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## NOTES ON THE MULTIPLE FACETS OF IMMIGRATION FEDERALISM

*Rick Su\**

Immigration is a national issue and a federal responsibility. To describe it solely in those terms today seems almost wistfully passé. There is increasing skepticism as to the federal government's willingness or ability to regulate immigration in the twenty-first century. At the same time, there appears to be growing enthusiasm for an increased sub-federal role. Frustration with immigration at the state and local level in recent years has led to a multitude of (albeit, relatively identical) local laws concerning immigration. Even the federal government is beginning to change its stance on the role of states and localities with respect to issues like immigration enforcement.<sup>1</sup> Thus, to the extent that an era of federal exclusivity over immigration ever existed, it appears to be slowly giving way to one in which multiple tiers of government play a role — a model many are now referring to as immigration federalism.<sup>2</sup>

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\* Associate Professor of Law, State University of New York at Buffalo Law School. Thanks to the participants of this symposium for their insightful remarks, many of which were inspirations for my ideas here, and members of the *Tulsa Journal of Comparative & International Law* for the invitation and putting together a wonderful symposium. In addition, special thanks to Jim Gardner for his thoughtful comments and suggestions about this essay.

1. See Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. (forthcoming 2008), (describing and analyzing immigration regulation efforts at the local level); see Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. (forthcoming 2008) (signaling the federal government's eagerness to embrace sub-federal activity on the issue); see Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1157-68 (discussing the effects of state and local efforts to regulate); see generally NAT'L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2008), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf> (listing sub-federal regulatory activity at the state level).

2. See Huntington, *supra* note 1; see Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635-1636 (1997); see generally Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (offering a

What exactly does immigration federalism mean? This essay takes as its starting point the contestable position that some degree of immigration federalism is both constitutionally permissible and politically desirable.<sup>3</sup> It suggests that liberating the issue of immigration from the shadows of federal exclusivity does not necessarily tell us much about what a conceptual framework of immigration federalism should or will actually be like. This is not solely a function of the difficulties inherent in incorporating principles of federalism into what is usually understood to be an exclusive federal field of immigration. Much of the current immigration jurisprudence exhibits strong concerns with federalist principles and is a consequence of the rifts and tensions that underlie the very concept and promise of federalism itself. Because of this, the stake of immigration federalism cannot help but be driven into contested grounds.

This essay is an initial foray into the issues that arise when some of the complexities of the federalism discourse are superimposed on the emerging field of immigration federalism. It does so by exploring the contemporary issues surrounding immigration through the lens of three different understandings of our federalist structure: as dueling sovereigns, transacting parties, and overlapping communities. For each, I examine the body of case law relevant to its particular approach, and explore how it intersects with existing immigration jurisprudence. In addition, I consider how these frameworks inform the current debate over sub-federal involvement with immigration regulations.

These three approaches are not intended to serve as a comprehensive list of how federalism can be conceptualized, nor do they constitute the only way of approaching immigration federalism. If anything, they raise more questions than they resolve with respect to the relative roles of the federal government and the states in the field of immigration. That being said, these frames offer a way of talking about immigration federalism which goes beyond simply applying general “values of federalism”<sup>4</sup> to the field of immigration regulation and enforcement. Ultimately, these forms suggest that the best way to tackle this issue is to refrain from seeing immigration jurisprudence as distinct and separate

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reformulation of the presumptions of federalism in the context of immigration); *see generally* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007) (advocating a more robust state role in the formation of immigration policy).

3. Huntington, *supra* note 1 (describing convincing arguments for the constitutionality of some sub-federal role with regard to immigration regulations); Rodriguez, *supra* note 2, at 611-18; Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 527 - 57 (2001); *but see* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FL. ST. U. L. REV. 965, 987- 98 (2004).

4. *See* EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 161-77 (2007) (describing and critiquing these “values”).

from the broader federalism discourse, and instead, to understand it as part of the ongoing process of balancing the roles of the federal government and the states in our federalist structure.

## I.

One way of understanding immigration federalism is to situate the body of immigration law concerning federal-state relations within the doctrinal development of federalism more generally. In other words, instead of seeing decisions in this area as immigration cases that draw upon the federalism jurisprudence, this view reads them as constituent parts of the federalism movement as a whole, and thus inseparable from its overall trajectory. This framework deviates somewhat from how immigration federalism has been portrayed in recent years. The common perception is that immigration federalism involves the introduction of federalism principles into the immigration discourse. Here we start with the baseline presumption that, not unlike the jurisprudential struggle over other areas of exclusive federal concern like interstate commerce, the doctrinal conversation over the scope and nature of the federal government's immigration powers is a part of the broader federalism discourse.

This particular view of immigration federalism draws support from two particular aspects of federalism. The first is the fact that the federalism jurisprudence cannot be down into a discrete and independent body of case law. Rather, the judicial construction of our federalist structure emerges from judicial interpretations of a broad range of constitutional and statutory provisions across a wide variety of substantive areas. Some "federalism" decisions, like the Supreme Court's recent anti-commandeering cases, invoke federalism principles more explicitly and formulate doctrinal rules specifically to serve those ends.<sup>5</sup> In others however, the federalism lesson arises out of the specific, and sometimes subtle, way that courts resolve a common judicial question like preemption or jurisdiction, as is often the case in the Supreme Court's Commerce Clause and sovereign immunity decisions.<sup>6</sup> Thus, in thinking about immigration federalism, there is not a principled way to separate immigration cases from federalism cases. To the extent an immigration decision implicates

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5. See *Printz v. United States*, 521 U.S. 898, 905 (1997).

6. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64-65 (1996); see, e.g., *Egelhoff v. Egelhoff*, 532 U.S. 141, 160-61 (2001) (Breyer, J., dissenting) (stating that "in today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, or to protect a State's treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.") (citations omitted).

the balance of federal and state power, as they often do, they are inextricably tied to the development of federalism as a whole.

The second related point is that once we recognize the potential connection with federalism generally, the established framework of federal exclusivity and the alternative model of immigration federalism can be understood to be but two sides of the same coin. The appeal to the model of dual sovereignty<sup>7</sup> and the fundamental divide between “what is truly national and truly local” that lie at the heart of the recent federalism revival,<sup>8</sup> are the same principles that underlie the dominance, or exclusivity, of federal power in the immigration context.<sup>9</sup> What this demonstrates is that less is gained from the conventional dichotomy of federal exclusivity and immigration federalism than is ordinarily assumed. The exclusivity framework can be just as empowering as confining. The true conflict is at the margins — over what falls within the province of federal exclusivity as a regulation of immigration and what falls without as an infringement of traditional state powers.

With this in mind, it is possible to see the bulk of the Supreme Court immigration jurisprudence not as a lockstep march toward federal supremacy, but as a nuanced and incomplete federalist struggle — one that is both historically contingent and ideologically fractured. The judicial federalization of the immigration power that began in the mid-nineteenth century was not simply the product of the Court’s recognition of immigration as a field of exclusive federal control. It also involved a substantive re-configuration of the federal-state relationship and a redrawing of the scope of state police powers, many of which had been sanctioned and protected as such in preceding decades.<sup>10</sup> When

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7. *See Printz*, 521 U.S. at 918-19.

8. *United States v. Morrison*, 529 U.S. 598, 599 (2000).

9. *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581, 605 – 06 (1889) (“The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations [in our immigration policies], we are but one people, one nation, one power.”).

10. *Compare New York v. Miln*, 36 U.S. 102, 142 - 43 (1837) (“We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease.”), *and id.* at 148 (Thompson, J., concurring) (“Can any thing fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance?”), *with Henderson v. New York*, 92 U.S. 259, 271–73, 275 (1875) (acknowledging a possible role for police powers with regard to certain ills of immigration, but employing a limited

the federal government's plenary power over immigration was cemented in *Chae Chan Ping*, the opinion was framed primarily within the federalist divide between spheres of national and local interests, which the Court translated into spheres of federal and state control.<sup>11</sup> It was clear even then, however, that a field as potentially expansive as immigration would not lend itself easily to clear federalist delineations. Thus, from *Yick Wo v. Hopkins*<sup>12</sup> to *Ohio v. Deckerbach*,<sup>13</sup> *Terrace v. Thompson*<sup>14</sup> to *Takahashi v. Fish & Game Commission*,<sup>15</sup> the Court continued to refine the boundaries of state and federal power. At the same time, perhaps not surprisingly, the fundamental structure of federal power<sup>16</sup> and the role of the federal government in American society<sup>17</sup> were undergoing profound and arguably irreversible changes.

As the current controversy over the state and local role with regard to immigration illustrates, this jurisprudential refinement is far from finished. This is certainly due, in no small part, to the changing nature of the immigration controversy — especially the recent focus on illegal immigration. Moreover, as legal commentators and jurists have recognized, shifts in our understanding of equal protection and due process have similarly complicated what is accepted doctrine and what continues to be left unresolved.<sup>18</sup> However, the changing

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reading of *Miln* and police powers to strike down a statute that sought to regulate immigration for similar purposes).

11. *Chae Chan Ping*, 130 U. S. at 605.

12. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (striking down a local laundry licensing law that was applied in a discriminatory manner against Chinese immigrants).

13. *Ohio v. Deckerbach*, 274 U.S. 392, 394 (1927) (upholding a local ordinance that forbids noncitizen immigrants from running billiard and pool halls, accepting as rational the justification “that the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare, and that the ordinance is a reasonable police regulation passed in the interest of and for the benefit of the public.”).

14. *Terrace v. Thompson*, 263 U. S. 197, 223 (1923) (upholding a state law that prevented certain immigrants from having any interest in land because of the strong state interests involved).

15. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420-21 (1948) (finding state interest insufficient to justify forbidding noncitizen immigrants from receiving commercial fishing licenses).

16. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 244-45 (1988) (arguing that civil rights amendments and legislation following the conclusion of the Civil War effectuated a shift in federal and state power).

17. See DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 363-80 (noting how the New Deal expanded the role of the federal government in American society).

18. See generally Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (assessing immigration doctrines with a view to contemporary equal protection and other constitution doctrines); see also Hiroshi Motomura, *The Curious Evolution of*

terrain of federalism has played a role as well. Indeed, it can be argued that many of the immigration precedents at the heart of the most recent controversy over sub-federal regulations of immigration are better understood through the ongoing effort to define the substantive and procedural protections that our structure of federalism guarantees. In other words, the indeterminate state of immigration federalism is not solely due to doctrinal uncertainties in immigration law; it is also the product of the ongoing battle over the doctrine of federalism.

Take, for example, the Supreme Court's decision in *De Canas v. Bica*.<sup>19</sup> At its most basic level, *De Canas* is the latest in a long line of Supreme Court cases addressing the ability of states to regulate immigration and immigrant residents.<sup>20</sup> Unlike most previous cases, however, the regulation at issue targeted illegal immigrants, and thus facially skirted many of the equal protection and foreign treaty concerns that plagued earlier cases in this line. Upholding a California statute that imposed penalties upon employers that hired illegal immigrants at a time when the federal government had yet to regulate in this area, *De Canas* is often cited for the observation that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted."<sup>21</sup> In the courts, however, it is better known today for giving rise to a three-part preemption analysis.

Federal immigration laws have changed in many ways since *De Canas* was decided, which lessens the relevance of some of the Court's specific findings.<sup>22</sup> Nevertheless, the three-part inquiry derived from the opinion by the lower courts — (1) whether the state is regulating immigration as such, (2) whether its activity is contrary to Congress's clear and manifest intent otherwise, and (3) whether it is regulating in a way that stands as an obstacle to federal objectives — survives as the predominant test for determining the state's role with respect to immigration.<sup>23</sup>

Although *De Canas* survives today primarily in the form of this top-down preemption analysis centered on the scope and content of federal law and congressional intent, it is worth noting that the decision was not so limited in its original incarnation. Indeed, after setting forth the established truism that the

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*Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (assessing immigration doctrines with a view to evolving due process law).

19. *De Canas v. Bica*, 424 U.S. 351 (1976).

20. *E.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *e.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *e.g.*, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

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

22. 8 U.S.C. § 1324a (2006) (preempting "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

23. *League of United Latin Am. Citizens v. Wilson*, 905 F.Supp. 755, 768 (C.D.Cal. 1995).

“[p]ower to regulate immigration is unquestionably exclusively a federal power,”<sup>24</sup> the Court went on to ground a substantial portion of its reasoning on a substantive and tangible conceptualization of state autonomy. This concept actively affirmed the vital role of states with regard to legitimate and, in the Court’s view, laudable local goals and interests.

Recalling the bottom-up approach of earlier decisions,<sup>25</sup> the *De Canas* Court spent considerable time probing and identifying the various state pursuits that would be foreclosed by preemption, and the consequences that foreclosure would have on the ability of the states to address pressing local problems. The Court emphasized that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State” before noting “[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws [as] only a few examples.”<sup>26</sup> It then sought to describe California’s attempt to regulate the employment of illegal immigrants in those terms before concluding the regulation in question was one primarily concerned with “protect[ing] California’s fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens,” by “focus[ing] directly upon these essentially local problems and is tailored to combat effectively the perceived evils.”<sup>27</sup> These sentiments set much of the tone for the legal analysis that followed.

It is easy to dismiss these remarks as dicta, just as it is easy to write off the Court’s assumptions about the deleterious effects of illegal immigration or the efficacy of California’s response. If *De Canas* is understood as simply a preemption decision, it is easy to view this as an irrelevant divergence since it did not directly relate to the preemptive scope of federal law nor was it contrary to the intent of congress. The prominence of these comments, however, suggests that *De Canas* may have been attempting to invoke a broader context — one over state autonomy and federalism — in its decision. This connection is even more striking when one considers the degree to which the language in *De Canas* parallels the substantive state autonomy frame set forth that same term in *National League of Cities v. Usery*.<sup>28</sup> There, the Court’s invocation of the myriad public and state interests that would be stifled if a sphere of state autonomy immune to federal preemption was not recognized,<sup>29</sup> seems to echo

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24. *De Canas*, 424 U.S. at 354.

25. See *New York v. Miln*, 36 U. S. 102, 139 (1837); see *Clark v. Deckebach*, 274 U.S. 392, 397 (1927).

26. *De Canas*, 424 U.S. at 356.

27. *Id.* at 356-57.

28. See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

29. See *id.* at 848.



*De Canas*'s fear regarding the scope of state power if federal preemption in the immigration context is applied too eagerly or willingly by the courts.<sup>30</sup> Moreover, in distinguishing prior decisions in part on the ground that, to the extent those cases were premised upon the "predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be similar interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers,"<sup>31</sup> *De Canas* seems to be anticipating the balance-of-interest federalism that would emerge out of *National League of Cities*.<sup>32</sup>

In making this comparison, I do not intend to paper over the important distinctions between *De Canas* and *National League of Cities*. *De Canas*'s concerns about state autonomy led it to merely limit the preemptive scope of the federal government's exclusive power over immigration by requiring a clearer statement of congressional intent. *National League of Cities* expressly denied the supremacy and applicability of a federal law based on the federal government's exclusive power over interstate commerce on similar grounds.

As many federalism scholars have noted, one should not be too quick to dismiss or underestimate the very real federalism norms that can arise from judicial soft checks<sup>33</sup> like the clear statement rule invoked by the Court in *De Canas*.<sup>34</sup> Nevertheless, the particular expansiveness of the *National League of Cities* doctrine together with its pronounced lack of constitutional support raised

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("The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage. It may wish to offer part-time or summer employment to teenagers at a figure less than the minimum wage, and if unable to do so may decline to offer such employment at all. But the Act would forbid such choices by the States.").

30. See *De Canas*, 424 U.S. at 366-61 (quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 243 (1959)).

31. *Id.* at 363.

32. The balancing inquiry is not mentioned in the lead opinion, but arises in Justice Powell's concurrence. See *Nat'l League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring) ("I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach."). Nevertheless, as Justice Powell argues later, many of the early attempts to apply *National League of Cities* followed a balancing approach. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 562 - 63 (1985) (Powell, J., dissenting) (describing the Court's approach in *EEOC v. Wyoming*, 460 U. S. 226 (1983) and *Transp. Union v. Long Island R.R. Co.*, 455 U. S. 678, 688 (1982)).

33. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 47-49 (2004).

34. See *De Canas*, 424 U.S. at 358 (adopting "the clear and manifest purpose of Congress" standard of *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963)).

immediate and substantial concerns.<sup>35</sup> Indeed, it is a large part of why Justice Brennan, who authored *De Canas*, wrote the leading dissent in *National League of Cities*;<sup>36</sup> and the reason that *De Canas* remains good law while *National League of Cities* has long been discredited and overruled.<sup>37</sup>

Despite the differences in their doctrinal result, the parallels between the two are just as revealing. Though directed at different aspects of federal power, one can see the two as but counterparts in the same federalist movement. Just as *National League of Cities* can be traced to concerns about continued expansion of the federal government's exclusive power over interstate commerce, *De Canas* appears to be similarly concerned about the risks that expansive doctrines of federal exclusivity with regard to issues like immigration pose for state autonomy and the structure of federalism more generally. In other words, in emphasizing that not all state regulations that affect immigration or immigrants should be read as immigration regulations, the Court in *De Canas* appears to be setting the groundwork for *National League of Cities*. By expressing the concern that continued proliferation and expansion of so-called exclusive federal fields like immigration (and later, the Commerce Clause) might be the Trojan horse that subverts the careful balance of our structure of federalism, the implicit seemed to be an "anxious sense that the lines purportedly separating national and state powers were no longer practicable or even consistently detectable."<sup>38</sup>

Despite the sense of exceptionalism that tends to pervade immigration law, the Court's description of the federal government's immigration powers is quite similar to the Court's treatment of the federal government's power over interstate commerce.<sup>39</sup> *De Canas* described the immigration power as unquestionably and exclusively a federal power but warned 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, whether latent or exercised."<sup>40</sup> With minimal alterations, this explanation can easily be used to summarize the Court's description of the federal government's power over

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35. See Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 96 (arguing that *National League of Cities*, like the *Lochner* doctrine, "rests on a relatively weak constitutional foundation . . . [P]roponents of state immunity have had difficulty tying their new doctrine to specific constitutional language or even any constitutional provision.").

36. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 860 (1976) (Brennan, J., dissenting) ("My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent.").

37. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530-31 (1985).

38. PURCELL, *supra* note 4, at 162.

39. See generally *Smith v. Turner*, 48 U.S. 283 (1849) (tracing the powers' doctrinal lineage to a point of intersection).

40. *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

interstate commerce — one that is exclusively within the jurisdiction of federal authorities,<sup>41</sup> but tempered by the understanding that not all regulations that affect interstate constitute regulation per se.<sup>42</sup>

That being said, the Court is correct to be concerned in both *De Canas* and *National League of Cities*. Both the Commerce Clause and federal immigration powers have expanded dramatically since they were specifically allocated to the federal government, or recognized as such by the Courts. Constitutional commentators have long noted the tremendous degree to which the Commerce Clause has broadened federal power, especially as the importance and reach of the national economy has grown over the years.<sup>43</sup> Moreover, many have described the recent federalism revival as a result of discomfort on the part of certain Justices with this expansion and the belief that the federalist structure of our Constitution requires the Court to actively stem or reverse this trend.<sup>44</sup>

A similar story can also be told from the immigration perspective. For a system originally based on fees and narrow prohibitions centered at the ports-of-entry and beyond, the federal immigration regime has steadily blossomed into a far-reaching regulatory system that touches almost every aspect of American life. Recent developments have only exacerbated this trend. The increasing number of immigrants in American society today, and the finer distinctions and statutes employed by federal immigration law to parse both legal and illegal

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41. See *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1792 – 93 (2007).

(“The Commerce Clause provides that ‘Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States.’ Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.”) (quoting U.S. CONST. art. I, § 8, cl.3).

42. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“The crucial inquiry [for commerce clause analysis], therefore, must be directed to determining whether [a particular state statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”).

43. See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1451 – 52 (1987); see also *United States v. Lopez*, 514 U.S. 549, 556 (1995) (describing decisions that “ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause,” while recognizing this as in part the result of “the great changes that had occurred in the way business was carried on in this country.”).

44. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 292 (2000) (“[T]he Justices assume that it necessarily falls on them to define new limits [on federal power] — some limits, any limits, even if those limits bear no resemblance to anything imagined by the Founders or observed in the past.”); Steven G. Calabresi, “*A Government of Limited and Enumerated Powers*”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (“Even if Lopez produces no progeny and is soon overruled, the opinion has shattered forever the notion that, after fifty years of Commerce Clause precedent, we can never go back to the days of limited national power.”).

immigrant residents, suggest not only that federal immigration policy will continue to affect the operation of state and local governments, but also that traditional exercises of local power may also become increasingly vulnerable to federal preemption as their effect on immigration and immigrants become more inevitable. Further, as observers have recently noted, there are few areas, even those that are left often considered quintessential aspects of state power, that are unregulated in some way by federal immigration and naturalization laws.<sup>45</sup>

The question that immigration federalism raises then is not simply how courts should apply cases like *De Canas* today, but how developments on the federalism front affect the next generation of immigration decisions. To be sure, if *De Canas* is understood to be a companion to *National League of Cities*, then it can be argued that much of the federalism dimensions of the decision were extinguished when *National League of Cities* was first narrowed by the Court and then expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>46</sup> *Toll v. Moreno*, decided the same term that *Long Island Railroad*,<sup>47</sup> continued the Court's practice of narrowly reading *National League of Cities*, Justice Brennan appeared to have done the same to his own opinion in *De Canas* through selective citations and a footnote explication.<sup>48</sup>

Though *Toll* was primarily an equal protection rather than a preemption decision, the implicit message sent by the Court's opinion on the subject of the latter did not escape Justice Rehnquist, who in dissent focused his attack on the majority's casual dismissal of *De Canas*' stance on preemption and state autonomy.<sup>49</sup> Considering that the *Toll* dissenters would later pen some of the most vigorous and ominous dissents in *Garcia*,<sup>50</sup> it is hard not to read *Toll*'s

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45. See generally, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) (describing how federal immigration laws affect state marriage regime and sometimes distort their goals and purpose).

46. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985). (“[T]he attempt to draw the boundaries of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.”).

47. See *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 682-83 (1982).

48. *Toll v. Moreno*, 458 U.S. 1, 13 n.18 (1982) (“[In *De Canas*] [w]e rejected the pre-emption claim not because of an absence of congressional intent to pre-empt, but because Congress intended that the States be allowed, ‘to the extent consistent with federal law, [to] regulate the employment of illegal aliens.’”) (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

49. See *id.* at 26-32 (Rehnquist, J. and Burger, C.J., dissenting).

50. See *Toll*, 458 U.S. at 24-25 (O’Connor, J., Rehnquist, J., and Burger, C.J., dissenting); see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557-80 (1985) (Powell, J., Burger, C.J., Rehnquist, J., and O’Connor, J., dissenting) (warning that *National League of Cities* would rise again); *id.* at 580 (Rehnquist, J., dissenting) (arguing that the principles of *National League of Cities* “will, I am confident, in time again command the support of a majority of this Court”); *id.* at

treatment of *De Canas* as a precursor to *Garcia*'s rejection of the substantive state autonomy framework of *National League of Cities*.

But *De Canas* has never been expressly overruled. More importantly, much of the spirit of *National League of Cities* has been "revived" in recent federalism decisions. The potency of the Commerce Clause today is not necessarily the result of federal overreaching. Instead, it is due in large part to the way the economic foundation of American society has evolved since its founding. Nevertheless, since *National League of Cities* was overruled by *Garcia*, the Court has returned to this issue and aggressively sought, most prominently in *Lopez* and *Morrison*, to restore the traditional balance between state and federal power by limiting the circumstances where the commerce clause can be invoked, even if it is undisputed that the underlying activity being regulated has an effect on interstate commerce.<sup>51</sup>

In doing so, the Court has re-asserted the judiciary's role in guarding the rampant nature of state power against the encroachment of the Commerce Clause into regulatory spheres that are more local than federal in nature. As the federal government continues to expand its regulation of immigration into traditional areas of local control, or in ways that impede local authority more generally, it is worth pondering if there is a line that Congress might cross which will trigger a federalism response in the mold of the Court's Commerce Clause scrutiny.

Already, there are complaints that Congress' anti-sanctuary provisions, which limit the degree to which states and localities can prohibit governmental cooperation with federal immigration authorities, hamper local efforts to institute community policing programs or deliver local services.<sup>52</sup> More than just a policy concern, however, it raises important questions about whether such an indirect regulation of immigration, especially one that seems to strike much deeper into the ability of states to exercise autonomy over traditional spheres of local control than those involved in either *Lopez* or *Morrison*, both of which had substantial support from state and local authorities, is consistent with Court's recent federalism turn.

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589 (O'Connor, J., Powell, J., and Rehnquist, J., dissenting) ("I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.").

51. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the federal Violence Against Women Act as beyond the power of Congress to enact under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 567-58 (1995) (striking down the Gun-Free School Zones Act as beyond the power of Congress to enact under the Commerce Clause).

52. See Huyen Pham, *The Constitutional Right not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1399-400 (2006) (discussing sanctuary laws in the United States and whether cooperation with the enforcement of immigration laws is absolutely required by local governments).

It is, of course, too early to tell. It has been decades since the Court addressed the federal-state divide in the immigration context, and the political and legal terrain of both immigration and federalism has changed substantially since then. Moreover, there are legitimate concerns about how much of the substantive state autonomy frame reflected in *National League of Cities* actually survives in the recent federalism cases. Many have described this most recent federalism revival as being more anti-federal than pro-local.<sup>53</sup> There is no doubt that subtle differences like this will have an impact on how the law evolves in the immigration context. The analysis here suggests, however, that views on federalism more generally will likely continue to have a notable influence on this area of federal immigration law. Since the federalism issue is still far from resolved, it is unlikely that an established or uncontested framework of immigration federalism will be possible any time soon.

## II.

The language of preemption, autonomy, and sovereign spheres is not the only way to understand the state and federal role with regard to immigration. Instead of seeing the federalist system as one of dueling sovereigns competing for jurisdictional primacy over particular regulatory fields, one can conceive of it as an intergovernmental marketplace where the federal government and the states, not unlike private institutions and individuals, negotiate and transact with one another to find the optimal policy and enforcement mechanism in light of the underlying interests involved. In short, such an economic or market-based account emphasizes how the federalist split allows for a more accurate and efficient accounting of immigration — not only with respect to its costs and benefits, but also the actual returns that can be expected of various enforcement or regulatory efforts.

This account complicates our understanding of the federal-state relationship thus far in a number of ways. First, it requires us to recognize that policymaking and policy implementation are two distinct steps. The federalist divide with regard to immigration may provide the ability of the federal government to establish immigration policy, but it does empower the federal government with unrestricted access to all governmental resources to implement those policies. Indeed, one tenet of federalism as it now stands is that federal interests trump countervailing state interests with regard to issues of national concern such as immigration. Another strand holds that the federal government has limited

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53. See, e.g., David J. Barron, *A Localist Critique of the New Federalism*, 62 DUKE L.J. 377, 411 (2001-2002) (discussing the new revival of federalism).

authority to conscript or commandeer state or local governments to do their bidding.<sup>54</sup>

Second, this account both relies on and draws attention to the fact that federal and state governments not only have differing interests with respect to far-reaching issues such as immigration, but that they are also differently situated with respect to their ability and capacity to address it. In other words, the immigration policy that the federal government prefers may not necessarily be the one that it is in the best position to implement vis-à-vis the states, just as the states may prefer a policy that is cost-prohibitive unless put into place by the federal government. Taken together, these two aspects reveal the degree of mutual interdependence contemporary federalism entails.

From this perspective, the legal structure of federalism is not to be understood solely as a framework for determining which tier prevails when there is a conflict of interests. Assuming, as many commentators have argued, that a certain level of cooperation is required between the federal government and the states to implement most federal policies, federalism then is more importantly the legal framework within which intergovernmental bargains are struck.<sup>55</sup> Thus, the specific contours of federalism are not only important in determining which tier ultimately decides the policy in a given field, but also which tier is responsible for its implementation and the bargaining position of each when cooperative arrangements are sought.

Take for example the Supreme Court's anti-commandeering turn in federalism, which emerged from two cases in which Court struck down federal programs that, in its view, sought to accomplish federal aims by commandeering the state's political process or its fiscal and human resources. First, in *New York v. U.S.*, the Supreme Court held that the federal government lacked the power to force a state to choose to take title of low-level radioactive waste generated within its borders or enact a state program for its disposal.<sup>56</sup> Later, in *U.S. v. Printz*, the Court held that the federal government could not conscript local law enforcement officials to perform background checks on potential gun buyers in furtherance of a federal program.<sup>57</sup> In both cases, the Court invoked familiar arguments of state sovereignty to justify its position.<sup>58</sup> Of particular interest, however, was the Court's pronouncement that the constitutional structure of

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54. See *infra* notes and text accompanying notes 56 – 62.

55. See generally MICHAEL D. REAGAN & JOHN G. SANZONE, *THE NEW FEDERALISM* 11-13 (2d ed., Oxford University Press 1981) (discussing cooperative federalism); see also Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (detailing a succinct history of federalism and explaining its importance in the future).

56. *New York v. United States*, 505 U.S. 144, 152, 188 (1992).

57. *Printz v. United States*, 521 U.S. 898, 935 (1997).

58. See *id.* at 918; *New York*, 505 U.S. at 181.

federalism requires the federal government to internalize the political and administrative costs of its own programs.

On its face, the Court's anti-commandeering decisions were rooted firmly in the framework of dual sovereignty. The Court explained this partition in the enforcement and implementation context as merely an extension of the divide that exists in the regulatory and policymaking context.<sup>59</sup> Noting the limitations of the Court's reasoning, however, observers like Roderick Hills have sought to justify the court's anti-commandeering rule from a different perspective. As Hills argues, the problem is not that the Court's dual sovereignty or political accountability rationales fail to justify the anti-commandeering principle, but rather that the anti-commandeering principle fails to give effect to these rationales.<sup>60</sup> This is especially true, he adds, when one realizes that despite the restrictions against commandeering, established judicial doctrines specifically permit the federal government to achieve similar ends through preemption or direct regulation of private parties, just as the federal government is allowed to recruit states to implement its programs through conditional grants of federal aid or threats of preemption.<sup>61</sup>

Taken together, however, Hills argues that organizing federalism around these all rules is desirable for another reason conducive to our federalist structure. He asserts that the anti-commandeering baseline established by the Supreme Court should be understood as a property entitlement that both protects local power and encourages governmental efficiency. It does so by requiring the federal government to internalize the cost of its regulatory programs by either paying for it themselves or purchasing those services from state governments through conditional grants.<sup>62</sup>

If the federal government is in the best position to implement a regulatory program that serves its interest, then this rule provides the incentive to do so on its own instead of mandating state assistance, which may be less efficient overall but enticing for federal policymakers. If the states are in a better position, then the federal government can still rely on the states by reaching a bargain with them to implement the federal law. The result is that federal programs are implemented in a more efficient manner by allowing state services to be solicited by the federal government. Moreover, because the state is free to assess its own costs and benefits in the negotiations, state interests and other non-fiscal costs are factored into the bargain without frustrating federal supremacy on the issue. Thus, to the extent the anti-commandeering rule promotes federalism; this view

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59. *See id.*

60. *See* 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, 817-18 (1998).

61. *See id.* at 817-18.

62. *See id.* at 856-58.



sees the federalist structure as being more concerned about the efficient and effective working of government that can emerge from intergovernmental bargaining than any freestanding commitment to limiting federal power or protecting states as states.

As Hills admits, unlike the dual sovereignty model of federalism, the economic or market-based model described here has little textual support in the historical development of the Supreme Court's federalism jurisprudence.<sup>63</sup> To the extent that much of the existing federalism jurisprudence cannot be traced to any constitutional provision, other than the structure of the Constitution as a whole, the functional or economic theory of federalism has the advantage of giving substantive effect to principles of state sovereignty and autonomy without unduly limiting federal supremacy in its enumerated spheres of power, or relying on judicial line-drawing around vague notions of integral state functions or a sense of the intended balance of state and federal power. In addition, by relying on structural features, such as anti-commandeering or intergovernmental bargaining, to protect or maintain the role of the states in our federalist system, it places much of the power and responsibility of federalism in the hands of the governmental parties themselves. In this respect, this framework seems to be a direct outgrowth of *Garcia's* assertion that influence through the political process is the means by which the framer's envisioned the federalist balance being maintained.<sup>64</sup>

Turning from federalism generally to the particular issue of immigration, thinking about immigration federalism through such an economic frame has a lot to offer our analysis thus far. Compared to the dueling sovereign or separate spheres paradigm, the cooperative and enforcement-oriented vision contained in the economic framework here seems better suited to capture the nuances of the federal-state relationship in the immigration context. This is due in some part to the fact that immigration is one of the few regulatory fields in which the gap between policy-making and policy implementation is particularly acute. However, the economic model also draws support from the specific way in which federal and state authorities relate to one another with regard to the issue of immigration. Unlike the typical adversarial mold of federalism, the federalist developments of our immigration system often seem to reflect a more muted bargaining between state and federal governments.

Take for example the federalization of immigration law that took place in the nineteenth century, which transformed immigration from what had largely

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63. *See id.* at 939.

64. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (“[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action.”).

been a state and local matter, to one of national importance.<sup>65</sup> It is not difficult to see this transition as a stunning rebuke of state power and local interests in favor of federal jurisdiction. Indeed, this was the conceptual frame that the Supreme Court employed while engineering this transfer of regulatory power.<sup>66</sup>

From a political perspective however, it is not clear that either the federal or the state government saw it in this light. Notwithstanding the Court's dire pronouncement of the various national interests over immigration threatened by state control, the immigration regime that the federal government first implemented mostly replicated existing state policies.<sup>67</sup> At the same time, most states were quite eager to embrace federal control because it relieved them of fiscal costs, and placed enforcement responsibilities on a level of government that was better suited to effectuate its demands.<sup>68</sup>

Federal control made possible enforcement techniques that the states were desperately trying to put into place when the Supreme Court intervened. It was largely shifts in regulatory technique — namely, state attempts to streamline and outsource its immigration review process by imposing broad or universal fee and bonding requirements upon steamship carriers — and not radical changes of immigration policy that spurred the courts to denounce local regulations of immigration in the mid- to late-nineteenth century.<sup>69</sup> It was the federal government's ability to put the state's regulatory vision into effect, not just through the continuation of similar fee and bonding requirements,<sup>70</sup> but ultimately by implementing a system of "remote control" through the use of federal consular offices as off-shore screening posts, that many now see as one of the most pivotal and immediate effects of federalization.<sup>71</sup>

A similar alignment of interests also characterizes much of the federal-state relationship today as the primary focus of immigration enforcement shifts from remote or entrance controls to interior enforcement and local surveillance, it is not surprising that the trend has been towards devolution of enforcement

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65. See generally Gerald L. Neuman, *The Lost Century of Immigration Law*, 93 COLUM. L. REV. 1833 (1993) (summarizing state and local immigration regulations before the so-called federalization).

66. See *Chae Chan Ping v. United States*, 130 U. S. 581, 605-06 (1889); see also *Chy Lung v. Freedman*, 92 U. S. 275, 279-80 (1875).

67. 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.")

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

69. See *Smith v. Turner*, 48 U.S. 283 (1849); *Henderson v. Mayor of New York*, 92 U. S. 268, 274 (1875).

70. See *Edye v. Robertson*, 112 U.S. 580 (1884).

71. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN* 211, 240-41, 264-67 (2006).

responsibilities. Putting aside the increased anti-immigration rhetoric emerging from state and local leaders, most sub-federal efforts to enforce immigration laws today seem to be prompted by the availability, or at least the promise, of federal incentives.

For example, there may be several reasons why the federal government's Section 287(g) program,<sup>72</sup> which allows state and local governments to enter into an agreement with the federal government to enforce immigration laws, was largely ignored in the several years after its legislative enactment.<sup>73</sup> It seems more than coincidental that state and local involvement in this program increased<sup>74</sup> around the time the federal government essentially decided to increase the price that it was willing to pay to purchase the services of the states by offering state and local jails partial reimbursement for the housing cost of any prisoner who also happened to be illegally present in the United States, and allowing prisoners so identified to be released into federal custody before serving out their full sentence.<sup>75</sup> This is not to say that there are no local interests involved in the decision of states and localities to take on what had normally been viewed as a federal responsibility. Many of these decisions seem to be prompted in large part by the federal government's own determination that it is more economically efficient to recruit state or local services than to broaden its own enforcement capabilities. This may be another reason why 287(g)

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72. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g).

73. The 287(g) program was enacted into law in 1996 and Florida became the first state to enter into such an agreement in 2002. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 346 (2005).

74. In the six years after Florida signed up with the 287(g) program, there are at least 41 active 287(g) *Memorandum of Agreements* in effect. See ICE.gov, Partners, [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (last visited April 15, 2008).

75. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: SECTION 287 (G) IMMIGRATION AND NATIONALITY ACT 2 (Aug. 16, 2006), available at <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf> ("In November 2005, the Arizona Department of Corrections (ADC) began processing alien inmates at their Intake Center as part of the 287(G) program. By processing aliens who met the criteria for early release and turning them over to ICE for removal, the ADC has realized a cost savings of \$2,985,655 and a savings of 53,135 bed days."); Kristin Collins, *Sheriffs Help Feds Deport Illegal Aliens*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 22, 2007, at A1 ("[Sheriff] Johnson said the [section 287(g)] program has dual benefits for Alamance County. It brings in money because, the federal government pays about \$66 a night for every immigration detainee who stays in jail. And it rids the county of illegal immigrants, who he contends sponge public resources and are more prone to commit crimes than legal residents.").

programs are growing in regions where federal enforcement deficiencies are especially pronounced.<sup>76</sup>

The fact is cooperative bargaining, rather than dueling sovereigns, appears to be a more accurate model of the federal-state relationship in the immigration context. It makes sense to think about immigration federalism with an eye to how or even whether the legal structure promotes federal-state interactions that increase the efficiency of the underlying policy by forcing the parties involved to internalize the costs, and balance that against its actual interests. It is possible to read much of the recent support for a more expansive sub-federal role as being based on the recognition that state and local governments are often better situated than the federal government with regard to enforcement or integration costs.<sup>77</sup> Similarly, it is possible to see instances where states and localities have resisted cooperating with federal officials not simply as symbolic denunciations of federal immigration policy or purposeful attempts to frustrate immigration enforcement, but also as situations where states and localities find it too costly to do so. To the extent that federalism requires the federal government to internalize the administrative costs of their programs and prevents it from commandeering local resources, this simply means that the federal government should assess whether it is more expensive to replicate similar enforcement capabilities or offer incentives sufficient enough to offset any given state or locality's perceived costs. If, as many argue, local enforcement is truly less costly overall than increased federal surveillance, then a deal reflecting this efficiency can certainly be reached.

Thus, an economic framework of immigration federalism would seem to suggest that while the federal government should be allowed to recruit the assistance of state governments in their effort to implement its immigration regime, it should tread lightly when attempting to circumvent local refusal through regulatory, rather than economic, means.<sup>78</sup> What remains unanswered,

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76. See, e.g. Mick Hunton, *GOP Senator Wants Parts of Law Repealed*, TULSA WORLD, Dec. 5, 2007, at A1 (describing state enforcement of immigration being implemented "at a time when federal immigration offers as scarce").

77. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005) (discussing enforcement); Rodriguez, *supra* note 2 at 581 (discussing integration of local officials).

78. Congress's anti-sanctuary provisions, which prohibit states and localities from refusing to cooperate with federal enforcement efforts but does not directly require such cooperation, seems to sit close to this line. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 434, 8 U.S.C. § 1644 (2006) (prohibiting state and local governments from placing restrictions on government employees who wish to provide immigration information to federal authorities); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 642, 8 U.S.C.A § 1373 (2008) (prohibiting state and local governments from placing restrictions on government employees who wish to provide immigration information to federal authorities);

however, is the extent to which, under this model, the states should be allowed to enforce immigration laws on their own initiative (with or without the imprimatur of federal support) or craft related immigration regulations on their own.

This question is not as simple as it might first appear. If the rationale behind the promotion of intergovernmental bargaining is to ensure the efficient development and implementation of federal law, then regulatory initiatives at the state level, especially those not taken at the specific bequest of the federal government, seem more likely to undermine than advance those aims. It would appear to raise the risk that a patchwork system of immigration regulations would emerge, thereby threatening the enforcement advantages that the federalization of immigration law first brought about. More than simply forcing the federal government to regulate, and implement those regulations, in an efficient manner by requiring it to internalize the political and administrative cost of its actions, sub-federal involvement seems to raise the figurative cost of doing business in a counterproductive manner. The resulting regulatory regime would then likely be less cost-effective overall than if the federal government selectively seeks out state assistance when it is prudent for it to do so.

Alternatively, if state efforts to regulate immigration lean more toward initiatives that replicate federal enforcement efforts or comport with the substantive intent of the federal regime, then state involvement in this matter merely restores the efficiency promises of federal uniformity and overcomes situations where federal holdouts raise the overall cost of implementing a truly national immigration system. Although substantive federal immigration laws apply uniformly across the country, the practical realities of limited fiscal resources means that the laws are not enforced uniformly in all areas. This is often justified by the fact that immigration violations are not significant issues in all parts of the United States.

It makes sense that border states like California and Texas, as well as other gateways such as New York, are the focus of interior enforcement efforts. Immigration flows often shift faster than the federal government's ability to alter the allocation of federal resources and mismatches are bound to occur. It is no surprise that many immigration regulations undertaken at the local level occur in states where federal immigration officials are scant and immigration-related facilities lacking. The intent behind many of these efforts is ultimately to compel federal authorities to extend its coverage to these areas. In light of this, one can still argue that there is good reason to require the federal government to coordinate how it wants to reorient its enforcement capabilities and request, or purchase state cooperation when necessary. Assuming that the overarching goal is the efficient actualization of the federal regulatory regime, then it is the states

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*see generally* City of New York v. United States, 179 F.3d 29 (1999) (rejecting facial challenge to anti-sanctuary provisions).

who are often most aware of where enforcement gaps exist. It is not clear that the opposite presumption — allowing state initiative with the possibility of federal preemption — might not serve those interests just as well, if not better.

If we are to take the economic analogy further, state initiatives that remain within the broader substantive parameters of federal immigration law might merit encouragement on the basis of furthering an optimal balance of cooperative federalism. Cast in the mold of a counteroffer, state regulatory efforts might be seen as a means of facilitating federal objectives while minimizing the indirect costs that federal enforcement imposes on states, especially at the local level. Considering the myriad interests involved in immigration, there is no reason to believe that the federal government is always in the best position to craft the most politically, or cost-effective, enforcement strategy.

A state may believe that local sanctions on employers or landlords are better suited to its circumstances than increased federal raids or other forms of intrusive federal intervention. Moreover, states may wish to integrate their enforcement regime with other state programs, like child welfare services or community policing efforts.<sup>79</sup> Allowing states to take the initiative accentuates their presence at the bargaining table without unduly increasing their bargaining position. Assuming the results are comparable to direct federal enforcement, the federal government may well agree to permit such alternatives by staying the use of its preemption powers, which always remains available if circumstances change. As Hills argues, one reason for a federalism regime that prohibits federal commandeering while allowing federal recruitment of state support is to encourage states to invest in their capacity to offer assistance to the federal government if necessary.<sup>80</sup> Reversing the presumption with regard to state initiatives in the immigration context arguably serves this objective as well.

To be sure, the analysis up to this point assumes a straightforward relationship between the substantive rule and the enforcement regime; namely that the latter serves to actualize the intent set forth by the former. In the immigration context, however, there are legitimate concerns that this may not actually be the case. Because of the chronic mismatch between our immigration laws and the realities of enforcement, many now see the enforcement regime, rather than the underlying law, as America's true immigration policy.

Even the Supreme Court has on occasion expressed the belief that our regime of incomplete enforcement is a better reflection of Congressional intent

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79. Cf. Yvonne Abraham, *As Immigration Raids Rise, Human Toll Decried: Arrests Across U.S. Break up Families*, BOSTON GLOBE, Mar. 20, 2007, at A1 (describing state frustration with the effects of immigration raids that leave children stranded, and the failure of Immigration and Customs Enforcement to coordinate with state officials).

80. See Hills, *supra* note 60, at 893 – 94.

than the laws themselves.<sup>81</sup> Thus, state efforts to enforce federal immigration laws beyond those of federal efforts can be understood to be a *per se* frustration of the *de facto* immigration policy of this country, especially if it produces peripheral consequences that the federal government may be purposely trying to avoid.<sup>82</sup> Even from this perspective, however, it seems that an economic model of federalism offers important insights. Indeed, it suggests that the focus of any federalist inquiry should be on the intricacies of implementation rather than just the balance of rulemaking.

### III.

Instead of seeing the federal-state relationship as dueling sovereigns or transacting parties, a third approach is to understand it as a set of overlapping communities. The aim of federalism then is to establish a framework to mediate their sometimes competing efforts to define the characteristics and membership of their communities, and the consequences of being an outsider — to determine how the law reconciles the organization of the federal government and the states as political communities both nested and distinct, and their simultaneous claims upon the same individuals in and outside their jurisdiction. From this perspective, immigration federalism cannot be understood outside the ongoing debate over the mutual relevance of these communities and the consequences and significance of having membership in each.

This reading of federalism draws support from the fact that federalism issues can often be construed as disputes over membership rules. As a result, resolution of these cases often depends on the extent to which national citizenship and the constitutional core of our “Union” trumps the right of states to exist and operate as distinct political (if not social or cultural) communities of interest. In this regard, this particular framework of federalism shares much of the same concerns raised in some of the previous frameworks. Under a system of governance based on “we the people,” it is difficult to imagine the existence of states as states apart from the membership that constitutes its communal and political existence. Similarly, it is difficult to imagine a sphere of jurisdiction substantively tied to the scope of local interest or concern that does not involve distinguishing the individuals who are a part of the state, and those who are not. Of course, the same can be said with regard to how we define the federal

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81. See *Plyler v. Doe*, 457 U. S. 202, 218, 218 n.17 (1982).

82. *Cf. id.* at 230 (raising concern that state law prohibiting free public education to illegal immigrants will lead to the creation of a semi-permanent subclass, which could be worse than the problems associated with illegal immigration); Wishnie, *supra* note 3, at 553 (fearing that state or local involvement in immigration issues would lead to increased racial discrimination and profiling).

government vis-à-vis the state, and the proper or legitimate scope of federal power.

Many bodies of case law, including many that we have examined, can be assimilated into this view of federalism. Commerce Clause cases can often be boiled down to the degree to which states are allowed to prefer their own members in the national marketplace. The anti-commandeering cases can similarly be cast as disputes over whether state resources are collectively owned by the people of the union as a whole, or the subset of individuals that collectively constitute the political existence of a given state. Another body of case law, however, is also worth considering: the right to travel and residency requirement cases. Taken together, they reflect the unsettled federalism terrain over the relevance of states and the federal government as communal institutions, and whether we relate to each hierarchically or independently.

Consider how these cases fall. On one hand, since the enactment of the Fourteenth Amendment and its repudiation of *Dred Scott*,<sup>83</sup> the Court has on many occasions asserted a constitutional right to travel, and has scrutinized state laws that in any way impede this right. Thus, in cases like *Shapiro v. Thompson*<sup>84</sup> and more recently in *Saenz v. Roe*,<sup>85</sup> the Court has struck down durational residency requirements for the receipt of any state benefits, even though none of these laws erected borders that directly limited the ability of people to cross state lines or seek residency in another state.<sup>86</sup> In the Court's view, the issue in these cases was not solely whether there is a real or sufficient deterrence to interstate mobility, but rather that deterrence does not frustrate the intent of our federalist structure. While federalism split governmental sovereignty, it was also meant to ensure that an individual's political membership in one is not undermined by his political membership (or lack thereof) in the other.<sup>87</sup>

On the other hand, the Court has been quite tolerant of state efforts to restrict certain benefits to bona fide residents. The Court upheld, among others, the right of states to limit in-state tuition at public universities to residents of the state.<sup>88</sup> In doing so, the Court has been willing to sanction idiosyncratic

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83. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that an African-American descendent of slaves is not a citizen of the United States, and cannot be granted citizenship by any state in the union).

84. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

85. See *Saenz v. Roe*, 526 U.S. 489 (1999).

86. See *id.* at 501 ("Given that [the state law] imposed no obstacle to respondents' entry into California, we think the State is correct when it argues that the statute does not directly impair the exercise of the right to free interstate movement.").

87. *Id.* at 504.

88. *Starns v. Malkerson*, 326 F. Supp. 234 (D.Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971); see also *Vlandis v. Kline*, 412 U.S. 441, 453 (1973).



residency requirements. For example, in *Martinez v. Bynum*, the Court upheld a state law that denied free public education to a United States citizen whose parents lived in Mexico because, although physically residing in a locality in the state, he was determined to have been present for “the primary purpose of attending the public free schools,” which prevented him from becoming a resident under state law.<sup>89</sup>

The problem, of course, is that the practical effects of these decisions cannot be easily distinguished from one another. The burden placed by the state upon an indigent citizen’s right to travel in *Shapiro* by denying welfare assistance to new residents is not unlike the burden that a state places upon a poor college student interested in leaving his state of residency for better educational opportunities elsewhere who can’t afford to pay out-of-state tuition. Similarly, the Court’s acceptance of the residency requirement in *Martinez* as rational effectively prevented an American citizen from moving to Texas and possibly from residing in the United States altogether.

Of course, it is not difficult to imagine the federalism concerns that would arise if the Court were to take any one of these decisions to the most logical extreme. It can be argued that going too far in either direction would undermine the existence of the federal government or states as relevant communities of interest at all, even if some system of dual sovereignty and administrative power is possible. To the extent that federalism is interested not just in the exercise of power in the abstract, but in the community from which such powers are thought to manifest, these struggles are inherently a part of the ongoing project of federalism itself.

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89. *Martinez v. Bynum*, 461 U.S. 321, 323, 328-29, 334 (1983) (“[A bono fide residency requirement ] does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. [It] simply requires that the person *does* establish residence before demanding the services that are restricted to residents.”). This is especially interesting given that in *Shapiro*, the Court specifically balked at the idea that a state should be able to “bar new residents from schools, parks, and libraries or deprive them of police and fire protection.” *Shapiro v. Thompson*, 394 U. S. 618, 632 (1969). Of course, even though interstate (indeed, international) migration was involved, it could be that the Court saw it primarily as an issue involving local boundaries. In contrast to the interstate context, the Court has traditionally been unwilling to subject interlocal barriers to mobility to heightened scrutiny. *See e.g.*, *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding local ordinance that prohibited more than two unrelated individuals to live in the same household); *see Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) (upholding local zoning ordinance against equal protection challenge notwithstanding disparate racial impact because no discriminatory racial intent could be shown); *see also* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 460 (2001) (“What is quite stunning is the radical disjuncture between Saenz’s rigorous attack on a statute that would make it marginally less attractive for poor residents from other states to move to California and *Warth*[[ v. Seldin’s, 422 U.S. 490 (1975),] equally rigorous defense of an exclusionary zoning regime that makes it virtually impossible for poor residents from a nearby town to move into Penfield.”).

As hinted at by *Martinez*, when the divide between residents and nonresidents is merged with the issue of immigration, the federalism issue becomes even more complex. The reason is because non-citizen immigrants, or aliens, occupy a third type of residency status that does not clearly fit into the community or membership structure of either the nation or the states. Formally outside the national polity, they are nevertheless recognized by federal statuses and protected as “persons” in the constitutional fold.<sup>90</sup> At the same time, their relationship with the state is even murkier. By nature of being in the United States, they are necessarily physically present in a state: the conventional hallmark of state residency.<sup>91</sup> Notwithstanding their physical presence however, they are also not citizens of the United States, which is the typical basis for challenging state discrimination against outsiders.<sup>92</sup>

The Courts have struggled with how aliens fit into the federalist structure of political communities. In some instances, the Court appears to be of the opinion that membership in the federal polity should be of little relevance or consequence to states when considering how they determine membership. For example, in *Graham v. Richardson*, the Court struck down a state law that limited access by certain aliens to state health benefits in part by noting that from the state’s perspective, immigrants were no different than any other state resident and indeed may be more of a resident than recent migrants from another state.<sup>93</sup> Reaffirming *Shapiro*, the Court indicated that it was unwilling to categorically limit the logic of the right to travel cases to citizens.<sup>94</sup> Similarly, an attempt to

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90. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

91. See *infra* note and text accompany note 95.

92. To the extent that right to travel cases are based on the Privileges and Immunities Clause and an emphasis on the importance of citizenship, it “also illustrates the perils of the citizenship project . . . [by] appear[ing] to draw an indelible line between the rights of citizens and aliens.” T. ALEXANDER ALENIKOFF, *SEMBLENCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 70 – 71 (2002).

93. *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (“We agree with the three-judge court in the Pennsylvania case that the ‘justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro*, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.’ There can be no ‘special public interest’ in tax revenues to which aliens have contributed on an equal basis with the residents of the State.”) (quoting *Leer v. Sailer*, 321 F. Supp. 250, 253 (E.D. Pa.1970)) (citations omitted)).

94. *Graham*, 403 U.S. at 375-76 (stating that the Court “has never decided whether the right [to travel] applies specifically to aliens, and it is unnecessary to reach that question here” and explaining that “[i]t is enough to say that the classification involved in *Shapiro* was subjected to

justify a discriminatory state statute as a bona fide residency requirement in *Plyler v. Doe*, which involved a Texas law that allowed schools to deny free public education to illegal immigrant children, was also rejected by the Court on the ground that it did not comport with “established standards by which the State historically tests residence” based on simply being physically present as a resident.<sup>95</sup>

In other cases, however, the Court has relied on an alien’s standing with the national polity as a baseline for assessing state attempts to circumscribe the bounds of its community on the basis of federal citizenship. The consequences of doing so have not been uniform. However, they have been justified retrospectively by the Court on the basis of the government function involved.<sup>96</sup> Thus, in cases like *Truax v. Raich* and *Takahashi v. Fish and Game Commission*, the Court construed legally admitted aliens as essentially guests of the federal government, and thus imbued with rights stemming from having a form of membership, however incomplete, in the national polity.<sup>97</sup> Echoing the language of the right to travel language of *Shapiro and Saenz* and their invocation of the Privileges and Immunities Clause, the Court in *Takahashi* described *Traux* as holding that aliens, through their admittance by the federal government, possessed “a federal privilege to enter and abide in ‘any state in the Union’ and thereafter under the Fourteenth Amendment.”<sup>98</sup>

At the same time, the Court has invoked national citizenship criteria, even those that are explicitly based on race, to justify state measures that discriminate

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strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement.”).

95. *Plyler v. Doe*, 457 U. S. 202, 227 n.22 (1982); *id.* at 229 (“In terms of educational cost and need, however, undocumented children are ‘basically indistinguishable’ from legally resident alien children.”); *see also id.* at 250-51 (Burger, C.J., dissenting) (“The Court has failed to offer even a plausible explanation why illegality of residence in this country is not a factor that may legitimately bear upon the bona fides of state residence and entitlement to the benefits of lawful residence.”).

96. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982) (reorganizing the equal protection jurisprudence regarding aliens by replacing “the old public/private distinction” with one “between the economic and political functions of government.”).

97. *See Truax v. Raich*, 239 U. S. 33, 42 (1915) (holding that states cannot deny “those lawfully admitted to the country under the authority of the acts of Congress” from “enjoying in a substantial sense and in their full scope the privileges conferred by the admission” or cause them to be “segregated in such of the states as chose to offer hospitality.”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 419, (1948) (interpreting a provision of a post-war Civil Rights Act, enacted to protect voting rights of newly freed slaves and ensure their equal citizenship, as not only applicable to aliens, but as a part of Congress’ “comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization”).

98. *Takahashi*, 334 U.S. at 415.

on race indirectly by relying on federal classification.<sup>99</sup> The Court has also pointed to an alien's exclusion from the national polity under federal law as the baseline presumption for his standing with regard to *all* political communities. In a number of cases that can be traced back to *Graham*, the Court all but abandoned the careful parsing of state and federal citizenship by holding, with regard to a state-level classifications, that "[t]he exclusion of aliens from basic governmental processes is . . . a necessary consequence of the community's process of political self-definition . . . . Aliens are by definition those outside of this community."<sup>100</sup>

With *Sugarman v. Dougall*, the Court planted the seed for what would later become the political function doctrine by recognizing that a state's interest in establishing its own form of government may require it to "limit[] participation in that government to those who are within 'the basic conception of a political community.'"<sup>101</sup> The Court would turn these comments into a powerful and expansive exception.<sup>102</sup> Thus, in cases like *Ambach v. Norwich* and *Cabell v. Chavez-Salido*, the Court held that citizenship requirements for public school teachers<sup>103</sup> and parole officers<sup>104</sup> respectively were legitimate efforts by the state to preserve representative government and thus were subject to less judicial scrutiny. In the Court's view, the very concepts of membership and community were at stake. Without employing something like the political function doctrine, the Court risked "obliterat[ing] all the distinctions between citizens and aliens, and thus depreciat[ing] the historic values of citizenship."<sup>105</sup>

What is striking about these decisions is that in spite of the addition of alienage, the results and the reasoning do not deviate much from those underlying the Court's right to travel and residency requirement decisions. In many ways, both invoke and wrestle with the federalist tension between the federal government and states as overlapping communities, and the consequences of having full or even partial membership in one, the other, or

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99. See *Terrace v. Thompson*, 263 U. S. 197, 220 (1923) ("The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation.").

100. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982).

101. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972)).

102. See *Cabell*, 454 U.S. at 458 (Blackmun, J., dissenting) (arguing that "*Sugarman's* exception [now] swallows *Sugarman's* rule").

103. See *Ambach v. Norwich*, 441 U.S. 68, 76-80 (1979).

104. See *Cabell*, 454 U.S. at 445-47.

105. *Foley v. Connelie*, 435 U. S. 295, 295 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

both. In both fields the Court seems to recognize that community self-definition at the federal and state level, though sometimes conflicting, are not only prerogatives of, but also prerequisites to, being such a community.

From this perspective, the recent proliferation of immigration-related state laws is neither unique nor unprecedented; it is merely the most recent attempt by states to define their community in opposition to, and by stemming the flow of, outsiders. It suggests, for example, that the California statute enacted in part to stem the influx of "Okies" from Oklahoma during the Dust Bowl period struck down in *Edwards v. California*,<sup>106</sup> one of the Court's earliest right to travel cases, is not unlike the recent attempt by Oklahoma to deter the international and interstate migration of illegal (and possibly legal) immigrants flowing in from other countries or other states.<sup>107</sup> The fact is local initiatives with regard to immigration enforcement in recent years are often just as interested in steering immigrants to other states as they are in returning them to their country-of-origin. Indeed, alongside state concerns that an influx of immigrants will turn their community into a third-world country,<sup>108</sup> one frequently finds worry that their state will become the next California.<sup>109</sup> How one reacts to these concerns is invariably tied to one's perception of states as distinct communities in our federalist system.

Immigration does change how we resolve this federalist tension in at least one respect. Even if we accept that federalism requires deference when a state acts to define itself as a community to serve the interests of its citizens at the expense of outsiders, it is not clear that this objective is well served by the increasing use of alienage as a dividing line at the state level. Although it may appear at first to be an appropriate compromise given that it relies on a distinction embedded in federal law, it can be argued that to expand the relevance of federal membership rules in this manner, as the Court did in *Cabell*,

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106. See *Edwards v. California*, 314 U.S. 160 (1941); see also TIM CRESSWELL, *MOBILITY IN THE MODERN WESTERN WORLD* 148 (2006).

107. See Oklahoma Taxpayer and Citizen Protection Act of 2007, H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007); see also Angel Riggs, *State Curb on Aid to Illegals Weighed*, TULSA WORLD, Mar. 27, 2006, A1 (describing Randy Terril, the sponsor of H.B. 1804, as saying years before that bill was passed: "As other states tighten immigration laws . . . more illegal residents are turning to Tulsa, Oklahoma City and other smaller Oklahoma cities.").

108. See, e.g., Andrea Walker, *N.Y. Group Critical of Immigration Policy: Billboard Messages Erected in 4 N.C. Cities*, CHARLOTTE OBSERVER, Nov. 17, 1999, at C1 (quoting Herbert Berry of Chapel Hill: "Our immigrant numbers must be reduced, otherwise we will turn into a Third World country with billions of people and a lot of problems.").

109. See, e.g., *So They Said*, WICHITA EAGLE, Feb. 17, 2008, at 11A (quoting State Senator Peggy Palmer: "Because other states are doing something, it forces us to. I don't think we want to become like California. There is a danger factor there.").

only serves to further erode the status of states as a distinct and independent community of interest.

In this respect, although *Graham* struck down a state effort to cast alien residents out of the state polity, the Court's requirement that states offer compelling reasons for relying on federal immigration status in this manner may have counter-intuitively led states to think about the place and role of its membership rules apart from the federal membership regime, even or especially as the salience of that regime continues to grow. Conversely, to avoid the role of the state polity becoming no more than a convenient administrative subdivision of the federal government<sup>110</sup> may require that states be permitted some leeway to define state membership criteria with regard to aliens in ways not intended by federal law.<sup>111</sup> It can be argued that members of the Court hinted at this complexity in cases like *Ambach*, in which the dissent, to illustrate "how shallow and indistinct is New York's line of demarcation between citizenship and noncitizenship" noted the irony of the regulatory scheme in question, which prohibited noncitizens from becoming public schoolteachers but permitted noncitizens to vote for, and serve on, local school boards that possessed extensive power to hire and fire schoolteachers and craft many aspects of the school curriculum.<sup>112</sup>

In short, not unlike the other approaches to federalism explored above, the community approach here shows that immigration both raises and complicates federalism concerns in different ways. This is due in part to the contested nature of the federal government and the states as political communities, as some of the analysis above shows. It is also the consequence, however, of how the relative salience of these communities in our everyday lives has changed since the federalist structure was put into place. Dissenting in *Garcia*, Justice Powell argued that separate and distinct sovereign spheres needed to be delineated and maintained not necessarily for its own sake, but to effectuate the structural protection stemming from state political influence that formed the basis of the majority's opinion.

In his view, for the states to be an effective "counterpoise" to federal power in the political realm, it must be able to "attract and retain the loyalty of their

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110. Cf. *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them."); see Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 850, 858 – 62 (1992) (arguing that the law oscillates between seeing localities as organic jurisdictions representing an authentic community, and synthetic jurisdictions created for the administrative convenience of the state).

111. Cf. generally Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1992-1993) (describing the long historical practice of non-citizen voting at the state and local level).

112. See *Ambach v. Norwick*, 441 U.S. 68, 86 (1979).

citizens” by remaining relevant with regard to their everyday concerns.<sup>113</sup> A number of developments outside of doctrinal developments, including the increasing mobility of individuals in American society, have undermined the degree to which individuals identify with, or express loyalty to, any given state as a community of interest. Nevertheless, as the analysis here suggests, although such federalism concerns extend into the immigration context, it is not always possible to apply federalism directly or in a straightforward manner without taking into account the particular frame of federalism involved and how the terms of the debate shift with the introduction of federal immigration laws.

#### IV. CONCLUSION

The wave of immigration-related activity at the state and local level in recent years has prompted many to examine what role, if any, federalism plays in the immigration context. With few exceptions, however, the discourse thus far has been relatively limited and largely results-oriented. Those who support greater enforcement of existing immigration laws or favor expanding restrictions on immigration in general often lend support to efforts to regulate immigration at the sub-federal level for this reason, while critics of the current immigration regime tend to assert federal exclusivity in response. In this regard, federalism is often no more than new clothes on an old debate.

It is far too early to tell whether an explicit doctrine of immigration federalism will emerge, or what form that doctrine might take. Nevertheless, as the analysis here suggests, the foundation for such a doctrine can already be detected in much of the existing immigration jurisprudence, especially if they are understood as part of the evolving doctrines of federalism as a whole. To the extent immigration federalism draws upon the insights of the federalism, a rich body of doctrine exists to guide our understanding of what immigration federalism should be. At the same time, to the extent immigration federalism is tied to the development of federalism more generally, it is unlikely that a coherent doctrine of immigration federalism will emerge anytime soon. Only by foregrounding the nuances and multiple facets of the federalism debate can we begin to understand the role that it plays, or will play, in the immigration context.

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113. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556, 571 (1985) (Powell, J., dissenting).