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## THE STATES OF IMMIGRATION

RICK SU\*

### ABSTRACT

*Immigration is a national issue and a federal responsibility. So why are states so actively involved? Their legal authority over immigration is questionable. Their institutional capacity to regulate it is limited. Even the legal actions that states take sometimes seem pointless from a regulatory perspective. Why do they enact legislation that essentially copies existing federal law? Why do they pursue regulations that courts are likely to enjoin or strike down? Why do they give so little priority to the immigration laws that do survive?*

*This Article sheds light on this seemingly irrational behavior. It argues that state laws are being pursued less for their regulatory impact and more for their ability to shape federal immigration policy making. States have assumed this role because, as alternative policy venues, they offer political actors a way to reframe the public perception of an issue and shift debates to more favorable ground. Moreover, states are able to exert this kind of influence without having to legally implement or effectively enforce their laws. This theory offers an explanation for why states have so frequently been drawn into policy disputes over immigration in the past, such as those that led to the major immigration reforms of 1986 and 1996. It also casts new light on more recent state responses, such as Arizona's controversial 2010 immigration enforcement law.*

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## INTRODUCTION

Is federalism in crisis? Looking at the recent controversies over immigration, one might presume that it is. Federalism is ordinarily imagined to require a clear delineation between matters delegated to the federal government and those left to the states.<sup>1</sup> And for more than a century, immigration has been widely recognized as both a national issue and a federal responsibility.<sup>2</sup> Yet in recent years there has been an avalanche of *state* activity on this issue. Since 2005, states have enacted more than one thousand laws concerning immigration.<sup>3</sup> States like Arizona and Alabama have drawn national attention and controversy by enacting elaborate enforcement schemes that are both comprehensive in scope and at odds with existing federal policies.<sup>4</sup> Through legal challenges, the federal government has sought to defend its policy-making authority and prevent the emergence of a patchwork of state standards.<sup>5</sup> Emboldened by the congressional paralysis over federal immigration reform, however, states are not only more active but they are also more

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1. See *United States v. Morrison*, 529 U.S. 598, 599 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

2. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

3. See NAT’L CONFERENCE OF STATE LEGISLATURES, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JANUARY - JUNE) (Aug. 9, 2011), available at [http://www.ncsl.org/documents/statefed/IMMIG\\_REPORT\\_FINALAUG9.pdf](http://www.ncsl.org/documents/statefed/IMMIG_REPORT_FINALAUG9.pdf).

4. See *Beason-Hammon Alabama Taxpayer and Citizen Protection Act*, 2011 Ala. Acts 535, § 9; S.B. 1070, ch. 113, 2010 Ariz. Sess. Laws 450, amended by Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070; see also 2010 Ariz. Sess. Laws at 450 (specifying in the preamble that the law is based on the theory of “attrition through enforcement”); Plaintiff’s Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 1-2, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413-SRB) (arguing that Arizona’s immigration enforcement law threatened federal policy by adopting a comprehensive and competing approach to immigration). Though the official short title of S.B. 1070 is “Support Our Law Enforcement and Safe Neighborhoods Act,” see 2010 Ariz. Sess. Laws at 468, this Article uses the popular short title “S.B. 1070.”

5. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (federal lawsuit against Arizona’s immigration enforcement law); *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (federal lawsuit against Alabama’s immigration enforcement law), *aff’d in part, rev’d in part*, 691 F.3d 1269 (11th Cir. 2012).

influential.<sup>6</sup> As such, the “free-for-all” in immigration policy making continues.<sup>7</sup>

Alas, the prospect of untangling this jurisdictional knot is remote—not because the legal questions are difficult, but because this kind of jurisdictional jostling is simply how policies in a federal system are made. Seeking specific outcomes, political actors have a strong incentive to draw states into contentious policy disputes, even when there may not appear to be a matter of state concern. This is because state policy making can shift the locus of a policy dispute, reframe the underlying issue, and build support for a particular position.<sup>8</sup> Moreover, it can have this effect even if the resulting laws are never legally implemented or even effectively enforced. It is no wonder that political actors of all kinds—from federal policymakers and national political organizations, to local officials and individual advocates—frequently turn to states to overcome political obstacles that they face. In short, as a matter of political strategy, states are often called upon to shape policy outcomes in ways that may require them to step outside their legal authority as lawmakers or even their institutional competence as regulators.<sup>9</sup>

I call this strategic use of states “venue-shifting,” and I argue that it sheds light on the role and influence of states in immigration policy making. Contrary to common perception, state involvement in immigration regulation is hardly unprecedented. States were actively involved in the years before the federal government enacted comprehensive immigration reforms in 1996. The enactment of state laws also surged in the run-up to the reforms of 1986. The state laws that emerged in these two instances not only complemented legislative efforts at the federal level, but they also became the baseline for the federal laws that followed. And they were able to do all this without ever having much of a regulatory impact.<sup>10</sup> As I demonstrate below, venue-shifting better explains the long involve-

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6. See Peter Nicholas, *Arizona Law Reshaping Reform Push*, L.A. TIMES, Apr. 27, 2010, at A7.

7. Editorial, *Stopping the Free-for-All*, N.Y. TIMES, Dec. 14, 2011, at A34.

8. See *infra* Part I.

9. See generally ANNE MARIE CAMMISA, *GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM* (1995).

10. See *infra* Part II.

ment and ongoing influence of states in immigration than traditional principles of federalism.<sup>11</sup>

I lay out venue-shifting as a theory in Part I. It is outlined generally and with reference to examples from many policy contexts in order to demonstrate the theory's robustness and broad applicability. I offer venue-shifting in part to supplement—and in part to challenge—traditional views on the federalism relationship between the federal government and the states, from those that see it largely as a matter of constitutional design to those that organize it around principles of institutional competence.<sup>12</sup> Yet I also derive my theory from the basic structure of our federal system and the incentives that it creates for political actors. Simply put, our federal system provides many opportunities for states to become involved in a variety of policy disputes, and political actors compete to seize them as a means of attaining tangible policy outcomes.

Part II turns to the issue of immigration. Here, I apply venue-shifting to a specific policy setting and plumb the theory for insights on the role of states in immigration policy making. I start here with an examination of the history of state involvement since the late nineteenth century, through which I show that the basic assumptions of my theory hold true in the immigration context. Then I turn to two case studies that examine how state activity influenced the enactment of two comprehensive immigration reform measures: the Immigration Reform and Control Act of 1986 (IRCA)<sup>13</sup> and the Illegal Immigration Reform and Immigrant Responsibilities Act of 1996 (IIRIRA).<sup>14</sup>

Part III examines how venue-shifting as a theory of state involvement holds up today. Here too, I apply the theory to two case studies. The first is the proliferation of state enforcement mandates, such as the controversial 2010 Arizona law recently considered by the Supreme Court.<sup>15</sup> The second looks at the simultaneous rise in state laws granting benefits to undocumented immigrants, which

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11. See *infra* Part I.

12. See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 23-61 (1995); Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459 (2007).

13. Pub. L. No. 99-603, 100 Stat. 3359.

14. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

15. See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

has shaped the federal debate about granting legal status and citizenship to certain undocumented immigrants.<sup>16</sup> Through these case studies, I show that emerging immigration controversies continue to follow the same script. I also use the case studies to make some predictions about what the future might hold for the state immigration laws of today.

Part IV discusses the implications of venue-shifting as a theory of state involvement for federalism generally and “immigration federalism” specifically. Through this, I show how the insights of venue-shifting challenge or complicate the current thinking about the relationship between the federal government and the states. This Part is followed by a brief conclusion.

### I. VENUE-SHIFTING AND THE ROLE OF STATES

Political actors are always looking for opportunities to strengthen their position in a policy dispute. I argue that states offer a powerful tool for doing so. Their involvement can shift the locus of a policy debate. Their influence can alter how the underlying policy question is framed. The reality of political competition dictates that, for any given issue, there is at least one side eager to alter the terms of a debate in these ways. This is why, I suggest, states are so often involved in controversial policy disputes, especially those that do not appear at first glance to be matters of state concern.

I refer to this political strategy as “venue-shifting,” and I argue that it explains the role and influence of states in policy disputes at all levels of our federal system. This theory does not attribute state involvement to the idiosyncrasies of particular states; nor does it see states defined by how jurisdictional boundaries are drawn. Rather, venue-shifting theory posits that the policy-making role of states is a function of our federal system and the incentives that this structure creates for political actors. Moreover, it suggests that the main effect of state involvement is not always regulatory. In other words, state laws cannot always be taken at face value; sometimes their

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16. See Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies and Undocumented Latino Students*, 33 REV. HIGHER EDUC. 239, 240-41 (2010); see also Jennifer Medina, *Legislature in California Is Set to Pass a Dream Act*, N.Y. TIMES, Sept. 1, 2011, at A16.

most important function is as a means of shaping policy at the federal or local level.

I outline this theory of state involvement in the following three Sections. First, I show that the structure of our federal system provides many opportunities for states to become involved in controversial policy disputes. Second, I argue that political actors compete to seize or foreclose these opportunities as a means of shaping policy outcomes. Third, I compare venue-shifting to more traditional federalism theories about the role of states in our federal system.

#### *A. The Structure of the Federal System*

My explanation for why states are repeatedly drawn into controversial policy disputes is derived from two observations about the structure of our federal system. First, it provides a number of policy venues in which substantive policies can be made. Second, the jurisdictional boundaries that divide these venues are surprisingly fluid, which allows enterprising political actors tremendous room to navigate a variety of policy disputes. As the next Section illustrates, competition over how disputes are positioned in this manner has historically been an important part of how significant policy developments are made.<sup>17</sup> Here, I look at how states contribute to this dynamic in our federal system.

States matter because they greatly expand the venues in which policy is made. This is furthered by the fact that each state offers a number of different policy venues to choose from—from the traditional division of power among the executive, the legislature, and the courts, to the growth of administrative agencies at the state level.<sup>18</sup> When local governments are added to the equation, the number of policy venues in our federal system expands exponentially. In short, the number of states in our federal system offers a diverse range of possible staging grounds for political mobilization.<sup>19</sup>

The importance of these policy venues for political actors lies not just in their numbers but also in their diversity. Whether at the

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17. See *infra* notes 34-39 and accompanying text.

18. See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 13-14 (2008).

19. See *id.* at 14.



federal or the local level, each venue provides a different roster of participants, from the decision makers themselves to those who are capable of influencing the proceedings.<sup>20</sup> Whether a court or agency, each policy venue also offers different policy-making routines, from how the agenda is set to how decisions are made.<sup>21</sup> Combined with the unique partisan makeup of different venues in every state, an institutional outlet for a wide range of positions likely exists. In other words, at any given point in time, political actors on all sides are likely to find certain policy venues that are more advantageous than others in pursuing their cause.

It helps that the jurisdictional boundaries between policy venues at the federal and state levels are more fluid than conventional legal analysis might suggest. The reason for this is twofold. First, few clear or consistent lines delineating spheres of federal and state power exist.<sup>22</sup> To be sure, federalism is often viewed as a sorting scheme for policy issues: national matters to the federal government, local concerns to the states.<sup>23</sup> In practice, however, the lines are notoriously difficult to draw and even harder to enforce. From education<sup>24</sup> and financial regulation<sup>25</sup> to housing<sup>26</sup> and environmental protection,<sup>27</sup> nearly every significant policy issue today is regulated at multiple levels in our federal system.<sup>28</sup> Moreover, jurisdictional assignments tend to rely as much on an ever-changing set

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20. See Frank R. Baumgartner & Bryan D. Jones, *Agenda Dynamics and Policy Subsystems*, 53 J. POL. 1044, 1047 (1991).

21. See *id.*

22. See, e.g., JIM ROSSI, REGULATORY BARGAINING AND PUBLIC LAW 214-15 (2005). For an argument that the Constitution was never intended or designed to establish clear boundaries between federal and state power, see EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 191 (2007).

23. See *The Chinese Exclusion Case*, 130 U.S. 581, 605-06 (1889).

24. See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006).

25. See, e.g., Johnathan Mathiesen, Note, *Dr. Spitzlove or: How I Learned to Stop Worrying and Love "Balkanization,"* 2006 COLUM. BUS. L. REV. 311.

26. See, e.g., John Kincaid, *From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption, 1780-1992*, 9 J.L. & POL. 333, 371-79 (1993).

27. See, e.g., Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 166-73 (2006).

28. See generally Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 301-15 (2005) (discussing examples of the interrelatedness of federal and state governments in modern federalism).

of legal frameworks as they do on how a policy issue is conceptually framed at any given moment.

Second, mutual delegation and intergovernmental collaboration have further undermined the significance of jurisdictional boundaries. As government programs and regulatory regimes become more complex, their implementation is increasingly dependent upon intergovernmental cooperation across the entire federal system.<sup>29</sup> This integration not only makes jurisdictional lines less significant, but it also increases the mutual influence that policy venues have on one another. For instance, because the federal government relies heavily on states to carry out public assistance programs like Medicare, states now have tremendous influence over how these programs are designed and implemented.<sup>30</sup> Similarly, because states have become dependent on federal grants, the federal government has the ability to steer state policy making even when it cannot control it outright.<sup>31</sup>

None of the features outlined here describe states in the way that they are commonly portrayed: as independent and separate sovereigns.<sup>32</sup> Taken together, however, they outline a federal system in which the role and influence of states is arguably more expansive, especially with respect to policy matters that are not traditionally understood to be within the province of states qua states.<sup>33</sup> In other words, by providing a number of ways for enterprising political actors to shift policy disputes into venues at the state level, the federal system creates strong incentives for political actors to consider the involvement of states in their policy-making strategy. I now turn to a closer examination of these incentives.

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29. See ROSSI, *supra* note 22, at 214-15.

30. See generally CAMMISA, *supra* note 9 (discussing the active role of states as policymakers in the federal system).

31. See MICHAEL D. REAGAN, *THE NEW FEDERALISM* 156-57, 160-63 (1972); JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* 116-17 (2008).

32. *E.g.*, Bradley W. Joondeph, *The Meaning of Fair Appointment and the Prohibition on Extraterritorial State Taxation*, 71 *FORDHAM L. REV.* 149, 183 (2002).

33. Many scholars have commented on the role of states in this regard, albeit through different theoretical lenses. See, *e.g.*, ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM* 98-101, 104-08 (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1284-92 (2009); Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism*, 106 *HARV. L. REV.* 1147, 1161-63 (1993); Erin Ryan, *Negotiating Federalism*, 52 *B.C. L. REV.* 1, 4-5 (2011).

### *B. The Incentives of Political Actors*

The structure of our federal system provides many opportunities for states to become involved in a number of policy issues. This Section argues that political actors compete to seize or foreclose these opportunities as a means of shaping how policy matters are resolved. Disadvantaged political actors have strong incentives to look to states as a means of strengthening their position in a policy dispute. At times, political actors seek state regulations as an alternative avenue to policy making; this is often the case when, for example, political actors want to challenge federal policies. In other situations, political actors use state involvement to alter how the underlying policy issue is framed, which can have a tremendous impact on the outcome even if the final policy resolution is made elsewhere. Both of these uses will be discussed in more detail below.

Venue-shifting assumes that political actors are interested primarily in results. To be sure, motivations may differ: whereas one policymaker might be angling for votes, another might be genuinely committed to a cause. All political actors, however, are invested in tangible policy outcomes.<sup>34</sup> As such, they are not likely to be deterred by federalism principles or jurisdictional boundaries if a policy-making opportunity presents itself. Given multiple options, political actors are likely to shoot as high as they can—few would turn their back on the chance at making national policy. But political actors will also in most cases take whatever they can get, especially if they can leverage intermediate steps into political victories higher up. Mayors interested in gun control are not likely to be content with local legislation if state or federal restrictions are possible.<sup>35</sup> Yet national political organizations seeking to legalize same-sex marriage nationwide will likely be more than happy to pursue it at

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34. See David S. Law, *Introduction: Positive Political Theory and the Law*, 15 J. CONTEMP. LEGAL ISSUES 1, 2 (2006).

35. See Elizabeth A. Harris, *Bloomberg's Gun-Limits Coalition Grows, but Finds a Hard Sell in Washington*, N.Y. TIMES, Jan. 26, 2011, at A19 (describing efforts of the organization "Mayors Against Illegal Guns" at the federal level); Jennifer Steinhauer, *At State Level, More Attempts to Limit Guns*, N.Y. TIMES, Apr. 15, 2008, at A1 (describing the influence of "Mayors Against Illegal Guns" on state gun laws).

the state level first, especially if they believe it will build political momentum for more far-reaching policies down the road.<sup>36</sup>

In this respect, venue-shifting is not a procedural technique that lies outside the world of substantive policy making. Rather, it is a vital part of the policy-making process itself. This is especially true in contentious disputes. Political actors recognize that significant policy victories are rarely won solely on the merits or persuasiveness of a proposal. As Elmer Schattschneider has argued, it is often how the scope of an issue is defined that ends up being the most important determinant of how it will eventually be resolved.<sup>37</sup> More recently, Frank Baumgartner and Bryan Jones showed that often the easiest way to shift the scope of an issue is simply to change the institutional venue in which the policy-making dispute takes place.<sup>38</sup> Indeed, looking at the history of policy making, it is often through precisely this kind of jurisdictional manipulation that significant policy developments are made.<sup>39</sup>

Venue-shifting to states is most effective when it is used as an alternative route to policy making. This is particularly true when the most direct route is blocked. Proposals that fail to gain traction at the national level, such as same-sex marriage, or at the local level, such as property tax caps, might make notable gains at the state level.<sup>40</sup> In this way, states can provide a valuable stepping stone to policy outcomes. For those facing political roadblocks at the federal level, states provide a means of *stepping down* an issue to build political support, expand the scope of participants, and showcase policy proposals on more favorable grounds.<sup>41</sup> Conversely, for those mired in local conflicts involving several communities, states

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36. See James Dao, *State Action Is Pursued on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2004, at A24 (discussing how both sides of the same-sex marriage debate are using state forums to pursue nationwide goals).

37. See E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 2-8 (1975).

38. See Baumgartner & Jones, *supra* note 20, at 1045, 1047-48.

39. See *id.* at 1049-53.

40. See ROGER L. KEMP, *HOW AMERICAN GOVERNMENTS WORK: A HANDBOOK OF CITY, COUNTY, REGIONAL, STATE, AND FEDERAL OPERATIONS* 260-63 (2002) (describing politics of property tax caps); GARY MUCCIARONI, *SAME SEX, DIFFERENT POLITICS: SUCCESS AND FAILURE IN THE STRUGGLES OVER GAY RIGHTS* 243-51 (2008) (discussing successes and failures of same-sex marriage at the state and federal levels).

41. See, e.g., MUCCIARONI, *supra* note 40, at 243-44 (describing this phenomenon in the context of same-sex marriage).

provide a means of *stepping up* an issue, contracting the scope of participants, and resolving it unilaterally at a higher level.<sup>42</sup>

A good example of this is the antinuclear energy movement in the United States. Faced with a federal agency—the Atomic Energy Commission—that was both eager to promote civilian nuclear power and averse to public input, opponents were nevertheless successful in forestalling the expansion of nuclear power in the 1970s and 1980s by leveraging sensational challenges at the state level: in state legislatures, before public utility commissions, and through ballot initiatives.<sup>43</sup> Another example is the state-based strategy pursued by critics of educational funding disparities and exclusionary zoning policies. After losing their landmark constitutional challenges before the Supreme Court in the 1970s,<sup>44</sup> both movements achieved a surprising measure of success by advancing similar legal challenges on state constitutional grounds in state courts throughout the country.<sup>45</sup>

States are also an effective means for political actors to consolidate their political gains by foreclosing challenges from rivals at the local level. This is especially useful when it is difficult for them to win in a particular local jurisdiction, or because it would take too much effort and too many resources to win in every community where opposition might be mounted. Consider, for example, the battle over gay and lesbian rights in the 1990s. When local governments began to take the lead by providing benefits to domestic partners and passing legislation to prohibit discrimination on the basis of sexual orientation, opponents in many states took aim by enacting state laws that repealed those local efforts directly, or by

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42. See, e.g., KEMP, *supra* note 40, at 263 (describing this scenario in the context of property taxes).

43. See Baumgartner & Jones, *supra* note 20, at 1053-58; Patrick A. Parenteau, *Regulation of Nuclear Power Plants: A Constitutional Dilemma for the States*, 6 ENVTL. L. 675, 675-78 (1976).

44. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977) (rejecting a claim of discrimination involving zoning policies); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973) (rejecting a constitutional challenge to education-funding disparities).

45. For education cases, see, for example, *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1357 (N.H. 1997); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989). For exclusionary zoning, see, for example, *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 731-32 (N.J. 1975).

challenging the authority of local governments to implement these policies without explicit authorization from the state.<sup>46</sup> More recently, energy companies engaged in hydraulic fracturing—or “fracking,” which is a new and controversial means of natural gas extraction<sup>47</sup>—have also turned to states as a way of circumventing their opponents. As antifracking advocates have challenged gas drilling by turning to local zoning bans on a town-by-town basis, energy companies have responded by pushing for controversial land use laws at the state level that would effectively strip local jurisdiction over the issue altogether.<sup>48</sup>

Even when states are unable to claim significant policy-making authority on a given issue, however, there is still a powerful incentive for political actors to seek out their involvement for two reasons. First, states remain prominent political platforms upon which arguments foreclosed in other institutional venues can be voiced.<sup>49</sup> This is especially true in national politics in which state laws have often been used to call attention to a political issue, maintain political pressure, or demand a federal response.<sup>50</sup> Second, efforts to draw states into a controversy often require substantial effort to reframe the underlying policy issue as one of state concern.<sup>51</sup> Though this may not succeed as a legal matter, it may still be influential on how the public perception of the issue is framed going forward.<sup>52</sup> Both of these are long-term strategies in which the impact of state

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46. See *Romer v. Evans*, 517 U.S. 620, 623-24, 633-36 (1996) (overturning a Colorado law that was enacted in order to overturn local antidiscrimination statutes in Denver, Boulder, and Aspen); *Arlington Cnty. v. White*, 528 S.E.2d 706, 708-09 (Va. 2000) (overturning a county policy providing healthcare coverage to “domestic partners” because the power to recognize same-sex unions lies in the state).

47. See Matt Willie, Comment, *Hydraulic Fracturing and “Spotty” Regulation: Why the Federal Government Should Let States Control Unconventional Offshore Drilling*, 2011 BYU L. REV. 1743, 1744.

48. See Sabrina Tavernise, *As Gas Drilling Spreads, Towns Stand Ground over Control*, N.Y. TIMES, Dec. 15, 2011, at A20.

49. See *supra* notes 18-21 and accompanying text.

50. See, e.g., Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Laws*, 118 YALE L.J. 1318, 1326-28 (2009).

51. Cf. Brainerd Currie, *The Constitution and the “Transitory” Cause of Action*, 73 HARV. L. REV. 36, 61 (1959) (“From the standpoint of the state’s concern for the welfare of its own people ... the place of injury ... [is] a mere incident.”).

52. See, e.g., Adam Liptak, *Justices to Hear Health Care Case As Race Heats Up*, N.Y. TIMES, Nov. 15, 2011, at A1.

involvement in a policy issue is not always immediately apparent. But, as a step towards specific policy outcomes, states are often just as effective in shaping policies even if they are not in a position to make policies themselves.

Take, for example, two issues in which states play a prominent role even though their regulatory authority is limited: the long-standing controversy over abortion and the recent political battle over the 2010 healthcare reform law.<sup>53</sup> Since *Roe v. Wade* was decided in 1973, the boundaries of abortion regulation have effectively become a matter of federal constitutional law.<sup>54</sup> Similarly, although the twenty-six states that sued to block implementation of the 2010 healthcare reform law raised interesting legal questions about the “individual mandate,”<sup>55</sup> it is clear that the law’s future will ultimately depend on what Congress and the President do in the next several years.<sup>56</sup> In neither of these cases are states positioned to become the primary policymakers in the foreseeable future. Yet that has not diminished the influence that they have been able to exert. For decades, a constant stream of state laws on abortion have pushed the boundaries of *Roe*, served as the basis for federal legislation, and kept the issue of abortion politically salient.<sup>57</sup> Similarly, by challenging the implementation of the 2010 healthcare reform law, states have not only been able to fuel a contentious national debate over the law but have also been successful in framing the debate almost entirely around the individual mandate.<sup>58</sup>

The state’s role in framing a policy dispute is also evident in the context of the medical marijuana debate. Not long ago, marijuana

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53. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

54. 410 U.S. 113, 164-66 (1973) (establishing a woman’s right to terminate her pregnancy as a federal right).

55. See Liptak, *supra* note 52, at A1.

56. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

57. See Devins, *supra* note 50, at 1326-30. These efforts were not local in nature. As venue-shifting predicts, national political actors played a significant role in urging state action. See Jongho Roh & Donald P. Haider-Markel, *All Politics Is Not Local: National Forces in State Abortion Initiatives*, 84 SOC. SCI. Q. 15, 20-22 (2003).

58. See generally Elizabeth Weeks Leonard, *Rhetorical Federalism: The Role of State Resistance in Health Care Decision-Making*, 39 J.L. MED. & ETHICS 73 (2011); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 155 (2010). For an analysis of the legal issues behind Virginia’s main lawsuit, see Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55, 56-58 (2012).

was viewed entirely through the lens of the federal war on drugs.<sup>59</sup> The prospect of legalization or decriminalization was thought to be impossible in American politics.<sup>60</sup> Yet today, not only are these alternatives being seriously considered but the sale of marijuana is also starting to be discussed as a potential source of tax revenue, its production and distribution as a promising economic growth sector, and its legalization as a way to redirect law enforcement resources.<sup>61</sup> This reframing was brought about almost entirely by the rise of the medical marijuana movement at the state level, which has thus far found success in several states.<sup>62</sup> This was possible even after the Supreme Court explicitly reaffirmed drug policy as a matter of federal law, which preempted any state effort to provide a medical exception.<sup>63</sup> It is still too early to tell how this conflict between federal and state law will be resolved. Even if the federal government decides to assert its authority over this field by aggressively cracking down on the proliferation of marijuana dispensaries,<sup>64</sup> it will likely be unable to change the fact that the political framing of the issue has already changed substantially because states became actively involved. The real impact of state involvement will then ultimately be in how it shapes policy decisions at the federal level in the years to come.<sup>65</sup>

Disadvantaged political actors have strong incentives to look to states to advance their policy objectives. This is true even if their ultimate goal is to effectuate reforms at a higher level. State policies may not always be their first preference. But given the realities of political competition, there is usually at least one side in a given

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59. See *Gonzales v. Raich*, 545 U.S. 1, 11-15 (2005).

60. See, e.g., Robert MacCoun & Peter Reuter, *Exploring Drug Depenalization: The Next Step After Proposal 1*, 13 MICH. ST. J. MED. & L. 449, 457 (2009).

61. See, e.g., Michael Berkey, Note, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POLY & ETHICS J. 417, 445-47 (2011).

62. *Id.* at 428-31, 438-47.

63. See *Raich*, 545 U.S. at 29-32.

64. See Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15; Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES, Oct. 8, 2011, at A10.

65. There are some in Congress that seem to be inclined to see this issue partially devolved as well. See *The Marijuana Bill*, PITTSBURGH TRIB. REV., June 26, 2011, available at 2010 WLNR 12718559 ("A bill introduced by Rep. Barney Frank, D-Mass., and Rep. Ron Paul, R-Texas, would let states legalize, regulate and tax marijuana, limiting Washington's role to cross-border and interstate smuggling enforcement.").



policy dispute eager to involve them as a means of strengthening their position and securing victory at a higher level in the future. It is for these reasons that states are so frequently drawn into controversial policy disputes, especially those that may not seem at first to be traditional matters of state concern.

### *C. The Descriptive Limits of Federalism*

Under my theory, states are frequently involved in policy disputes at other levels of the federal system as a political strategy. These are not, however, the only factors that go into determining the policy-making role of states. Federalism theories abound that purport to establish the proper allocation of state power. Some believe it should be based on the legal mandates of our constitutional structure.<sup>66</sup> Others believe it should be based on the specific institutional competencies of states, especially relative to those of the federal government.<sup>67</sup>

I do not deny the usefulness of these theories. They do, however, have one important limitation: although they might tell us a little about whether it is constitutional or wise for states to regulate a particular issue, they have limited influence on whether states will do so. The reason for this is simple: the political influence that a state law can exert on an ongoing policy dispute does not usually depend on whether the law survives constitutional scrutiny or is effectively enforced. Federalism theories may help us design an ideal political system, but without changing the political incentives that underlie our federal system, the actual behavior of states will likely continue to be determined by strategic interests rather than federalist principles.

Indeed, states do not seem to be inclined to stay within constitutional boundaries, no matter how clearly they are defined. This is especially true when the very purpose of state involvement is to

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66. See, e.g., REDISH, *supra* note 12, at 23-24, 59-61.

67. See, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 781-84 (1995); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118-20 (2010); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 817 (1998).

challenge an existing federal policy or precedent. Some suggest that clearer jurisdictional boundaries and more vigorous judicial enforcement would deter the kind of federalism battles that so often embroil controversial policy disputes.<sup>68</sup> This, of course, assumes that political actors are averse to legal controversy and dissuaded by judicial sanctions. Unfortunately, this is not often the case, especially when testing legal boundaries and raising political controversy is the whole point. By pushing for state abortion laws that run headlong into *Roe v. Wade*, political actors are not confused about Supreme Court precedent or unaware that they run a high risk of their laws being struck down. Indeed, the very purpose of these laws is to challenge the existence or relevance of *Roe* and leverage political pressure in favor of its repeal.<sup>69</sup> The fact that they create a sensational legal faceoff only enhances the law's effectiveness in this regard.

At the same time, states are not likely to be deterred from regulating in a particular field simply because they are not in the best position to do so. This is especially true if raising political awareness or pointing out shortcomings of existing federal policy is their goal. Admittedly, venue-shifting assumes that political actors are interested foremost in results. It also recognizes, however, that they will seek policy outcomes wherever they can get them, especially when they can use them to build political momentum. Many policy issues, undoubtedly, are simply not suited to regulation at the state level. It might also seem wasteful that states are enacting laws that they know are difficult for them to enforce. But it would be remiss to call these laws pointless, just as these concerns are unlikely to deter states from acting.

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The venue-shifting theory of state involvement is not a prescriptive vision of how our federal system should be organized. It also does not profess to be the purpose for which that system was

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68. See generally E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35 (2009) (describing how federalism affects corporations and asking whether an institutional effort is needed to clarify the appropriate dividing line between federal and state power).

69. See Devins, *supra* note 50, at 1326-28.

designed.<sup>70</sup> Instead, the goal of my theory is to offer a structural explanation for why states behave the way they do in controversial policy disputes. It is an attempt to explain why behavior that might seem senseless and irrational through a normative perspective of federalism actually makes perfect strategic sense from a political perspective. I leave further consideration about the implications of venue-shifting for federalism to Part IV. In the meantime, I turn to how the theory holds up under case study.

## II. STATES IN IMMIGRATION POLICY MAKING

My argument thus far is that the federal structure explains the involvement and influence of states in policy disputes at all levels of the federal system. The theory offered to explain this is rooted in the different ways that states are capable of shaping the policy-making process. It is also based on the incentives of political actors. Here, I demonstrate the usefulness of this theory by employing it to examine the controversial role of states in immigration policy making.

The reason for focusing on immigration here is twofold. First, given its legal status as an exclusive federal issue,<sup>71</sup> immigration offers a useful lens for testing the robustness of venue-shifting at the margins. In other words, immigration represents a stringent test because theoretically there should be no jurisdictional overlap between the federal government and the states on this exclusively federal issue. Nor are states in a legal position to actually *make* immigration policy.<sup>72</sup> But if their behavior is shaped more by political interests than legal boundaries, the expectation might nonetheless be that they would be drawn into the immigration controversy as a means of influencing policy making at the federal level.<sup>73</sup> Indeed, there is a long history of state involvement in immigration

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70. Although, it is worth noting that two of the Founders, Thomas Jefferson and James Madison, opportunistically solicited state support in raising their challenge against the Alien and Sedition Act of 1798, leading to a constitutional crisis. See ANDREW BURNSTEIN & NANCY ISENBERG, *MADISON AND JEFFERSON* 337-38 (2010).

71. See *infra* note 79.

72. See Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47, 47 (2008).

73. See *supra* Part I.

policy making, and states tend to become more active in the years before significant federal reforms are made.

Second, venue-shifting offers valuable insights into many of the peculiar ways that states actually respond to immigration. Specifically, it sheds light on puzzling behavior that traditional theories of federalism have difficulty explaining: why states enact legislation that essentially copies existing federal law; why states pursue regulations that are likely to be enjoined or struck down by courts; and why states so rarely prioritize the immigration laws that do survive. Construed as acts of regulation, these behaviors seem pointless and ineffectual, which is how legal observers often portray them.<sup>74</sup> Understood as a means of reframing the political debate, these responses are not so easily dismissed. Indeed, as I outline below, opponents of existing federal policy often turn to state regulations to call attention to federal laws that they believe are under-enforced, to challenge federal policies they consider misguided, or to urge the adoption of reform proposals they believe to be necessary. State laws are often able to exert this influence without ever being successfully implemented or effectively enforced.

In short, venue-shifting tells us a lot about the role of states in immigration policy making. In the next two Parts, I demonstrate this through a series of case studies. I begin by examining the history of state involvement in immigration policy making. I then turn to the role states have played in the two most recent comprehensive immigration reforms at the federal level. The first is the wave of state employer sanction laws enacted in the years leading up to the passage of the IRCA in 1986.<sup>75</sup> The second focuses on the passage of Proposition 187 in California, the burst of state activity it generated, and its impact on the IIRIRA in 1996.<sup>76</sup> Taken together, I suggest that state involvement in the immigration context has long been driven by political actors seeking to reshape the federal policy-making process.

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74. See, e.g., Patrick S. Cunningham, Comment, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?*, 42 ARIZ. ST. L.J. 411, 412 (2010).

75. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

76. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

Part III will pivot from these historical examples to today's immigration controversies. Most of the attention will be centered on Arizona's S.B. 1070, the provocative immigration enforcement law that inspired a wave of similar measures in states like Alabama and whose constitutionality was the subject of a much anticipated Supreme Court opinion.<sup>77</sup> Part III will also focus on recent state efforts to support undocumented immigrants and their effect on the prospect of a new round of "amnesty" for undocumented immigrants. Of particular interest are the in-state tuition laws that have been enacted specifically to benefit undocumented students entering higher education and the impact those laws have had on the development of the most widely supported legalization measure currently under consideration at the federal level: the Development, Relief and Education for Alien Minors Act—better known as the DREAM Act.<sup>78</sup> Although both of these state immigration efforts are still very much in progress, I show that they continue to adhere to the same script that has guided state involvement in the past. By examining these similarities, I offer some predictions about what kind of impact these state efforts are likely to have going forward.

#### *A. Immigration Policy Making in a Federal System*

The theory of venue-shifting is derived from three observations about the nature of policy making in our federal system: (1) our federalism offers many opportunities for states to become involved in a variety of policy disputes; (2) political actors look for these opportunities in order to shape policy outcomes; and (3) states are able to exert a policy-making influence without needing to have any regulatory impact. As discussed in Part I, these structural features underlie a diverse range of policy disputes, from nuclear power to medical marijuana. I show here that they apply equally to the issue of immigration.

To be sure, this position is not commonly held. Indeed, under a formal view of federalism, states have no reason to be involved in

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77. See S.B. 1070, ch. 113, 2010 Ariz. Sess. Laws 450; *Arizona v. United States*, 132 S. Ct. 2492 (2012).

78. The DREAM Act has been introduced several times. For the most recent version, see DREAM Act of 2011, S. 952, 112th Cong. (2011).

immigration at all. The power to control immigration is a uniquely federal responsibility. Given this, there should not be any state regulation of immigration. States are also not in a position to effectively implement an immigration policy. As a result, they should have little incentive to pursue them. Yet looking across the history of immigration, not only do many instances of state involvement exist, but they have also been quite influential on the course of immigration policy making. The reason, I suggest, is because the three fundamental features that underlie venue-shifting as a political strategy are also at play in the immigration context.

First, notwithstanding the constitutional origins of the federal government's plenary power over immigration,<sup>79</sup> states have always had plenty of opportunities to regulate immigration in practice. In the absence of any significant federal regulations in the nineteenth century, states eagerly filled the gap. A web of state laws limiting the admission of criminals, paupers, lunatics, and the infirm operated as this nation's first set of immigration restrictions,<sup>80</sup> whereas screening facilities like Castle Gardens in New York served as some of our nation's earliest advances in immigration enforcement.<sup>81</sup> Both of these would go on to become models for federal policy.<sup>82</sup>

State activity persisted even after the federal government began to actively occupy the field of immigration in the early twentieth century. At first glance, this may seem surprising given that it was

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79. Constitutional support for federal immigration powers is usually justified with respect to a combination of related delegated powers (the Commerce Clause, the Naturalization Powers, the War Power, the Migration and Importation Clause, and the Foreign Affairs Power), an appeal to inherent powers (national sovereignty), or with reference to the construction and structure of the Constitution (necessity, government structure, and citizenship). See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 185-95 (4th ed. 1998); see also STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY* 182-92 (1987) (discussing several "sovereign" powers used to justify the exclusion of aliens by the federal government).

80. See generally Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 *COLUM. L. REV.* 1833, 1841-84 (1993) (examining the five major categories of immigration policy implemented by state legislation prior to 1875).

81. See VINCENT J. CANNATO, *AMERICAN PASSAGE: THE HISTORY OF ELLIS ISLAND* 30-54 (2009) (providing a history of Castle Gardens).

82. See *id.* at 52-54 (discussing the transition from state to federal immigration regulation); DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 69 (2002) (noting that federal regulations "essentially nationalized state policies governing European immigration that had been struck down by the Court").

already clear at this stage that immigration was an exclusively federal issue. Nevertheless, state involvement was still possible because what actually constituted an “immigration regulation” was constantly in flux. When the federal government assumed control over admission criteria and “head taxes” as a means of regulating immigration,<sup>83</sup> states did the same by turning to “alienage” regulations that discriminated against noncitizens in such areas as land ownership and employment on government projects.<sup>84</sup> When the Supreme Court started to invalidate alienage laws as an impermissible regulation of immigration,<sup>85</sup> states simply turned to more informal means of exerting pressure. For example, by offering a number of powerful incentives to depart, states like California and Illinois were able to orchestrate the largest repatriation program in the United States during the Great Depression.<sup>86</sup> State regulations continued to test the boundaries of the federal government’s immigration power well into the late twentieth century, even as the scope of this power was expanding.<sup>87</sup> Indeed, two of these efforts—employer sanctions and benefit restrictions—will be examined in more detail below. In sum, the fluidity of “immigration regulations” as a legal category has provided states with many opportunities to participate in immigration policy making.

Second, political actors have always had strong incentives to look to states to support their efforts in shaping immigration policy. This is because states have shown themselves to be quite influential throughout the years. What is striking about the state efforts described above is how seamlessly they interact with policy developments at the federal level. In nearly every case, it appears that into each new ground that states expand their efforts—bonding require-

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83. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 192-93 (2006).

84. See, e.g., *Terrace v. Thompson*, 263 U.S. 197, 212-13 (1923) (land ownership); *Crane v. New York*, 239 U.S. 195, 195 (1915) (employment); see also, e.g., *Ohio ex rel. Clarke v. Deckenbach*, 274 U.S. 392, 396-97 (1927) (upholding local ordinance forbidding noncitizens from operating pool and billiard rooms).

85. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 65-67 (1941).

86. See FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 120, 125, 133, 149-51 (rev. ed. 2006); Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and the Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 4-10 (2005).

87. See, e.g., *infra* notes 104-10, 140-42 and accompanying text.

ments, immigration inspections, alienage regulations, employer sanctions—the federal government eventually follows.<sup>88</sup> As I will examine in more detail later, this often appears to be the case because political actors press for reform at the state and federal levels simultaneously. In other instances, however, states specifically prompt the federal government to act, as when state agitation against the Chinese in the late nineteenth century eventually led to a federal ban on Chinese immigration.<sup>89</sup> In any event, history shows that although states do not ultimately make immigration policy, their actions have tremendous influence.

For political actors involved in immigration, the influence of states is all the more important because of the volatility of immigration politics. Although exclusive federal control is often asserted as a means of ensuring clarity and uniformity,<sup>90</sup> competing priorities and conflicting interpretations often mean that neither quality exists in the federal implementation of our immigration laws.<sup>91</sup> This is especially true today as disagreements over immigration priorities lead to conflicts between the President and Congress and between successive presidential administrations.<sup>92</sup> In these cases, political actors cannot rely on continued success at the federal level, or even on the expectation that a federal law that has already been enacted will actually be prioritized. In this kind of volatile political landscape, there is great assurance in knowing that alternative means to influencing policy making and policy implementation exist at the state level.

Third, although states have long been influential in immigration policy making, that influence is not contingent on states actually being able to legally or even effectively implement immigration

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88. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1907-09 (2000) (discussing early federal law reliance on state practices); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1581-82 (2008) (explaining the growth of state activity in immigration law).

89. See ZOLBERG, *supra* note 83, at 180-84, 187.

90. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 91-106 (1995) (describing how individual states reflect their own individual state populations).

91. See *id.* at 137-38 (explaining that there is an “impatience with waste and overlap inherent in dealing with governments on several levels instead of just one”).

92. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009).



regulations of their own. In many cases, state laws have their effect simply by sending a political message. This is important because the legal authority of states in the immigration context is constrained, even if a legal case for their involvement can be made. States, moreover, have never been in a good position to enforce immigration laws. Indeed, one of the main reasons states did not rise up in protest against the federal government taking over their immigration responsibilities in the late nineteenth century was because they knew federal coordination and resources would be much more effective than the patchwork screening system that existed at the time.<sup>93</sup> This rationale remains today.

Yet, given that their ultimate interest is often in shaping federal policies, this knowledge rarely deters states. If anything, they are emboldened to act with the knowledge that their actions are more likely to provoke controversy. Courts overturned most of the anti-Chinese legislation that states enacted in the late nineteenth century.<sup>94</sup> The laws that did survive also had little impact on the influx of Chinese immigrants.<sup>95</sup> Nevertheless, this burst of legal activity, accompanied by escalating violence, prompted a firestorm of national attention that ultimately forced congressional action.<sup>96</sup> This kind of state escalation and federal response would be repeated time and time again: in response to immigrants from Japan, from southern and eastern Europe, and from Mexico and the Americas.<sup>97</sup> Indeed, as later Sections will illustrate, this appears to be precisely the pattern that led to the enactment of two of the most important federal immigration reforms in recent history.

In short, venue-shifting explains the role of states in shaping federal immigration policy since the late nineteenth century. The history of immigration policy making meets all of its underlying assumptions. First, immigration is a federal responsibility, but the

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93. See, e.g., LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 5-6 (1995).

94. See, e.g., *In re Lee Sing*, 43 F. 359, 360-61 (C.C.N.D. Cal. 1890) (one of many cases striking down anti-Chinese legislation).

95. See ZOLBERG, *supra* note 83, at 181-83.

96. See *id.* at 187.

97. See generally Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19-27 (2007) (explaining how “[s]tate laws ... are an important influence on Congress’s agenda”).

fluidity of legal boundaries in this area provides states many opportunities to get involved. Second, political actors have strong incentive to look to states as a means of building political support for federal policy, especially given the political volatility that surrounds the issue of immigration. And third, as a means of shaping the immigration debates, the influence of states has not historically been tied to whether state laws are legally enforceable or capable of being effectively implemented. To be sure, this Section paints this background in broad strokes. In the case studies to follow, each of these elements are examined in much closer detail.

### *B. State Employer Sanction Laws and the Road to IRCA in 1986*

This Section examines the road to Congress's first significant response to the problem of undocumented immigration. Specifically, it focuses on the role that states played in the political negotiations leading up to the enactment of the IRCA.<sup>98</sup> The issue of undocumented immigration was actually created in large part by the Immigration and Nationality Act of 1965,<sup>99</sup> which was meant to liberalize our immigration system.<sup>100</sup> By abolishing the national-origin quota system that had been in place for most of the twentieth century, it opened America's doors to immigration from many regions that had been severely restricted or altogether foreclosed before.<sup>101</sup> But for the first time it also imposed a limit on immigration from countries in the Western Hemisphere, including Mexico.<sup>102</sup> Coupled with the expiration of long-standing guest worker programs,<sup>103</sup> these legal changes set the stage for the rise of undocumented immigration.

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98. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

99. Pub. L. No. 89-236, 79 Stat. 911.

100. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3004 n.162 (2006) (discussing this perception).

101. Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 *WHITTIER L. REV.* 119, 126 (2008) (describing this facet of the legislation as one of "the most creative moments in Anglo-American law").

102. See ZOLBERG, *supra* note 83, at 332-35.

103. See *id.* at 334-35.

### 1. *The State Response*

Agitation over undocumented immigration began soon after the Immigration and Nationality Act of 1965 was enacted. Indeed, California was soon in the spotlight for enacting the first employer sanction law in the nation in 1971.<sup>104</sup> Targeting the “employment magnet” that many believed to be the main cause of undocumented immigration, California made it illegal for employers to “knowingly employ an alien ... not entitled to lawful residence in the United States.”<sup>105</sup> It also authorized state officials to investigate and impose monetary sanctions against employers found to have hired undocumented immigrants.<sup>106</sup> As the first of its kind, this employer sanction law incited considerable controversy and interest. It was soon joined by similar laws in Connecticut and Kansas, which were enacted in 1972 and 1973 respectively.<sup>107</sup> Delaware, Massachusetts, and New Hampshire joined them in 1976,<sup>108</sup> while Florida, Maine, Montana, Vermont, and Virginia followed a year later.<sup>109</sup> Louisiana kept the issue alive by enacting its employer sanction law in 1979.<sup>110</sup>

Legal questions about the proper scope of state power in immigration drove much of the controversy over these laws. Indeed, the legality of California’s action was challenged in court immediately after it was enacted for infringing on the federal government’s immigration powers.<sup>111</sup> But the issue of employer sanctions tran-

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104. Act of Nov. 8, 1971, ch. 1442, 1971 Cal. Stat. 2847 (repealed 1988).

105. *Id.* § 1(a).

106. *Id.* § 1(b).

107. Act of May 24, 1972, 1972 Conn. Acts 451 (Spec. Sess.) (codified at CONN. GEN. STAT. ANN. § 31-51k (West 2012)); Act of Mar. 31, 1973, ch. 140, 1973 Kan. Sess. Laws 522 (repealed 2011).

108. Act of July 7, 1976, ch. 517, 60 Del. Laws 1793 (repealed 1995); Act of Oct. 20, 1976, ch. 452, 1976 Mass. Acts 641 (codified at MASS. GEN. LAWS ANN. ch. 149, § 19c (West 2012)); Act of May 26, 1976, ch. 31, 1976 N.H. Laws 42 (codified at N.H. REV. STAT. ANN. § 275-A:4-a (2012)).

109. Act of Oct. 1, 1977, ch. 77-250, 1977 Fla. Laws 1192 (codified as amended at FLA. STAT. ANN. § 448.09 (West 2012)); Act of Oct. 24, 1977, ch. 116, 1977 Me. Laws 170 (codified as amended at ME. REV. STAT. tit. 26, § 871 (2011)); Act of Mar. 19, 1977, ch. 56, 1977 Mont. Laws 239 (codified at MONT. CODE ANN. § 39-2-305 (2011)); Act of May 5, 1977, 1977 Vt. Acts & Resolves 320 (codified at VT. STAT. ANN. tit. 21, § 444a (West 2012)); Act of Mar. 27, 1977, ch. 438, 1977 Va. Acts 651 (codified as amended at VA. CODE ANN. § 40.1-11.1 (West 2012)).

110. Act of July 18, 1979, 1979 La. Acts 1498 (codified as amended at LA. REV. STAT. ANN. § 23:992 to :994 (2011)).

111. *See De Canas v. Bica*, 115 Cal. Rptr. 444, 446 (Ct. App. 1974).

scended the federal-state divide. By all accounts the campaign for employer sanctions was concurrently waged at both levels. Employer sanctions were considered in Congress as early as 1952, and a bill was introduced in 1971 immediately following the enactment of the California law.<sup>112</sup> Seizing upon California's success, Congress specifically devoted two days of hearings on the bill.<sup>113</sup> An employer sanction bill passed the House of Representatives before expiring in the Senate in both 1972 and 1973,<sup>114</sup> the same years that Connecticut and Kansas enacted their versions.<sup>115</sup> Federal efforts to pass employer sanctions were repeated throughout the 1970s, including a major push by President Carter in 1977, which was precisely when state activity on this issue peaked.<sup>116</sup> In short, during the entire time that states were debating employer sanctions, a concerted effort was also in place to adopt them as federal law. Moreover, these efforts were mutually reinforcing. Repeated failures to enact employer sanctions at the federal level spurred states to pursue legislation in their stead. At the same time, with every successful enactment at the state level, pressure for federal action mounted.

As a matter of political strategy, there was good reason for supporters of employer sanctions to encourage state action on the issue. This campaign for employer sanctions was also directed towards states for another reason: it was an area of law in which a convincing case for state involvement can be most easily made. Although federal power over immigration had long been established, indirect regulations that targeted the behavior of native residents and businesses as a means of regulating immigrants—as employer sanctions sought to do—were not yet a common feature of our immigration system.<sup>117</sup> Moreover, employment regulations were still

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112. See Kitty Calavita, *California's "Employer Sanctions" Legislation: Now You See It, Now You Don't*, 12 POL. & SOC'Y 205, 205-06 (1983).

113. See *id.*

114. See Kitty Calavita, *The Contradictions of Immigration Lawmaking: The Immigration Reform and Control Act of 1986*, 11 LAW & POLY 17, 23-24 (1989).

115. See *supra* note 107 and accompanying text.

116. See Calavita, *supra* note 114; Alan K. Simpson, *The Politics of Immigration Reform*, 18 INT'L MIGRATION REV. 486, 490-92 (1984).

117. See Stumpf, *supra* note 88, at 1583-84 (explaining that congressional attempts to control illegal immigration through employer sanctions began in 1974 and gained prominence in 1986 with the passage of the IRCA).

widely seen at this time as a traditional matter of state concern.<sup>118</sup> It was precisely because the issue of employer sanctions occupied this jurisdictional overlap between traditional spheres of federal and state power, however, that state involvement proved to be particularly effective. States were able to argue that their actions were prompted by the failings of federal regulation and enforcement, which were now seriously impacting a core interest of the state.<sup>119</sup> They were also able to claim that their response was appropriately tailored—by focusing on the action of employers, they limited their regulatory efforts to traditional spheres of state power.<sup>120</sup>

These arguments proved influential when the question of state employer sanctions reached the Supreme Court in the case of *De Canas v. Bica*.<sup>121</sup> In the state appellate court, the California law was held unconstitutional because it “encroache[d] upon, and interfere[d] with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration.”<sup>122</sup> In a surprising turn, however, the Supreme Court reversed. Writing for a unanimous court, Justice Brennan began by stressing that not every “state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power.”<sup>123</sup> He then continued to hold that, absent explicit federal legislation on the matter, the California employer sanction law fell within the state’s general police powers and was not pre-empted by existing federal law.<sup>124</sup> In addition to having technical concerns about the scope of federal preemption, the Court was also won over by the argument that the issue of employment regulation, especially when the protection of workers was involved, was a traditional area of state concern. Indeed, the Court went as far as to suggest that the economic impacts of undocumented immigrants on

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118. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

119. See, e.g., *id.*

120. See Calavita, *supra* note 112, at 211-13.

121. 424 U.S. 351.

122. *Dolores Canning Co. v. Howard*, 115 Cal. Rptr. 435, 444 (Ct. App. 1974). The California court deciding *De Canas* cited *Dolores* in holding that the California law was “in conflict with the national law and policy. These are remedies which ... may not be utilized by the states.” *De Canas v. Bica*, 115 Cal. Rptr. 444, 447 (Ct. App. 1974).

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

124. *Id.* at 356-57.

the state's fiscal interests and labor markets were "essentially local problems."<sup>125</sup>

## 2. *The State Impact*

*De Canas* was a landmark victory for states. And as predicted, the decision led to an explosion of state laws prohibiting employers from hiring undocumented immigrants.<sup>126</sup> There was, however, one major problem: there did not appear to be interest in actually implementing these laws at the state level.

For all the state effort put into enacting and defending state employer sanctions, there was little evidence that states cared about their enforcement. Reviewing reported cases in 1984, one study failed to find a single successful prosecution.<sup>127</sup> A report published in 1986 had more luck but still found only a handful of instances.<sup>128</sup> To be sure, even with the Supreme Court's blessing, state employer sanction laws continued to face a number of obstacles to enforcement: resistance by lower courts, reluctance by local officials, and noncooperation by federal authorities.<sup>129</sup> Yet, as Kitty Calavita argued with respect to the California law, it was already largely "symbolic" the moment it was enacted.<sup>130</sup>

One might ask whether all this legislation was for naught. Calavita titled an earlier report on California's employer sanctions "The Case of the Disappearing Law."<sup>131</sup> But the law never actually

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125. *Id.* at 357.

126. Nine of the eleven states that enacted employer sanctions did so after 1974, when *De Canas* was decided. See *supra* notes 108-10.

127. See Kathleen M. Johnson, Note, *Coping with Illegal Immigrant Workers: Federal Employer Sanctions*, 1984 U. ILL. L. REV. 959, 968-69 & n.69.

128. ANNE LISE ANDERSON, *ILLEGAL ALIENS AND EMPLOYER SANCTIONS: SOLVING THE WRONG PROBLEM* 7 (1986), available at <http://andrsn.stanford.edu/Other/illegal.html> ("[A]s of 1983 neither California nor Florida had prosecuted any cases under their respective laws, and only five convictions had been attained throughout the country in the eleven jurisdictions having employer sanctions legislation."); see also Carl E. Schwarz, *Employer Sanctions Laws, Worker Identification Systems, and Undocumented Aliens: The State Experience and Federal Proposals*, 19 STAN. J. INT'L L. 371, 382-83 (1983) (reporting that prosecution has only occurred in two states—Montana and Virginia).

129. See Schwarz, *supra* note 128, at 383-91.

130. See Calavita, *supra* note 112, at 214.

131. See KITTY CALAVITA, *CTR. FOR U.S.-MEXICAN STUDIES, CALIFORNIA'S EMPLOYER SANCTIONS: THE CASE OF THE DISAPPEARING LAW* 3-4 (Research Report Series, 39, 1982)

went away; it simply became federal policy. Indeed, nearly every aspect of California's employer sanction law survived as federal provisions in the IRCA.<sup>132</sup> Moreover, it continues as a cornerstone of federal immigration law today, even as support for the other components of IRCA—for example, broad legalization for undocumented immigrants—have faltered.<sup>133</sup> In this respect, the immigration policy of eleven states became the new national baseline for every state in the country—and not for the reasons offered by more traditional accounts of federalism. These states did not serve as true “laboratories” of policy experimentation<sup>134</sup> in demonstrating the wisdom or effectiveness of these laws. After their sensational enactment, there was no corresponding effort to actually implement these laws. As a result, federal government action to reconcile an emerging patchwork of competing state standards was not really necessary. Nevertheless, none of this took away from the influence that these state laws were able to exert on federal policy making.

In the enactment of IRCA, then, venue-shifting is once again used as a political strategy. Because employer sanctions were an innovation in immigration regulation, states were able to claim jurisdiction by exploiting the legal uncertainty about the federal government's occupation of the field. Political actors at the federal and state levels were emboldened by state involvement because it kept the issue of employer sanctions alive, and because it framed the issue of undocumented immigration around the so-called “employment magnet.”<sup>135</sup> By shifting the locus of the immigration debate into state forums, these state laws might have also made it easier to think about federal immigration regulations in a different light—not just at the border but involved in regulations directed at the nation's interior as well.<sup>136</sup> All of this was possible even though the political will and

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(arguing that “the Arnett Law, for all practical purposes, has been repealed”).

132. See 8 U.S.C. § 1324a (2006); see also Stumpf, *supra* note 88, at 1590 (“Similar to the California statute that served as its model, IRCA imposes criminal penalties, namely fines and imprisonment, on employers with a pattern or practice of violating its provisions.”).

133. See Stumpf, *supra* note 88, at 1590-93 (remarking on the continued relevance in contemporary society).

134. See *infra* notes 299-303.

135. See, e.g., Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1512-13 (1995) (recounting the “magnet” perception lasting into the 1990s).

136. See Stumpf, *supra* note 88, at 1583.

institutional capacity required to implement these laws did not exist. In the end, however, the ultimate success of these state efforts was ensured not by their judicial victory in *De Canas v. Bica* but rather in the political sphere through the enactment of IRCA in 1986.

*C. Proposition 187, Reimbursement Lawsuits, and the Road to IIRIRA in 1996*

Despite its promises, IRCA did not resolve the undocumented immigration issue. Legalization put millions of undocumented immigrants on the path to citizenship.<sup>137</sup> Yet employer sanctions did little to prevent the undocumented population from growing.<sup>138</sup> By the 1990s, political momentum for other ways of stemming the flow of undocumented immigrants took hold, leading to the enactment of the IIRIRA.<sup>139</sup> I examine here the prominent role that states played in the political negotiations that led to this significant reform of federal immigration law. Indeed, the particular manner in which states intervened in immigration policy making had a major impact on how the problem of undocumented immigration was framed and how IIRIRA was designed in response.

*1. The State Response*

California was once again at the center of state immigration policy making in the 1990s. But unlike the employer sanction law of 1971, its involvement came about through a different political process: the ballot initiative. In 1994, a political organization named "Save Our State" gathered enough signatures to place what would become Proposition 187 on the California ballot.<sup>140</sup> When it was first introduced, the issue of undocumented immigration was not even among the top ten issues that concerned California voters.<sup>141</sup> After

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137. See TICHENOR, *supra* note 82, at 261-62.

138. See *id.* at 262-63.

139. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

140. ROBIN DALE JACOBSON, *THE NEW NATIVISM: PROPOSITION 187 AND THE DEBATE OVER IMMIGRATION*, at xiii, xvii (2008).

141. Nancy H. Martis, #187 *Illegal Aliens. Ineligibility for Public Services. Verification and*



it won a decisive victory in September of the same year, however, similar laws were considered in states across the country. The issue of undocumented immigration rose to become a major issue in California and on the national stage.<sup>142</sup>

Proposition 187 is best known for prohibiting undocumented immigrants from receiving public social services, nonemergency healthcare, and public education.<sup>143</sup> The goal was twofold: first to reduce the fiscal costs of undocumented immigrants, and second to eliminate the public services and benefits that some believed to be the “magnet” for undocumented immigration.<sup>144</sup> Aside from these provisions, Proposition 187 also contained a number of enforcement-oriented measures. The law made it a felony offense to manufacture, distribute, sell, or use false citizenship or immigration documents.<sup>145</sup> It also required all law enforcement officials to verify the immigration status of anyone who was arrested and to otherwise fully cooperate with federal immigration enforcement efforts.<sup>146</sup> Moreover, it specifically forbade any local government or law enforcement agency in the state from limiting or restricting the ability of its officials to cooperate with federal authorities on immigration.<sup>147</sup> This last provision is worth noting because it targeted so-called “sanctuary cities” within California that had promulgated policies limiting local cooperation in federal immigration enforcement efforts.<sup>148</sup> In other words, for longtime opponents of local opposition to active immigra-

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*Reporting.*, CAL. VOTER FOUND. (1994), <http://www.calvoter.org/archive/94general/props/187.html>.

142. See ANDREW WROE, *THE REPUBLICAN PARTY AND IMMIGRATION POLITICS: FROM PROPOSITION 187 TO GEORGE W. BUSH 2-3* (2008).

143. Proposition 187's initiatives are codified at CAL. GOV'T CODE § 53069.65 (West 2012); CAL. EDUC. CODE § 48215(a) (West 2006); CAL. WELF. & INST. CODE § 10001.5 (West 2001); CAL. HEALTH & SAFETY CODE § 130(a) (West 1990).

144. See JACOBSON, *supra* note 140, at 84-85; see also Johnson, *supra* note 135, at 1512-13, 1539-40.

145. Phillip Martin, *Documentation, Proposition 187 in California*, 29 INT'L MIGRATION REV. 255, 255 (1995).

146. GOV'T § 53069.65; see also Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance of Race*, 70 WASH. L. REV. 629, 632-33 (1995).

147. GOV'T § 53069.65.

148. See, e.g., Ronald J. Ostrow, *Big Cities Criticized for Failing to Cooperate with INS*, L.A. TIMES (Nov. 11, 1993), [http://articles.latimes.com/print/1993-11-11/news/mn-55561\\_1\\_illegal-immigrants](http://articles.latimes.com/print/1993-11-11/news/mn-55561_1_illegal-immigrants) (describing the cities in California with nonenforcement policies prior to Proposition 187's enactment).

tion enforcement, Proposition 187 was a way of stepping up this issue from the local to the state level.

It is easy to think of Proposition 187 as a quirk of California politics. Yet this overlooks the extent to which Proposition 187 was entangled with the national political conversation and national political actors.<sup>149</sup> The chief architects and financial supporters of Proposition 187 were the Federation for American Immigration Reform (FAIR) and the Pioneer Fund—both major political organizations interested foremost in national policy reform rather than immigration policies tailored to specific states.<sup>150</sup> The authors of Proposition 187 were prominent figures in federal politics: Alan Nelson, who served as the Commissioner of the Immigration and Naturalization Service (INS) under President Reagan; and Harold Ezell, who was the western regional commissioner for INS at the same time.<sup>151</sup> It was also clear that the authors of Proposition 187 were primarily interested in federal policies. Ezell argued that “[t]here’s no need for another Proposition 187 in any other state if Congress does its job.”<sup>152</sup> Similarly, Nelson explained that the reason he included an education ban that ran headlong into the Supreme Court’s precedent in *Plyler v. Doe*, which forbade states from denying free public education to undocumented students,<sup>153</sup> was precisely “to provoke court action. There’s nothing new about getting decisions reversed when circumstances have changed, and in immigration terms, we are a world away from 1982 [when *Plyler* was decided].”<sup>154</sup> Even California’s Governor Pete Wilson called for a national version of Proposition 187.<sup>155</sup>

Although the original backers of Proposition 187 were primarily interested in national policy, it also made sense for them to pursue these specific reforms through state politics. California offered a prominent political platform for these proposals and a convenient

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149. See JACOBSON, *supra* note 140, at xvii-xviii (examining the political battles and tension that developed around Proposition 187).

150. *Id.* at 111-14; WROE, *supra* note 142, at 80-82.

151. WROE, *supra* note 142, at 57-61.

152. *Id.* at 117.

153. 457 U.S. 202, 230 (1982).

154. Herman Schwartz, Op-Ed., *The Constitutional Issue Behind Proposition 187*, L.A. TIMES (Oct. 9, 1994), [http://articles.latimes.com/1994-10-09/opinion/op-48272\\_1\\_illegal-immigrants](http://articles.latimes.com/1994-10-09/opinion/op-48272_1_illegal-immigrants).

155. See WROE, *supra* note 142, at 117.

mechanism for placing them before a large electorate. Moreover, states like California were in a good position to claim jurisdictional authority. By focusing on the fiscal costs of immigration and the public benefits that immigrants received, Proposition 187 tapped into an emerging jurisdictional overlap between the federal government and the states.<sup>156</sup> Immigration may be a federal matter, but the provision of social services and public benefits was a major state concern.<sup>157</sup> Facing major budget deficits, Governor Wilson quickly seized upon Proposition 187 to cast blame on the federal government for California's fiscal woes.<sup>158</sup> That point was further strengthened when the State filed a sensational lawsuit against the federal government demanding reimbursement for the cost incurred by undocumented immigrants, which the State portrayed as a federal responsibility.<sup>159</sup> From this perspective, immigration could be sensibly understood as a matter of "states' rights." As Governor Wilson argued in support of Proposition 187: "California will not submit its destiny to faceless federal bureaucrats or even congressional barons.... California is a proud and sovereign state, not a colony of the federal government."<sup>160</sup>

Backed by national political organizations and cast as a matter of state concern, Proposition 187 triggered a wave of political activity in states across the country. After its introduction in California, efforts to adopt similar legislation under the "187" moniker spread to fifteen other states including Arizona, Washington, Oregon, and Florida.<sup>161</sup> To be sure, none of these efforts would ultimately prove

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156. See Johnson, *supra* note 135, at 1539-40.

157. See Kristen M. Schuller, Note, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 308-09 (1996) (making this argument for constitutionality).

158. See WROE, *supra* note 142, at 48.

159. See JACOBSON, *supra* note 140, at 71; see also *California v. United States*, 104 F.3d 1086, 1089 (9th Cir. 1997).

160. William Claiborne, *Wilson Challenges Hill to Match His Hard Line*, WASH. POST, Jan. 10, 1995, at A7. Many leaders in the federal government began to embrace this message. See, e.g., Kenneth J. Cooper, *House Votes to Reimburse State Prison Costs*, WASH. POST, Feb. 10, 1995, at A16 (quoting then-House Speaker Newt Gingrich: "I really do believe [it] is a federal responsibility because I think that if the federal government fails to secure the borders, it's unfair to simply dump on one or two states the burden of federal failure." (alteration in original)).

161. See Ann Davis, *The Return of the Nativists*, NAT'L L.J., June 19, 1995, at A1 (discussing the rise of state attempts to pass anti-immigration statutes modeled after

successful in the two years between Proposition 187's enactment and the federal response in 1996.<sup>162</sup> Yet the political controversy it generated in states all across the country cannot be easily dismissed. In addition, the sense of political crisis was heightened by a series of sensational lawsuits filed by state and local officials seeking federal reimbursement for benefits and services provided to undocumented immigrants. Florida took the lead by filing suit in April 1994,<sup>163</sup> with California following shortly after.<sup>164</sup> Later, officials filed similar suits in New York,<sup>165</sup> New Jersey,<sup>166</sup> Arizona,<sup>167</sup> and Texas.<sup>168</sup> As the lawsuits proliferated, the legal claims were no longer restricted to undocumented immigrants; many of the later cases started to allege that the federal government had failed to internalize the fiscal costs of *legal* immigration as well.<sup>169</sup>

## 2. *The State Impact*

Proposition 187 and the rash of reimbursement lawsuits that it triggered had tremendous political influence on the development of federal immigration policy in the 1990s. None of this, however, was due to their legal or regulatory impacts. The various state lawsuits seeking federal reimbursement were all dismissed on the merits or as nonjudicial.<sup>170</sup> Proposition 187 did not fare much better. Its enactment was immediately denounced by local officials in California's largest cities, many of whom refused to implement its provi-

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California's Proposition 187).

162. See, e.g., Patrick J. McDonnell, *Anti-Illegal Immigration Proposition Fails to Qualify for Arizona Ballot*, L.A. TIMES (July 15, 1996), [http://articles.latimes.com/print/1996-07-15/news/mn-24427\\_1\\_illegal-immigrants](http://articles.latimes.com/print/1996-07-15/news/mn-24427_1_illegal-immigrants) (describing the failure of "Arizona 187" and "Florida 187" to make it onto the ballot).

163. See Raymond Tatalovich, *Official English as Nativist Backlash, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 78, 93 (Juan F. Perea ed., 1997); see also *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).

164. See *California*, 104 F.3d 1086; Tatalovich, *supra* note 163, at 93.

165. *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996).

166. *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996).

167. *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997).

168. *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

169. See, e.g., Appellants' Brief at 3-5, *Padavan*, 82 F.3d 23 (No. 95-6156) (seeking compensation for the "disproportionate impact on New York of otherwise *legal immigration* to the United States and the massive and uncontrolled influx of aliens" (emphasis added)).

170. See *supra* notes 163-68 and accompanying text.

sions.<sup>171</sup> In any event, there was no need for them to do so: all of Proposition 187's central provisions were enjoined by federal courts almost immediately after it was enacted.<sup>172</sup> Given that Proposition 187 was drafted in part to challenge Supreme Court precedent, the legal challenge against the law was, of course, anticipated and welcomed.<sup>173</sup> Yet when the injunction was finally ripe for appeal in 1998, the State instead sought a mediated agreement that maintained the injunction.<sup>174</sup> In the years since the enactment of Proposition 187, California's leadership had changed and the state was no longer supportive of the law.<sup>175</sup> Thus, by the 1990s, Proposition 187 was all but dead as a legal matter.

The legal challenge against Proposition 187 led to its demise. It did not, however, dampen Proposition 187's impact—nearly every one of its provisions had already become federal law. The comprehensive reforms of 1996, which included the passage of the IIRIRA and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), were based explicitly on the same benefit-restriction theme that underlaid Proposition 187 and the state reimbursement lawsuits. With the sole exception of public education, undocumented immigrants were specifically denied all the public services and benefits that Proposition 187 identified.<sup>176</sup> As PRWORA explained, it was now “a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”<sup>177</sup> But federal law also went further. The new laws imposed severe restrictions upon legal immigrants to ensure that “the availability of public benefits not constitute an incentive for immigration to the United States.”<sup>178</sup> Receipt of federal

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171. Editorial, *Why Proposition 187 Won't Work*, N.Y. TIMES, Nov. 20, 1994, at E14.

172. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

173. See Schwartz, *supra* note 154.

174. See WROE, *supra* note 142, at 109-10.

175. See *id.* at 108.

176. See, e.g., *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, 3009-670 to -689 (“Restrictions on Benefits for Aliens”); *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2105, 2260-77 (“Restricting Welfare and Public Benefits for Aliens”).

177. *Personal Responsibility and Work Opportunity Reconciliation Act* § 400(6) (codified as amended at 8 U.S.C. § 1601(6) (2006)).

178. *Id.* § 400(2)(B) (codified as amended at 8 U.S.C. § 1601(2)(B)).

benefits was curtailed.<sup>179</sup> States were also authorized to do the same for their own programs, including making distinctions between different categories of legal immigrants in ways that had been questioned by the Supreme Court.<sup>180</sup>

Benefit restrictions, however, were not all that Proposition 187 and the comprehensive reforms of 1996 shared. Federal law also incorporated the various enforcement measures contained in California's initiative. Criminal penalties were increased and new crimes were created for those that either used or enabled the use of false identity documents to claim immigrant admission, public benefits, or employment.<sup>181</sup> Federal law also adopted Proposition 187's "anti-sanctuary" provision, barring any state or local official from refusing to participate in federal immigration enforcement efforts.<sup>182</sup> Federal lawmakers went further to encourage verification of immigrant status at the state and local level by requiring federal agencies responsible for immigration to respond to any and all inquiries from state and local officials.<sup>183</sup> Indeed, taken as a whole, it appeared that the federal law incorporated nearly all the provisions of Proposition 187 in one way or another. Moreover, federal policy was beginning to reflect the idea that states and localities might play an important enforcement role as well.

The enactment of IIRIRA in 1996 showed how state involvement was capable of shaping federal immigration policies. States were able to exert this influence without having to implement any regulation or actually prevail in a legal challenge. At the most basic level, Proposition 187 and the state lawsuits that followed served as an important political platform for drawing public attention to the issue of undocumented immigration and setting forth a proposal about how it should be handled. As noted earlier, when Proposition 187 was first introduced, immigration was not especially prominent as a matter of state or national concern.<sup>184</sup> Party leaders were also

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179. *Id.* § 401 (codified as amended at 8 U.S.C. § 1611).

180. Illegal Immigration Reform and Immigrant Responsibility Act § 553; *see also* *Graham v. Richardson*, 403 U.S. 365, 381-83 (1971).

181. Illegal Immigration Reform and Immigrant Responsibility Act § 334.

182. *Id.* § 642(a)-(b).

183. *Id.* § 642(c).

184. *See* Martis, *supra* note 141; *see also* JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* 212 (1999).

wary of delving into the issue.<sup>185</sup> Much of that changed with the introduction and success of Proposition 187 at the polls.<sup>186</sup> If it was possible to ignore the issue before, these state activities demanded federal attention on immigration.<sup>187</sup> In this respect, political actors, like the authors of Proposition 187 and California Governor Wilson, were able to leverage a ballot initiative into a national controversy that made federal reforms much more likely.

State activity also influenced the types of reform that arose by reframing the issue of immigration in the political conversation. If the “employment magnet” was the theme of the 1980s, prompted in large part by the state employer sanction laws that led up to that debate,<sup>188</sup> Proposition 187 and the reimbursement lawsuits centered the focus in the 1990s squarely on the issue of the so-called “benefits magnet.”<sup>189</sup> Proposition 187 enshrined the theory that immigrants were entering the U.S. illegally to take advantage of social services like public education and welfare.<sup>190</sup> The emphasis on the fiscal costs of immigration after the introduction of Proposition 187 cannot be understated: questions about the financial strain of immigration and the relative burdens that each level of government had to bear dominated the political debates leading up to the 1996 reforms. Proposition 187 was bookended by three major reports about what burdens immigrants imposed on states and localities.<sup>191</sup> As a result, nearly all of the political commentary and academic discourse were

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185. See, e.g., WROE, *supra* note 142, at 64.

186. See GIMPEL & EDWARDS, *supra* note 184, at 201-02.

187. See, e.g., Frank del Olmo, *Perspective on Proposition 187: Muddle Now Yields to Congress*, L.A. TIMES, Nov. 26, 1995, at M5 (arguing that the loss of Proposition 187 in court “has virtually guaranteed that Congress will now finish rewriting the nation's immigration laws”).

188. See *supra* Part II.B.

189. See Johnson, *supra* note 135, at 1512-13.

190. See Janet L. Dolgin & Katherine R. Dietrich, *When Others Get Too Close: Immigrants, Class, and the Health Care Debate*, 19 CORNELL J.L. & PUB. POL'Y 283, 300-05 (2010) (demonstrating the link between public fears about the economic burden of immigrants in California, the eventual enactment of the federal immigration reforms of 1996, and the belief that “immigrants to the United States were motivated by the opportunity to obtain social benefits”).

191. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-95-22, *ILLEGAL ALIENS: ASSESSING ESTIMATES OF FINANCIAL BURDEN ON CALIFORNIA* (1994), available at <http://www.gao.gov/archive/1995/he95022.pdf>; REBECCA L. CLARK ET AL., *THE URBAN INST., FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES* 50, 56 (1994); DONALD HUDDLE, *CARRYING CAPACITY NETWORK, THE COSTS OF IMMIGRATION* (1993).

focused on the accuracy of these findings and what implication, if any, they should have on how our immigration policy should be reformed.<sup>192</sup>

As was the case in 1986, states also appeared to play an important role in setting the agenda for immigration policy making in 1996. States entered the conversation by focusing on the impact that immigration had on the states' traditional responsibilities over education, healthcare, and public benefits. Through this window, they ignited a contentious public debate that centered on the fiscal cost of immigration and the need to increase penalties on those that supported undocumented immigrants. Furthermore, they did this in the absence of any real regulatory effect.

There is one twist to the success of states in this particular case, however: it may have actually hurt the fiscal interests of the states in the long term. Although the 1996 reforms gave states the authority to deny undocumented and legal immigrants certain public benefits, they also pulled the federal government out of funding federal means-tested programs for those immigrants as well.<sup>193</sup> This comported with the political message that states were sending about "benefits magnets." But it also meant that if states wanted to provide some assistance to legal immigrants, they would have to do it without any federal matching funds. This was precisely what happened. Not only did nearly every state ultimately decide to provide some of these benefits but they did so entirely from their own coffers.<sup>194</sup> Because of the tremendous cost that this imposed on states, federal amendments were eventually introduced that re-

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192. See generally, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-95-133, *ILLEGAL ALIENS: NATIONAL NET COST ESTIMATES VARY WIDELY* (1995), available at <http://www.gao.gov/assets/230/221495.pdf>; JEFFREY S. PASSEL, TOMÁS RIVERA CTR., *HOW MUCH DO IMMIGRANTS REALLY COST?* (1994); David Simcox et al., *The Costs of Immigration: Assessing a Conflicted Issue*, CENTER FOR IMMIGR. STUD. (Sept. 1994), <http://www.cis.org/articles/1994/back294.htm>. For a summary and comparison of these studies, see Susan Gonzalez Baker et al., *Fiscal Impacts of Mexican Migration to the United States*, in *AT THE CROSSROADS: MEXICAN MIGRATION AND U.S. POLICY* 145, 156-73 (Frank D. Bean et al. eds., 1997).

193. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 400(5), (7), 110 Stat. 2105, 2260 (announcing the national policy of alien "self-reliance[ce]" as the "least restrictive means" for states "mak[ing] determinations concerning the eligibility of qualified aliens for public benefits").

194. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 515-17 (2001).



stored federal funding for some but not all of these benefits.<sup>195</sup> Not surprisingly, states played an important role in these changes as well.

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To summarize, the involvement and influence of states in the enactment of IRCA in 1986 and IIRIRA in 1996 demonstrate that the venue-shifting theory is a useful framework for understanding state involvement in immigration. In neither of these cases did it appear that states were acting according to more traditional theories of federalism: as laboratories of policy experimentation<sup>196</sup> or as independent sovereigns focused on local issues.<sup>197</sup> The history of immigration policy making shows the powerful impact states can have on the development of federal immigration policy and why political actors seize these opportunities when they appear. This influence is also not dependent on whether state regulations are legally enforceable or even capable of being effectively implemented. Thus, arguments about jurisdictional boundaries or institutional capacity are unlikely to have much of an effect on the behavior of states or how political actors use them. The role of states in this regard, of course, is not new. When it comes to state involvement, IRCA and IIRIRA share many similarities to earlier immigration developments. One issue remains: whether this is just history or whether it continues to be relevant today.

### III. MODERN DEVELOPMENTS

How does venue-shifting hold up today? As the immigration debates enter the twenty-first century, states are once again in the spotlight. Many observers believe, however, that this time is different. One reason for this thinking is the sheer number of immi-

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195. See Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, §§ 503-504, 112 Stat. 523, 578-79 (codified as amended at 8 U.S.C. § 1612(a)(2)(A), (F) (2006)) (restoring eligibility of some legal immigrants for food stamps); Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5301-5308, 111 Stat. 251, 597-603 (codified as amended in scattered sections of 8 U.S.C.) (restoring eligibility of some legal immigrants for Supplemental Security Income (SSI) benefits).

196. See *infra* notes 299-303.

197. See *infra* notes 304-09.

gration-related laws that have been enacted at the state level.<sup>198</sup> Another reason is the growing severity of state responses, with many states competing over the title of having the “toughest” laws on immigration.<sup>199</sup> In these respects, the stakes of state involvement today seem more than just political.

It is always difficult to examine an ongoing political controversy: passions are high, details unclear, and outcomes uncertain. Even so, there are many signs to suggest that states today continue to follow the familiar script of venue-shifting. States are finding opportunities for participation, including jurisdictional overlaps that have been created by federal policy in recent years.<sup>200</sup> Political actors at all levels of the federal system—including repeat players that have spearheaded state efforts in the past—continue to seize these opportunities with an eye towards broader federal outcomes.<sup>201</sup> Moreover, none of the tremendous political impacts associated with these state laws have depended on their regulatory impact.<sup>202</sup> Indeed, all the signs thus far suggest that venue-shifting is at play.

This Part demonstrates the continuing relevance of venue-shifting and uses it to make predictions about what kind of impact states’ activity will have in the next round of comprehensive immigration reforms. First, I examine Arizona’s S.B. 1070, the most prominent state enforcement measure that has been enacted in

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198. See, e.g., Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1 (“[A]t least five states plan to begin an unusual coordinated effort to cancel automatic United States citizenship for children born in this country to illegal immigrant parents.”).

199. See, e.g., Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1 (“Gov. Jan Brewer of Arizona signed the nation’s toughest bill on illegal immigration into law on Friday.”); Mick Hinton, *States Double Migrant Laws*, TULSA WORLD, Aug. 8, 2007, at A4 (“Oklahoma’s immigration measure is reportedly the nation’s toughest.”); Tim Hoover, *Immigration Restrictions Get Bipartisan Support: Missouri Senate OKs Bill*, KAN. CITY STAR, Apr. 27, 2006, at B1 (“The bill, which now can go to the House, represents the toughest set of restrictions on undocumented immigration lawmakers have approved so far.”); Campbell Robertson, *Part of Alabama Immigrant Law Blocked*, N.Y. TIMES, Oct. 15, 2011, at A13 (“The [Alabama] law, considered the toughest state immigration law in the nation, was signed by Gov. Robert Bentley in June.”).

200. See Jordan Jodré, *Preemptive Strike: The Battle for Control over Immigration Policy*, 25 GEO. IMMIGR. L.J. 551, 568 (2011) (“[F]ederal statutes, such as the INA and IRCA ... have been clear in expressing that the states’ role in administering and enforcing immigration policy and law was not fully abrogated to the federal government.”).

201. See, e.g., *infra* note 284 and accompanying text.

202. See, e.g., *infra* notes 249-53 and accompanying text.

recent years. I show that by “mirroring” federal law, S.B. 1070, and other copycat legislation, has called attention to federal provisions its supporters believe to be underenforced, provoked a sensational legal challenge to existing federal policy, and generated both support and opposition to increased immigration enforcement efforts.

Next, I show how political actors are using states to advocate on the other side, against an enforcement-only response to immigration. This includes noncooperation policies and other state efforts to resist participation in federal immigration enforcement initiatives. I also show how a series of state laws that provide in-state tuition for undocumented immigrants has helped reframe the immigration debate in support of a new round of “amnesty” or legalization of the presence of certain undocumented students through the Federal DREAM Act. If enforcement advocates are turning to state laws for support in the run-up to the next comprehensive immigration reforms, those in favor of a more restrained approach are doing the same.

#### *A. Arizona’s S.B. 1070 and State Enforcement Mandates*

In the spring of 2010, Arizona thrust itself into the national debate over immigration. At issue was the enactment of S.B. 1070, an enforcement-oriented measure touted as the toughest immigration law in the country.<sup>203</sup> To be sure, S.B. 1070 was not the first comprehensive state effort to regulate immigration in recent years. Before its enactment, both Missouri and Oklahoma had passed major immigration enforcement laws.<sup>204</sup> And since S.B. 1070’s enactment, states including South Carolina, Indiana, Georgia, and Alabama have passed copycat legislation that goes even further.<sup>205</sup> Nevertheless, Arizona quickly became the poster child for state

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203. S.B. 1070, ch. 113, 2010 Ariz. Sess. Laws 450; *see also* Nicholas Riccardi, *Arizona Passes Strict Border Rule*, L.A. TIMES, Apr. 14, 2010, at A1 (“Arizona law makers on Tuesday approved ... the toughest measure in the country against illegal immigrants.”).

204. *See* Hinton, *supra* note 199, at A4 (“Oklahoma’s immigration measure is reportedly the nation’s toughest.”); Hoover, *supra* note 199, at B1 (“The bill, which now can go to the House, represents the toughest set of restrictions on undocumented immigration lawmakers have approved so far.”).

205. *See* Brian Lawson, *Law Puts State at Center of Debate on Immigration*, BIRMINGHAM NEWS, Aug. 14, 2011, at 11 (describing Alabama’s immigration law—the latest Arizona copycat bill following others in Georgia, Indiana, and South Carolina).

activism on immigration. The public response to S.B. 1070 was overwhelming. Legal commentators and policymakers endlessly dissected and fiercely debated its provisions.<sup>206</sup> Supporters and critics clashed over the consequences of its enactment on the airwaves and in the streets.<sup>207</sup> Even today, there is little agreement on the legality or wisdom of S.B. 1070.<sup>208</sup> All sides seem eager, however, to cast the controversy in the familiar framework of federal power versus states' rights.<sup>209</sup>

"Attrition through enforcement" and "inherent authority" are the two theories behind S.B. 1070. The first posits that even if the removal of all the undocumented immigrants in this country directly is impossible, a serious and concerted effort to effectuate enforcement would convince many to leave rather than live in constant fear of detection.<sup>210</sup> The second argues that state and local officials have the "inherent authority" to enforce federal immigration laws" without direct federal authorization.<sup>211</sup> The goal was to greatly expand immigration screening beyond what is currently possible by relying on state and local law enforcement, and S.B. 1070 was an attempt to codify that goal. The law mandates that all state and local law enforcement officials directly participate in immigration enforcement by checking for immigration status in specific circumstances, such as when an individual has been placed under arrest or during lawful police stops when there is reasonable suspicion that an

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206. See, e.g., Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010); Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 29, 2010, at A31; see also *Will Arizona's Immigration Law Survive?*, N.Y. TIMES ROOM FOR DEBATE (Apr. 26, 2010, 7:24 PM), <http://roomfordebate.blogs.nytimes.com/2010/04/26/will-arizonas-immigration-law-survive>.

207. See Julia Preston, *Fueled by Anger over Arizona Law, Immigration Advocates Rally for Change*, N.Y. TIMES, May 2, 2010, at A22; Kirk Semple, *3-Day Fast Supports Immigration Overhaul*, N.Y. TIMES, June 3, 2010, at A29.

208. *Compare* Arizona v. United States, 132 S. Ct. 2492, 2510-11 (2012) (striking portions of S.B. 1070 as unconstitutional), *with id.* at 2511 (Scalia, J., concurring in part, dissenting in part) (arguing that S.B. 1070 is within the realm of state sovereignty).

209. See, e.g., Linda Turley-Hansen, *1070 Ruling Just More Fuel for States' Rights War*, ARIZ. REPUBLIC, Aug. 6, 2010, at 22.

210. See Julia Preston, *11.2 Million Illegal Immigrants in U.S. in 2010, Report Says; No Change From '09*, N.Y. TIMES, Feb. 2, 2011, at A15.

211. See Suzy Khimm, *The Man Behind Arizona's Immigration Law*, MOTHER JONES (May 7, 2010, 2:00 AM), <http://motherjones.com/politics/2010/05/kobach-arizona-immigration-law>.

individual is unlawfully present in the United States.<sup>212</sup> It also prohibits local governments and police departments in the state from deprioritizing immigration enforcement and makes them subject to civil lawsuits by any resident of Arizona if they do.<sup>213</sup> Moreover, it creates a number of state penalties for conduct in support of undocumented immigration, such as the harboring or transportation of unauthorized aliens,<sup>214</sup> which essentially copies existing federal prohibitions.<sup>215</sup>

S.B. 1070 has another distinction: it was the first of the recent state laws on immigration directly challenged by the federal government.<sup>216</sup> A little more than two months after S.B. 1070 was signed into law and weeks before it would go into effect, the Department of Justice took the unprecedented step of filing a constitutional challenge against it and requesting an injunction to block its enforcement.<sup>217</sup> In doing so, the federal government argued that the Arizona law was not only directly preempted by existing federal law but that it also impermissibly infringed upon the federal government's exclusive power to set national immigration policy.<sup>218</sup> On the basis of that argument, the district court issued a preliminary injunction against many, though not all, of S.B. 1070's provisions,<sup>219</sup> a decision that the Ninth Circuit Court of Appeals affirmed.<sup>220</sup> In a split decision, the Supreme Court agreed with the federal government and struck down many of S.B. 1070's provisions but upheld the controversial immigration enforcement mandate.<sup>221</sup>

Given the federal lawsuit and the manner in which it has been portrayed, the controversy over Arizona's S.B. 1070 appears to be a classic federalism battle between the federal government and the states. As the federal government argued in its case against Arizona, even more important than the individual provisions of S.B.

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212. See ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

213. See *id.* § 11-1051(F)-(H).

214. See *id.* § 13-2319; see also *id.* §§ 13-1509, 23-212.01, -214.

215. See, e.g., 8 U.S.C. § 1342(a)(1)(A) (2006).

216. See *Supreme Court Decision on SB 1070*, NAT'L IMMIGR. L. CENTER, <http://www.nilc.org/USvAZimplications.html> (last updated June 25, 2012).

217. See Plaintiff's Motion, *supra* note 4, at 2-3.

218. See *id.* at 12-15.

219. See *United States v. Arizona*, 703 F. Supp. 2d 980, 995-1006 (D. Ariz. 2010).

220. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011).

221. *Arizona v. United States*, 132 S. Ct. 2492, 2510-11 (2012).

1070 was the fact that Arizona enacted a comprehensive legislative scheme that represented a unique policy position for how immigration should be regulated and enforced.<sup>222</sup> Further, the federal government stressed the danger this law posed to federal uniformity, especially if other states followed Arizona's lead in enacting a series of similar or, even worse, dissimilar, state policies on immigration.<sup>223</sup> Arizona played its part. Not only was the text of S.B. 1070 clear in stating that its purpose was to effectuate a clear policy of "attrition through enforcement,"<sup>224</sup> but its sponsors have described the law's passage as a direct challenge to existing federal policy and administration.<sup>225</sup> All the while, the mantra of "states' rights" has served as a rallying cry for its supporters.

### *1. The Roots of S.B. 1070 and the Rise of State Enforcement Mandates*

Although a traditional federalism framework has dominated the legal discussion of S.B. 1070,<sup>226</sup> this Section argues that venue-shifting offers a more accurate analysis, especially with respect to the law's political motivations and legal impacts. The name of the original lawsuit against S.B. 1070—*United States v. Arizona*—suggests a dispute between federal and state. Yet looking at the amici that filed briefs when the case was on appeal before the Supreme Court—eighty-one members of Congress in support of Arizona against the federal government<sup>227</sup> and cities in Arizona in support of the federal government against their own state<sup>228</sup>—a

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222. See Plaintiff's Motion, *supra* note 4, at 1-3.

223. See *id.*

224. S.B. 1070, ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450 (stating the legislature's intent).

225. See, e.g., Randal C. Archibold, *Immigration Bill Reflects a Firebrand's Impact*, N.Y. TIMES, Apr. 20, 2010, at A12.

226. See, e.g., John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 HARV. J.L. & PUB. POL'Y 569, 584-86 (2012) (criticizing the Ninth Circuit's decision with respect to S.B. 1070 as "a fundamental conceptual misunderstanding of federalism").

227. Brief Amici Curiae of Members of Congress Brian Bilbray et al. in Support of Appellants and Partially Reversing the District Court at 1, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645).

228. Amicus Curiae Brief of the Arizona Cities of Flagstaff et al. in Support of Plaintiff-Appellee at 4-5, *Arizona*, 641 F.3d 339 (No. 10-16645); Amicus Curiae Brief Submitted by the

more complicated political framework appears at play. Here, I examine three aspects of S.B. 1070: the political actors behind it, the federal policies that led up to it, and the peculiar way it imitates existing federal law. Through this I suggest that far more important than considering whether it was constitutional or enforceable is recognizing that S.B. 1070 was foremost a political move in the federal struggle over the future of immigration policy.

First, given the emphasis S.B. 1070 places on empowering states to enforce immigration laws, it is easy to assume that it faced federal opposition from the start. But the theoretical roots of S.B. 1070—“attrition through enforcement” and “inherent authority”—actually began at the federal level. They were drawn from federal immigration policies after 9/11, which strongly supported expanding state participation in immigration enforcement.<sup>229</sup> They were also proposed by federal officials, the most prominent of which is Kris Kobach, who at the time was the special advisor on immigration to Attorney General Ashcroft during the second Bush administration but had since become the architect behind S.B. 1070 and nearly every state law on immigration in recent years.<sup>230</sup> Indeed, for a number of years, the federal government was pushing for states to impose enforcement responsibilities upon their law enforcement officials.<sup>231</sup> The Department of Justice’s Office of Legal Counsel issued an infamous memorandum that espoused “inherent authority” as a legal theory.<sup>232</sup> Ashcroft and other federal officials invoked it to call for more state action.<sup>233</sup> It was only when federal support

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City of Tucson in Support of Plaintiff-Appellee at 2-7, *Arizona*, 641 F.3d 339 (No. 10-16645).

229. See, e.g., Sylvia R. Lazos Vargas, “*Latina/o-ization*” of the Midwest: Cambio de Colores (*Change of Colors*) as *Agromaquilas Expand into the Heartland*, 13 *BERKELEY LA RAZA L.J.* 343, 364 (2002).

230. See Tony Dokoupil, *America’s Deporter in Chief*, *NEWSWEEK*, Feb. 7, 2011, at 6-7; Julia Preston, *A Professor Fights Illegal Immigration One Court at a Time*, *N.Y. TIMES*, July 21, 2009, at A10.

231. See Mike Allen, *Bush Orders New Crackdown on U.S. Border*, *POLITICO* (Aug. 9, 2007, 8:53 PM), <http://www.politico.com/news/stories/0807/5323.html>.

232. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 7-8 (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>.

233. See Jerry Markon, *‘Hard Look’ at Immigration Law*, *WASH. POST*, May 18, 2010, at A17.

stalled in 2005 that Kobach and FAIR—the national organization also responsible for Proposition 187<sup>234</sup>—began to turn to state and local laws as an alternative means of pushing these theories.<sup>235</sup> And as their actions have shown, Kobach and FAIR have always been more interested in national policy outcomes than states' rights. Although championing state laws that target undocumented immigration, they challenged other state laws under federal preemption doctrine for being too accommodating to undocumented immigrants.<sup>236</sup>

Second, there are also signs that states got involved in the enforcement context because of the jurisdictional overlap between federal and state authority. To be sure, enforcement is often thought to be one of the most exclusively held of the federal government's immigration powers.<sup>237</sup> Even so, delegation to and reliance on states to carry out this responsibility has increased over the years,<sup>238</sup> which has eroded the traditional federal-state divide in this area. Recall, one of the goals of IIRIRA in 1996 was to prohibit states from *refusing* to participate in immigration enforcement.<sup>239</sup> IIRIRA also took many steps to encourage the federal government to look at state participation, including the creation of the 287(g) program—which deputizes state and local law enforcement officials as federal immigration agents<sup>240</sup>—and a legal mandate requiring the federal government to respond to all state and local inquiries about

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234. See *supra* text accompanying note 150.

235. See Preston, *supra* note 230, at A10.

236. See *id.* (“Mr. Kobach lost a suit against Kansas to block a statute allowing illegal immigrants to pay in-state tuition rates in public colleges. But he won a similar case in California; it is now before that state’s highest court.”).

237. See *Arizona v. United States*, 132 S. Ct. 2492, 2498-99 (2012); see also *supra* note 79.

238. See Allen, *supra* note 231.

239. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 642, 110 Stat. 3009-546, 3009-707 (codified at 8 U.S.C. § 133 (2006)); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified at 8 U.S.C. § 1644 (2006)); see also *City of N.Y. v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (finding that the federal government can bar state and local government policies that seek to inhibit immigration enforcement by state or local officials).

240. See 8 U.S.C. § 1357(g) (2006); see also LISA M. SEGHELLI ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 14-18 (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf>.



immigration status.<sup>241</sup> Even today, the federal government is pursuing federal initiatives that rely on joint efforts by federal and state law enforcement, like Operation Community Shield<sup>242</sup> and Operation Secure Communities.<sup>243</sup> From this perspective, Arizona and others may be taking a controversial step in mandating immigration enforcement. But in light of recent federal encouragement to participate, it was not as large a step as it might have been in decades past.

Third, as venue-shifting predicts, there are signs that S.B. 1070 and similar state laws are explicitly designed to call attention to the limits of existing federal policy. And because this time around the complaint is not about the lack of regulations but rather the lack of enforcement,<sup>244</sup> it makes sense that S.B. 1070 essentially copies existing federal law instead of innovating new regulations. To be sure, states selectively choose which federal laws to copy and which to ignore. As such, the “mirror” that they are creating is just one of many interpretations of federal policy and how it should be enforced.<sup>245</sup> But that is the point. Rather than creating a new regulatory framework, state laws are being used here to offer commentary on federal law. Indeed, there was always a sense that even if S.B. 1070 was the law being challenged in court, it was the federal government’s response to immigration that S.B. 1070 aimed to put on trial.

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241. See 8 U.S.C. § 1373(c).

242. See Jennifer M. Chacón, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member”*, 2007 U. CHI. LEGAL F. 317, 327-33.

243. See *More Questions About the Secure Communities Program*, NAT’L IMMIGR. L. CENTER (Mar. 2009), <http://www.nilc.org/secure-communities-2009-03-23.html>; *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities) (last visited Feb. 13, 2013).

244. See *supra* notes 210-15 and accompanying text.

245. Of course, to say that states are mirroring federal law is not to say that differences in approaches between federal and state laws do not exist. Nor is it necessarily true that state immigration laws that mirror federal laws are necessarily constitutional as a matter of federal preemption, as some have argued. Compare Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 475-77 (2008), with Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253-61 (2011).

## 2. *The Preliminary Impact of State Enforcement Mandates*

It is widely assumed that the central issue with respect to state enforcement mandates is whether states are constitutionally allowed to regulate immigration in this manner. The Supreme Court answered that question in *Arizona v. United States*, which upheld and struck down portions of the law.<sup>246</sup> Because of the split decision, both sides claimed victory in the outcome.<sup>247</sup> At the same time, the Supreme Court left many legal questions unanswered, going so far as to invite further litigation to settle many of these details once the upheld portion of Arizona's law is actually put into action.<sup>248</sup> Thus far, state and local involvement in immigration enforcement have not appeared to change all that much since the Supreme Court's decision. As a result, many are holding their breath in anticipation of the next development in this ongoing saga.

But even while we wait to see what consequences, if any, *Arizona v. United States* will have on how federal immigration laws are enforced in this country, it may be argued that the most significant impact of S.B. 1070 and other state enforcement mandates has already been made. As our earlier case study of state employer sanction laws, Proposition 187, and the state reimbursement lawsuits suggest, the ultimate legacy state enforcement mandates will likely have is how they affect federal policies to come.<sup>249</sup> This is particularly true here because laws such as S.B. 1070 are so dependent on federal cooperation. Even if these laws survive judicial scrutiny, federal policy can always be changed to limit state involvement or to require more supervision of their activities. If, for example, the federal government decides to adopt a different deportation priority, state laws can do little if the federal government opts not to accept the suspected immigrants that the state refers. The main question then is how these state immigration laws will shape federal policies down the line.

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246. 132 S. Ct. 2492, 2510 (2012).

247. See Julia Preston, *Justices' Decision a Narrow Opening for Other States*, N.Y. TIMES, June 26, 2012, at A12.

248. *Arizona*, 132 S. Ct. at 2510.

249. See *supra* Parts II.B.2, II.C.2.

From this perspective, it can be argued that S.B. 1070 has already changed the political landscape. It has reframed the immigration issue around the wisdom and effectiveness of enforcement, particularly the theory of “attrition by enforcement.”<sup>250</sup> Moreover, it did so long before the constitutionality of S.B. 1070 was even decided. Lest it be forgotten, S.B. 1070 ignited a firestorm of controversy about our nation’s immigration policy—one that dominated media channels and public discourse for months. It prompted an immediate federal response both in Arizona and across the country.<sup>251</sup> Even today, as more states have followed in Arizona’s footsteps and attempts have been made to broker a federal immigration compromise, S.B. 1070 continues to be a benchmark by which many of these efforts are measured.<sup>252</sup> Even with all the talk about “states’ rights,” there appears to be little interest among states to actually oust or replace the federal government in the regulation or enforcement of immigration. These state enforcement mandates have, if anything, been more interested in prompting more federal enforcement action, not in telling the federal government to back off and let states take over. It is hard to say that this strategy has not worked. In fact, with record high deportation in 2010,<sup>253</sup> it appears that the federal immigration administration received the message.

There is, however, another side to how state enforcement laws have shaped the national conversation on immigration. Critics have also effectively used these laws as a rallying point for those who support a more measured approach to immigration enforcement.<sup>254</sup> They have been able to leverage the controversy over state laws to call attention to the dangers of *federal* enforcement initiatives. The

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250. 2012 Republican presidential candidate Mitt Romney explicitly adopted “attrition through enforcement.” See Eric Sturgis, *Romney Consistent on Views of Immigration*, ATLANTA J.-CONST., Feb. 7, 2012, at B1.

251. See, e.g., Randall C. Archibold, *National Guard Will Be Deployed to Aid at Border*, N.Y. TIMES, May 26, 2010, at A1; Helene Cooper, *White House Talk Lightens Tone of Dispute on Immigration Law*, N.Y. TIMES, June 4, 2010, at A12; Peter Nicholas, *In Pivot, Obama Plans Immigration Bill Push*, CHI. TRIB., June 30, 2010, at 18.

252. See Editorial, *It Gets Even Worse: New Anti-Immigrant Laws Are Cruel, Racist and Counterproductive*, N.Y. TIMES, July 4, 2011, at A18; Peter Nicholas, *Arizona Law Reshaping Reform Push*, L.A. TIMES, Apr. 27, 2010, at A7.

253. Julia Preston, *Deportations from U.S. Hit a Record High*, N.Y. TIMES, Oct. 7, 2010, at A21.

254. See Preston, *supra* note 207, at A22.

E-Verify program, an effort to create a national database of immigrant—and citizenship—status for all U.S. residents, was being developed and slowly rolled out with little public awareness until state laws began mandating its use.<sup>255</sup> With the increased attention that it received as a result, E-Verify's future is now uncertain.<sup>256</sup> Similarly, although S.B. 1070 sought to deflect fears about racial profiling by specifically incorporating federal standards on the use of race in immigration enforcement,<sup>257</sup> the law also drew increased attention to how paltry those federal standards actually are.<sup>258</sup> All the while, frustration about the lack of federal reform is building on all sides. When or if reform will come remains unclear, but these state laws make it all the more likely.

### *B. Sanctuary, In-State Tuition, and the Federal DREAM Act*

Given the case studies offered thus far, it makes sense that immigrant advocates are particularly concerned about state involvement. Indeed, I have focused on state laws centered on immigration enforcement precisely because those are the laws that have had the most tangible impact on federal policies since 1965. Yet these are not the only kinds of policy making that states or local governments have engaged in. In recent decades, critics of federal immigration

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255. See ARIZ. REV. STAT. ANN. § 23-212 (2012) (mandating use of E-Verify); MISS. CODE ANN. § 71-11-3 (2011) (same); S.C. CODE ANN. § 41-8-20 (2011) (same); see also GA. CODE ANN. § 36-60-6 (2012) (requiring certain employers to register with and utilize the federal work authorization program). For a critique of E-Verify, see Rachel Feller, Comment, *Preempting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices,"* 84 WASH. L. REV. 289, 289-92, 310-16 (2009). But see Ross Douthat, Op-Ed., *Trust but E-Verify*, N.Y. TIMES, May 30, 2011, at A19 (arguing now that Arizona's 2007 employer verification law has "been implemented, it might just be a model for nationwide reform").

256. See Miriam Jordan, *E-Verify Bill Against Illegal Workers in Doubt*, WALL ST. J., Sept. 21, 2011, at A6.

257. See, e.g., S.B. 1070, ch. 113, § 2, 2010 Ariz. Sess. Laws 450, 451, amended by Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070 (whereby race may be considered "to the extent permitted by the United States ... Constitution").

258. Gabriel J. Chin & Kevin R. Johnson, *Profiling's Unlikely Enabler: High Court Ruling Underpins Ariz. Law*, WASH. POST, July 13, 2010, at A15; see Casey Newton & Ginger Rough, *Law Is Revised in Effort to Allay Concerns About Racial Profiling*, ARIZ. REPUBLIC, May 1, 2010, at A1 ("Our law mirrors federal law. So, why is it bad for Arizona to mirror federal law? No one was crying out in the wilderness about the federal law being wrong or racial profiling. I don't get it. It's spin.")

enforcement and supporters of legalization have also turned to these venues for support, especially when they faced political obstacles at the federal level. Sanctuary measures limiting state and local participation in immigration enforcement is one example. Another is state efforts to offer benefits and services to undocumented immigrants, including the growth of state laws offering lower “in-state” tuition rates at public universities for undocumented students. This Section will focus on the impact of these two developments from a venue-shifting perspective.<sup>259</sup>

### *1. State and Local Resistance to Federal Immigration Enforcement*

As far back as the late 1970s, cities began implementing policies that limited the ability of their officials to inquire into immigration status or cooperate with federal immigration officials.<sup>260</sup> These policies proliferated, however, in the 1990s and early 2000s as federal immigration enforcement efforts became increasingly reliant on state and local officials.<sup>261</sup> Although a couple of states adopted such policies statewide, they largely exist at the local level, and primarily in major cities.<sup>262</sup> Nevertheless, state resistance to federal immigration efforts has also expanded in other ways. In recent years, states have begun to challenge federal programs that require state and

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259. But there are other examples as well, such as Utah’s immigration law, which specifically encourages the federal government to expand guest-worker programs to offer more opportunities for immigrants to enter the United States on a legal basis. *Compare* Illegal Immigration Enforcement Act, 2011 Utah Laws 261, *with* Utah Immigration Accountability and Enforcement Act, 2011 Utah Laws 228, 236 (establishing a state immigrant worker permit), *and* Utah Pilot Sponsored Resident Immigration Program Act, 2011 Utah Laws 256. All three of these bills were signed on the same day as part of a grand legislative compromise. For an analysis of these provisions, see *Utah: Going Down Arizona’s Unconstitutional Path*, NAT’L IMMIGR. L. CENTER (Apr. 6, 2011), <http://www.nilc.org/utah-bills-analysis-2011-03.html>.

260. See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1639 (1997) (noting that the 1970s “sanctuary movement” prompted several provisions in the IIRICA).

261. See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1086 (2004) (discussing the FBI’s role in advising local police in making immigration arrests).

262. See, e.g., Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 142 n.59 (2008) (mentioning New York City and Seattle as cities that have adopted “sanctuary” policies).

local participation;<sup>263</sup> New York has also experimented with “pardon panels” as a way of exempting certain immigrants from being deported for minor state crimes or dated convictions.<sup>264</sup>

Venue-shifting is more complicated with respect to state and local resistance to federal enforcement compared to the other cases examined thus far. This is because it involves another significant layer—local governments—that has not yet been discussed at length. First, there has been a growing divide between states and localities over sanctuary policies.<sup>265</sup> As many cities have sought to limit their cooperation with federal immigration enforcement efforts, opponents of such policies have turned to states to overturn them. Proposition 187 was such a ban.<sup>266</sup> It has also appeared in a number of recent state enforcement laws, including Arizona’s S.B. 1070 and similar laws in Missouri,<sup>267</sup> Colorado,<sup>268</sup> and Georgia.<sup>269</sup>

Second, as the federal government has challenged state enforcement mandates, it has also turned to local officials for support. To be sure, sanctuary policies were dealt a major blow when opponents leveraged Proposition 187 into a federal ban on noncooperation in 1996.<sup>270</sup> Given the recent federal challenge against enforcement *mandates*, however, the federal government now prominently features local opposition in its lawsuits against states.<sup>271</sup>

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263. See Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18 (reporting that Illinois was one of the first states seeking to entirely withdraw from President Obama’s immigration program).

264. See Kirk Semple, *Panel Is Facing Deadline on Immigrants’ Pardons*, N.Y. TIMES, Oct. 22, 2010, at A24.

265. See Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 568 (2009) (“Sanctuary policies vary in approach and scope, but all distinguish between local and federal roles in the enforcement of immigration statutes and restrict the role that local authorities will perform.”).

266. See *supra* notes 146-47 and accompanying text.

267. See MO. REV. STAT. § 67.307 (2012).

268. See COLO. REV. STAT. § 29-29-101 (2012).

269. See GA. CODE ANN. § 36-80-23 (2012).

270. See *supra* notes 182-83 and accompanying text.

271. See Declaration of Phoenix Police Chief Jack Harris at 2, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), available at <http://www.justice.gov/opa/documents/declaration-of-jack-harris.pdf>; Declaration of Santa Cruz County Sheriff Tony Estrada at 2, *Arizona*, 703 F. Supp. 2d 980 (No. CV 10-1413-PHX-SRB), available at <http://www.justice.gov/opa/documents/declaration-of-tony-estrada.pdf>; Declaration of Tucson Police Chief Roberto Villaseñor at 2, *Arizona*, 703 F. Supp. 2d 980, available at

Third, local officials have also begun to turn to the federal government to support their efforts against immigration enforcement conducted by other local governments. For example, the mayor of Phoenix famously wrote a letter to the U.S. Attorney General asking the Department of Justice to investigate the enforcement activities of the Maricopa County Sheriff's Office,<sup>272</sup> which eventually led the office to be removed from joint collaboration efforts with the federal government.<sup>273</sup>

All of this complicates the traditional federal-state framework in the immigration enforcement context. Yet it shows the many creative ways that political actors at all levels have turned to venue-shifting as a means of effectuating policy outcomes. Moreover, it illustrates that even when state and local governments have not been able to affect federal enforcement efforts as a matter of policy, their reluctance and vocal opposition have had an influence. When the federal government was actively pursuing large-scale employer raids and neighborhood sweeps, there were many sensational accounts of local and state officials balking at the federal government's excessiveness.<sup>274</sup> It is also worth noting the tremendous amount of controversy that state and local opposition to Operation Secure Communities has generated, especially given that this federal program automatically turns fingerprint matching at the local law enforcement level into an immigration screening system.<sup>275</sup> Though it is hard to predict how much direct influence any of this has had,

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[justice.gov/opa/documents/declaration-of-roberto-villasenor.pdf](http://justice.gov/opa/documents/declaration-of-roberto-villasenor.pdf).

272. See Casey Newton & JJ Hensley, *Gordon Calls for Inquiry into Arpaio*, ARIZ. REPUBLIC, Apr. 13, 2008, at A1. To read a copy of the letter, see Letter from Phil Gordon, Mayor, Phx., Ariz., to Michael B. Mukasey, U.S. Attorney Gen., U.S. Dep't of Justice (Apr. 4, 2008), available at <http://www.azcentral.com/ic/pdf/arpaio-gordon-2008-investigation-letter.pdf>.

273. See Randal C. Archibold, *U.S. Alters Disputed Program Letting Local Officers Enforce Immigration Law*, N.Y. TIMES, Oct. 17, 2009, at A9 (reporting that federal authorization for Arpaio's street enforcement efforts had been withdrawn); Yvonne Wingett, *Arpaio Probe Began in 2008*, ARIZ. REPUBLIC, July 11, 2010, at A1 (describing the high-profile federal investigation of Joe Arpaio).

274. See, e.g., Yvonne Abraham, *Patrick Says Promises Broken on Raid: Access Disputed on Immigrants*, BOS. GLOBE, Mar. 15, 2007, at A1 (reporting that Massachusetts Governor Deval Patrick criticized an immigration raid conducted by the federal government in New Bedford).

275. Julia Preston, *Deportation Program Sows Mistrust, U.S. Is Told*, N.Y. TIMES, Sept. 16, 2011, at A12.

it is telling that the federal government has at times scaled down enforcement activity as state and local protests have escalated, or refined federal initiatives in response to state and local concerns.

## *2. Higher Education and Legalization for Undocumented Students*

An even more interesting development from a venue-shifting perspective is the connection between state laws offering lower in-state tuition to undocumented students and the Federal DREAM Act, the legalization bill that has the best chance of being enacted or incorporated into the next federal immigration compromise.<sup>276</sup> This connection is all the more interesting because under the benefit-restriction zeal of the 1990s, spurred in large part by California's Proposition 187,<sup>277</sup> a federal provision was enacted to limit the ability of states to grant preferential tuition to undocumented immigrants on the basis of residency.<sup>278</sup> Not only did opponents of this federal policy find ways around it through careful drafting of state law but only a few years after the 1996 reform, these state efforts would serve as the basis for a powerful federal push to provide undocumented college graduates with a path to legal status.

In many ways, state interest in providing in-state tuition to undocumented immigrants is a testament to how many children had grown up in the United States as "Americans" but remained in the shadow of its laws as undocumented immigrants. By striking down a Texas law that sought to deprive undocumented students of a free public education, the Supreme Court in *Plyler v. Doe* ensured them access to primary school.<sup>279</sup> But as college education has become more important, and more undocumented students have come out

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276. See Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 655 (2011) (opining that "the DREAM Act still has a fighting chance"—albeit at an early point in the Obama administration's tenure).

277. See *supra* Part II.C.2.

278. See 8 U.S.C. §§ 1621, 1623(a) (2006) ("[A]n alien ... not lawfully present in the United States shall not be eligible on the basis of residence within a State ... for any postsecondary education benefit unless a citizen ... is eligible for such a benefit.").

279. 457 U.S. 202, 205, 230 (1982).



of high school with limited options, states have begun to consider possible solutions. One of these is whether to provide in-state tuition in public universities to undocumented residents<sup>280</sup>—a matter that also involves significant jurisdictional overlap between federal and state policy.

Support for expanding higher education opportunities for undocumented students found many ready outlets at the state level in the late 1990s and the early 2000s.<sup>281</sup> By that time, however, federal law already prohibited states from granting tuition preferences to undocumented students on the basis of residency unless they were willing to grant such preferences to all students irrespective of residency—thereby eliminating any preferences at all.<sup>282</sup> As a result states sought ways to regulate around the federal prohibition by awarding tuition preferences not on the basis of residency per se but rather on where the student attended and graduated high school.<sup>283</sup> Legal challenges have been raised against these workarounds on the ground that they conflict with federal law. As noted earlier, these challenges have, tellingly, been spearheaded by the same political actors—Kris Kobach and FAIR—who are defending state enforcement laws against similar claims of federal preemption at the same time.<sup>284</sup> Thus far, courts have sided with the states on this issue.<sup>285</sup>

From a venue-shifting perspective, it is telling how many states enacted in-state tuition laws even with a federal restriction in place.

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280. See Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies and Undocumented Latino Students*, 33 REV. HIGHER EDUC. 239, 240-41 (2010) (describing different state approaches to providing in-state tuition to undocumented residents in public universities).

281. See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1764-84 (2009).

282. See *Plyler*, 457 U.S. at 205, 230.

283. See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859-60 (Cal. 2010) (interpreting the California in-state tuition law based on high school attendance to not be dependent on residency). For an argument that these laws are still preempted by federal law, see Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POLY 473, 507-17 (2007). For an argument that Congress did not intend to, or cannot, restrict states from designating undocumented immigrants as “residents,” see Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 452-55 (2004).

284. See Preston, *supra* note 230, at A10.

285. See *Martinez*, 241 P.3d at 859-60.

Rather than be deterred by the possibility of legal conflict, states eagerly jumped in. Texas began this trend in June of 2001 and was joined immediately by California, Utah, and New York. Ten other states, including Kansas, Nebraska, and Maryland, followed throughout the 2000s.<sup>286</sup> There is, of course, political pressure on the other side as well. Oklahoma, which passed its law in 2003, repealed it in 2007.<sup>287</sup> Moreover, five states have explicitly passed laws to prohibit the granting of in-state tuition.<sup>288</sup> In any event, the amount of state activity on this issue has been tremendous; more than half of all states have considered bills on the matter.<sup>289</sup> The total tally currently stands at twelve states granting in-state tuition,<sup>290</sup> with California recently expanding their laws to allow undocumented students to apply for and receive scholarships and other financial aid.<sup>291</sup>

This has not escaped federal attention. Similar to the employer sanctions in the 1970s, this campaign to support undocumented students appears to have been jointly waged with similar efforts at the federal level from the start. Immediately after Texas passed its in-state tuition law, the Federal DREAM Act was first introduced in Congress in August of 2001.<sup>292</sup> At its most basic level, it sought to repeal the higher-education provision from 1996 reforms by “permit[ing] States to determine State residency for higher education purposes.”<sup>293</sup> With this as the foundation, however, the DREAM Act also took another major step: it provided a path to legalization for undocumented students who attend college.<sup>294</sup> As state activity mounted, the DREAM Act was introduced several times throughout

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286. See Olivas, *supra* note 281, at 1763-65.

287. *Id.* at 1776.

288. For an updated summary of the state activity in this area, see Ann Morse & Kerry Birnbach, *In-State Tuition and Unauthorized Immigrant Students*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/immig/in-state-tuition-and-unauthorized-immigrants.aspx> (last revised Nov. 28, 2012).

289. See Flores, *supra* note 280, at 240-41; Olivas, *supra* note 281, at 1764-84.

290. Morse & Birnbach, *supra* note 288 (explaining which states have passed legislation allowing for in-state tuition).

291. See Nanette Asimov & Wyatt Buchanan, *Brown OKs Student Aid for Illegal Immigrants*, S.F. CHRON., Oct. 9, 2011, at A1 (reporting that Governor Jerry Brown signed the California DREAM Act).

292. The Dream Act of 2001, S. 1291, 107th Cong. (2001).

293. *Id.*

294. Olivas, *supra* note 281, at 1764.

the 2000s, including a close vote in 2007 and 2010.<sup>295</sup> Today, it is considered the legalization program with the best chance of being enacted.<sup>296</sup>

If state support for in-state tuition benefits and their struggle against the 1996 law prompted the Federal DREAM Act, the legalization provision of the Federal DREAM Act also transformed in-state tuition efforts. None of the in-state tuition laws contain anything close to the legalization provision of the Federal DREAM Act.<sup>297</sup> Yet, starting in 2003, supporters began to explicitly refer to their in-state tuition bills as “dream acts”: the Texas Dream Act, the Maryland Dream Act, the California Dream Act.<sup>298</sup> This connection is striking because, as a legal matter, the legalization that is at the core of the Federal DREAM Act appears worlds apart from its state counterparts’ focus on in-state tuition. As a political matter, however, the connection between these two has been powerful for legalization supporters. Although the regulatory and fiscal impacts of state dream acts have been minimal, they have been successfully leveraged into strong political appeals for legalization at the federal level.

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As we enter the second decade of the twenty-first century, the structure and incentives that make venue-shifting an appealing political strategy appear to be alive and well. The immigration proposals being debated are not the same as those in the past—nor are the interests and concerns, which for many have been more

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295. See Julia Preston, *Bill for Immigrant Students Fails Test Vote in Senate*, N.Y. TIMES, Oct. 25, 2007, at A16 (reporting that the DREAM Act failed to garner the sixty votes needed to make it to the floor of the Senate in 2007); Julia Preston, *Immigration Vote Leaves Policy in Disarray*, N.Y. TIMES, Dec. 19, 2010, at A35 (reporting that the DREAM Act failed to achieve the sixty votes necessary to withstand a filibuster in the Senate).

296. For example, prominent Republican figures such as Marco Rubio seek to compromise with Democrats and pass a form of the DREAM Act. See Jonathan Weisman, *Rubio, in Appeal to G.O.P.’s Conscience, Urges Compromise on Dream Act*, N.Y. TIMES, Apr. 20, 2012, at A14.

297. Compare, e.g., TEX. EDUC. CODE ANN. § 54.051(m) (West 2011) (“[T]uition for a student who is a citizen of any country other than the United States ... is the same as the tuition required of other nonresident students.”), with S. 952, 112th Cong. § 3(b) (2011) (allowing a deportable alien to gain United States citizenship if he or she meets certain domiciliary and educational requirements).

298. See, e.g., Shankar Vedantam, *Md. to Weigh Own ‘DREAM’ Tuition Act*, WASH. POST, Dec. 30, 2010, at B1 (reporting that Victor Ramirez, senator and proponent of the Maryland tuition bill, has dubbed the bill the “Maryland Dream Act”).

focused on the enforcement of existing laws rather than the adoption of new ones. Yet as a matter of policy making, states appear to be playing a familiar role. Despite the lip service about federalism and states' rights, state involvement in immigration appears to be part of a broader national effort to shape the future of federal immigration policy. Even when their regulatory impact is limited, state immigration laws have been politically effective in shaping the immigration debates. And although both sides of the most recent immigration controversies decry state policies that run counter to their positions, both eagerly encourage state and local action as a means of building long-term political momentum. The goal today is the same as it has always been: comprehensive policy reforms at the federal level. And once again, states are playing a significant role towards that end.

#### IV. IMPLICATIONS OF VENUE-SHIFTING

Drawing states into a contentious policy dispute like immigration is an effective political strategy. Time and time again, law making at the state level—often orchestrated in conjunction with federal efforts to advance a specific policy objective—has framed the national debate over immigration and shaped the course of immigration policy making. All of this has shown venue-shifting to be a useful framework for understanding the role of states in the immigration context. The central question is what implications venue-shifting has with respect to traditional principles of federalism more generally. Moreover, questions remain as to what implications venue-shifting might have for the emerging field of “immigration federalism.” This Part comments on both, showing how my theory both deviates from and questions many of the assumptions that underlie the pillars of these two questions. It also considers, however, what all this means for the substance of immigration policy making and the prospect of comprehensive immigration reform.

### *A. Implications for Federalism*

Federalism does not overlook instances when state policy making interacts with federal policy making. Indeed, many believe that state policy making can enhance federal efforts to address particularly challenging policy issues. Two reasons are traditionally given for this. The first is that states serve as laboratories for policy experimentation. The second is that states offer policies tailored to the unique and specific circumstances of a particular state. Both explanations have tremendous intuitive appeal and are frequently posited in defense of state efforts to regulate immigration. Venue-shifting, however, suggests that these rationales do not always bear out, especially in the immigration context.

Let us start with states as laboratories.<sup>299</sup> Given all the state immigration regulations that have become federal law, one might assume that states have served as an important ground for policy experimentation in the immigration context. But that inference would be mistaken.<sup>300</sup> A central premise of the laboratory theory is that states not only innovate on the policy front but that these innovations are actually tested.<sup>301</sup> It is only through implementation that federal policymakers can know which policies are effective and what kind of unintended consequences they might cause. Yet one of the most striking aspects of state immigration regulations is that they are almost never actually put into action. They are enjoined, struck down, or simply not prioritized. Although eleven states adopted employer sanctions before the federal government, none of those states provided anything more than a token enforcement.

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299. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may ... serve as a laboratory; and try novel social and economic experiments.”).

300. Keith Cunningham-Parmeter has made a similar argument, though on more formal grounds. He concludes that state laws “do not internalize costs or yield replicable results.” Keith Cunningham-Parmeter, *Forced Federalism: States As Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1673 (2011). My argument here is related but also simpler: after making a political impact, states are usually not interested in enforcing, much less testing, these laws anyway. States realize that they are not experimenting and they have no interest in being laboratories. But they will continue to claim to be doing so, and to rely on any other number of federalism rationales, if it serves the interests of the political actors behind these laws.

301. See *id.* at 1680 (discussing how decentralized policy making leads to states “produc[ing] evidence about the effectiveness of ... programs”).

Few, if any, data on the effectiveness of employer sanctions were collected from these “experiments” before the federal government adopted it as a central pillar of our nation’s immigration policy.<sup>302</sup> Indeed, if anything, the fact that states ultimately decided not to prioritize or fully implement the employer sanctions that they enacted was the most significant lesson that could have been learned, albeit one in which Congress seemed uninterested. The same could be said of Proposition 187, which was enjoined from being implemented as law but nevertheless saw nearly every one of its provisions adopted into federal policy.<sup>303</sup>

There is also the argument that state immigration policy making allows for tailored responses.<sup>304</sup> Not all issues do well under a one-size-fits-all approach; regulatory flexibility is oftentimes as important as regulatory standardization. States are often believed to be in a good position to design policies that are fitted to the particular interests and specific circumstances of their state.<sup>305</sup> Patterns of immigrant settlement have always been unevenly distributed.<sup>306</sup> As a result, they tend to impact different states in different ways. Yet this rationale also falters once we look more closely at the wide variety of states that have responded to immigration and how they have responded. It is surprising to think that California, Kansas, and Massachusetts had such similar problems with undocumented immigration in the 1970s that they all believed the same employer sanction law would be perfectly tailored to their predicament.<sup>307</sup> It is also difficult to imagine that Alabama and South Carolina, each with relatively small immigrant populations,<sup>308</sup> saw themselves just like Arizona in needing a more aggressive immigration enforcement response.<sup>309</sup>

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302. *See supra* notes 170-75 and accompanying text.

303. *See supra* notes 174-76, 181-83 and accompanying text.

304. *See, e.g.*, Cooter & Siegel, *supra* note 67, at 118-20.

305. *See, e.g.*, LARRY N. GERSTON, *AMERICAN FEDERALISM: A CONCISE INTRODUCTION* 119-20 (2007) (discussing that different regions embody differing—and dynamic—“political cultures”).

306. *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 574-75 (2008) (discussing immigration trends).

307. *See supra* notes 104-08 and accompanying text.

308. *Cf. Rodríguez, supra* note 306, at 574 n.21 (highlighting traditional immigrant destinations but not listing either Alabama or South Carolina).

309. *See supra* notes 203-05 and accompanying text.

This is not to say that states do not serve as laboratories of sorts for federal policy making. Nor do I deny that state policies are in some ways tailored to the states that enact them. It is simply that state involvement in immigration is more often designed to test the political influence of a proposal rather than its effectiveness as a substantive policy. And to the extent that state laws are tailored to the characteristics and circumstances of a state, it is much more likely to be with respect to the partisan makeup of the state as a policy-making venue at a given point in time rather than the specific conditions on the ground. Rather than traditional values of federalism, this kind of experimentation and tailoring is more aligned with venue-shifting as a means of federal policy making.

### *B. Implications for Immigration Federalism*

In recent years, legal scholars have also begun to develop frameworks of federalism fitted specifically to the immigration context. These have at times been referred to as “immigration federalism.” I examine three of them here—steam-valve, cost accounting, and institutional competence—and comment on how venue-shifting either adds to or challenges their basic insights.

One of the first accounts of federalism fitted to the immigration context was Peter Spiro’s “steam-valve” theory.<sup>310</sup> Looking back historically, Spiro suggested that we might learn to tolerate and allow some state restrictions on immigration because they would allow those states, often teeming with anti-immigrant sentiment, to essentially “blow off steam” and not demand a more far-reaching federal response. He used the example of the escalating anti-Chinese restrictions in California at the end of the nineteenth century to cast light on the aftermath of Proposition 187. He speculated that if more of these restrictions had been allowed to survive, the outrage would have stabilized, and demand for Chinese exclusion at the federal level would have dampened.<sup>311</sup>

Venue-shifting suggests, however, that states are just as likely to regulate as a way of “building pressure” as “blowing off steam.” States often design regulations to provoke controversy and draw

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310. See Spiro, *supra* note 260, at 1627.

311. *Id.* at 1631-32, 1634-36.

public attention.<sup>312</sup> Irrespective of whether they are enforced, state immigration regulations often have the effect of escalating an issue, leading to even more regulations.<sup>313</sup> Moreover, given that the goal is often a federal response right from the start, states will unlikely feel satisfied with a few state laws that they know are not capable of having the actual impact they want.<sup>314</sup> Recent developments seem to illustrate this. Oklahoma passed one of the first immigration enforcement laws in the most recent wave.<sup>315</sup> Rather than being quelled, however, that success, along with successes in other states, only encouraged legislators to step up enforcement even further with a follow-up law.<sup>316</sup> Similarly, Arizona enacted S.B. 1070 after it had already enacted an enforcement measure a year earlier.<sup>317</sup> Though that earlier measure had survived judicial scrutiny<sup>318</sup> and the constitutionality of Proposition 187 remained pending, Arizona aggressively considered other bills, including ones that would undermine the birthright citizenship.<sup>319</sup> In both of these states, successfully passing an immigration restriction only emboldened legislators to pursue more.

In addition to the steam-valve theory, some see the involvement of states as important because it allows a more accurate accounting of the actual impact of immigration.<sup>320</sup> Immigration might be set at the federal level, but under this view, the federal government is also not in the best position to account for the costs and benefits associated with its policies.<sup>321</sup> In the 1990s, many argued that the anti-immigrant activity at the state level should be taken seriously because it offered a window into how immigration disproportion-

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312. Cf. Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 351-52 (2009).

313. See, e.g., *id.* at 330-35.

314. See, e.g., *id.* at 360-61.

315. See *id.* at 351-52, 355-56.

316. See Greater Protecting Victims of Human Trafficking Act of 2010, ch. 409, 2010 Okla. Sess. Laws 1687, 1687-88.

317. See Legal Arizona Workers Act, ch. 279, 2007 Ariz. Sess. Laws 1312.

318. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

319. See Marc Lacey, *On Immigration, Birthright Fight in U.S. Is Looming*, N.Y. TIMES, Jan. 5, 2011, at A1.

320. Cf. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 805-06 (2008) (discussing the unequal impact of "unauthorized migration" on states).

321. See, e.g., *id.* at 805 n.71.



ately burdened states and localities more than the federal government.<sup>322</sup> Many views exist on whether or why this might be the case.<sup>323</sup> Nevertheless, many argued that the involvement of states was necessary to raise this issue in the federal debates.

Even if cost accounting is possible, state involvement can also distort the cost calculations. Given that the political actors behind these efforts are primarily interested in policy outcomes, they have strong incentives to use states to conceal the costs, or exaggerate the benefits, that are associated with the immigration policies they are championing. For example, the structural design of S.B. 1070 seems to exploit the intermediate position of states to sell its enforcement mandate as a low-cost solution to the problem of undocumented immigration. It did so by essentially pushing all the fiscal and social costs of its enforcement up to the federal government and down to localities. On one hand, nearly all the screening costs of implementing S.B. 1070 at the front end were forced onto local governments.<sup>324</sup> This explained why so many local officials in Arizona protested the law as another unfunded mandate.<sup>325</sup> On the other hand, S.B. 1070 imposed all of the processing, detention, and removal costs on the back end onto the federal government.<sup>326</sup> Indeed, one of the federal government's main arguments against S.B. 1070 was that it would "impermissibly shift the allocation of federal resources away from federal priorities," which were not focused on the kind of undocumented immigrants that Arizona's law targeted.<sup>327</sup> In the end, states like Arizona often see little downside to these laws because they are designed to impose few fiscal burdens on state coffers.

Instead of dismissing the role of states outright, some legal scholars have suggested that states and localities might be asked to play a more significant role in immigration.<sup>328</sup> This is because they

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322. See, e.g., GORDON H. HANSON, WHY DOES IMMIGRATION DIVIDE AMERICA?: PUBLIC FINANCE AND POLITICAL OPPOSITION TO OPEN BORDERS 38-40 (2005).

323. See, e.g., CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1-5 (2007), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf>.

324. See, e.g., S.B. 1070, ch. 113, § 7, 2010 Ariz. Sess. Laws 450, 458.

325. See Garin Groff, *Cities Uncertain What Impact SB 1070 Rules Will Have on Their Wallets, Image*, E. VALLEY TRIB. (Mesa, Ariz.), July 1, 2010.

326. S.B. 1070, § 2.

327. See Plaintiff's Motion, *supra* note 4, at 30-32.

328. See Huntington, *supra* note 320, at 789 & n.11.

are simply more institutionally competent to address certain aspects of immigration policy, such as integration and assimilation.<sup>329</sup> As such, more efforts should be made to encourage states to focus their regulatory efforts on these and other immigration-related issues to which they are better suited.

This view draws from institutional design principles of federalism, which posit that policy issues should be allocated to the level that is in the best position to address them.<sup>330</sup> Venue-shifting suggests that states may sometimes have strong incentives to regulate beyond their institutional competence, especially if the goal is to draw attention or send a message. But venue-shifting recognizes that efforts can be made to change the incentive structure to encourage states to channel their regulatory efforts into productive ends, to which they are in fact better suited than the federal government. Excessive reliance on venue-shifting, however, may also stifle this kind of policy delineation in the immigration context. States may become too reliant on federal immigration solutions to what are essentially local problems. States often portray themselves as victims in order to justify their involvement in immigration policy making.<sup>331</sup> They use this to assert a jurisdictional claim over the issue.<sup>332</sup> It is also politically expedient, as it allows them to deflect blame for local problems, like budgetary shortfalls, onto the federal government. This is what motivated Governor Wilson to support Proposition 187 in the 1990s.<sup>333</sup> Over time, however, states may start to look to the federal government to solve problems that they might actually be more institutionally competent to address. In other words, the political incentives of venue-shifting might start to erode the institutional incentives of federalism.

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329. See, e.g., Rodríguez, *supra* note 306, at 581, 608-09 (designating integration as the state and local governments' responsibility because it is an immigration-related issue they are well-suited to address).

330. See Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 803-04 & n.3 (2011) (discussing institutional design relative to executive branch powers).

331. See, e.g., Huntington, *supra* note 320, at 802 & n.60.

332. See *supra* notes 22-31 and accompanying text.

333. See WROE, *supra* note 142, at 42, 45-46; cf. Calavita, *supra* note 112, at 212 (arguing that California's earlier employer sanction law "shift[ed] attention away from the structural sources of economic downturns and insulate[d] the system from responsibility").

*C. Implications for Substantive Policy Making*

State involvement in immigration has historically produced little in the way of experimentation and tailored policy making. It also introduces cost distortions and encourages shirking on the part of states. I challenge that we can do better. In other words, rather than clashing over state efforts to regulate immigration, I contend that we might be better off focusing on enacting comprehensive immigration reforms at the federal level and, if necessary, to do so on a regular basis. Indeed, one of the strongest criticisms against state involvement in immigration policy making is that it distracts us from efforts to reach an immigration compromise at the federal level. And it is not only those opposed to recent state efforts to regulate immigration that emphasize the need for a federal response; even those most directly responsible for state immigration laws stress the need for action at the federal level.<sup>334</sup> This appears to be the one constant in today's immigration debates: the need for comprehensive immigration reform at the federal level.

It is easy to assume that state efforts to regulate immigration interfere with federal efforts to reach a comprehensive immigration compromise. Yet, given the structure and incentives of our federal system, it appears that the kind of jurisdictional conflict that surrounds the recent faceoff between the federal government and states like Arizona and Alabama is simply how immigration reforms are made. Venue-shifting allows political actors to shake up the policy making process, to spur federal action in a system that is prone to stalemate and inaction. State involvement may not always improve *how* we talk about immigration as a country. It has, however, increased the likelihood that immigration will be talked about and addressed as a matter of federal policy. This process is not pretty. In many cases it works by painting the federal government into a corner. But it is effective. Nearly every major federal immigration reform in recent history, from IRCA in 1986 to IRRIRA in 1996, was accompanied by sensational state efforts that set the stage for the federal compromise to come.<sup>335</sup> Nor are these modern reforms unique; looking back, this pattern has repeated time and time

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334. See, e.g., Huntington, *supra* note 320, at 802 & n.60.

335. See *supra* Part II.B-C.

again, from the state agitation that led to Chinese exclusion in the 1880s, to the state laws that led to the enactment of the literacy requirement in the early twentieth century.<sup>336</sup>

This, of course, is not the only way that significant developments in immigration policy can be made. Yet any reform of the policy-making process will likely require us to address the underlying *political* incentives that drive state involvement in contentious policy issues like immigration, and not simply the jurisdictional boundaries that are supposed to define the state's legal authority to act. Striking down state immigration regulations—or even upholding them for that matter—is unlikely to have much of an effect on the behavior of states if the purpose is to make a political impact and compel federal action. Indeed, state laws that fail judicial scrutiny go on to become federal law just as often as those that manage to survive. This is not to say that the legal challenges and debates about whether states are constitutionally permitted to enact such regulations are not important—they happen to be an important part of how state regulations shape the national conversation over immigration. If the goal is to change the behavior of states, however, our analysis of venue-shifting suggests that we must address the reasons why political actors seek to draw states into contentious policy disputes like immigration and how states are able to exert their influence on the policy-making process.

At the same time, we might not want to be too quick to dismiss venue-shifting as a means of substantive policy making. For one, it broadens our ability to process and wrestle with immigration-related issues, especially when the issue is prevented from making it onto the federal agenda. Suggestions and concerns that fail to receive a hearing in a federal forum can nevertheless arise in states as alternative avenues into the national debates. Moreover, states have proven to be powerful tools for drawing attention to the limitations and consequences of how our immigration regulations are actually enforced. We may not all believe, as a nation, that Arizona's enforcement mandate is the right way to implement our existing immigration laws. Nor is there much agreement on whether it is appropriate for states to oppose federal initiatives that require

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336. See *supra* Part II.A.

federal-state information sharing, like Operation Secure Communities.<sup>337</sup> But it is because of these faceoffs in our federal system that important debates about different policy options are held. Over the long term, the ebb and flow of this struggle may have helped to create a federal immigration system that is far more flexible and responsive than one would expect otherwise.

### CONCLUSION

Immigration is a national issue and a federal responsibility. One might ask why then states are so actively involved. This Article offered an explanation by turning to the institutional structure of immigration policy making. I argued that rather than as a means of regulating immigration, states frequently act in order to shape the federal policy-making process. I referred to this strategic role of states as venue-shifting, and showed how it is made possible by the basic structure of our federal system and the incentives it creates for political actors. Through this lens, we saw why states are frequently drawn into the center of the immigration controversy, and the role and influence that they have had on the course of federal policy making from the earliest immigration laws to the most recent reforms.

There are good reasons why venue-shifting is so often employed in the immigration context. Immigration is just too contentious, too expansive, and too volatile an issue to be contained in the halls of Congress or the chambers of federal courts. Immigration advocates at all levels of the federal system seek to make political gains, whether they come through a federal lawsuit or a local ordinance. It should be no surprise that given the number and diversity of states as distinct policy venues, states are an important part of this strategy. As we saw, the IRCA was shaped in large part by the state employer sanctions laws that were enacted in the preceding years. The IIRICA was also influenced by states in the same way. States do not ultimately make immigration policy. But they are a part of the process that does.

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337. For an account of some of the states that have spoken out against Operation Secure Communities, see Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES, May 12, 2012, at A10.

At the same time, venue-shifting is not limited to immigration. Given the many ways that state involvement can shift the locus of policy making or reframe the issue underlying a dispute, there is no shortage of matters in which their involvement might be sought, from same-sex marriage to abortion. Of course, successful venue-shifting to states is not always easy. For every side that may want to alter the terms of the debate in this way, there is usually another that will contest it to maintain the status quo. Moreover, states and other venues may be drawn in to support competing positions, which may ultimately cancel each other out. Political actors look for advantages wherever they can find them. Given this, opportunities for state involvement in a policy dispute are nearly always welcomed, even if not always by the same side.

In conclusion, venue-shifting does not help us resolve what kinds of immigration policies are needed. Nor does it offer a better institutional alternative for policy making, assuming that the strategic incentives behind venue-shifting can be quelled or altered. What it does is offer us a better understanding of the political motivations and structural roots behind state involvement in immigration. In other words, it tells us a lot about what is actually happening. To the extent that normative proposals require this kind of descriptive insight, the explanation ventured here is an important step.

