., Kansas, Nebraska) are also coming to terms with integrating a culturally and ethnically different population. Some of the stringent policies against undocumented immigrants have found public and legislative support in those states that are new migrant destinations that have seen their migrant populations increase proportionally at a rapid rate in the 1990s and 2000s.

2 Local-level Policies

In addition to states making policy for undocumented immigrants, local governments have become involved as well. Local government policymaking includes the policy action of cities, counties, and other jurisdictions below the state level. As local governments work within the powers given to them by states, local leg-

⁵ After the devastation of Hurricane Katrina in Fall 2005, many migrant laborers moved to Louisiana to help with rebuilding the New Orleans and other communities. These new migrants, mainly Hispanic, added another layer of complexity to race and social relations to once largely Black/White communities (Mui 2010).

isolation can easily be preempted by state action. In terms of local-level policymaking, there is variation again with some localities choosing to create restrictive immigration policies and others choosing more liberal policies.

Some examples of local-level policymaking include the action of some city governments to adopt a “hands-off” policy for city law enforcement regarding the questioning or examining the immigration status of individuals taken into custody for violations of local law, partly to build closer relationships with immigrant communities. By 2009, over 64 cities had adopted so-called sanctuary clauses excluding their law enforcement agencies from cooperating with federal immigration authorities except in the case of felony crimes (Varsanyi 2010b).

In terms of restrictive local ordinances, by 2009, 133 cities had either considered or passed laws that penalized landlords and employers for renting to or hiring undocumented immigrants, respectively (*ibid.*). For example, Maricopa County in Arizona, led by the sharp law enforcement efforts of Sheriff Joe Arpaio, has among the strictest ordinances targeting undocumented immigrants (Chinni and Gimpel 2010). In the early 2000s, Suffolk County in New York State tried to pass an ordinance to build a labor hall where migrant workers could gather and contract with prospective employers. This proposal was defeated in part through robust public protests against building such a facility with public funds (Public Broadcasting Service 2004).

In terms of explaining variations in policy directions at the local level, Ramakrishnan and Wong (2010) found that the partisan composition of a community is an important factor in explaining whether a locality will choose to legislate restrictively or expansively, with Democratic partisan majority localities more likely to legislate expansively and Republican party majority localities more likely to legislate restrictively.

3 Dimensions in Immigration Policymaking

How is state and local immigration policymaking different from federal immigration policymaking? Is it fair to say that states and localities have taken on historically federally mandated immigration functions? Certainly, immigration policymaking can broadly be viewed along two dimensions. One is immigration control (i.e., determining who can enter a country) and the other is immigrant treatment (i.e., how an immigrant is treated, once in the country) (Money 1999). Currently, state and local immigration policymaking have been directed toward the latter issue of how immigrants are treated (e.g., whether states will extend in-state tuition benefits to undocumented immigrant students or whether states

will provide driver's licenses to undocumented individuals).⁶ Although states do not have the authority currently to exercise the power of admitting immigrants or denying them entry, historically, they had this power as well.

In fact, the role of states in immigration policymaking is not a recent phenomenon. The earliest governmental actors in immigration policymaking in American history were the states (Tichenor 2002). Some states with ports including New York, Massachusetts, Pennsylvania, Louisiana, and California regulated the entry of migrants in the early 19th century and before (Bernard 1950).⁷ State regulation of immigrant entry eventually came to an end when the US Supreme Court in 1849 held that immigration control was solely under the jurisdiction of the federal government under its powers in Article I of the US Constitution. Further court rulings have affirmed the federal government's plenary power in immigration policy.⁸

In terms of immigrant treatment policies, both state and federal governments have been active at various times in history and continue to play a role here. For example, current state policies toward undocumented immigrants include legislating availability of public supported health care for these immigrants, legislating availability of subsidized higher education, and so on.⁹ Federal government policies toward undocumented immigrants include, for example, federal government discretion in choosing which of such immigrants to target

6 Arizona, in particular, through its recent legislation, may be trying to bridge both these dimensions by trying to control the presence of undocumented immigrants within its jurisdiction by attempting to bring the presence of undocumented immigrants to the attention of federal authorities with the expectation that these individuals will then be deported.

7 Texas, for example, had its own state agency in the 19th century to attract immigrants from Europe (Rozek 2003).

8 The plenary power of the federal government in immigration policymaking is found in two important ways. First, the Supreme Court held in a series of cases challenging the exclusion of Chinese migrants from re-entering the USA in the late 19th century that, while these migrants may have had worthwhile arguments, the court could not extend relief because immigration control was recognized uniquely to be under the purview of the Congress; essentially, the Supreme Court removed judicial oversight over federal immigration control decisions (Tichenor 2002). Second, the court ruled that state and local governments did not have the power to legislate in immigration policy (Varsanyi 2010a: 7). Thus far, this prohibition has not been interpreted to exclude states and localities from policymaking for immigrants (legal or undocumented) already within their jurisdictions.

9 For example, Colorado, until 2004, accepted any pregnant woman into its Medicaid program for prenatal care under an eligibility system called "presumed eligibility" (PE) where every individual was presumed to be eligible for care and their documentation was collected at a later time. Under this program, Colorado had unofficially extended prenatal care to several thousands of undocumented immigrant expectant mothers each year (Spencer 2004).

for deportation.¹⁰ State governments also make policies for legal immigrants, which includes determining eligibility for some social welfare programs, initiatives for funding English as a second language programs, policies for funding naturalization and civic education classes to assist immigrants in successfully fulfilling requirements for gaining citizenship, and other programs. States vary on the availability and extent of funding for such programs to their immigrant populations (Hero et al. 2005).¹¹

While states such as Arizona and Colorado have enacted legislation to dissuade undocumented migrants from living there, other states such as Washington and New Mexico have comparatively generous policies toward these immigrants, including in-state tuition availability, driver's license availability, and prenatal health-care availability (Thangasamy 2010). The varying configuration of activist groups for immigrant rights and those pressing for stricter enforcement of immigration laws in the above states help explain the variance in policies toward undocumented immigrants. On the one hand, in both Washington and New Mexico, during the period when liberal policies were created for undocumented immigrants, pro-immigrant rights groups were able to outmaneuver any activity by anti-immigrant groups (*ibid.*). On the other hand, both Arizona and Colorado have had robust pluralist competition between immigrant rights groups and immigration law enforcement groups, which has disadvantaged immigrant rights groups in their advocacy for undocumented immigrants. Thus, while both Washington and Colorado have significant needs for farm labor, in Colorado, the pluralist competition has made it difficult to pass progressive laws for undocumented immigrants. In Washington State, the lack of an organized opposition to pro-immigrant rights groups has made it more difficult for such groups to press to maintain a restrictive status quo and/or to pass restrictive laws. Currently, a little over fifth of the states offer in-state tuition benefits to undocumented immigrants

10 Currently, the Obama administration has focused on criminal undocumented immigrants through a new federal program "Secure Communities" for their apprehension and deportation. The Secure Communities program, which was expected to be a joint partnership among federal, state, and local law enforcement, has come under some uncertainty regarding whether state and local governments can be compelled to participate in this program by the federal government (Preston and Semple 2011).

11 For example, states have some flexibility in choosing to accept refugees from overseas to settle within their jurisdictions. For example, Arizona, which has developed tough policies toward undocumented immigrants, accepts more refugees per capita than any other state in the union. To be sure, numerically, Arizona took in 4700 refugees in 2009, while it is estimated to have about 375,000 undocumented immigrants (DeParle 2010). In terms of funding for the costs of refugee resettlement, the federal government, through the State Department, funds a large share of costs, while states may also contribute a small measure of the costs.

(Fischer 2004, NCSL 2011). Regarding the in-state tuition issue, there has not been a retrenchment, as some states such as Nebraska recently legislated to extend it (NCSL 2011).¹²

On the one hand, while state governments at one time had been involved in making immigration policy along both dimensions of immigrant treatment and immigrant control, currently, their policymaking reach is only within the dimension of immigrant treatment.¹³ The federal government, on the other hand, can exercise its authority across both dimensions.

Whether states and localities have remained within the sphere of immigrant integration or have crossed into *de facto* immigration control is a matter for debate. Some scholars have questioned if there is, indeed, a blurring in state and local legislating that may reach into immigrant control influencing legislation (Varsanyi 2010a). Varsanyi (2010b) notes that restrictive policies, particularly city ordinances that aim to establish an individual's right to legally be in the USA before allowing such individuals to live and work in a community, are examples of "immigration by proxy" by local governments, which are in fact carrying out immigration control policing.

While there is federal inaction regarding undocumented immigrants and some states have allowed these immigrants to attend state-supported colleges, there is anecdotal evidence of some undocumented immigrants beginning to graduate from college but without prospects for finding work using their education as a result of their undocumented status. The anecdotal reports in the print media suggest that some of these individuals are choosing to work "under the table," doing menial work despite their college education for lack of working papers (Weinrip 2011). The solutions being crafted at state and local levels to extend benefits and opportunities to undocumented workers and students are essentially Band-Aid solutions; they address some aspects of the problem of undocumented immigrants in the USA, but they do not have the power to either deport or legalize such immigrants.

12 In mid-2011, Colorado again took up the issue of extending in-state tuition to undocumented immigrants. While Colorado has never passed such legislation, it has been considered in its statehouse almost yearly since the early 2000s because of the unsuccessful championing efforts of Colorado state legislator Val Vigil (Thangasamy 2010). At present, in the place of the term-limited Representative Vigil, other state legislators have taken up the cause, but without success.

13 Nevertheless, Utah recently passed legislation to allow undocumented immigrants in that state to pay a fine and register as guest workers beginning in 2013, pending approval of a waiver from the federal government (Roche 2011).

Finally, a key aspect of subnational-level immigration policymaking has been its impact on national policymaking. Policy diffusion is robustly found both horizontally between the states and vertically between state and federal governments.¹⁴ In terms of immigration policymaking, many of the provisions of the Illegal Immigrant Reform Act of 1996 were drawn in large part from California's restrictive immigration Proposition 187 in 1994. In terms of immigration reform at the federal level, clearly, there are signs of policy diffusion. While the federal Real ID Act was passed in 2005 to restrict the ability of undocumented immigrants from acquiring driver's licenses, a number of states had already begun to move in that direction immediately after the events of 9/11.

4 Explaining Policy Directions

What explains different approaches and directions in immigration policymaking? Public opinion, as one factor, has had a varied influence here. Historically, the role of public opinion in national immigration policymaking reveals some interesting results. Since the beginning of recorded public opinion in the 19th century, there is no evidence of public opinion supporting immigration increases in the USA. In fact, public opinion polls at the national level have routinely opposed any increase in immigration (Simon and Alexander 1993). Nevertheless, immigration policymaking at least at the federal level has not always reflected public opposition to immigration. In the 19th and early 20th centuries, liberal immigration policies continued despite public opposition to them (Tichenor 2002). In part, liberal policymaking in light of widespread restrictionist sentiment can be explained by the role of what Freeman (1995) calls client politics. For Freeman, immigration advocacy groups including kinship migrant groups have played a role in influencing immigration policy such that government officials view these groups as client groups and act to meet their interests to varying levels despite any public opposition.

14 Policy diffusion between the states is aided in part through interstate cooperative institutions such as the NCSL, a state legislative membership organization that includes all state legislators in the 50 states and US territories, which maintains one of the key information repositories of state-level immigration action. The NCSL and other such organizations have allowed for better communication between state legislative leaders across the country allowing for easier policy diffusion.

However, the recent rise in immigration policymaking at the state and local levels does reflect an important difference from federal policymaking. Public opinion has become an important factor in subnational policymaking. Restrictionist policies at the state and local levels are reflecting public sentiment among various communities where immigration has become a salient issue. The Pew Research Center (2010) has reported that Arizona's strict immigration measures have found "widespread" support among communities in that state.

States with beneficial policies for undocumented immigrants have a number of characteristics that are different from states with restrictive policymaking. First, they either do not have a high percentage of population opposed to the presence of undocumented immigrants or the salience of the immigration issue is weak. Second, these states also have well-organized advocacy coalitions that have created working relationships with influential elected policy leaders in the states to circumvent the opposition of anti-immigrant groups (Thangasamy 2010).

Public opinion is affected by how the fiscal impact of undocumented immigration is also understood. There is burgeoning research on whether undocumented immigrants constitute a burden – fiscally or otherwise – on state and local governments. Some of this research is produced by immigrant advocacy and undocumented immigration opposition groups such as the Federation for Immigration Reform (FAIR) and Center for Immigration Studies (CIS), which have argued to limit some immigrant rights.¹⁵ Some basic facts about the fiscal contributions and impact of undocumented immigrants are widely accepted. For example, different levels of government are fiscally affected differently by the presence of undocumented immigrants. These immigrants pay sales taxes and social security taxes, and a portion of such immigrants also pay annual income taxes to state and federal governments using individual taxpayer identification number (Porter 2005).¹⁶ Some studies show that while undocumented

¹⁵ For example, Mark Krikorian (2008) at the CIS has argued that restrictionist policies both at subnational and federal levels are succeeding in leading to an attrition of the undocumented population (i.e., individuals are choosing to leave the country voluntarily as a consequence of the increasingly difficult environment to live and work without documentation). Recently, *New York Times* columnist and conservative writer Russ Douthat (2011) made an argument for extending the federal e-Verify program across the country to further make it difficult for undocumented immigrants to work in the country. This federal program allows prospective employers to check whether prospective employees are legally eligible to work in the USA.

¹⁶ An alternative to a social security number, this personal identification number is available through the Internal Revenue Service for some types of noncitizens.

immigrants may pay more taxes than they absorb in social services, their taxes are paid to the federal government, with states and localities shouldering most of the fiscal burdens of meeting the social service needs of this population (Gray 2004). States have had to address the financial costs of providing social welfare services to this population, including health care,¹⁷ and the costs of incarceration of undocumented immigrants who have engaged in criminal activities.¹⁸ These costs vary by state; however, there is evidence that border states such as California, Arizona, New Mexico, and Texas have paid a disproportionately higher financial cost than other states. A Congressional Budget Office (2007) report examining the fiscal cost of undocumented immigrants in the states found that in states such as Colorado, Iowa, Missouri, and others, state and local governments spent more money that they took in from undocumented immigrants in taxes on such services as education, health care, and law enforcement. As a consequence, the negative association of fiscal costs with undocumented immigrants is accepted by some communities. In some states, these costs are more easily visible than any benefits these migrants may bring to their communities.

Content analysis of public discourse in print media in various states reveals that there is a correlation between dominant public understandings of a problem and policy directions. For example, Thangasamy (2010) found that when dominant print media framing of undocumented immigrants portrayed them as worthy, deserving populations, then progressive public policies also followed for this group. When dominant print media framing of undocumented immigrants portrayed them as deviants and unworthy individuals, then restrictive policies appeared more likely. These findings match Schneider and Ingram's (1993) framework of framing of target populations and the likelihood of sympathetic

17 Governors in several border states including New Mexico and Arizona have at various times declared a state of emergency in some of their border counties because of escalating costs of caring for undocumented immigrant patients (Associated Press 2005). Federal legislation – the Emergency Medical Treatment and Active Labor Act (EMTALA) – requires hospitals to accept any patient who presents himself in an emergency ward. While hospitals do not have the legal ability to deny health care, there have been reports in recent years of hospitals airlifting some undocumented immigrants to their home countries, thereby also terminating any further obligations the hospitals may have had toward them (Sontag 2008).

18 Currently, the federal government reimburses states a portion of their costs in the incarceration of undocumented immigrants through the State Criminal Alien Assistance Program (SCAAP), which was created by Congress through the Immigration and Nationality Act of 1990. However, it is not clear whether these funds meet all the costs borne by states in incarcerating criminal undocumented immigrants.

or nonsympathetic types of policies being enacted.¹⁹ In a related study using content analysis, Seif (2010) examined letters to the editor in California newspapers assailing granting driver's licenses to undocumented immigrants. Seif found that the authors of these letters were not representative of Californians in general. However, their vocal advocacy of their position through letter-writing placed unique burdens on state lawmakers in terms of choosing to extend or not some benefits as driver's licenses to undocumented immigrants.

The push for restrictive policies includes efforts at repealing liberal policies as well. Opponents to liberal legislation have initiated court cases to challenge the constitutionality of legislation favoring undocumented immigrants (Lovett 2010). In early 2011, some restrictionist lawmakers in Arizona considered introducing a further restrictive bill that would stamp the birth certificates of children born to undocumented mothers in Arizona in an attempt to exclude them from American citizenship.²⁰

The Supreme Court has previously adjudicated on the constitutionality of government policies that target the treatment of immigrants in the country. Among the most important cases is *Plyler v. Doe* (1982), which challenged the constitutionality of a Texas statute that sought to impose a fee on undocumented immigrant students attending K-12 public schools. The court ruled the Texas statute unconstitutional, giving undocumented immigrant K-12 students across the country the right to public-supported K-12 education. Given particularly the increasingly and sharply restrictive bills coming from some states, especially Arizona and some of the southeastern states, the courts, in particular the US Supreme Court, may have the opportunity to adjudicate on the constitutionality not only of the content of these bills but also on whether states can legislate on immigrant treatment within the country.²¹ In the recent wave of subnational

19 To be sure, negative framing of immigrants goes back to early immigrants to this country. For example, negative descriptions of 18th-century Irish Catholic migrants as unfit migrants and other 18th-century migrants such as the Chinese migrants as also unfit have been used against various generations of immigrants (Tichenor 2002).

20 This proposed bill may be viewed as one attempt by some in Arizona to have this bill examined for its constitutionality by the Supreme Court and, hence, attempt to overturn the accepted practice of birthright citizenship through the 14th amendment. Barring such a ruling, only a constitutional amendment to bar birthright citizenship would exclude the American-born children of undocumented immigrants from American citizenship. Given the extraordinary difficulty in passing a constitutional amendment, the strategy of some restrictionists to try to compel a judicial challenge and change law through judicial action is particularly shrewd.

21 In a recent ruling challenge, the Supreme Court affirmed a recent Arizona legislation requiring all employers in that state to use a federal employment eligibility verification program (Preston 2011).

immigration policymaking, federal courts have begun to address the constitutionality of the content of bills emerging from the states.

5 Evaluating the Immigration Policy Process

In terms of a policymaking model that includes a clear problem identification, clarification of goals and values and evaluation of alternatives, the policy process as it exists for undocumented immigrants is beset with varying problem definitions and solutions across different states and localities. Variation in policies for treatment of immigrants across the country is evolving into a nationally chaotic immigration policy landscape.

Currently, there are many different problem identifications across the country as evident in the variation in state- and local-level policies, leading to outcomes that can both be viewed as humane in their treatment of undocumented immigrants and restrictive in their treatment as well. For example, in Arizona, the presence of undocumented immigrants is being represented as a breakdown in law and order. However, in neighboring New Mexico, the presence of undocumented immigrants is being defined more as a civil rights issue, in which immigrants are not defined as a threat to law and order but generally as migrants seeking a better life.²² The differences in problem identification and definition are being played out wherever states and localities have begun to engage in policymaking. Certainly, a sizeable majority of state governments are more likely to accept the restrictive type problem definitions that states such as Arizona and Alabama have successfully adopted.

The different problem definitions and identifications are leading to different policy outcomes in states and localities. If the status quo of state- and local-level immigrant policymaking continues, then we can expect to continue to see a varied patchwork of immigration and immigrant treatment laws across the country. In essence, the quilt-like and chaotic type of policymaking seen today will continue and expand unless the federal government acts to preempt and/or expressly deny state and local governments the ability to create legislation for immigrants.

Certainly, the federal gridlock on this policy issue may preclude national lawmakers from preempting the states should they decide that policy variation in the states is not acceptable; however, it would open up discussion on the merits of the

²² Currently, New Mexico has in-state tuition availability for undocumented immigrant students and issues driver's licenses to undocumented immigrants. The recently elected Republican governor of that state, Susana Martinez, has indicated she would like to roll back some of these benefits, however (Simonich 2012).

current de facto policy devolution of certain aspects of immigrant treatment. Currently, the discussion as it relates to policymaking for undocumented immigrants in the print media and on television news programs centers around either whether benefits or rights ought to be extended to undocumented immigrants or whether they should be quickly sent back to their home countries. While these are important issues, a larger and more fundamental issue is whether the nation can accept such a diversity of policy outcomes. This is a key question for debate and discussion now.²³ However, the fragmented policymaking structure at the federal level makes it difficult to move forward with policy change even if the federal government should find such diversity of immigration policy outcomes unacceptable. For advocates of immigration reform, the challenge is to develop a dominant narrative and problem definition that finds support among key communities and elected leaders. A recent study estimates that a progressive approach toward immigration, particularly in terms of regularizing the status of undocumented immigrants, may in fact lead to wage increases of both native-born workers and newly legalized workers while increasing the US GDP (Hinojosa-Ojeda 2010). Such evidence can be particularly useful for immigrant rights advocates in making their case for comprehensive immigration reform to include regularization of these immigrants.

Federal preemption in immigrant treatment policies in some areas is already present. However, federal preemption on immigration is also a patchwork of preemptory laws and policies. For example, states cannot deny K-12 public education to undocumented immigrant children as a consequence of a Supreme Court ruling in *Plyler v. Doe* (1982). In another example, the federal Emergency Medical Treatment and Labor Act (EMTALA) of 1986 requires hospital emergency units to attend to any patient, including undocumented immigrants.²⁴ These are two key acts of federal preemption in immigrant treatment. Although EMTALA was not specially addressed toward immigrant treatment, it has become a part of legislation affecting undocumented immigrants (Weiss and Martinez 1999). Thus, there is precedent of the federal government preempting other levels of governments in immigrant treatment policymaking. While the plenary power ruling in the late 19th century by the Supreme Court effectively closed the door for subnational

23 Recently, the *New York Times* editorial page, among others, has opined against the move toward restrictive policies in many states (*New York Times* Editorial 2011).

24 EMTALA is a sore point in state-federal government relations because it imposes a fiscal burden on state and local jurisdictions to serve the medical needs of undocumented immigrants who may seek health care under the provisions of this act. To be sure, since EMTALA was passed, Congress has set aside a billion dollars for reimbursement to medical care providers who serve undocumented immigrants under the mandate of this law (Gustafson 2006).

immigration control policies, no such broad ruling or federal legislative act exists to exclude states and localities from immigrant treatment legislation entirely.

Other federal preemptory interventions include the REAL ID Act, which engendered opposition from some states as a result of the unfunded nature of this mandate to bring state driver's licensing to meet stricter licensing standards introduced by the federal government (Regan and Deering 2009). Federal preemption in certain areas of state- and local-level immigrant policymaking has moved forward since the events of 9/11, although such acts were present in earlier times as well. Federal preemption has occurred through legislative acts of Congress and through rulings from the US Supreme Court. The preemptory policies of the federal government are themselves a patchwork of restricting state participation in some areas of immigrant policy legislating. Barring a wholesale federal legislative or court decision prohibiting states and localities from decision-making on immigrant policy issues, the federal government will continue to be in a rearguard position addressing bit-by-bit state and local involvement in various aspects of immigrant treatment policies.

6 Conclusions

Currently, there exists a quilt-like patchwork of immigration policies across the country with states and localities choosing to go in their own directions. Certainly, federal action such as the Real ID Act have sought to streamline some processes such as creating uniform and enhanced standards for granting a driver's license in the states. However, immigration policy as it relates to undocumented immigrants today is varied across the country. While some states or localities have chosen to turn a blind eye or even extend some benefits to this group, other jurisdictions have chosen to restrict benefits for this group. In large part, this trend of varied immigration policies has been the result of inability at the federal level to pass legislation addressing the problems that other subnational jurisdictions are addressing by themselves. Also, the quilt-like diversity of immigration policy stems from a system of federalism that allows states significant leeway in some policy areas until the federal government chooses to preempt the states.

In terms of future policymaking, particularly at the federal level, future policymaking will be influenced by reforms coming from states and localities. The fact that a significant majority of such subnational legislation is restrictive to immigrants may be a harbinger for the kind of federal legislation that may follow in the coming years. The immediate policy implications for a quilt-like immigration policy in this country is the lack of standardization of laws and essentially a lack of standardization in how one group of people—undocumented immigrants—is

treated in different parts of the country. Apart from addressing issues of policy directions, the federal government has a larger task of addressing if such a policy divergence at state and local levels is acceptable.

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