

E PLURIBUS UNUM? FEDERALISM, IMMIGRATION AND THE ROLE OF THE AMERICAN STATES

By

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ABSTRACT OF THE DISSERTATION
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ABSTRACT:

Unlike the assumptions contained in the federal plenary power doctrine, immigration policy in the United States is the result of conflict, collaboration and intense interaction between the states and the federal governments. Since the 19th century, immigration policy making has exhibited familiar patterns: when state and federal objectives have been aligned, states act as backers of federal policy, often using their legislative authority to strengthen federal immigration law. When preferences diverge, states become powerful lobbyists who can use their legislative authority to keep immigration-related issues on the top of the federal agenda. Large, electorally rich states are particularly effective pressure agents. Electoral and political concerns often lead the federal government to yield to state pressure and implement immigration reforms (often restrictive) that are consistent with state preferences.

Acknowledgements

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Introduction

In a unitary system, political decision-making authority is centralized: the central government of the polity has final authority over all political decisions while local governments are mere subdivisions of the center, acting as administrators and implementers of the policies made by the central government. By contrast, in a federal system, sub-national governments have independent policy-making authority and are often important participants and partners, if not final arbiters in policy decisions. There are only a few policy domains where the American federation is expected to operate more like a unitary system. Immigration policy is considered to be among those few. Since the 1870s, the Supreme Court has insisted that the federal government has “plenary” or exclusive power over immigration policy.¹ Thus, in the immigration domain, states are assumed to be executioners of federal fiat, if they have any role at all.

Yet, both the historical record and modern day experience provide ample evidence of state involvement in this domain. The institutions of federalism are far more flexible than the Supreme Court envisioned, allowing states room for legislative action in this field. The central puzzle addressed in this study is why do we see so much fluctuation in the distribution of intergovernmental power in a policy domain which is deemed to be exclusively federal? Why are states even involved in making decisions in an area where they lack formal authority? What does immigration policy tell us about the inner-workings and politics of the federal system and the conditions under which power arrangements are negotiated across government levels?

¹ *Fong Yue Ting v. United States*, 149 US 698, 724, 730 (1893); *Nishimura Ekiu v. United States*, 142 US 651, 660 (1892); *Shaughnessy v. Mezei* 345 US 206, 210 (1953); *Matthews v. Diaz* (1976)

Following recent work in comparative federalism (Bednar, 2009; Kelemen, 2004), I argue that federalism is not a static system but rather a set of institutional structures that provide some primary rules of conduct. As a result, the distribution of authority in a federal system is not fixed: who does what when and how is actually the result of complex negotiating processes between levels of government. The system eliminates a narrow set of options (e.g., exiting the Union), but it allows actors to select from a wide variety of other strategies and possibilities. In a stable federal system where the structure itself is not challenged (as it was during the Civil War, for example), the debate is typically over the marginal distribution of power in specific policy areas. Under these circumstances, the calculations can allow both centralization and devolution as viable options with benefits for both states and the national government. In immigration policy, states themselves sought the federalization of immigration decision-making as a way to overcome problems of collective action and to enforce a more equitable distribution of costs related to the admission, processing and transport of immigrants.

After the enunciation of the plenary power doctrine, states never challenged federal primacy in the field of immigration but that has not prevented them from enacting a variety of immigrant-related laws and regulations. This study argues that there are three main explanations for state legislative activity in the immigration domain. First, state legislation fills the void in areas of the law where the federal government is less involved. Since immigration is a regional phenomenon, states and localities act as first responders. New issues relating to immigrant populations always appear first at the local and state level before they reach national scope. As a result, sub-national governments have to articulate solutions to these problems and to develop new ideas and approaches. Second, states are not simply “legislators in the void” (Filindra and Tichenor, 2008), but also calculating, strategic actors. In cases where state and federal preferences are aligned, states act to reinforce federal policies, marshalling their internal

resources to support joint state-federal objectives. However, a third distinct pattern emerges when state and federal priorities diverge. In such cases, states often use their legislative authority as a tool to keep immigration issues at the top of the national political agenda. The contestation that often results from state action, the legal challenges and the ongoing public debate, serve to maintain a high level of issue salience. Since the immigration battle is most often fought in key “swing” states, the logic of the electoral cycle forces national decision-makers to compromise and set aside national preferences to honor state demands. State immigration legislation thus becomes a unique and powerful lobbying instrument that has often forced national policymakers to yield to state preferences at the expense of national priorities and goals.

This introduction offers a summary of the empirical puzzle stemming from the plenary power doctrine as well as a discussion of the argument offered in this study which contradicts the idea of federal exclusivity and explains why and how states are involved in immigration policymaking. The limitations of existing theories are also discussed in summary. Finally, I provide an outline of the remaining chapters.

The Puzzle of the Plenary Power Doctrine

Political scientists and legal scholars agree that by Constitutional design, there are a few policy areas where the federal government is the exclusive decision-maker: according to the Constitution, the federal government alone provides for the national defense, declares war, conducts foreign policy, enters into treaties with foreign countries and issues currency. The federal government is also entrusted with providing “a uniform rule of naturalization” which makes it the exclusive decision-maker in the domain of immigration policy. According to what is known as the “plenary power doctrine,” the United States government is solely responsible for determining which aliens are permitted to enter the national realm, under what conditions they can do so and for how long they can stay. Congress is also exclusively authorized to specify the rights and obligations that noncitizens have while present on U.S. territory. Violation of the regulations that govern entry and abode constitute violations of federal law. The United States government is also the sole determinant of rules of deportation and exclusion. Federal immigration courts decide if an alien is deportable or if special circumstances warrant for her continued residency in the country (Aleinikoff, Martin and Motomura, 2008).

These responsibilities are part of the sovereign authority of the United States government and the U.S. Supreme Court deemed these functions not only exclusively federal but also unreviewable by federal courts.² In *Nishimura Ekiu v. United States* (1892), the Supreme Court had forcefully pointed out that:

[I]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such

² *Fong Yue Ting v. United States*, 149 US 698, 724, 730 (1893); *Nishimura Ekiu v. United States*, 142 US 651, 660 (1892); *Shaughnessy v. Mezei* 345 US 206, 210 (1953); *Matthews v. Diaz* (1976)

conditions as it may see fit to prescribe. In the United States, this power is vested in the National Government, to which the Constitution has committed the entire control of international relations.

A year later, in *Fong Yue Ting v. United States* (1893), the Court once again declared that the right to determine rights of access and presence for noncitizens is “an inherent and inalienable right of every nation.” Since then, legal scholars and political scientist alike have for the most part assumed that the doctrine of federal exclusivity or “plenary power” doctrine precludes state action in the domain of immigration policy.³ If there is a role for states in this field, it should be that of implementers or administrators of federal fiat not as policymakers of their own right. In immigration policy, the American system is expected to behave as a unitary authority.

The absolute dichotomy established by the plenary power doctrine flies in the face of centuries of empirical reality. Historical and contemporary evidence shows that states and local governments have been a lot more than implementers or executioners of federal law. States were the first to develop policies to encourage Europeans to immigrate to the New World, they devised marketing campaigns, employed immigration agents in Europe and at East Coast ports and advertised the guiles of each area in innovative ways. Once immigration began in earnest, states designed the original immigrant admissions system of the country, setting up institutions to facilitate the processing of millions of people annually. State poor laws and laws regulating morality became the basis for evaluating immigrant eligibility for admission (Skerry, 1995). Furthermore, states have long been involved both in the admission and exclusion of noncitizens, acting on their own initiative or collaborating with the federal government to identify and remove aliens from the territory of the United States. Everything from market regulations, labor

³ For exceptions see Newton and Adams (2009), Skerry (1995). For the legal debates see: Rodriguez (2008), Kobach (2006), Wishnie (2002), Spiro (1996),

market laws, land ownership laws, health and public safety codes and housing ordinances have been used in ingenious ways to force certain categories of noncitizens to leave a region. State legislation has thus operated as a form of unofficial deportation or exclusion law. In the area of labor policy, states and localities have used their legislative authority to severely restrict noncitizens' access to the labor market and to protect American citizens from competition.

In recent years, the picture has become more complicated: some states have used their legislative authority to pursue immigration control and to exclude certain immigrant groups (especially undocumented immigrants) while others have been equally enthusiastic in embracing noncitizens and vesting them with a variety of new rights. Even at the local level there is substantial variation in legislative responses to immigration. Most large urban centers have declared themselves to be "sanctuary cities," prohibiting local law enforcement from inquiring as to the immigration status of individuals with whom they come into contact. Some cities have also set up day labor centers for immigrant and citizen day laborers to find work and meet their employers in a safe and sanitary space. Other towns have taken the opposite tack, explicitly authorizing their police forces to enforce civil immigration law, collaborate with federal immigration authorities and prevent day laborers from congregating on street corners or parking lots.⁴ Much like it was the case in the past, the purpose of many of these restrictive legislative initiatives is to drive out noncitizens (primarily undocumented immigrants) from local jurisdictions. What has changed between the 19th and the 21st centuries is not so much the enthusiasm for restriction or the pursuit of state-level innovation in this policy area, but the geographic location of these exclusionary initiatives: while large immigrant-receiving states such as California, New York and Texas have generally opted for progressive, immigrant-

⁴ See Pulitzer Prize winning coverage of Eastern Valley Tribune which focused on the immigration control efforts of Sheriff Joe Arpaio in Maricopa County, Arizona (<http://www.eastvalleytribune.com/story/138178>).

inclusive or neutral policies reversing decades-long exclusionary trends, new immigration states in the Southeast and the Southwest are resurrecting ideas and laws often not seen in over a century. Table 0.1 (below) provides a timeline of state involvement in immigration policy since colonial times.

Table 0.1 State Involvement in Immigration Policymaking	
1600-1776 (Colonial era)	<ul style="list-style-type: none"> • States had individual admissions policies; restrictions on paupers, moral undesirables (convicts, prostitutes), religious undesirables; restrictions on real property ownership and inheritance; slave laws. • Confrontation with Britain over convict “dumping”
1776-1840s	<ul style="list-style-type: none"> • Restrictions on paupers, limitations on real property ownership and inheritance; racial-restrictions (e.g., black foreigners could not land on Southern ports) • <i>Miln v. New York</i> (1837) and <i>Passenger Cases</i> (1849) provide conflicting answers to the legitimacy of state immigration laws.
1850s-1870	<ul style="list-style-type: none"> • Competition over European immigration; states establish recruitment offices in Europe and at East Coast ports. • Post states impose head taxes and other levies on incoming aliens. • (New York estimates the value of immigrants at \$800 per head)
1875	<ul style="list-style-type: none"> • <i>Henderson v. Mayor of New York</i> (1875) nullifies the head tax system and declares that a uniform admissions policy is a federal responsibility. • States threaten to close down ports; Washington passes federal head tax (50 cents). States continue to be the administrators of the system but the financing comes from the federal government
1870-1892	<ul style="list-style-type: none"> • Chinese exclusion crisis begins in California. Local and state laws preventing the Chinese from employment in agriculture, mining, laws targeting Chinese laundries and hand-drawn carriages, state restrictions on incoming Chinese immigrants. Chinese excluded from public education, primary to tertiary. • Federal liberalism and efforts to establish strong commercial ties with China blocked by strong anti-Chinese reaction on the West Coast.
1880s-1920s	<ul style="list-style-type: none"> • After the Chinese exclusion becomes federal law, Western states target the Japanese. Pressure to exclude them from agriculture through alien land laws. • Federal efforts to maintain strong ties to Japan, a rising military power, are obstructed by state anti-Japanese activism. The federal government yields and abandons its liberal efforts.
1920s-1930s	<ul style="list-style-type: none"> • The exclusionary national origins legislation of the 1920s and World War I bring European immigration to a halt. States promote the idea of Mexican temporary “stoop” labor. • The Great Depression changes the mood vis a vis Mexicans. States (assisted by localities) initiate a Mexican repatriation program which forces half a million people to “return” to Mexico. Between 40-60% of them were U.S. citizens.
1920s-1970s	<ul style="list-style-type: none"> • High skilled European refugees pour in after both World Wars and during the interwar period. States pass a variety of restrictions on alien professionals, requiring citizenship for a number of employment categories ranging from

1940s-1960s	<p>physicians to hair-dressers. Some of these restrictions (related to “political functions, e.g., police officers) survive today. Most were nullified in the 1970s by the Supreme Court.</p> <ul style="list-style-type: none"> • During WWII, states pressure the federal government for a new temporary workers program to bring in Mexican workers to work in the fields. The federal government negotiates the bracero program with Mexico, but states deem its labor protection provisions too restrictive. Texas is blacklisted from the program because of a long history of abuses towards Latinos. • Mexico pressures the U.S. government to enact employer sanctions are countered by Southwestern states’ resistance. Congress passes the “Texas Proviso.” • Texas and other Southwestern states pressure the INS to be lax about the entry of undocumented immigrants. • The climate turns in 1954 when Mexico ascends to fewer restrictions and domestic public opinion is alarmed about the “wetback problem.” States and localities collaborate with the INS to deport over one million undocumented workers.
1970s-1980s	<ul style="list-style-type: none"> • Texas tries to exclude undocumented immigrant children from public school education, but the Supreme Court invalidates the state statute in <i>Plyler v. Doe</i> (1981). • Efforts to exclude immigrants from federally-funded benefits are also invalidated in <i>Graham v. Richardson</i> (1976) • States introduce “English only” law, requiring schools and public administration to use English to the exclusion of other languages • Cities declare themselves “sanctuaries” for undocumented immigrants instructing local police departments not to inquire as to individuals’ immigration status. • States pass employer sanctions legislation; California and Kansas try to enforce them. The pressure from states for employer sanctions leads to 1986 IRCA which also explicitly prohibits the “sanctuary city” practice.
1990s	<ul style="list-style-type: none"> • California, plagued by recession, passes Proposition 187 in 1994 excluding undocumented immigrants from all state-provided services, including benefits, healthcare, and education. Federal courts declare the Proposition unconstitutional. • In 1998, California bans bilingual education through another initiative. • California, New York, Texas, Florida, New Jersey and Arizona sue the federal government in an effort to recover the costs of providing services (healthcare, education and incarceration) to undocumented immigrants. The lawsuits are thrown out of court, but the affair is a major publicity disaster for President Clinton. State governors make pleas to Congress for relief. • Congress passes PRWORA and IIRIRA, excluding legal immigrants from federal welfare and healthcare programs, making easier to deport immigrants, and providing immigration administration agencies with new powers. The new laws also open the door for federal-state (and local) collaboration in enforcement of civil immigration law. The first to test the new option is Salt Lake City which works with INS on immigration enforcement during the 1998 Winter Olympics.
2000s	<ul style="list-style-type: none"> • As a result of PRWORA, states have to choose whether to cover legal immigrants through state-funded welfare programs or not. Some provide coverage; others exclude them completely from welfare rolls. • States pressure Washington to reinstate funding for legal immigrants

	<p>especially for SSI and food stamps. Washington yields to state pressure.</p> <ul style="list-style-type: none"> • Ten states, led by Texas, introduce a new positive right for undocumented immigrants: in-state tuition benefits. Others pass legislation to explicitly exclude undocumented children from in-state tuition programs. • “Sanctuary cities” reappear for the first time since the 1980s: most major metropolitan areas become undocumented immigrant sanctuaries. • States and localities sign up for the 287(g) program which allows state and local police officers to enforce federal immigration law. Charges of abuse of minorities in Alabama and more so in Arizona. • Hazelton, PA and hundreds of other towns consider ordinances that require landlords to check tenants’ immigration status and not lease homes to undocumented immigrants. The ordinance has been found unconstitutional in lower courts, but the case is still pending. • States and local governments have passed a variety of employer-sanctions legislation, most of it for symbolic purposes as it is not really enforceable. • States introduce new “English only” laws, requiring schools and public administration to use English to the exclusion of other languages
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If the roles of federal and state governments in the immigration domain are determined by the Constitution and fixed by the “plenary power” doctrine, what explains the continuing involvement of states in the immigration domain? If immigration policy is an exclusively federal domain, as the Supreme Court has declared it to be time and again, why are states and localities so active in immigration-related legislation? This is particularly intriguing since states have explicitly recognized federal supremacy in this domain and have often called for Washington to introduce changes to the country’s immigration laws. Yet, states continue to introduce, debate and enact legislation in this area knowing that a significant portion of these laws would be deemed unconstitutional and thus void. During the 1880s alone, states had to defend their immigration laws in more than seven thousand legal challenges, most by Chinese immigrants (Salyer, 1995).

The practice was not restricted to earlier epochs. In recent years too, several prominent immigration-related cases with states and localities as defendants are being tried in federal

courts across the country.⁵ Why would states enact laws that have a marginal likelihood of surviving Supreme Court scrutiny? Since 1990 alone, states have considered 6,969 immigration-related bills and have enacted about one thousand such laws. Some of these laws represent attempts to implement federal law and align state regulations with federal mandates. However, much of this activity has been independent of, and often contradictory to federal initiatives. If, as political scientists expect, states have but limited authority over immigration decision-making and especially in the area of immigration control, why do they focus so much effort and time on immigration legislation, especially when their laws are likely to be deemed unconstitutional? On the surface, state action in immigration policy seems quite costly and rather irrational. By what logic do states seek to involve themselves in an area where their authority is severely circumscribed without even challenging the formal primacy of the federal government?

The plenary power doctrine and the assumptions that flow from it are inconsistent with the historical record in a second important dimension. As a result of the doctrine of federal exclusivity a general untested assumption has prevailed that power over immigration has always rested with the federal government. However history shows that the distribution of power in immigration policy has varied over time. States used to be the primary actors in immigration policy in the first half of the 19th century, but in the post- Civil War era they welcomed federal involvement. Overtime, states have vigorously resisted some federal initiatives and actively collaborated with the federal government on others. In recent years, the federal government took the lead in devolving certain decision-making authority over immigrants to states. Today, states can deny or allow immigrant access to a variety of state and federal benefits programs, fund non-emergency healthcare programs for pregnant undocumented women, or admit

⁵ The case that has received most attention in recent years is that of *Lozano v. Hazelton* (2007) but other cases are also active: *Martinez v. Regents of the University of California (in-state tuition)*, *Day v. Sebelius*, No. 04-4085-RDR (D.Kan., decided July 5, 2005) (in-state tuition).

undocumented immigrant students to state colleges and universities at in-state tuition rates. Some states are also significantly more involved in the enforcement of civil immigration law, training state police in immigration procedures. If the distribution of authority is formally fixed why do we see patterns of centralization and devolution of power over time? What explains why power-maximizing policymakers whether at the state or the federal level may willingly cede authority to another level of government?

“Immigration” Policy or “Immigrant” Policy? The Problem of Definitions

Following the legal literature, some authors in the social sciences have made a distinction between “immigration,” or “entry and abode” law which includes rules that govern the admission and deportation of aliens and “immigrant” or “alienage” legislation which determines the rights, privileges and obligations of noncitizens while in the United States (Bosniak, 2006; Skerry, 1995; Fix and Passel, 1994). According to this view, this distinction in legal principles also implies a clear distinction in authority: the federal government has formal responsibility for the admission and deportation of immigrants, while states have been heavily involved in the “alienage” side. As part of their role in developing social policies, states have been expected to enact rules that affect immigrant incorporation in a variety of social programs and in the social sphere in general.

In reality, however, the lines dividing what is “immigration” and what is “alienage” are quite blurrier than what is propounded by legal doctrine and so are the corresponding divisions of authority. In great part, this is the result of the development of the welfare state since the 1930s and especially after Lyndon Johnson’s Great Society programs of the 1960s. In the modern American state, the federal government has taken on a variety of responsibilities related to redistributive programs, social welfare, and civil rights. As a result, the federal government has often been a major factor in “alienage” policies, as it has been the one to determine immigrant eligibility rules for publicly-funded healthcare and welfare programs or other national initiatives.

At the same time, states have been participants in “immigration” policy both in explicit and implicit ways. For example, states have often collaborated with the federal government in the enforcement of immigration law, participating in and on occasion initiating deportation

drives. In the 1930s, states and localities were the driving force behind the “repatriation program” which sent more than half a million people to Mexico, while in 1954 state and local law enforcement agencies were enthusiastic participants in “Operation Wetback” which led to about a million deportations in the span of less than a year.

Manipulation of “alienage law” to achieve immigrant exclusion has been a second, less direct way in which states have been involved in the shaping of “immigration” policy. States have used “alienage law,” including market regulations, land ownership provisions, and access to health and education services as a means to discourage immigrants from entering their territory.⁶ By restricting access to jobs, housing and land ownership, states can make it all but impossible for noncitizens to survive at the local level. These laws are thinly veiled attempts to interfere with the flow of immigration. As alienage laws are often used with the intention of regulating the flow rather than just the presence of immigrants in a territory, the distinction between what is “immigration” and what is “alienage” becomes quite difficult to sustain.

As the final arbiter of the constitutionality of both federal and state laws, the Supreme Court has stayed away from any firm distinctions between “immigration” and “alienage” policies. The Court has upheld the federal government’s exclusive authority to restrict both the entry and the rights of noncitizens in almost any domain of social life it chooses to do so. On the other hand, the federal bench has been quite ambivalent as to the proper role of states in this sphere: for the most part, state laws have been struck down on the basis of violating the federal plenary power, but on occasion, the Court has raised questions about noncitizens’ rights under

⁶ Not all state legislative activity is restrictionist. As we shall see, in the mid-19th century as well as in recent years, states have used their legislative authority to create new positive rights for immigrants beyond and above those granted by the federal government. In the 19th century many states even allowed noncitizens to vote (Hayduk, 2006).

the 14th Amendment.⁷ At the same time, the Court has developed another line of doctrine, often cited as the “political function exception,” which indicates that for certain types of employment and functions within the community, states do have the right to require citizenship (Bosniak, 2006). Overall, neither jurisprudence nor political practice allows for a clear distinction between “entry and abode” and “alienage” policies.

⁷ See *Graham v. Richardson*, 403 U.S. 365 (1971) (the 14th amendment prevents states from discriminating on the basis of alienage in distribution of public benefits), *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholds federal restrictions on alien participation in federal programs), *Ambach v. Norwick*, 441 U. S. 68 (1979) (states can require public school teachers to be citizens), *In Re Griffiths*, 413 U. S. 717 (1973) (states cannot require citizenship for law practitioners).

The Non-Exclusivity of Immigration Policymaking: The Limits of the Plenary Power Doctrine

The American federalism literature has little to offer by way of answers to questions pertaining to the distribution of authority in immigration policy and how it has varied over time. Traditionally, the literature in American federalism has sought to describe and define the division of authority in the American polity and identify areas of shared authority as well as those where power is exclusively entrusted to one level or the other (Lowi, 2006; Conlan, 1999; Elazar, 1966). The topic of distribution of authority over immigration has never been analyzed by federalism scholars who have generally assumed rather than empirically investigated federal exclusivity in the immigration domain. However, the historical record shows that contrary to what federalism experts may have thought, immigration policy was originally controlled by states only to be centralized in the hands of Congress in the post Civil War era. Since then, actual responsibility over immigrants and immigration has been divided between the states and the federal government in ways that vary over time.

The literature in American federalism remained mostly descriptive and normative leading to a proliferation of “theories” of federalism, each with its own moniker which did little more than illustrate the distribution of authority in a given policy area at a given time (Stewart, 1982; Davies, 1956, 1978). With the notable exception of William Riker (1962) whose focus was on how federal systems come into existence, the field did not yield many causal explanations for the changing patterns of intergovernmental relations that political scientists painstakingly documented.

Much of the American federalism project has been normative in nature: the debate in the field as it originated in the 1960s centered on the appropriate distribution of power across levels of government. Arguing against the canon established by Supreme Court decisions and

legal normative thought, political scientists sought to defend the expansion of the federal government during the New Deal by providing historical evidence of significant federal involvement in policy areas that were traditionally viewed as exclusive state prerogatives (Elazar, 1987, 1966, 1962; Grodzins, 1960). The conservative response came from public choice economists and political theorists who compared the political system to the competitive market, arguing that competition among governments is a safeguard for democracy (Wildavsky, 1998, 1967; Buchanan and Tullock, 1962). This view led to the assumption that the institutional devices that promote competition in a federal system would minimize the likelihood of coerced centralization. The possibility of voluntary centralization over and above the signing of the Constitution was not seen as a likely possibility or as a normatively desirable outcome for any policy area.

Theories of federalism have often argued that governments are power maximizing actors: given the power differential between the central government and the states, the temptation for national politicians to encroach on state authority is quite formidable. And federal encroachment can lead to a monopoly of the political marketplace which in the minds of many public choice theorists and other conservatives is equated with tyranny (Wildavsky, 1967; Buchanan and Tullock, 1962). Indeed, in the extreme, encroachment can destroy a federation (Bednar, 2009; Riker, 1967). Therefore, the more actors there are in the system -the theory goes- the more diffused the political power, the safer is the democratic regime. Self-interested local politicians would be as interested in maintaining their power as national policymakers and therefore a balance of power would ensue as a result of political competition. However, the history of the American federal system and immigration policy in particular, provide cases of voluntary centralization when states decided to empower the federal government with new responsibilities and also cases of devolution of authority when the federal government

authorized states to act in domains that were previously exclusive federal purviews. The immigration story also shows that states continued to have an independent policymaking role in the regulation of immigrants even after immigration policy was centralized and the Supreme Court elaborated the doctrine of federal exclusivity.

A separate vein of the literature was more productive in generating testable theories, but the focus here was on the effects of inter-state (rather than intergovernmental) competition on policy outcomes and especially on the survival of the welfare state. Comparative political economists and scholars of American state politics in the 1980s feared that market deregulation and a preference for laissez-faire economics could intensify competition among states for investment and capital. In an effort to attract more investments, states would pare down their social spending, eliminating programs and weakening the welfare net (Pierson, 1994). Competition in a free, integrated market environment where capital is fully mobile could thus lead to a “race to the bottom” in terms of social welfare spending (Soss, et.al., 2001; Schram, 2000; Schram and Beer, 1999; Schram, Nitz and Krueger, 1998). Turning the theory on its head, George Borjas (1999) argued that pressure on the welfare state did not only come from capital mobility but also from increased inflows of immigrants. States with strong welfare systems would act as “magnets” for poor immigrants looking to benefit from these programs. As the low-income population in need of benefits increases due to the influx of immigrants, Borjas (1999) predicted that states would have no choice but to cut down on their social spending hurting the citizen poor. The theory and the accompanying evidence have been strongly criticized by sociologists and demographers who study immigrant networks and the migration process itself (Massey et.al., 1998).

American immigration policy did not start life as an exclusive federal purview: much like other policy areas that require extensive coordination between levels of government, immigration was federalized when interstate competition over immigrants led to significant collective action problems at the state level. States encouraged and pursued a strategy of federalization in an effort to lower the costs of maintaining a system that allowed for the importation of millions of people across the ocean, provide for a more fair distribution of burdens across regions and ensure a uniform system of admission and processing, based on similar standards.

Due to their focus on the welfare state, theories of the “race to the bottom” have neglected the side of competition that leads to improved social benefits and also to centralization. Economies of scale do enter the political calculus even in a system of diffused authority. In the consumer market, a race between firms leads to lower prices for consumers because the power of selection is in the hands of consumers. Thus supply-driven markets benefit individuals. Already in the antebellum era states competed with each other to attract the best of the immigrant stock from Western Europe. States found themselves in a supply-driven market in the mid-19th century when they competed with each other to attract immigrants. If there ever was a “race to the top”⁸ in immigration policy with states seeking to become as attractive as possible to new arrivals, it was this middle part of the 19th century. This competitive market was beneficial to immigrants because states offered more and more

⁸ The “race to the top” argument states that as a result of competition, states strengthen and improve their policies in certain domains. The argument has often been used in the globalization literature to counter the position that globalization will inevitably destroy social welfare systems because as states compete for capital investment they are forced to cut down on social spending (Soss, et.al., 2001; Schram, 2000, 1999, 1998; Pierson, 2000). In the context of American immigration policy, the race to the bottom argument has also been employed to show that as a result of devolution states are likely to scale back benefits to immigrants (Hero and Preuhs, 2007; Graefe, et.al., 2008). Peter Spiro (1996) has argued that the movement of immigrants across states may lead to a “race to the top” as it may ignite competition for immigrant labor.

inducements in the forms of free transportation, cheap land, resources (e.g., livestock) and even improvements in public services such as education. By 1870s, the cost of competition had become apparent to immigrant-seeking states: not only did “package deals” to prospective settlers become more extravagant, including land and other offerings, but port states for whom each arriving immigrant represented \$800 in total revenue, competed for head taxes. However, this competition was too costly for states and unnecessarily so: smaller inducements would be sufficient to attract European peasants to the United States if states could find a way to coordinate their efforts and act as a monopoly. Federalization of immigration policy provided that opportunity to transform the market from a competitive one to a monopolistic one.

Federalization was the solution to a second problem that states faced in the 19th century: the asymmetry of costs and benefits across regions. The vast majority of immigrants arriving in the United States in the 19th century landed in one of the main Eastern Ports, mostly New York. From the perspective of East Coast states, the costs of processing arriving aliens fell upon these few port states while the rest of the country benefited from the labor of immigrants but not the problems of handling thousands of arrivals. Western States on the other hand, argued that Eastern Ports benefited doubly from new arrivals: first, each new immigrant brought with him some money which went mostly to the local port economy for food, accommodations and other needs (the 19th century equivalent of tourism income). Second, port states required immigrants to pay head taxes which in effect was a form of double-dipping. In Western states eyes, immigrants were a source of revenue not a cost center for the Ports and for that reason, as the century progressed, efforts were made to divert immigrant traffic to Gulf ports. Centralization of immigration policy and the imposition of a federal head tax eliminated state conflict over the costs and benefits of arriving immigrants as well as possible economic wars between port cities in different regions.

Voluntary centralization can thus occur when states believe that by acting as a trust they can set prices at desired levels and at the same time they can distribute costs in a more appropriate manner that is beneficial to all. Cost diffusion and market control are powerful incentives for states to “move up” authority to the federal government. A common approach to immigration and a shared understanding of immigrants as beneficial to the country were also essential factors in facilitating centralization. By the mid-19th century, states were quite aligned in the criteria they used for the selection of immigrants as well as the rules of exclusion. Centralization of rules of entry and abode ensured continued uniformity and made “cheating” by changing the rules of the game more difficult. However, states did “cheat” by frequently contradicting federal rules and using their independent legislative authority as a weapon against federal priorities and preferences.

States as Actors in Immigration Policymaking: Collaboration, Conflict and Independent Action

After the centralization of immigration authority and the elaboration of the plenary power doctrine by the Supreme Court, states did not become mere executioners of federal law nor did they relinquish all their authority in the realm of immigration to a power-hungry federal government. The actual distribution of authority in immigration policy has been quite fluid over the years, with periods of harmonious collaboration and eras of intense intergovernmental conflict. Contrary to theories of federalism that expect the federal government to push out states and encroach on their authority (Bednar, 2009), in the field of immigration Washington has been a reluctant and wavering decision-maker both because it has perennially lacked the resources required to establish a full-scale, centralized admissions system and because it has taken its cues from the state level where agreement on immigration restriction has not come by often.

The history of federal-state interaction in the immigration arena reveals three patterns of interaction which are familiar from other areas of policy. When state and federal policy preferences coincide, states tend to be active collaborators helping the federal government achieve its objectives. However, when state preferences diverge from the policy choices of the federal government, states have actively used their legislative authority to interfere with federal policy, block national choices and keep the debate alive at the national level. Large immigrant states with significant electoral power or “swing states” have been especially successful in pressuring the federal government to change its policies. Finally, even when it comes to immigrants there are areas of the law where the federal government has minimal reach. Also, most immigration-related challenges appear at the local and state level first long before they

enter the national debate. In these cases, states often act independently, devising their own programs and producing innovative legislation to cope with immigration-related concerns.

When Interests Coincide: States as Federal Collaborators

The relationship between states and the federal government is not always competitive or conflictual. On many occasions, Washington and the states agree on both policy objectives and on the means to achieve them. In such cases, states have eagerly collaborated with the federal government to achieve mutually agreed upon goals. In the 19th century, the collaboration between states and Washington centered on the implementation of the immigrant admissions system. In the 1870s, Congress established a general framework for the admission of immigrants and allowed states to be the main implementers and executioners. The institutional framework that Congress created mirrored the practices and rules that states already had in place (Filindra and Tichenor, 2008).

Most often, however, collaboration has taken place in the area of immigrant exclusion with undocumented immigrants as the most frequent targets. States have worked with the federal government to identify and remove certain categories of immigrants from the territory of the United States. In the 1930s, states initiated the Mexican “repatriation” program which was supported by federal authorities. The program resulted in the removal of half a million people, many of whom were American citizens. In 1954, states in the Southwest were key participants in Operation Wetback which led to the deportation of more than a million undocumented immigrants, and in the 1990s, states participated in a number of border control initiatives. The collaboration between states and the federal government in the area of civil immigration law enforcement became institutionalized in the early 21st century through the voluntary 287(g) program which enables state and local law enforcers to be trained in civil immigration law procedures.

When Interests Diverge: States as Saboteurs of Federal Policy

In the immigration domain, when federal and state interests deviate, states have often acted as saboteurs. They have used their legislative authority in a strategic way, as a tool in keeping immigration on the top of the federal agenda and forcing Congress and the President to accept state immigration policy preferences to the detriment of federal policy initiatives. States have used the power afforded to them by the institutions of federalism to push for their own agenda in Washington, D.C. And when legislation and direct lobbying have not been sufficient, states have sued the federal government to force it to act in accordance with their preferences.

The experience of states with specific immigration-related issues often proved a major advantage in the context of intergovernmental conflicts. Long before the national government ever considered what to do with the millions of arriving Europeans, it was New York, Boston, Baltimore and the other major port cities that had to develop rules and regulations to rationalize and control the importation of people. Similarly, governments and courts in the West had to determine the rights and privileges of Asians within local society starting in the 1850s at a time when imperialistic ambitions were on the backburner for a federal government gearing up to fight for survival of the Union. Also, undocumented immigration had been debated in the Southwest since the interwar era, long before Congress introduced its first half-hearted attempt (in 1954) to penalize those harboring undocumented immigrants.

Electoral power plays an important role in immigration policymaking. Large, electorally important states have often used their role as “swing states” as a weapon to promote their immigration policy agenda at the federal level. In effect, states have used legislative innovation both as a short-term means to push noncitizens out of their territory and as an intergovernmental lobbying tool. By authoring vast amounts of immigration-legislation, often

fully-aware that many of these laws would not stand up to judicial scrutiny, states succeeded in keeping the level of polarization over immigration high for years at a time. Federal officials determined to raise the country's international profile and have it assume the role of great power in world economic and political affairs, initially resisted state exclusionary pressures, giving preference to a more liberal, outward-looking national agenda. However, the electoral logic eventually forced them to give in and implement state preferences into federal law, often at a cost to foreign policy objectives. Time and again, as restrictionists came to command growing majorities in key swing states and local political and economic factors allowed them to keep immigration restriction high on the political agenda federal policymakers could ignore the restrictionist impetus only at their own peril.

States as Independent Actors

Unlike in other policy areas where states have asserted their authority and have fought the federal government in Court to ensure that their decision-making powers remain intact in immigration states have never challenged the plenary power doctrine. In fact, states have frequently and consistently argued that immigration policy is a federal responsibility and they have forcefully voiced their expectations for federal action of various types. And this pattern is not restricted to a specific time period: states insisted on federal action in the 19th century and they do so today. However, the clear understanding that immigration decision-making is a federal prerogative has not stopped states from regulating immigrants in many ways. In part, state legislation filled the void in areas of the law where the federal government was not much involved. For example, state labor law determined whether or not noncitizens could be employed in a variety of professional occupations from doctors and lawyers to morticians and beauticians. Although a form of immigration regulation, these laws were typically upheld by the Supreme Court as a legitimate use of state police authority, thus allowing states to restrict alien competition in the labor market to the benefit of local professional associations which viewed immigrants as a threat. Congress never provided any guidance in this domain leaving states and the courts to determine the rights of alien professionals.

The prominence of states and even localities in the shaping of immigration policy is in part a result of the demographics of immigration itself. The movement of people in the United States has not been equally distributed across regions, states or even localities. More often than not, immigration is a regional or local rather than a national phenomenon. Therefore, the first responders to issues relating to immigration are local and state governments. National solutions become necessary when an issue has become a concern in enough states that the

benefits of national coordination outweigh the costs of trying to develop a single policy that is acceptable to most if not all.

Responding to new problems is not the only time when states may act independently in the immigration domain. By virtue of the way authority is distributed in the federal system, states are the primary decision-makers in fields such as education, community development, law enforcement and others. In these areas, the role of the federal government is circumscribed, even where immigrants are concerned. As a result, states have to make decisions on whether or not to create programs of bilingual education, adult English language training, and citizenship classes, whether to provide public documents in various languages, offer translation and interpreting services in public hospitals, establish prenatal care programs for undocumented immigrant women, provide college tuition assistance to undocumented children and how best to integrate and incorporate immigrants and their families. In most of these “alienage” programs, states have operated independently of Congress but under the watchful eye of federal courts.

All through the history of American immigration, the role of states has been prominent as independent agents, federal collaborators or saboteurs of federal policy. This study follows the history of state-federal interaction from the 19th century through the 21st, focusing on specific policies and time periods. The structure of the project is outlined below.

Project Outline

This study consists of eight chapters. Following this introduction, Chapter 1 provides an in-depth, critical review of the American federalism literature from the perspective of immigration policy. The argument here is that the normative focus of both the structural and the economic approaches to federalism prevented theorists from ever incorporating immigration policy into any theoretical framework as a legitimate concern for the study of intergovernmental relations. Early federalism theorists such as Elazar (1987, 1966, 1962) and Grodzins (1966?) sought evidence of federal involvement in policies that were traditionally considered state domains in order to justify the expansive role of the federal government during the New Deal. Public choice economists took the opposite tack, seeking formulations that would support intergovernmental competition and minimal federal involvement as the best guarantors of economic efficiency and democracy (Buchanan and Tullock, 1962). Ultimately, neither perspective had room for immigration policy which was a priori categorized as exclusively federal and thus not a concern from a federalism perspective. Chapter 2 then discusses theories of “horizontal federalism” or interstate competition. Here, the focus has been on the possible detrimental effects of interstate competition on the welfare state. Some work has looked at programs for immigrants offering some support to the contention that devolution of decision-making concerning immigrant eligibility for federal assistance programs has led to a weakening of the welfare net for immigrants (Hero and Prheus, 2007; Graefe, 2008). However, most of the work in this domain has focused on the factors that drive states to select specific criteria for programs and services thus bringing the lens to the intra-state level of analysis rather than intergovernmental relations.

The empirical portion of the study begins with Chapter 3 which documents the role of states in immigration policy-making in the 19th century. The discussion centers on how states opted for federalization of immigration decision-making in the 1870s, an approach that was strengthened and blessed by the Supreme Court in the enunciation of the federal plenary power. Then I show how the divergence in state and federal preferences over Chinese immigration led California to use its legislative authority to force the federal government to a more restrictive position. The United States of the late 19th century perceived itself as a rising great power, seeking to participate in the imperialism game, pursue commercial expansion. The belief that economic expansion in the Far East was essential for the well-being of the country's economy was quite widespread among the nation's policy-makers who saw in imperialism the answer to the problems caused by the closing of the Western frontier (Trubowitz, 1998). Free trade and colonialism were popular among the industrial states of the Northeast which eyed China and other markets in Asia as major growth opportunities. California and other Western states, however, wanted cheap labor, market protection for their farmers and the expulsion of Chinese immigrants. Within the span of 14 years as a result of on-going pressure from Western states and cities, Congress went from the Burlingame Treaty (1868) which celebrated free trade and freedom of immigration between China and the U.S., to the Chinese Exclusion Act (1882). During this period, Washington made a number of concessions and tried a variety of tactics to mollify the Western states but without success.

The Chinese exclusion debate served as harbinger of two things: that even in the post-plenary power era, states would continue to play a significant role in immigration policy using their legislative power as a means to force federal compromise if not outright capitulation, and that unlike other social issues, immigration was not to be a partisan issue cleanly dividing proponents and opponents along party lines. Surely, the outer edges of the spectrum were

typically occupied by the extreme right and the liberal left. However, the middle ground involved a rather unusual set of alliances. The immigration debate brought to the table a complex constellation of strange bedfellows, from Southern conservatives and labor leaders on the restrictionist side to Northeastern industrialists and Southwestern farmers on the open-door end (Tichenor, 2003). The “Chinese question,” much like the “Japanese,” “Mexican and “undocumented questions” that followed it, represented a major electoral threat to politicians from both parties. As a result, at the federal level both parties had to weigh national ambition and federal priorities against the prospect of losing the votes of key battle-ground states.

Chapter 4 looks at state laws regulating immigrant access to the professions. Here, states have been independent legislative actors often supported by federal courts in their exclusionary goals. The chapter documents the development of immigrant restrictions in the professions as they emerged during the inter-war era. Among the refugees who came from Europe in WWI and during the brief interwar period, were many skilled professionals such as physicians, lawyers and artisans. American professional associations and guilds sought to protect their ranks from immigrant competition by lobbying state legislatures to impose citizenship requirements for those entering certain professions. States complied and as a result, not just medical doctors, architects and lawyers but also beauticians, morticians, and pool-room operators had to be American citizens before they could be licensed to work in most states. Even Broadway actors lobbied for legislative protection from foreign stars! Most of these restrictions were tolerated by the Supreme Court until the mid-1970s; since then the Court has stricken down a number of them, but has created some exceptions for employment categories that fall under the “political function” of the state. Those include teachers, police officers and certain types of public officials.

In Chapter 5, I return to the chronological narrative, picking up the thread from the inter-war period and the increased immigration of Mexicans to the United States. The Mexican immigration which spans the 20th century, has led to instances of intergovernmental collaboration but also conflict. During the Depression, states and the federal government agreed on the benefits of the removal of half a million people from the territory of the United States and their “repatriation” to Mexico. States and localities run the program, requiring any Latino family that signed up for public assistance to also agree to board a train to the border. The states did not make distinctions between citizens and aliens; as a result, 40% of those repatriated were American-born. In the 1940s and 1950s, states continually interfered with Washington’s efforts to negotiate a temporary worker program with Mexico. The strict provisions of the initial “bracero” program upon which Mexico insisted and the US government agreed, were inconsistent with state preferences. In response, Texas bypassed the agreement and encouraged undocumented immigrants to enter its territory as farm workers. The use of undocumented labor became popular in other states as well since it allowed farmers to ignore the wage and labor provisions of the treaty with Mexico. During the renegotiation of the treaty in the 1950s, Texas legislators pressured Congress to include a provision which ensure that employers of undocumented workers would not get penalized.

When the growth of undocumented immigration reached unforeseen levels in 1954 prompting a strong public and media reaction, states worked closely with the federal Immigration and Naturalization Service (INS) in the removal of more than one million undocumented immigrants. State and local governments paid for print and radio ads in Spanish that warned undocumented immigrants to leave the country or face arrest. Local and state police forces rounded up undocumented farm workers and boarded them on leased Greyhound buses destined for the border.

In Chapter 6, I document state responses to the undocumented immigration challenge in the 1990s and the 2000s. Between 1990 and early 2008, states had considered 6,969 pieces of immigration-related legislation and passed more than one thousand of those. Cities also passed immigration ordinances, some seeking to protect immigrants and others aiming to impose restrictions on undocumented residents. The discussion analyzes the distribution of immigration law enactments across states and regions. The goal is to point out that as the demography of immigration has changed, so has the locus of legislative activity. In recent years, immigrants have headed for “new destination” states in the Southeast and elsewhere. Many of these areas have not had any experience with immigration since the 19th century and the growth of their immigrant population in the span of less than two decades has caused great alarm. The chapter highlights the case of Virginia, a “new destination” state that has debated and enacted a number of legislative initiatives at the state and local level in an effort to find solutions to the challenges of undocumented immigration.

Chapter 7 provides the history of one of the most intense intergovernmental contestations in recent years: the fight over criminal aliens. Starting in the late 1980s, states were faced with mounting costs for the incarceration and processing of deportable immigrant criminals. In many cases, states were expected to house and care for these felons until the federal government arranged for their deportation. The Immigration Reform and Control Act (IRCA) of 1986 included provisions for some reimbursement, but the funding was not sufficient to cover the actual costs to states. Politically, criminal aliens were also a far less controversial topic of debate than the undocumented immigrant population. The public viewed states’ demands for reimbursement as legitimate which empowered and emboldened states. The Clinton Administration did not recognize the political importance of the immigration issue from early on and sought to stall. The result was a heated intergovernmental battle which included six states

(unsuccessfully) suing the federal government, the rise of Governor Pete Wilson in California and the passage of Proposition 187 there. By 1994, Washington had established a generous state reimbursement program and in 1996 Congress passed two of the most restrictive immigration statutes of the post-war era: the welfare reform act which restricted legal immigrant access to federally-funded benefits programs and the Illegal Immigration Reform and Immigrant Responsibility Act which made deportations easier and appeals of deportation orders more difficult.

The final section of the study, Chapter 8 offers some concluding thoughts on the role of states in immigration policy-making and the effects that state legislation has on immigrant rights in the United States.

Chapter 1: Federalism and Immigration Policy: The Limitations of Federalism Theories

Immigration policy has raised a political firestorm over the years and has been the subject of many historical, legal, economic, demographic and other social science studies. In the context of American politics, immigration policy has generated important theoretical debates and continues to do so (Cornelius & Rosenblum, 2005). With one interesting exception: when it comes to the study of American federalism, immigration policy does not even reach the status of the ugly stepchild. It is typically lumped into the generic “foreign affairs” category and rarely even mentioned in the important texts of the field. When it is mentioned, it is generally to assert that this is a federal responsibility, exclusive and unreviewable, just as the Supreme Court declared back in the late 19th century.⁹

For a discipline that tends to take Supreme Court pronouncements with a sizeable grain of salt, and is (quite legitimately, in my view) open to the investigation of political drivers, motivations, and explanations in almost any text outside of grocery shopping lists, this unreflective and unconditional bracketing of immigration policy is curious. It is more so puzzling when American history offers many well known examples of state activism in immigration policy, among them the debate over Chinese exclusion and the anti-Japanese alien land laws of the early 20th century, the Mexican repatriation program of the 1930s, the infamous “Operation Wetback” of the Eisenhower years, California’s Proposition 187 and “Operation Gatekeeper” in 1994, and a variety of state and local proposals and laws introduced in the first decade of the 21st century. In addition, for the most part of the 20th century, states enacted and vigorously defended in federal courts restrictions on alien professional employment, from physicians to

⁹ *Fong Yue Ting v. United States*, 149 US 698, 724, 730 (1893); *Nishimura Ekiu v. United States*, 142 US 651, 660 (1892); *Oceanic Navigation Co. v. Stranahan*, 214 US 320 (1909)

hairdressers. Equally mysterious is that federalism theorists, in their various lists of state and federal spheres of authority (for an example, see Lowi, 2006:6), do not even mention the role of states in immigrant incorporation policies or other immigrant-related services.¹⁰ As students of the history of American federalism and constitutionalism, these scholars surely were aware of the “passenger cases” of 1848¹¹ and the variety of state statutes that determined noncitizen rights in such areas as property ownership, employment, inheritance, health, and poverty assistance. Yet they remained silent about this dimension of federalism. In his 1962 account of the American federal system, Daniel Elazar was willing to see federal-state cooperation even in national defense, but he was completely silent about immigration. On the other hand, Timothy Conlan’s (1998) work on American federalism and intergovernmental relations from 1965 to the 1990s which provided a reinterpretation of the framework on the basis of a metaphor derived from geological science never addressed immigration policy in any context. Similarly, a recent edited volume on American federalism (Morgan and Davies, 2008) which includes essays from several well-known scholars in the field does not mention immigration even once.

Another curious dimension of this omission is that an entire branch of federalism theory, the one derived from public choice theory, is best known for its normative conclusion that migration, or spatial mobility as they call it, is absolutely essential for the efficient functioning of the political marketplace in a federal system (Buchanan & Tullock, 1962; Tiebout, 1956; Hirschman, 1970). Yet, the study of immigration policy never became a focus for these theorists. What explains the complete lack of interest in immigration policy on the part of

¹⁰ Immigration law is typically divided into “entry and abode” legislation that is laws relating to immigration control and immigrant classification at the border, and “alienage” law that is, legislation pertaining to immigrants as residents in the United States. The social science literature has used an equivalent distinction between immigration policy and immigrants’ policy. Neither of these variants of policy has been discussed from a federalism perspective.

¹¹ *Smith v. Turner, Norris v. Boston*, 7 How. (48 U.S.) 283 (1849)

American federalism scholars? Why is it that in more than 50 years of theoretical development and expansion in this field, immigration has not once been discussed as a federalism concern?

In part, the explanation rests on the fact that immigration policy was not top-of-mind in the 1950s and 1960s when much of the federalism “canon” was developed. It is true that seminal books on American immigration were published during this period (for example, Higham’s study of nativism was first published in 1955) and the issue of the “melting pot” and ethnicity in the context of American society had started to puzzle sociologists and political scientists alike (Glazer and Moynihan, 1964; Gordon, 1960). This interest in ethnicity and race was quite understandable: after all, this was a period of introspection and self-reflection for the American polity. This was the era of the civil rights movement and the Warren Court decisions that changed race relations in America. However, on the surface, immigration as a policy was still quite settled in this period: the 1924 National Origins Act was alive and well thanks to its reaffirmation in the context of the Immigration and Naturalization Act of 1952 (also known as the McCarran-Walter Act). With few exceptions, such as the revolving door of the Southern border, the “wetback problem” of the Southwest, and the bracero program of 1942-1964 which begun in the 1940s, the general understanding in the public and in academia was that the flow of immigration had dwindled. Europeans, busy with reconstruction of the continent and awash in American cash thanks to the Marshall Plan, had little interest in moving to the United States. The influx of European war refugees had ended and the crisis resulting from the arrival of Southeast Asian refugees had not yet begun. In a world where the notion of immigration was still coterminous with European immigrants, the issue became a secondary political and academic concern. The radical changes of the era ensured that other issues took priority for students of federalism, such as the massive intergovernmental transfers and the unprecedented social programs of the New Deal and (later on) the Great Society.

This study argues that aside of the understandable contextual explanations for the lack of interest in immigration policy among federalism theorists, there are other more important reasons which relate not so much to the historical moment but to the weaknesses of federalism theories themselves: specifically, the early theories of federalism, especially those informed by the structural/functional paradigm of the era, did not rely on systematic and generalizeable hypotheses, but rather on ad hoc theorizing. Furthermore, cooperative federalism, the foundation of many federalism studies in later years, was deeply influenced by a normative commitment to defend the national government in the face of an onslaught from Conservative proponents of “states’ rights.” The result has been that many structural theories of American federalism have little analytical value. The theoretical defects are often hidden behind assertions relating to the intractability of the concept: federalism, they claim, comes in so many forms, and it is so flexible and mutable over time and space, that it is only inevitable that scholars who look at it from the point of view of one policy, one country or one era may come to different conclusions as to what the concept means and how governments behave in the context of federal arrangements (Elazar, 1987). In this sense, federalism fits perfectly with American “exceptionalism” in general: it is complex, it is unique and it really defies explanation (Krislov, 2001). Unfortunately, as I will discuss, it is also consistent with Lakatos’ analysis of a degenerative scientific program (Lakatos, 1978).

The public choice model, another 1960s development introduced at the same time as structural theories, had a normative goal of its own. Conservative in outlook, this school sought to promote states’ rights not on formalistic constitutional grounds, but using arguments about economic efficiency and democratic accountability. The theory of fiscal federalism which

followed tried to provide a formula for how best to “split the atom of sovereignty”¹² (in Justice Kennedy’s dramatic saying) and use economic explanations to decide what should be federal and what should be local regardless of formalistic limitations (Oates, 1972). These economicstic approaches led to important studies in “horizontal federalism” which examined the dynamics that arise across states. This branch of the literature sought to determine whether interstate competition leads to superior service delivery (Wildavsky, 1998) or to an erosion of the welfare state as states strive for efficiency at the expense of equality (Schram, 2000; Schram & Beer, 1999; Rom and Shieve, 1998).

The public choice approach and its derivatives were deeply rooted in economics and as such did not provide any political explanation for the dynamics that developed in federal systems. The first to develop a political theory of federalism, one consistent with the idea of a generalizeable theory, was William Riker (1964). This important study shows that the motivations and interests of political actors (specifically political parties) provide much of the explanation to the federalism puzzle. As we will see, the story is purely instrumental: self-interested actors, seeking to maximize benefits, strike a political bargain which takes the form of the federal system. In recent years, scholars in comparative politics have been inspired by Riker’s approach and sought to update it using the principles of rational choice institutionalism. The goal of these studies has been to provide a revised theory of federalism that explains how federations emerge, how they become consolidated and the institutional framework that is necessary for federalism to be maintained (Bednar, 2009; Wibbels, 2005; Kelemen, 2004, Bednar, 2004; Filippov, et.al., 2004).

¹² *U.S. Term Limits v. Thornton*, 514 U.S. 779, (1995) (Justice Anthony Kennedy concurring)

When it comes to immigration policy, the studies in the economic/behavioral paradigm are almost as silent as their structuralist counterparts, a surprising fact given the centrality of migration to this school of thought. And it is particularly curious that this pattern continued to recent years even though the devolutionary welfare reforms of the 1990s mostly targeted immigrants. In part, this silence is due to the politics within the field: many of these ideas were developed as a response to the unsatisfying structural paradigm and sought to provide more scientifically robust accounts for the same phenomena that the structural theorists sought to explain. However, public choice theory suffers from a second important defect in relation to immigration policy: the theory as stated by Hirschman (1970) and proponents of the principal/agent model, is founded on an assumption of full social membership. If that assumption is loosened, then the theory becomes far less viable. In this respect, immigration policies make for a uniquely unsuitable topic for this branch of federalism even though migration is an underlying assumption of the model.

Behavioralist theories are inherently more confident in their explanations and findings when applied to economic, fiscal or developmental policies and phenomena that can be easily reduced to a cost-benefit calculus. Immigration policy may have an economic component which over the years has been emphasized, especially by immigration restriction enthusiasts, but on a deeper level this policy falls within the domain of identity formation and identity politics. In spite of many recent efforts especially in comparative politics to develop rational and even game-theoretic models of identity politics (Bates, Figueroa & Weingast, 1998; Bates, Greif & Levi, 1998; Ferejohn, 1991; Laitin, 1986) there is a strong tension between a group-level phenomenon such as ethnic identity and individual level theories such as rational choice models. As many comparativists working in the area of culture have noted, the glue between individual action and social identities is not rationality but culture which works to make certain

options open and available while it renders others impossible and unthinkable (Ross, 1997). Behavioralist theories have trouble endogenizing preferences; once the preferences are identified, rational choice models can predict outcomes but they have no explanation for how these preferences are derived.

This chapter is divided into two substantive parts: the first part provides a detailed critique of formalistic and structural theories of federalism and discusses their general limitations as well as their inability to account for state immigration policies and initiatives. Similarly, part two discusses the challenges that immigration presents for behavioralist theories of federalism and especially models derived from public choice theory. The chapter that follows introduces a critical review of approaches to “horizontal federalism” or interstate competition theories as they apply to immigration policy.

Formalistic and Structural Theories of Federalism and the Immigration Blind-spot

A federal system is one comprised of at least two levels of government whose territorial rule overlaps, and whose roles and spheres of authority may expand or contract over time and by policy area, but whose continued existence is formally guaranteed. Neither level of government can eliminate the other. The political autonomy of each level is formally guaranteed in a written compact. Feeley and Rubin (2008), drawing on Friedrich (1950) and Livingston (1956) defined federalism as a means of governing a polity that grants partial autonomy to geographically defined subdivisions of that polity. Bednar (2009) has identified three criteria for federalism: territorial division into distinct and non-overlapping jurisdictions for the lower-tiers, decision-making independence for both the central and the lower level governments and direct governance at each level which is formally guaranteed. As it is understood today, federalism is often seen as an American invention, a system that the Founders of the United States devised after the Revolution to ensure that individual states would sign on to the idea of a government for the Union to replace British rule. The design had a strong instrumental purpose to it: the central government had to be pitched in such a way that it would not be seen as an authoritarian replacement to the hated British throne, but rather as a mutually beneficial development that would help the states maintain cohesion and security (Riker, 1987).

From the outset, the federal system was not founded on clear and concrete constitutional norms. The term “federalism,” for example, is not once mentioned in the Constitution neither is the central government formally branded as “federal” in that document. Consequently, federalism has been used to defend a variety of confusing and even contradictory principles and positions. Even James Madison realized the challenges ahead: soon after the

conclusion of the Constitutional Convention, he admitted that “the double object of blending a proper stability and energy in the government with the essential character of republican Form, and of tracing a proper line of demarcation between the national and state authorities was necessarily found to be difficult as it was desirable, and to admit of an infinite diversity concerning the means among those who were unanimously agreed concerning the end” (Madison, 1787).

The structural and political aspects of the system, often undifferentiated from normative positions and preferences, have long become central to the theoretical debates about the division of power and authority within the American federal system. According to Purcell (2007:7),

[T]he Constitution neither gave the federal structure any single proper shape as an operating system of government nor mandated any particular timeless balance among its components, [suggesting] that the Constitution established a structure that accepted certain types of change as natural and desirable. [Therefore] there was no “original” intention, understanding or meaning that prescribed either a single and true federal system or a single and true set of relationships among the structure’s constituent parts.

As confusing as the Founders’ intentions or expectations may have been, the Supreme Court has not been particularly helpful in clarifying the scope and meaning of federalism either; its affinity for line drawing combined with political motivations and rivalries between nationalists and “states’ rights” proponents have led to an inconsistent record. As a result, the delineation of federal-state authority changes from issue to issue and from case to case.

Formalistic Approaches: Dual Federalism and the Delimited Spheres of Authority

The first theories accounting for the division of authority within the American federal system¹³ were developed by constitutional law scholars and Supreme Court Justices of the early 19th century who relied on formalistic arguments. Since Chief Justice John Marshall's decisions in *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824)¹⁴ which definitively carved out an authoritative and primary role for the federal government in the nation's politics, legal scholars and judges have been engaged in a controversial and interminable "exercise in line-drawing" (Shapiro, 2005:246). The main argument presented by early accounts of federalism is that the federal government and the states have distinct spheres of power in addition to some (very few) joint responsibilities.

The federal system, as envisioned during those early years, consisted of two administrative systems and two distinct judicial systems each serving the same population; each of these systems was "autonomous and each was complete in itself" (White, 1954:506). In this view, given the minimal authority overlap, it was empirically and normatively possible to delineate what is federal and what is local. The system was seen as static and unalterable, impervious to history or politics. This traditional legal view of the American federal system, one which has dominated legal normative thought and action since the early 19th century, is that federalism is a zero-sum game: in each policy area, one side is dominant while the other is invariably has no codified, legitimate role.¹⁵ These dualistic arguments also found resonance in

¹³ For the sake of brevity, from now on I will call these theories about the distribution of power and authority within the federal system "federalism theories" or "theories of federalism," each a slight misnomer.

¹⁴ *McCulloch v. Maryland*, 17 US 316 (1819); *Gibbons v. Ogden* 22 US 1 (1824)

¹⁵ Most recently, in *US v. Morrison* 529 US 598, 617-18 (2000) the Rehnquist Court declared that "the Constitution requires a distinction between what is truly national and what is truly local," reaffirming its

political discourse emanating from the White House and from state capitals: political agents with specific goals in mind, used theories of federalism to either expand or protect their turf.¹⁶

Immigration policy, a subset of the “foreign affairs” domain according to many,¹⁷ was firmly believed to be an exclusive federal domain. At least that was the unequivocal view of the post-Reconstruction Supreme Court. In 1875, the Supreme Court strayed from its previous declarations that imposing head taxes on arriving immigrants was within a state’s police powers which allowed it to protect itself and its citizens from indigent aliens by requiring shipmasters to post bonds for their passengers or by getting ship manifests with information about all passengers.¹⁸ The new court ruling specified that the rules governing immigrant admissions must be uniform. As Justice Miller noted,

[I]t is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco... We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and, with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters.¹⁹

belief that in the American federal system authority can be cleanly and neatly divided across levels of government.

¹⁶ For example, James Monroe noted in his veto of an appropriations bill which set aside funding for the repair of Cumberland Road, that “the National government begins where the state governments terminate...” while Andrew Jackson in 1830 warned that “the practice of mingling the concerns of the Government with those of the states or the individuals is inconsistent with the object of its institution and highly impolitic” (Elazar, 1962:16-17).

¹⁷ There is debate in the legal literature as to where exactly immigration policy does reside. Over time it has been associated with the federal government’s power to regulate foreign commerce, the naturalization clause and the foreign affairs clause among others (Wishnie, 2001). That discussion is very technical and irrelevant for the purposes of this study. In all cases, there is agreement over federal exclusivity.

¹⁸ *Passenger Cases (Smith v. Turner; Norris v. Boston)*, 48 U. S. 283 (1849)

¹⁹ *Henderson v. Mayor of City of New York*, 92 U. S. 259 (1875); Justice Miller also commented on the striking similarities between the three state statutes an indication that innovation was spreading across the federal system and port states were learning from each other.

The nationalization of immigrant admissions policy was further solidified in the *Chinese Exclusion Case* of 1889, when the Court determined that:

[T]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.²⁰

This plenary power of the federal government over alien admissions was reaffirmed several times in the 20th century, most dramatically so in 1909 when the Court established that, “over no conceivable subject is the legislative power of Congress more complete than it is over [immigration and naturalization].”²¹ Ever since, federalism scholars of all ideological and theoretical leanings have fully accepted the doctrine of federal exclusivity over immigration policy. Immigration simply was not a theoretical puzzle.

Modern social science took on the challenge of providing a more satisfactory, causal theory of federalism in the 1950s and 1960s at a time when federal authority was reaching its zenith. Roosevelt’s New Deal programs followed by World War II greatly empowered the federal government as Americans looked to Washington rather than the states to ensure prosperity and national security. The civil rights ideals that the Warren Court introduced to constitutional analysis and Lyndon B. Johnson’s Great Society of the 1960s only increased both the perception and reality of federal involvement in state politics. During this period, it became clear that the formalistic arguments of conservatives (also known as “states’ rights” proponents) did not reflect the facts on the ground. Conservatives, shocked and threatened by the expansion of the authority of the national government, pointed to the enumerated powers and to the 10th Amendment of the Constitution to make the normative-formalistic point that these two should

²⁰ *The Chinese Exclusion Case*, 130 U. S. 581 (1889)

²¹ *Oceanic Navigation Co. v. Stanahan* 214 US 320 (1909)

guide the actual distribution of authority in the American system. Proponents of “dual”²² or “layer cake”²³ federalism as it came to be known sought to delegitimize the new role that the national government had assumed in American society by arguing that regardless of the lofty goals, the *means* used were not consistent with the covenant that the American states had signed in 1787.

²² The term was coined by Edward Corwin (1934).

²³ This metaphor is attributed to Morton Grodzins (1960).

Cooperative Federalism and the Structural-Functional Perspective

In response to this normative threat which sought to use the Constitution to dismantle the national project, some political scientists sought to employ the tools of social science to defend the role of the national government. Their main argument was that contrary to the beliefs of dual federalism, the American federal system was formally *structured* like a “layer cake” but it *functioned* more like a “marble cake” with federal and state governments sharing responsibilities and authority. This project, most enthusiastically taken on by Morton Grodzins (1960) in *The American System: A New View of Government* and Daniel Elazar (1962) in *The American Partnership*, had several goals:

- 1) To provide historical evidence from eras prior to the New Deal that the federal government actually collaborated with states in policy areas outside of the enumerated powers;
- 2) To provide documentary evidence from the early years of the Republic to support the idea that state and federal public officials supported a role for the federal government in state affairs;
- 3) And, to build a theory that would both explain how and why functions and powers are distributed in the American system and account for change in that distribution over time.

An unstated goal, which is nevertheless quite evident in many of the writings of this era, was to provide scientific backing to the normative project of national empowerment and help fight the backlash from conservatives, especially those in state governments, who strongly objected to the expanded role of the national government in state affairs, especially in the domain of civil rights.

There is no doubt that these scholars were committed to social science and aimed at providing explanations for important historical phenomena. In his book, Elazar sought to debunk the assertions of dual federalism by showing that state-federal collaboration and interaction had existed since the early days of the Republic and that it was often seen as

mutually beneficial by both levels of government. The introduction goes to great pains to set out the methodology for the project in terms consistent with J.S. Mill's (1963) principles of scientific study. Elazar explains that his criterion for case selection is the principle of the "hard case": he looked for those cases where state-federal collaboration was least likely due to the political traditions of a state or its view of the federal government. He thus reasoned that if Virginia, the bastion of 19th century anti-national sentiment was at times open to working with the national government in areas within the state's exclusive jurisdiction, then this would be sufficient evidence that dual federalism is not a valid theory.

The main point of contention with Elazar's works of this period is that they are not really driven by a causal theory the way social science has come to understand the meaning of the term. Social science theory rests on "an organized and interactive body of generalizations which is more or less widely accepted as useful for understanding an identifiable subset of related conceptual problems" (Stewart, 1982:8). Elazar had ably identified an empirical anomaly, a phenomenon that did not fit with the established beliefs of the time. However, his study did not offer an explanation of why certain functions are shared in the manner they are, while others are exclusive, nor did he have a general explanation of how the distribution of authority within various domains came to change over time. His ad hoc explanations, when provided, were not tied to a theory of the federal system as such. For example, in his final chapter he asserts that the new states were admitted to the Union by the federal government over the course of the 19th century did not have the old "baggage" of the original thirteen which allowed them to forge a different relationship with the nation's capital. True as this may be, it is exogenous to any structurally derived model and more consistent with a cultural explanation than with a structural one.

Another problem with this type of theory stems in part from its reliance on theories of structural functionalism, popular in the 1950s and early 1960s among sociologists and political scientists. As developed by sociologist Talcott Parsons (1949), structural functionalism rested on the notion that each part of a social system performs specific functions. These functions are typically determined either as a result of a social compact or as a result of the dynamics of the system. While the system operates under the prevailing rules, it is stable or in equilibrium. Exogenous factors can be introduced that shake the system's balance until a new balance is established; however, the new equilibrium may involve a different distribution of power or functions across members or constituent parts of the system.

Structural/functional theories were introduced in political science by students of comparative politics and especially political development scholars (Almond and Coleman, 1960). Structural theories of this type were (and continue to be) popular in the field of International Relations where they are used to explain the prevalence of peace in the context of an "anarchic" international system defined as a system that lacks a "hegemon" or dominant power who determines the roles of constituent members (Vasquez, 1993; Keohane, 1986; Waltz, 1979). As critics of structural theories not only in federalism studies but in comparative politics and in international relations have demonstrated quite convincingly, structuralism is inherently incapable of explaining politics and the change that is the result of politically-motivated action (Lane, 1997, 1994; Turner and Holt, 1975; Verba, 1971). Structures are static and the only way to explain change that occurs within those structures is to attribute it to exogenous factors such as technological change, ideological change, external threats to the stability of the system (e.g., war) and the like. In many ways, the structural-functionalism paradigm in the study of federalism resembles what Lakatos termed "degenerative research programs" (Lakatos, 1978).

In his classic treatise *The Methodology of Scientific Research Programmes*, the philosopher of science Imre Lakatos (1978) examined epistemological systems of thought (“research programs”) and classified them as either progressive or degenerative. A degenerative program is one characterized by a closed system of thought which no longer gives rise to new ideas while at the same time has lost its capacity to interpret the world around us in a coherent and logically consistent way. In an effort to protect the “core” of the theory from falsification efforts, scientists develop auxiliary hypotheses which are not derived as a result of a rational, scientific process, but rather as ad hoc explanations. Overtime, a degenerative research program is characterized by growth in the number of auxiliary hypotheses associated with it, but not in stronger explanatory power. In short: it is weak theory.

This effort to protect the core precepts of the structural-functional federalism model has had significant adverse consequences for the study of the phenomenon. The most notorious development resulting from the model’s inability to explain change is the proliferation of descriptors and “new” ad hoc theories. Few concepts in social science have been qualified with so many hundreds of descriptors and adjectives. If God has 101 names, federalism has 326 and counting (Stewart, 1982). Once, Americans had to choose between being “federalists” and “anti-federalists.” Thanks to modern day political science, economics and legal studies, Americans today can be “layer-cake” federalists, “marble-cake” federalists, or proponents of hundreds of other versions of federalism derived from a variety of disciplines from music to astronomy.²⁴ This has led to considerable and understandable confusion and frustration in the discipline and a lack of faith in and enthusiasm for theories of federalism overall. Interestingly,

²⁴ “Federalisms” include among other things: cooperative (and uncooperative), competitive, consensual, antivacuum, conservative, permissive, coercive, emergent, adolescent, mature, commercial, economic, feudal, antagonistic, monistic, concentrated, peripheralized, centralized (and non-centralized), integrated, interlocked, organic, bamboo-fence, picket-fence, row boat, dead, counterfeit, postmodern.

“immigration federalism” is one such moniker, used mostly in the legal scholarship, a clear indication that legal studies have recognized what political science missed in the relationship between immigration and federalism. Hiroshi Motomura is credited with its introduction into the legal and federalism lexicon (Spiro, 1997). The term refers to state involvement in immigration decision-making and to the normative and constitutional implications of these activities.

For critics, the proliferation of descriptors and self-proclaimed “theories” of little analytical value is more of an indication that our normative commitments drive our analysis of intergovernmental relations and less evidence of conceptual complexity, as Elazar (1987) would have it. Mainly, federalism is plagued by bad theorizing (Feeley and Rubin, 2008; Stewart, 1982; Davis, 1978, 1956). Many of these modifiers have been value-laden with little theoretical backing. As a very frustrated Rufus Davis put it, from the existing literature we understand:

[L]ittle of the precise distribution of functions between two levels of government, the range of influence of their functions, the precise set of fiscal relations created, the party system and the power structure within each party, the degree of cohesion and diversity in the community, their political skills and dispositions, their attitudes to the formal garment, or their wealth, traditions, and usage (1956:226).

To make matters worse, recent scholarship critical of federalism theory has argued that much of federalism theory confounds the concept of federalism with related but very distinct ideas such as decentralization, consociationalism, and local democracy (Feeley and Rubin, 2008). In the effort to defend normative positions, some federalism scholars associated and confused the concept of federalism with other institutional forms, power relationships and a variety of other distinct concepts that have nothing to do with the structural characteristics of a federal system. Which is why federalism came to be known as a promoter of democracy, innovation, decentralization, minority protections, and efficiency, but also it has been associated with conflict, competition, fractionalism, and minority abuse. According to Feeley and Rubin (2008)

the explanation for the various “federalisms” that scholars have identified over the years is not to be found in the structure but rather in the norms that various political elites bring to the table.

Elazar and his cohort were committed to the normative project of protecting the New Deal and the expanded role of the federal government as much as they were invested in the advancement of the study of federalism as a phenomenon. This commitment to a federal system with a strong center was so deep-seated for Elazar that he attributed the idea of the federal compact to the Bible (Elazar, 1987).²⁵ Given this normative commitment, it is not a surprise that the design of his study focused on disconfirming dual federalism rather than analytically explaining the dynamics of the federal system. Immigration policy would have been an unsuitable case study for his project: not only did it not conform to his “hard case” criteria (i.e., state-dominated policy domains) but evidence of significant state involvement in a federally-dominated policy area such as immigration could have undermined his normative assumptions and played powerfully into the hands of conservatives. How could the nationalist position be sustained if states could be shown to be important participants in exclusive federal domains?

Yet, as will be discussed in later chapters, evidence shows that even without formal authority over stamping visas into foreign passports, states have always played an important and decisive role in the encouragement of immigration flows, in the incorporation of immigrants in the American system and in restricting immigrant access to basic rights (e.g., right to work), liberties (e.g., persecution of alien radicals) and benefits (e.g., welfare and healthcare). The purpose of many of these restrictive regulations was always rather clear: states wished to force

²⁵ Elazar was also committed to resolution of the Arab-Israeli conflict in the Middle East and his work made him a strong proponent of the federalist principle as a solution to the Middle East crisis.

immigrants out of their territory or (in the least malevolent of cases) to protect classes of local workers from unwanted competition. States often operated as independent agents, making policy on their own right. With immigration, when new challenges arose, it was typically at the local level: unmanageable inflows into the Port of New York, unwanted Asians at Angel Island in California, wetbacks in Texas and the Southwest. The states have always been the first line of response to these new challenges, and the first to develop new ideas and solutions. In several occasions, these state innovations found their way to the national agenda: the exclusion of Chinese in the late 19th century was first enacted in California; employer sanctions legislation was passed by almost a dozen states before it reached Congress in 1986; and states experimented with immigrant exclusion from public benefits under the waiver programs of the late 1980s and early 1990s before Congress passed analogous legislation in 1996. In many cases, their objectives clashed with those of the federal government, yet sub-national governments found ways to legislate their will at the national level. States also competed with each other, first to attract European immigrants, later on to secure Mexican braceros. This competition was expressed in the form of inter-state conflict, with states seeking to penalize their neighbors for “stealing” immigrants from them or with appealing to the federal government for uniform rules that would prevent this type of behavior.

The new conservative approach that developed in the 1960s sought to distance itself from formalism and provide strong analytical support for its normative positions. This evidence came from the field of microeconomics and from theories of the firm. Paradoxically, the public choice approach directly implicated migration even though it never studied it as a policy domain.

The Behavioral Approach to Federalism: The Theory of William Riker, Public Choice Theory and Fiscal Federalism

The late 1950s saw the development of another trend in political science, this one adapted from behavioral sciences and economics rather than sociology. Behavioralists argued that by making some general assumptions about the way people behave, political scientists can develop testable, causal hypotheses about collective outcomes (Levi, 1997). In the context of federalism theory, behavioral principles were used both to support normative preferences—mostly conservative—and to develop testable theories. The best example of theory development in federalism studies is the work of William Riker (1962) on the origins and maintenance of federal systems. In recent years, a number of new scholars in the field of comparative politics have sought to apply and enhance Riker’s theory (Bednar, 2009; Filippov et.al. 2004; Kelemen, 2004). Other behavioral approaches, however, were far more normatively oriented than concerned with the development of general theory.

The early public choice theorists used theories of the firm and market competition to explain political phenomena and to justify their belief in less governmental involvement in the economy and empowerment of state and local governments for reasons of economic efficiency and greater democratic accountability. Economists further developed these ideas by arguing that the central government is better suited to perform different function than lower-tier governments (Peterson, 1995; Oates, 1972; Musgrave, 1965). These functional arguments related to fiscal federalism not structural theory, further confused the federalism lexicon, adding another version of functional theory to the list of federalism theories. However, much like it was the case with structural-functionalist theories, this branch of theory proved to have nothing to say about immigration policy. In part, this was a consequence of the normative framework within which public choice theory developed: its goal was to provide a conservative response to

national expansion that would move away from formalistic justifications for states' rights to economic ones.

Federalism According to William Riker: External Threats & Political Bargains

An early believer in rational choice as the basis for understanding political outcomes, William Riker (1962) used spatial modeling to develop a testable, general theory of the origins and maintenance of federalism as a political institution. Until recently, Riker's model remained the only effort to develop a general theory of federalism. In Riker's view, the driving force behind federalism is security: individual states see the benefit in banding together in the face of an outside threat. Common values are nice to have in this view, but unlike what Deutch (1957) believed, for Riker it is shared interests not shared norms and ideals that forge the federal bargain. Elazar (1987) may have identified as important in every federal union the idea of federalism and the normative belief of elites in the federal principle, but for Riker only tangible political and economic interests counted.²⁶ The growth of national power over time is also explained in terms of external threats: the demands of national defense make it more likely for states to "rally around the flag" and acquiesce to more centralization in exchange for more physical and territorial security.

The dynamics which Riker outlined to account for how the federal system is formed in the first place are not sufficient to explain its continued existence. If what holds together the federal union is an outside threat, then when that threat dissipates, the federation should collapse. Yet, the American system (and some later federations) has persisted in good times and bad. Riker argues that federations have a tendency to become more centralized overtime because the national government strives to consolidate its power at the expense of states, but

²⁶ A fundamental difference between Elazar and Riker was the way they understood the meanings of centralization and integration. Elazar compared a federation to the starting point of independent, loosely related units and in this respect he viewed federalism as an exercise in integration. On the other hand, Riker compared federal systems to unitary ones and found them very loose and decentralized. These definitional misunderstandings stemming from a difference in the vantage point of each perspective have plagued the field for decades.

his initial theory does not account for evolutionary dynamics of this type. To explain the continued existence of federal systems even in the absence of national security threats, Riker goes outside of the federal bargain. His explanation rests in the role of political parties.

Although his theory did not strive to account for the relationships that develop overtime between the national government and the lower level governments or across state and local governments, Riker made the important observation that conflict is inherent in the system, and borrowing from functionalists he argued that “intergovernmental disputes are inherently necessary in federalism. Clearly, if there are no disputes [across levels of government], then either the federal system has been fully unified or it has collapsed” (Riker, 1987:74). For Riker, disharmony or conflict is an expected and natural part of having a federal system. Common norms are not sufficient to quell conflict, and as different interests clash, confrontation becomes part of the game. With several governments that have independent authority within their area of sovereignty and shared rule in other areas, there is always disagreement and discord: “federalisms constantly suffer from a lack of integration between the policies of the states and the nation... [T]he institutional structure of most contemporary federalisms is highly conducive to intergovernmental conflicts and to a failure to integrate policies” (Riker, 1987:75-76). Consistent with this view, there is no a priori reason as to what may cause interstate or intergovernmental conflict. The formal division of authority may be irrelevant in a dynamic system where encroachment and innovation from both sides are ever-present. Therefore, immigration policy can and has generated similar types of competitive, conflictual and collaborative behavior that has been documented in other policy domains. The main difference is that in immigration policy these phenomena occurred as early as the 1850s while in fiscal and welfare policies they developed after the New Deal.

Although Riker did not explore this competitive aspect of federalism any further, the theme of conflict and its role in the federal system was an integral part of public choice theories of federalism which viewed inter-governmental competition as a guarantee of an efficient market and a democratic society. These ideas about competition have only recently been introduced to the study of immigration policy. Some of this work has been by legal scholars, concerned with the normative implications of state involvement in immigration (Rodriquez, C. 2008; Rodriquez, A., 2008; Collins, 2007; Spiro, 1996-97, 1994) and a few others have been by political scientists trying to understand drivers of state immigration policies (Hero & Preuhs, 2007; Gould & Hong, 2004).

Public Choice Theory

The debate over the benefits of political centralization and decentralization has not been confined to the field of political science and law. In addition to the formalistic arguments, economists introduced new ideas and suggestions both in favor and against decentralized political decision-making. Neoliberal economics were introduced to the study of federalism in the 1950s to provide quantifiable and mathematized evidence that a system with many smaller jurisdictions competing against each other for residents/consumers leads to more responsive government, more efficient production of public goods and services, and more local democracy. Keynesian economists countered this approach with the theory of fiscal federalism which sought to qualify the newly found enthusiasm for states' rights with models which indicated that for reasons of economic efficiency related to economies of scale, the central government and local governments are best suited to perform different functions (Musgrave, 1959; Samuelson, 1954; Olson, 1969; Arrow, 1970; Oates, 1972). The foundational assumption of this model was spatial mobility that is freedom of migration. This underlying assumption has made the relationship between this branch of federalism and immigration policy quite complex even though understudied.

Charles Tiebout (1956) was among the first to apply the theory of the firm to government. In political life, he argued, we can assume that individuals behave as consumers: if they are not satisfied with the bundle of goods and services that their government provides at a fixed price (in the form of taxes), they can move to a different jurisdiction which provides the desired combination of goods and services at a more attractive price. In Tiebout's famous phrase, individuals "vote with their feet" and spatial mobility "provides the local public goods counterpart to the private market's shopping trip... Just as the consumer may be visualized as

walking to the private market place to buy his goods, the prices of which are set, we place him in the position of walking to a community where the prices (taxes) of community services are set” (Tiebout, 1956:422). Governments, much like firms, are in competition with each other for consumers/residents and they have a strong motivation to adjust their offerings or stand to lose out in the competition. For example, families who are not happy with the schools in their community can move to a neighboring community that has better schools thus depriving the original community of important revenue from taxes. Or, retired people with adult children may choose to live in communities that do not collect taxes in support of schools, day care or other services that privilege the young, but do offer services for older adults such as healthcare and senior centers. In this model, individuals need to be able to voice their preferences either directly (for example through ballot initiatives and direct democracy options) or indirectly through their elected representatives to ensure that their preferences are implemented by government. Thus faced with the prospect of losing residents and tax revenue, communities will strive to adjust the services they offer and do so in an efficient manner.

The idea of smaller jurisdictions in competition with each other attracted many conservatives who placed their absolute faith in the free market and viewed the political process at the national level with great mistrust. Public choice theorists such as Gordon Tullock and James Buchanan (1962) believed that a system of government that most closely resembles a free market is optimal because it is less likely to become politicized and corrupt. A large national government is tantamount to a monopoly which in political terms is equivalent to “tyranny.” The introduction of political considerations in the operation of society always leads to suboptimal results for the individual members of that society. According to Buchanan (1995:20), “the empirical reality of politics [is that] any increase in the relative size of the politicized sector of an economy must carry with it an increase in the potential for exploitation.

The well-being of citizens becomes vulnerable to the activities of politics.” Public choice theory thus became the home of states’ rights proponents for whom formalistic arguments were not enough to provide an effective defense against the expansion of the national government.

Hirschman’s (1970) work, another prominent example of the field even though not specifically tackling federalism, centered on the dual notions of exit and voice as guarantors of access in political society. In this view, individual interests and individual liberty can only be guaranteed if political society is not a centrally-controlled, inescapable monopoly and if individuals have the option to voice their preferences. The existence of multiple levels of government provides individuals with a choice: they can select as their home the location that offers a bundle of goods and services closest to their preferences. The dual option of exit and voice gives individuals maximum power *vis a vis* the government.²⁷

The welfare state which continued to expand in the 1960s and 1970s introduced a significant problem for proponents of public choice theory: in a competitive model of governance, the welfare state is unsustainable. As income-generating taxpayers do not see a need to be contributing for redistributive programs geared to provide income support for others, the expectation was that there would be enormous pressure to dismantle the welfare state. With this starting point, Peterson (1995) turned the public choice theory to its head,

²⁷ Hirschman (1970; 1978) does not explicitly discuss federalism nor is his theory specific to federalism. However, his ideas have been used by students of federalism and applied to the American federal context, especially in the study of urban politics and inter-jurisdictional competition (Peterson, 1981). Interestingly, Hirschman (1978) is one of the few authors to have something to say about immigration: his main point was that the large scale exit of immigrants from Europe in the early 20th century and the sizeable wave of Southern European immigrants to Western Europe after World War II may have helped open up the political system in sending countries, operating as a pressure-valve for the system. As many revolutionaries and anti-establishment radicals left these countries along with masses of low-income, low skilled immigrants, political elites may have felt more secure to introduce democratic reforms. Interestingly, Hirschman does not analyze the effects of immigration on receiving societies but the elimination of political participation for permanent residents in the 1920s has often been associated with the fear of radical immigrants from Europe who arrived in the United States at the time of the First World War.

arguing that redistributive policies which can only be implemented over the objections of a portion of the population must be centrally determined. The national government enjoys a monopoly status because it is far less affected by spatial mobility and the threat of individuals “voting with their feet.” The federal government’s immunity to spatial mobility makes it better suited to make redistributive decisions (Oates, 1981). On the other hand, state governments which are more sensitive to the threat of exit, tend to be more attuned to the needs and demands of the local population and thus better suited for developmental policies. For example, states and localities are better equipped to assess the investments that need to be made in education, local infrastructure, and other types of local services that citizens expect from government. Therefore, for reasons of economic efficiency, different levels of government are suited for different functions. Peterson labeled this theory “functional federalism,” which added confusion to the expanding lexicon of federalism theory.

Public choice theory has problems other than its normative and empirical view of the welfare state. Much like their structural contemporaries, public choice theorists developed their ideas at a time when immigration was not an issue at the top of the political agenda. As public choice theory in federalism was a conservative response to the structural critique of dual federalism, the emphasis was more on countering the arguments of cooperative federalism in its own turf rather than developing a new theory of federalism. In the 1960s, that meant that the focus par excellence would be the controversial federal conditional grants-in-aid that limited state policy options and forced them to implement national initiatives regardless of local preferences.

One major inference from Tiebout’s theory is that local communities will become more homogeneous over time as people whose preferences are represented in local government

move in and those whose preferences are not realized move out. Some data indicate that many local communities are becoming more socially, economically and demographically homogeneous; this self-segregation pattern, the result of Americans' spatial mobility may impact the country's beliefs and attitudes towards social diversity (Bishop, 2008). When determining the bundle of goods and services that are appropriate for their constituents, local politicians have an incentive to take into account not only the cost of the service but also the demographic and social characteristics of their population. For example, since the cost of public safety decreases when there is less crime, there is an incentive for political leaders to encourage law abiding citizens to move to their jurisdiction and discourage criminals from doing so. The same process is true for low-income families who use social welfare services (Oates, 1981).

In more theoretical terms, public choice theory and its derivatives have a strong citizenship bias which is problematic when discussing people who do not have equal political rights. As developed in economics and political science, the model requires that individuals have a "voice," that is full political membership in the community, which allows them to play the role of "principals" whose preferences are represented by "agents" (politicians). Individuals can exercise their political rights in the form of voting and political participation in order to ensure freedom from government. Their right to "voice" guarantees that their views will be represented to some degree. When "voice" and "exit" are combined, individuals are ensured to find a place where they can be in the majority rather than a perpetual minority. As Clark and Ferguson (1981:82) note, "[the] more inconsistent a policy is with the preferences of a given sector, the more the sector is likely to (1) become politically involved... or (2) migrate out of the city if more attractive alternatives are available. Or options 1 and 2 may be pursued simultaneously by different members of the same sector." However, in the American context since the 1920s at least, political rights are a privilege of full citizenship. Noncitizens of all

stripes do not have the right to vote; in fact, political participation by noncitizens is a criminal offense that bars an individual from ever becoming a citizen. If voice is what is required for corrective action on the part of government, then noncitizens can only be in a losing position.

Public choice theory assumptions of spatial mobility or “exit” and access to political participation or “voice” make it quite difficult to use when dealing with a population of noncitizens who lack the franchise. Given the dynamics of the model, one would expect the uniform prevalence of restrictionist immigration policies across the country as immigrants have little hope of having their interests represented citizens everywhere would be expected to resist sharing public goods with non-members of society. However state and local immigration policies are a lot more nuanced than what a simple application of Tiebout’s model would anticipate.

Noncitizens may still have the right of “exit” but if “exit” is defined as termination of one’s role as constituent the effects of immigrant exit or the threat of exit upon government behavior may be neither as potent nor as realistic as public choice theory would have it. First, individual mobility is not unconstrained as the theory implies: information limitations, resources constraints and personal attachments make the “exit” option a very costly proposition for individuals and especially immigrants, many of whom may be constrained by the conditions of their visa, or have too few resources to seek employment in another jurisdiction. Second, as Peterson (1981) has demonstrated, from the perspective of local governments, the “exit” threat is credible and important if it is issued by wealthy residents who contribute significantly to the locality’s coffers. The “exit” of a low-income, low skill population that is easily replaceable may not be a reason for local governments to change their behavior and be responsive to immigrant concerns. What is worse, if the preferences of the high-value citizens of a jurisdiction are

inconsistent with immigration, then governments have a strong incentive to heed to the anti-immigrant call rather than attend to the needs of immigrants. Plenty of evidence from low-income urban centers whose residents are unable or unwilling to use the double options of “exit” and “voice” demonstrate the disadvantaged position of those groups in relation to more affluent, more politically active and more mobile citizens (Peterson, 1981; Hirschman, 1978; Schattschneider, 1960).

Given that the U.S. Constitution prohibits states and localities from discriminating against citizens of other states and thus spatial mobility is constitutionally guaranteed for individuals, local governments cannot use zoning laws to keep undesirable populations of citizens out of their jurisdiction. However, local governments have been tempted to restrict spatial mobility for immigrants by introducing restrictive housing ordinances or being quite aggressive in their efforts to enforce civil immigration law. The most well-known case in this respect is that of Hazelton, PA which introduced an ordinance requiring proof of legal residence for tenants. The case is currently being tried on appeal in federal court and could soon reach the Supreme Court. Another prominent case is that of Sheriff Joe Arpaio of Maricopa County, Arizona, who has a “posse” of sheriff’s deputies investigating the immigration status of Latinos in Phoenix’s more diverse and poorer neighborhoods.

Since immigrants have no political rights wherever they reside in the country,²⁸ we would expect the uniform emergence of restrictive immigrant and immigration policies across states and localities. However, this is not the case: a number of states offer immigrants rights and benefits that go over and above the required federal minima. Not only do many states offer welfare and healthcare benefits to many low-income legal immigrants, but ten states have

²⁸ With the exception of a handful of town which allow noncitizens to vote in local elections or school board elections.

instituted a new positive right for undocumented immigrant children in the area of higher education. One could of course assume that immigrant preferences may be politically represented by the American-born second generation. This is a problematic assumption on many counts: not only does it equate the preferences of immigrants with those of their descendants, but it assumes a sizeable second generation group with strong political participation habits. Numerous studies have shown that the country's largest immigrant populations, Latinos, are less likely than other ethnic groups to be politically active (Frey, 2008; Pantoja & Segura, 2001; Desipio, 1996; Calvo and Rosenstone, 1989). However, even if these assumptions held, the theory could hardly explain why some states such as Florida with large populations of noncitizens and second generation individuals are quite restrictive in their approach to immigration while other states such as Washington or Oregon with small and relatively recent immigrant communities have been far more welcoming and generous.

Although public choice theorists have not studied immigration policy from a federalism perspective, ideas derived from this approach have been introduced in the legal scholarship on immigration federalism. Drawing on Peterson's (1995) functional federalism, this perspective argues that immigration policy is an externality of economic development. Governments develop labor policies that allow them to implement their local development plans more efficiently and effectively; in that respect, immigration policy is a form of regulation that influences the cost of labor. At the same time, immigrants can add costs to local governments in the form of services they consume such as education, healthcare, and public safety (Rodriguez, 2008). In this view, because states and localities are in a better position to assess the costs and benefits of immigration vis a vis the preferences of local residents, then lower level governments should be the ones making decisions about immigrants. If the price is right, immigrant labor can be among the bundle of goods that local governments make available to

their residents. That was, in fact, the case in the mid-19th century when states competed to attract more immigrants to populate a vast and empty country. Conversely, in communities where the cost of immigrant labor is considered too steep in comparison to the benefits, localities should have the option to bar immigrants. States have used restrictions to target immigrants in the professions whose presence threatened local professionals. They also used their legislative authority to exclude immigrants on the basis of race as in the Asian exclusion era and the Mexican repatriation efforts. This purely normative approach uses public choice theory to develop a justification for state involvement in immigration policy. Ironically, this normative statement would not sit well with public choice theorists who have had too strong an individualist and libertarian presumption to describe immigrants in the language of externalities. The use of public policy to restrict the movement and rights of individuals runs counter to the basic normative premises of the public choice school that cherished local government as the guarantor of rights and freedom of choice.

Chapter 2: Horizontal Federalism and the Vagaries of Inter-State Competition

Elaborating on public choice theory, Hirschman (1970) argued that individuals have two ways to react to government decisions with which they do not agree: they can voice their objections through political participation and voting, or they can move out of a jurisdiction and into one that offers a bundle of goods and services that they like, or at the very least a locality they perceive more amenable to implementing their preferences. As a result, governments will behave much like firms: in an effort to maintain citizen/consumers within their jurisdiction, states will compete with each other offering various bundles of services and taxes that are perceived to be most likely to attract residents. In the context of the U.S. federal system, where competition can only be political or economic and (since the Civil War Amendments) no longer military, states are expected to conform to the demands of the market. The role of states is to supply the market-preferred bundle of goods, or risk being uncompetitive and lose out to other states.

The effects of inter-jurisdictional competition have become an important concern for students of federalism and social policy. In the context of a polity with no internal borders, a number of scholars have focused on competitive pressures across sub-national units and the positive and negative effects of this type of competition (Dye, 1990). The predictions have been particularly ominous for the survival of the welfare state in a fully competitive system. As Oates (1972) and Peterson (1995, 1981) have demonstrated, redistributive functions are more efficiently performed when they are centralized at the national level. When states become involved in welfare programs the incentive to free-ride (Arrow, 1970) puts significant pressure on state governments to dismantle redistributive programs and reduce social spending.

The conservative turn of the federal government since the 1970s has meant that states have taken on more responsibility for programs and policies associated with the welfare state. For those who took public choice theory and fiscal at face value, the decentralization of redistributive policy would lead to a “race to the bottom” as states sought to become more efficient in their spending in order to attract more high-end residents and investors. In this view, a generous welfare state was inconsistent with the low taxes and other incentives that a sound developmental policy required. At the same time, some economists turned the theory on its head to develop even more dire predictions: not only would valuable investors stay away from states with generous welfare programs but these states would act as “magnets” for low-income families seeking more generous income support. Thus when combining the spatial mobility of the poor with the reluctance of the wealthy to move in, the pressure for states to dismantle their welfare systems would be even more difficult to resist. These theories of competition in horizontal federalism have been applied to the immigration field in recent years with mixed results. They have also given rise to a literature aimed at identifying the reasons why the “race to the bottom” hypothesis may not be valid and what it is that actually drives state policy responses in the context of decentralization.

“Race to the Bottom”: Welfare Magnets Meet Immigrants

Scholars have identified two dynamics, both related to spatial mobility and migration that put pressure on state redistributive programs. On one hand, inter-jurisdictional competition is thought to be fueled in great part by capital mobility. On the other hand, states with generous redistributive policies will fall victim to significant inflows of low-income people from states with more stringent welfare policies. Using the classical supply and demand assumptions, these models expect that welfare recipients will concentrate in generous states, overtime putting enormous fiscal pressures on them. In the context of welfare decentralization, the potential flight of capital provides a strong incentive for states to cut spending, reduce benefits and dismantle their welfare structures in order to preserve or increase investments (Piven, 1998). The mobility of firms-much like the mobility of capital- is thus assumed to force states into a “race to the bottom”²⁹: states have to compete against each other for who can offer the best deal in order to maintain production, jobs and tax benefits at home. In keeping up with market pressures, states are forced to dismantle their social welfare systems and pay less attention to domestic social inequities.

In this scenario, states are contained in their use of their discretionary powers to alleviate social ills and as a result, certain portions of the populace lose out. The most important casualties of this irreversible race are wages and social insurance, closely followed by environmental protection (Schram, 2000). The result will be an equalization of welfare benefits at lower levels across the country and in essence the elimination of state-funded re-distributive programs (Buchanan, 1995a; Buchanan, 1995b; Peterson, 1981; Buchanan and Tullock, 1962; Tiebout, 1956). In studying AFDC benefits, Rom, Peterson and Scheve (1998) found some evidence that states with higher than average benefits were more likely to experience declines

²⁹ Justice L. Brandeis, *Ligget Co. v. Lee*, (1933) 288 U.S. 517, 558-559

in benefit amounts when neighboring states reduced their benefits, but the race to the bottom hypothesis continues to be doubted. Longitudinal studies show that both in social policy and in environmental policy, both of which involve significant spill-over effects and would thus be expected to validate the “race to the bottom” thesis, states have not conformed to the lowest common denominator. In some cases, states used their own funding to replace extinct federal programs, as is the case with welfare support for immigrants.

As Peterson (1995) has argued, the involvement of sub-national governments in redistributive decision-making has the potential to ignite a “race to the bottom” not only because of capital flight but because of “magnet effects.” Focusing on the other side of the “race to the bottom” equation, Peterson and Rom (1990) argued that loss of capital investment and revenue is not the only thing that states have to worry about in the context of a decentralized welfare system. Given individual mobility, low-income people seeking more generous benefits could migrate to those more generous jurisdictions adding even more pressure on state budgets.

Since the 1970s, states have been engaged in competition to limit welfare expenditures out of fear of attracting more low-income families within their jurisdiction. The idea that generous states would become “magnets” for low-income people seeking to maximize their revenue got significant traction. In the context of fiscal difficulties and a weak economy, the argument that states could become “welfare magnets” for out-of-state poor (and more so, immigrants) found a receptive audience among policymakers, the media, certain interest groups and a portion of the public (Berry et.al., 2003; Borjas, 1999a; Peterson, 1995; Peterson and Rom, 1990). In a repackaging of Peterson’s (1981) theory and applied specifically to welfare policy, the generalized theory argued that poor people “vote with their feet” and would move to states that offer higher benefits. This movement of poor people would put state welfare systems to

the test as states would have to allocate more resources to public benefits. The potential of becoming a “welfare magnet” was expected to drive even traditionally generous states to implement welfare restrictions and lower benefits, leading to a “race to the bottom” (Schram and Beer, 1999; Donohue, 1997).

The theory of welfare magnets became central to the immigration debate in the 1990s after Harvard Economist George Borjas (1999b) introduced the concept to the immigration policy-making environment. Ironically, in the 19th century, states strove to become magnets for immigrants, competing with each other to attract immigrant labor. In 1912, the *New York Times* reported that Wyoming, desperate for farm labor, was discussing how to become a magnet for immigrants arriving in Eastern ports. By the end of the 20th century, the concern had become how to contain low-income immigrants.

Reacting to the large scale immigration that took place during the decade, Borjas (1999a) specifically adapted the theory in the mid-1990s to reflect the residential choices of immigrants. Borjas (1998, 1999a) argued that this population is far more likely than natives to be motivated by higher income possibilities and therefore seek out states that offer higher income supports. According to this view, states with higher welfare benefits have larger low income immigrant populations because poor immigrants migrate to states where they can derive the most benefits from the state view (Borjas, 1999a; 1999b). The prediction was dire: as immigration rates increased, generous states would be inundated with new low income immigrants demanding a place on the dole which would overwhelm state budgets and reduce what is available for rightful supplicants, American citizens. The hypotheses derived from the extension of the welfare magnets theory to immigrants are that as the immigrant population increases and immigrant mobility is high, states will respond with more eligibility restrictions and lower cash benefits. Generous states would be forced to implement more stringent

eligibility rules for immigrants to discourage their arrival and maintain an acceptable level of support for citizens.

The welfare migration fear has been quite widespread among policymakers who have sought to restrict spatial mobility and interfere with the privileges and immunities clause. Borjas' (2002) data indicate that immigrant participation in welfare programs dropped precipitously in California and moderately in other states, either because many immigrants elected to naturalize, or because they stayed out of the programs. As will be discussed in more detail in Chapter Three, some immigrants were picked up by state-funded programs that certain states set up for populations that did not qualify for Temporary Assistance for Needy Families (TANF) benefits. In 1998, the Supreme Court refused to stray from its 1969 decision in *Shapiro v. Thompson* which determined local residency requirements for benefits to be unconstitutional.³⁰ This put to rest state efforts to restrict individuals' access to welfare programs on the basis of length of residency.

The evidence of the "welfare magnets" hypothesis has been challenged vigorously by researchers who find that state poverty levels do not increase correspondingly to high benefits neither do benefits vary more than per capita income does (Schram et.al., 1998). Further, findings show that states do not adjust their benefits downward as sharply as expected. Recent analysis of TANF eligibility rules for immigrants shows that more permissive and open eligibility rules are positively associated with a state's per capita income and its average welfare spending an indication that states that are traditionally supportive of the poor will also include the indigent immigrant in their welfare programs (Graefe, et.al., 2008).

³⁰ *Saenz v. Roe* (98-97) 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969)

The Drivers of State Policy-Making

Welfare policy and especially AFDC rules and eligibility requirements have always varied across states, but the new system introduced by PRWORA increased state flexibility and authority over the administration and the eligibility rules of the programs, while at the same time creating clear exclusionary principles (Mettler, 2000). On the other hand, the federal government has specified both the objectives of the program and made available a series of tools for inclusion and exclusion. Best described by Soss, et.al. (2001:380), the new framework is one “in which the states enjoy increased discretion in choosing means so long as they toe the line in meeting federally prescribed ends.” The new law has thus led to the development of 50 distinct state welfare regimes. As many states have further devolved authority over welfare policy to local governments, the U.S. now has countless local and county-level welfare systems (Edelman, 2006).

The study of social policy has a long and venerable tradition in the United States as scholars have sought to identify the economic, social and political determinants of the state-level welfare landscape for more than thirty years (Howard, 1999; Rom, 1999; Plotnick and Winters, 1985; Wright, 1976). Studies seeking to understand state social policy choices have looked at a variety of indicators from the fluctuations or decline in the amount of cash benefits provided to the poor to changes in the overall state budget for welfare programs. Changes in caseloads across states, rules and institutions that govern welfare policy, administrative implementation patterns, eligibility and access have all been the focus of numerous studies (Soss et.al, 2001; Howard, 1999; Peterson and Rom, 1990). The complete overhaul of the welfare system and the elimination of AFDC in 1996, made the study of the institutional framework that governs welfare policy at the state level an even more attractive topic of

research, especially as political actors positioned the new rules as tools toward achieving modifications in the behavior of the poor (Soss et.al., 2001).

Given its importance and its longevity, welfare policy has attracted scholars from a variety of disciplines. As a result, there is a plethora of theories and hypotheses- oftentimes conflicting and contradictory- that cover the span from economic explanations, to racial and ethnic diversity theories, and from ideological or partisan hypotheses to postulations involving the role of societal actors such as interest groups. Prior to a discussion of my data in the chapters that follow, I provide below a critical summary of the economic, social/racial and political/interest group theories and hypotheses.

Economic Explanations of Alienage Policies

Economic explanations and hypotheses derived from neoclassical economics have taken center stage in the academic (and also in the political) debate over immigrant welfare policies. A key preoccupation in the literature over the past two decades has been what drives participation in welfare programs among various low-income populations. Especially since the implementation of PRWORA which was followed by a dramatic decline in caseloads, research in this area has flourished. A significant number of studies have linked state welfare caseloads to macroeconomic conditions, some claiming that “the economy” –measured as unemployment rates, per capita income differentials, and a variety of other proxies- explains as much as 50 percent of the variance in case loads across states (Blank, 2003; Blank 2001; Currie and Grogger, 2001; Jacobson, et.al. 2001; Figlio et.al., 2000; Wilde et.al., 2000; Wallace and Blank, 1999).

Scholars who focus on the economic context have shown that the fiscal conditions that prevail in the state are significant factors in policy decisions. Therefore, less wealthy states with high poverty rates are more likely to restrict welfare benefits for immigrants to conserve resources for the citizen population. On the other hand, states that are on a growth path and where the per capita income is on the rise may be more likely to maintain a more inclusive welfare system. Another measure of a state’s economic health is the level of unemployment. However, as noted above, the relationship between unemployment and policy stringency is not clear cut. Some have hypothesized that a rise in unemployment would increase the pressure on state budgets and force them to adjust welfare benefits downwards (Pierson, 1994); on the other hand, Zylan and Soule (2000) have found that the likelihood of states to ask for a waiver of AFDC requirements actually decreased in conditions of high unemployment, when the number of benefits recipients was on the rise. Consistent with Hero and Preuhs (2007), urbanization is

included in the model as a proxy for the presence of a more “cosmopolitan” culture which may be more accepting and open to immigrant incorporation.³¹

³¹ States with high per capita income tend to be more urbanized as well; the Pierson correlation coefficient between the degree of urbanization and states’ per capita income is .65. However, there is no statistically significant relationship between growth in per capita income or poverty rates and level of urbanization.

Racial/Social Diversity as a Cause of Restrictions on Immigrants

Economic explanations suggest that adverse fiscal conditions, high poverty rates, and a declining per capita income will force states to implement more stringent eligibility rules and lower the cash benefit that they offer to welfare recipients. By contrast, theories that showcase *race* as an explanation for state policy choices hypothesize that states with higher percentage of Latino immigrants and other racial minorities would be more likely to enact restrictions and exclude immigrants from their welfare programs. Although undocumented immigrants have never been eligible to receive social welfare benefits in the U.S., it is likely that the presence of large populations of undocumented immigrants in a state would also have a deleterious effect as nativist elites would introduce “illegal immigration” into the debate. States with large minority and immigrant populations would also be more likely to reduce cash benefits.

Although the evidence of the impact of immigration on state policies is still under close scrutiny and this area of study is relatively new, there is significant support that race plays a major role in welfare policy development. Although up until the 1996 reforms the “face” of welfare in the United States was mostly white, popular wisdom described welfare recipients as members of racial minorities. The image of the “welfare Queen” driving to the store in her Cadillac to make purchases using food stamps, popularized by President Reagan, was an evocative image that resonated with portions of the public (Edelman, 2006). Studies of public opinion and of media have show that there is a strong bias among Americans who tend to think of welfare policy in highly racialized terms, views that are reinforced by media coverage that tends to present welfare recipients as members of minorities (Sears, Sidanius and Bobo, 2000; Gilens, 1999). Recent studies have shown that a spike in anti-welfare sentiments that prevailed in the mid-1990s was strongly correlated with media coverage of the topic during that period

(Schneider and Jacoby, 2005). Quite ironically, PRWORA did result in a mass exodus of white poor from the system and by the turn of the 21st century, welfare rolls consisted mostly of African-Americans and Hispanic poor (Schram and Beer, 1999).

A significant literature indicates that welfare benefits in states with large minority populations –especially African-Americans- tend to be less generous than those in more white states (Keiser et.al., 2004; Johnson, 2001; Howard, 1990; Wright, 1976). Zylan and Soule (2000) have demonstrated that in the years prior to the enactment of PRWORA, states with large African-American populations were more likely to request a waiver from the federal government that allowed them to implement more stringent welfare rules such as job requirements. Soss et.al. (2001) have also documented that areas with high concentrations of minority welfare populations were more likely to implement more stringent eligibility rules, tougher work requirements and other restrictive measures. Fellows and Rowe (2004) conclude that the presence of large African-American populations are strongly correlated with more restrictive eligibility rules, but that is not the case for Latinos. According to the study, states with large Latino communities tend to be more permissive and inclusive in their TANF rules.

In recent years, the role of race in immigrant welfare policies has started to attract scholarly attention and the findings so far indicate that although the presence of a large immigrant community may not be statistically correlated to restrictive immigrant welfare policies, the racial makeup of the state population may have a statistically significant relationship with exclusionary rules; however, the evidence is contradictory. Specifically, one study has found that in states where TANF caseloads are made up in large part of African-Americans immigrant welfare eligibility criteria tend to be more stringent. Interestingly, the same study did not find a statistically significant relationship between the percent of Hispanic TANF cases or the size of the Hispanic population and welfare stringency (Graefe, et.al., 2008).

The racial hypothesis, however, found weaker support in Hero and Preuhs' (2007) study which also looked at immigrant welfare eligibility rules. This analysis showed no statistically significant relationship between the overall size of the Hispanic or the African-American population and restrictive welfare rules. Hero and Preuhs (2007) did find a positive relationship between race (both Latino and African-American) and the maximum amount of the TANF cash benefit offered by each state, leading them to conclude that racial considerations drive social policy design. It is my contention that the study's weak findings were the result of the study's design. The authors constructed a dependent variable that included immigrant eligibility in *all* welfare programs. As my analysis will show, this design conflated the differences between healthcare and income assistance programs as well as programs targeting legal immigrants and those targeting undocumented. The result was a neutralization of the effects of race and other important variables.

Contrary to anecdotal evidence, the size of the immigrant population has not so far been shown to have an impact on state generosity in terms of public benefits. Zimmerman and Tumlin (1999) argued that states with large immigrant populations did not rush to exclude immigrants from their welfare programs after the enactment of PRWORA and state generosity levels did not change significantly by immigrant population type. Hero and Preuhs (2007) also indicate that inclusiveness is generally unrelated to the size of the immigrant population. However, the absolute size of the immigrant population may not be what drives policy-decisions. Rather, states may be more strongly influenced by the *growth rate* of immigration. Graefe et.al.'s (2008) analysis indicates that a high rate of growth of the immigrant population is associated with less liberal welfare policies. Of course, this type of analysis is better suited for timeseries rather than cross-sectional data like the data I am using in this study.

Political Factors and their Influence on Policies for Immigrants

Social policy is driven not only by economics and demographics but also by politics. Political actors with power over policymaking bring to the table different worldviews, different attitudes toward social groups and varying perceptions of the role of economic regulation or redistributive programs. In turn, political elites vary in their ideas about the size, shape and role of government, the legitimacy of entitlement programs and the moral appropriateness of income support programs for the low-income population. Political actors also have varying perceptions of and attitudes toward immigration and immigrants; these ideas can significantly influence policy decisions that affect noncitizen access to programs and benefits.

The role of political parties and of inter-party competition as influencers of policy outcomes has been studied extensively in American politics. As early as 1949, V.O. Key (1949) posited that the monopoly of a conservative and quite illiberal Democratic Party in the South explained the perseverance of legal racism and minority discrimination in Southern states. In this view, the presence of a second more moderate party would have mitigated the racist policies of Southern Democrats by capitalizing on the votes of the portion of the public who stood in disagreement with Jim Crow. Similarly, Downs has associated party competition with a move to the center, resulting in more moderate policies (Downs, 1957). Many observers have associated the demise of the American welfare state with the Republican Party as the GOP is expected to push for more socially conservative policies and restrictions on government spending for social programs (Rinquist et.al., 1997; Alt and Lowry, 1994). However, the data from the states are anything but consistent as a number of cross-sectional studies indicate that Democratic Party strength is inversely related with liberalism and liberal social policies (Barrilleau, 2000; Erikson, et.al., 1993).

Partisan explanations do not offer sufficiently straightforward expectations of outcomes. There are contradictory findings on the role of political parties in social policy, as *both* Democrats and Republicans have at times been associated with welfare policy restrictions of different kind. According to some, in states with very competitive electoral conditions, Democrats need to move ideologically closer to the median voter and enact more conservative policies than is typically expected because otherwise they risk losing power. At the same time, in traditionally one-party states like those in the Deep South, Democrats have also been associated with illiberal policies, especially in the area of civil rights. Most recently, Fellows and Rowe (2004) confirmed this contradictory relationship between Democratic Party strength and social policy, specifically TANF benefits, rules and flexibility, at the state level. According to this study, Democratic dominance contributes to lower TANF cash benefit amounts, less flexibility in the programs, but more inclusive rules.

Immigration policy has traditionally been a field that cuts across party lines which has led to complex and unusual coalitions between parties. As a result, our expectation is that party strength (in this case the strength of the Democratic party) will not have a significant impact on welfare policy permissiveness, but any association that may exist will be positive. In immigration policy, specifically, there are strong indicators that bipartisan coalitions are necessary for major reform as the two parties do not have a consistent view in this area (Tichenor, 2003).

Policies require sign-off from both the legislature and the state executive. In the context of divided government, when the legislature and the governor's mansion are controlled by different parties, the passage of radical reform and major changes becomes more difficult. For example, in Arizona, the state's Democratic governor has repeatedly vetoed extremist anti-immigrant legislation and initiatives. Divided government therefore could act as a break for the

passage of legislation that targets immigrant groups. The expectation is that divided government will have a positive relationship with more liberal welfare policy outcomes, but overall, it is not clear how parties tend to behave in the context of divided government.

In the process of decision-making, political elites also have to take into account public opinion. The public's attitudes towards immigration have been quite ambivalent if not outright negative for many decades (Alexander and Simon, 1993). Although we are used to describing Democrats as "liberals" and Republicans as "conservatives," these concepts are not coterminous. In fact, there are significant regional and local differences between the ideologies that parties represent. However, there is evidence that when it comes to citizens, those who describe themselves as conservative, regardless of which party they may vote for, are more likely to support policies that curtail benefits and access to state-supported programs for minorities and immigrants. Therefore, we expect that states with more liberal citizenry are more likely to protect social welfare benefits for immigrants and substitute federal funding with state resources. Indeed, a number of studies have indicated that a liberal citizen ideology is strongly correlated with inclusive welfare policies, even for immigrants (Hero and Preuhs, 2007). Similarly, Graefe et.al. (2008) also found the ideological leanings and political preferences of citizens to be statistically significant drivers of immigrant welfare policy.

The political context within which policy is determined does not include only parties and voters. Interest groups play a significant role in the American policy formation process. In the U.S. pluralistic system- imperfect as it is- a variety of interest groups act as influencers of varying degree on policy outcomes. Civil rights advocates representing minority groups have often been credited with the development of stronger civil rights protections for immigrants (Wong, 2006), while labor unions have fought against the retrenchment of the welfare state. Latino interest groups have played an important role in securing benefits and rights for immigrants, but their

strength and influence is not equally spread across the country: in the biracial societies of the Deep South, Latino organizations do not yet have the constituency, legitimacy or relationships that they enjoy in other parts of the country (Beck and Alleksaht-Snider 2002).

As Pierson (1994) has argued, radical public policy changes are very difficult to implement because over time institutions develop constituencies and clients. These groups and interests- both in the public sector administration and in the populace at large- who benefit from the existing policies will mobilize to prevent changes and to minimize their losses. In policy areas where benefits are concentrated, retrenchment is quite difficult to achieve; however, in the case of welfare, both the recipient population and the administration of benefits is highly decentralized (Pierson, 1994:101).

Pierson has demonstrated that welfare programs tend to be weaker and in danger of dismantlement when interest groups are anemic and prevented from mobilizing effectively. The work of conservative reformers is facilitated by a dearth of interest groups coming out in support of welfare programs and a lack of interest and support from voters. According to Pierson, the target audience of the social program, that is if it is meant to help low-income or minority populations, is not the best predictor of whether states will curtail benefits. Rather, “retrenchment occurred where supporting interest groups were weak, or where the government found ways to prevent the mobilization of these groups’ supporters” (Pierson, 1994:6). Recent findings show that prior to PRWORA implementation, states were more likely to request a waiver in states where union mobilization was higher (Zylan and Soule, 2000).

The importance of political organizing and representation is underscored by Freeman (1995:881) who has theorized that the presence of “densely organized webs of interest groups” protects immigrants from the vagaries of politics and of swings in public opinion and preferences. However, in many states immigrants many of whom do not have access to the

franchise, typically are among the least organized and mobilized groups. Not only do they have limited political rights in the United States, but they have even less of an understanding of the American political system. In many cases, their immigration status or that of their families makes them weary of participating in any mobilization efforts and exposing themselves to added state scrutiny. The presence of strong Latino organizations with access to the political system, however can be a strong influencer on public policy relating to immigrants. Especially in states where Latinos are or are about to become a “majority-minority,” and Latino politicians are elected to state legislatures and local government, Latino groups can be a powerful voice in the community. Thus Latino groups should be correlated positively with more permissive immigrant welfare eligibility rules at the state level.

The role of unions, on the other hand, is more complicated. Over the past decade, labor unions have become strong allies of immigrant groups, supporting many immigrant causes and seeking to unionize documented and undocumented immigrants especially in the services industry, such as janitors, hospitality workers and others. However, Bowles and Gintis (1982) have argued that labor mobilization and high union membership may produce a backlash when it comes to social benefits for the poor. In areas where labor has been successful in protecting its entitlements and benefits, state governments may be more likely to curtail social services for the poor. Especially in areas where the benefiting population suffers from low levels of mobilization, as is the case with immigrants, the retrenchment of services is more likely (Pierson, 1994).

Chapter 3: The Nationalization of Immigration Policy in the 19th Century: Intergovernmental Competition for Europeans, Conflict over Chinese

Constitutional doctrine has classified immigration policy as an exclusively federal domain, but in reality states have always played a significant role in immigration and immigrant-related policies both as executors of federal law and as policy-makers in their own right. Not only are classifications of immigration in the “exceptionally federal” category misleading, but so are assumptions about the interaction of states and the national government in this domain. A federal system, because of the independent political authority which is granted to both the national and the sub-national units, is structurally prone to conflict and competition while also allowing the possibility of collaboration. Independent state action, even in an “exclusively federal” domain is also possible: in some cases, state innovation can lead to adoption of new standards by Congress, in others it can lead to protracted court battles. In the absence of a national consensus on immigration and immigrant policies, states have often been the ones to devise new policies, adopt new ideas and improvise. The choice of policies and their direction is often determined by local social and political dynamics.

In the course of the US history, a national consensus over immigration formed on three occasions: at the time of the country’s founding, Americans implemented a largely-open door policy, recognizing the need to populate this vast and empty land, then in the 1920s when the U.S. faced with economic depression and war decided to effectively close the border to all non-Western European immigrants and finally in the 1960s when a booming economy in demand of cheap labor coupled with low immigration made the implementation of a more open system anchored on family reunification a viable possibility. States played a role both in the formation of consensus and in its dismantlement.

In this chapter, I argue that through the 1860s states were the main immigration policy-makers: they funded campaigns to recruit immigrants from Europe and competed with each other for immigrants. However, this open-door policy did not welcome all immigrants in the same way. As Rogers Smith (1997) has demonstrated, American immigration law has been highly racialized, containing both ascriptive and liberal elements in intriguing combinations. Already in the 1840s, fissures started to show in the system when the potato famine in Ireland drove thousands of impoverished Irish families to the Eastern seaboard. Tensions in California started to emerge over Chinese immigration in the 1850s even as the gold rush was in full swing. But these issues were sufficiently localized that they did not make it to the federal agenda; states handled them locally with their own laws.

In the late 19th century, while some Western states continued to compete for cheap European labor, hoping to act as magnets for unskilled European workers, others introduced restrictions on the arrival of new immigrants. Eastern states facing mounting costs for the processing and care of millions of new arrivals at their ports, complained about the lack of federal financial assistance. In the West, the enthusiasm for Asian “coolie” labor which was driven by the construction of railroads dampened significantly once Asians started competing with white residents in California’s slowing economy. In conjunction with calls for federal action to control Asian immigration, states introduced their own legislative solutions to the problem. These solutions included a variety of restrictions such as limitations on land ownership for Asians, as well as barriers to enter in certain professions (e.g., restrictions on getting fishing licenses). California, in fact, defied the federal government and even the orders of Presidents who viewed the state’s actions on the issue of Asian immigration as a threat to the country’s foreign policy objectives vis. a vis. the Far East (Tichenor, 2002). The first concerns about Mexican immigration also emerged during this tumultuous period and Southwestern states

were important influencers in the development of the Border Patrol (Ngai, 2005). Combined with World War I, economic crises, and a strong anti-immigrant public opinion, state complaints and actions helped consolidate a new national consensus, this time in favor of major immigration restrictions. The National Quota Laws of 1921 and 1929 and the National Origins Act (1924) put the federal imprimatur on the new restrictionist norms.

This chapter follows the history of state-federal relations on immigration through the 19th century. On the European immigration front, I show how the competition across states for more immigrants led to both the nationalization of immigration admissions policy and more benefits for the immigrants. To ensure the flow of Europeans into their territory, states were willing to take a good look at their internal systems, invest in public education, provide cheap land near railroads and subsidize transit from Europe and the Eastern ports. The squabbles among states and the constant recrimination, coupled with Eastern states' anxiety that they could lose revenue from immigration to other ports or be saddled with the costs of supporting Westward-bound immigrants, made nationalization acceptable to all.

Nationalization was also the result of the battle over Chinese immigration but the dynamics there were quite different. Chinese exclusion brought Western states into direct confrontation with the federal government. California and other Western states, as well as towns in the region, used their legislative authority as a weapon to put further pressure on Washington to amend bilateral treaties with China and bar Chinese immigrants from the United States. As the Supreme Court observed, these laws were outrageous and unconstitutional, but their purpose was not legal, but rather political. States and localities used laws to keep the issue of Chinese exclusion on the national political agenda and to ensure that Washington would not step out of line and prioritize the country's commercial interests over the racial angst of Western states. In this story, race won: Washington not only banned the Chinese from

immigrating to the United States over the objections of China, but it also reneged on its promises to protect the rights of those who had been U.S. residents.

Federalism and Immigration in the Early Years of the Republic

During colonial times immigration policy was the responsibility of individual states; they determined the criteria by which aliens could be admitted to their territory, instituted poverty laws to protect themselves from those likely to become public charges or bring infectious diseases into the community, and they established rules about alien property ownership and inheritance. The Constitutional Convention of 1787 did little more than rubberstamp the existing legal order in this domain. Immigration was generally viewed as vital for the prosperity of the new Republic. The Founding Fathers, having no way of knowing the diversity of the incoming immigrant populations of the future, were mostly concerned with protecting the new institutions of their country from potential British infiltrators. During the debates, property ownership was discussed as a possible requirement for the franchise but citizenship status was not even considered as a disqualifier (Anti-Federalist Papers, 2003:145-156). States were going to be responsible for determining the criteria for voting eligibility and it was up to them to decide whether immigrants should vote.

The requirement of citizenship was imposed only for elected officials in order to mitigate “the danger of admitting strangers into our Public Councils” out of fear that “foreign powers would make use of strangers as instruments for their purposes” (Anti-Federalist Papers, 2003:156-157). Even if they did not act as agents of foreign powers, the attachments that aliens may have to their land of origin could color their preferences and decisions as lawmakers. Therefore, as Gouverneur Morris warned, “admit a Frenchman into your Senate and he will study to increase the commerce of France; an Englishman would feel an equal bias in favor of that of England” (Anti-Federalist Papers, 2003:159). Another more pressing problem than an alien’s allegiance to his native land was the way Senators were selected by the states. Senators

were not to be elected by the people but rather appointed by state officials and the Founders viewed states with great suspicion and mistrusted both their selection criteria and their ability to make proper appointments. In this respect, Gouverneur Morris was particularly suspicious and critical of state legislatures which could not necessarily be trusted to appoint meritorious and honorable foreigners to national office thus potentially jeopardizing the national project.

States and national leaders in the first half of the 19th century agreed that immigration was vital for the development of the country since it was necessary to populate the vast lands on the western frontier. During the first decades of the 19th century, immigration accounted for 4.4 percent of the country's population growth, but as the century moved on, by the 1850s, immigrants represented almost one-third of new Americans (Tichenor, 2002:56). The need for immigrant recruitment was so deeply felt during this period that states set up recruitment stations in various European countries and developed advertising literature to point out the benefits of migration to Europeans. According to the Harvard Encyclopedia of American Ethnic Groups (1980), by the 1850s a total of thirty-three states and territories had established immigration agencies. In the context of the intensifying debate over slavery, Northeastern states supported and encouraged the immigration of "freemen" to the South, hoping that this new population would bring to the Slave states a new abolitionist spirit. Placing its hopes in the power of culture to bring change, *The New York Times* calculated that:

[A]n immense tide of Northern and European emigration [will land] upon Maryland, Virginia, North Carolina, Kentucky, Missouri and Tennessee. These [states], in their turn, will slough off their slave population to the extreme South and become free states by force of circumstances, in spite of their sectional pride and prejudice (*The New York Times*, 1855b).

The competition for immigrant labor among states was intense: states touted land purchase opportunities for \$1.25 per acre, they sent agents to the Port of new York to pick up newcomers off the boat, compiled mailing lists of immigrants' friends and families to whom they

sent advertisement about the golden opportunities available to them in the United States, developed advertising materials in several languages and appropriated monies to support these recruitment efforts. In its promotional materials, Wisconsin pointed out that rival Minnesota was further to the West and away from the Coast, had limited rail service and was plagued by more natural disasters. Minnesota focused its attention on the Dakotas zeroing in on the danger of Indians, the bad weather, the mosquitoes and locusts. Further to the South, Kansas concentrated on attracting Mennonites offering to exclude them from militia service, while Nebraska put its faith in the recruiting zeal of the Union Pacific railroad which touted the benefits of life in the state.

The general consensus at the national and the state level over the desirability of immigration did not mean lack of conflict. During the early years, immigrants came mostly from Protestant communities in Western Europe but the potato famine in Ireland in the 1840s forced thousands of poor Irish families to migrate to the United States. The settlement of large numbers of Catholics in several states led to major local tensions. New York and Philadelphia experienced riots and large scale sectional violence in the 1840s and a variety of local anti-catholic parties developed in states with large Catholic populations. The American Republican Party won municipal elections in the Northeast in 1844 and its successor, the Native American Party, carried the legislature and governorship in Massachusetts in 1854 but lost in New York. In California, the party's focus was the Chinese and other Asians who had arrived in the 1840s and 1850s attracted by work on the railroads and in the mines, more so than the Catholic Irish. The party also won the mayoral election in Chicago in 1854, and the new "Know Nothing" mayor promptly barred immigrants from employment in city jobs and yanked liquor licenses from German and Irish Catholic tavern-owners who responded with the "Lager Beer Riots" (Byrne, 2004). In Louisiana, which had a large French Catholic population, the American Party had to

position itself as anti-foreign rather than anti-Catholic in order to get any traction. Generally in the South, the party's popularity did not translate into many electoral victories since the "Know Nothings" found themselves caught in the slavery controversy.

The popularity of the "Know Nothings" did not translate into a national consensus over immigration. In many cases, "Know Nothings" had to ally themselves with other parties in order to get sufficient electoral support to win office. That often diluted their agenda and blurred their main message in many states. As *The New York Times* (1855) pointed out, "amid such confusion, to estimate with anything like accuracy the strength of any of the many divisions of the American Order is impossible" with the Southern divisions supporting slavery, the Western divisions supporting abolition and the Northeast being somewhat noncommittal. In any case, fears over the cultural and economic effects of immigration in communities around the country were soon upstaged by the approaching Civil War.

Inter-State Competition at Full-Swing: The Era of Mass Immigration

Already in the midst of the war, President Lincoln was concerned that declining immigration rates would affect post-war economic growth. In 1863, he told the thirty seventh Congress that the United States needed a new system that would encourage and foster immigration. "This noble effort," the President noted, "demands the aid and ought to receive the attention and support of the Government" (Hing, 2004). The Congress responded in 1864 with the establishment of the U.S. Immigration Bureau and a U.S. Commissioner of Immigration under the auspices of the State Department. The Commissioner was entrusted to recruit immigrants from Europe and ensure their safe transit to their employment site (Tichenor, 2002). The minimally-funded Commissioner was a small, token effort to initiate federal involvement in the growing challenges of immigration policy.

During the Reconstruction years, with the Know Nothing party a memory of the past, states returned to their busy competition over immigrants and immigration rates, which had declined significantly during the war years, started to climb once again. The South, strapped for cash and in need of labor, entered the competition for immigrants with enthusiasm. Virginia was the first to establish an Emigration Board in 1869, followed by other states. Southern states that relied on property taxes for revenue saw the solution to their problems in immigration: giving out lands to immigrants which could then be taxed would increase the tax base for states (Durham, 2004). As *The New York Times* (1870c) reported, Southern states and towns were "disposed to extend every facility to those who propose to reside permanently in that section." Governor Coke of Texas in his annual address sharply criticized "conservatives" in the legislature who refused appropriate funding in aid of immigration recruitment and declared that for the development of the state, the goal should be to have a population equal to that of New York

(*The New York Times*, 1875b). The Governor also noted the state's plans to invest in public education, an area of disadvantage for Texas, in order to attract "good German families." In 1871, a Commercial Convention of the Southern States complained vigorously that rumors about KuKluxKlan activity, especially in South Carolina, had caused them difficulty in terms of attracting skilled and unskilled immigrants and begged the federal government not to impose martial law on the state because of the undue economic burden that such action would cause (*The New York Times*, 1871).

In 1870 delegates from twenty-two states and Washington, DC met in Indianapolis to discuss how best to recruit immigrants and what the federal government should do to help states in that respect. The Convention resulted in a sectional brawl with recriminations flying from all directions. Inter-state competition over immigrants quickly led to sectional divisions and to a meeting fraught with suspicions, disparagement and animosity. A frustrated *New York Times* correspondent declared the convention "a failure" dominated by "self-seeking" delegates representing "private interests" who purposefully accentuated sectional differences rather than provide national solutions and ideas (*The New York Times*, 1870b).

New York and Massachusetts were castigated by Conference members from other states because in their view, shipping interests had lobbied these two states to turn a blind eye to the living conditions of immigrants and some conference speakers argued that if New York was found "derelict to its duties" it should be reported to Congress. Governor Harvey of Kansas took issue with New York's head taxes, declaring that taxing immigrants was the exclusive prerogative of the federal government which states could not violate. The administration of Castle Garden was vigorously criticized, noting the influence of Tammany Hall over the New York Bureau of Immigration, and the state's alien laws came under attack. Western states noted that Tammany had succeeded in appointing his supporters to the Commission and as a result, Castle

Garden was so fraught with abuse and graft that only a federal takeover could improve things, as New York could no longer be trusted to protect immigrants (*The New York Times*, 1871b).

New York, which had traditionally viewed itself as a good Union member, shouldering most of the burdens of immigration but few of its benefits, did not take the attack kindly. The New York Commissioner of Emigration had often declared that “our State acts in the interest of the whole Union, by effectively protecting all the immigrants on their arrival and by preventing the spread of diseases imported by them over the country at large, and this while deriving far less advantage from immigration than the Western States” (Kapp, 1870:157-158; as in Filindra and Tichenor, 2009:6). After all, New York had established Castle Garden in 1855 in an effort to create a system of entry and admission that did not leave immigrants vulnerable at the piers. New York had been a pioneer in immigration legislation, requiring shipmasters to provide manifests including all their human cargo, establishing inspections of immigrants, and developing an immigration board to oversee the operation of the system. As touted by the State, Castle Garden, a former opera house, had reception and orientation services, a hospital, a restaurant, free baths, baggage carrying services and a communal kitchen. The facility also provided employment support and lists of local boarding houses (Harvard Encyclopedia of American Ethnic Groups, 1980).

According to the shell-shocked paper’s assessment, the Convention was called for the benefit of the Eastern port states but it was dominated by the West and its agenda, heavily influenced by railroads and large-scale farmers. As a result, the focus was on the transit conditions of immigrants in the ocean, and no attention was paid to land transit. New York and the other northeastern states were suspicious of Western state motivations, believing that the West’s main goal was to find ways to transport immigrants to the Western territories through other ports, thus depriving the Eastern states of both immigrants and immigration-related

revenue. Eastern delegates also charged that Western states are influenced by railroad interests which wanted attention deflected from the terrible transit conditions in railway cars. As the resolutions noted, immigrants were transported to the United States in conditions of squalor and the situation grew worse when they were packed on trains and shipped to points West (*The New York Times*, 1870a). In a defiant, “may the best man win” conclusion, *The New York Times* noted that “what these Northwestern gentlemen seem to have forgotten, is that immigration, like commerce to which it is allied, will flow like natural channels to the most advantageous ports and the most profitable markets and its course thereto no amount of scheming can divert or interrupt” (*The New York Times*, 1870b).

The main focus of the Conference as originally defined was to discuss the need for federal regulation of the immigration process. The growing flow of immigration and the challenges it posed brought home the realization that centralized solutions were needed. The federal government was the only one that could allay state fears and help break the stalemate. The Conference in its confusion hinted at three issues that required federal action: 1) regulation of ocean-liners bringing immigrants from Europe to ensure descent transit conditions for the people aboard; 2) regulation of railroads that offered westward transit to immigrants; 3) establishment of a proper system of taxes and duties to help defray the costs of immigrant welfare and transit services. One recommendation, coming from Governor McCook of Colorado was that the federal government should establish a new Federal Immigration Bureau and a Federal Land Agency to help bring more immigrants to the country and determine the appropriate and equitable distribution of immigrants across the country (Dinnerstein and Reimers, 1999; *The New York Times*, 1870a).

The idea of nationalizing immigration policy was not met with unanimous approval. Neither the need for federal involvement nor the legitimacy of nationalization was a slam-dunk

among some state delegates to the Convention. Governor Palmer of Illinois took issue with the idea of federalizing immigration regulation; his statement highlighted that what the U.S. needed was not more immigration regulation but proper enforcement of the existing state regulations. Even among those who were willing to entertain more federal involvement there were concerns. Echoing debates over welfare in the 1990s, one of the speakers noted that Congress should not “help the immigrant too much lest his independence be injured” (*The New York Times*, 1870a).

If there ever was a “race-to-the-top” in immigration policy, it was during this early post-Civil War era when immigrant arrivals were still deemed insufficient to cover state needs in population growth and labor and states sought to become “magnets” (*The New York Times*, 1912) for immigrant labor. New York estimated the value of each immigrant off the boat at \$800 and more arrivals through the Port meant more money spent in the City. Undoubtedly, states did not want just any kind of immigrant: “undesirables” such as “any lunatic, idiot, deaf, dumb, blind, maimed or infirm persons, or persons above the age of sixty years, or widow with a child or children, or any woman without a husband, and with child or children, or any person unable to take care of himself or herself without becoming a public charge” (Emigration Act of May 5, 1847 as in Kapp, 1870:98-99) were to stay away, and as the century progressed Asians came to be added to this category. However, for those “sturdy Northwestern [European] folk” (*The New York Times*, 1875b), states were ready to pay for their transit to the final destination, provide prime quality land for settlement, improve the public education system, ensure protection from the Indians by organizing and expanding state militia (such as the infamous Texas Rangers). Kansas was selling prime land adjacent to the all-important railroads at \$2.50 an acre while the railroads themselves were selling it at \$8/acre (*The New York Times*, 1870c).

Texas was even ready to admit that it needed to address “the vaguely-defined fear that life and property were not held so sacred [in Texas] as in older states” (*The New York Times*, 1875b).

Inter-state competition over immigration, gave way to conflict between states and the federal government in the 1870s, over who should pay for the costs of admitting and regulating immigrants. The nationalization of the costs of immigration control became a major point of contention between the federal government and New York in the 1870s. In 1875, the Supreme Court nullified state laws that required shipmasters to pay bonds and head taxes for immigrants. In its decision which was laced with newly found nationalism, the Court proclaimed that “the laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans and San Francisco.”³² By 1880, Congress was also having hearings on the issue of fraudulent naturalizations taking place the month prior to the 1868 national election in New York, Philadelphia, Baltimore and New Orleans. Although in accordance to the Constitution, Washington had set up a “uniform law of naturalization,” states were entrusted with its implementation and in the late 1870s wild charges surfaced about local politicians and judges not following the correct procedures and naturalizing people without the appropriate documentation. Congressional Republicans were rightfully suspicious that local Democrats seeking to control legislatures in various states pushed for the naturalization of thousands of immigrants regardless of their eligibility (*The New York Times*, 1880).

The *Henderson* decision deprived New York and other maritime states of their traditional means of supporting immigrant reception and assistance but did not offer anything to replace the existing system. State immigration boards continued to screen European newcomers at port city depots like Castle Garden and without the bonding system they faced the prospect of raising taxes or realigning their budgets to offset the burdens of receiving and

³² *Henderson v. Mayor of New York* 92 U.S. 259 (1875)

providing public benefits for record numbers of immigrants. In 1875, New York's Emigration Commissioners issued a report to the state including immigration statistics for the previous year. Even though arrivals in 1874 were substantially lower than in some of the previous years, the Immigration Board estimated that the Commission was still in the red by \$60,000 because the revenues from commutation fees, which amounted to \$1.50 per passenger, were not enough to cover the cost of running Castle Garden and the various services associated with it. The Commission's report estimated that the State would need to appropriate funding to the amount of \$300,000 to cover the cost of running the immigration depot and reimburse counties and cities for services they provides to immigrants on their way West (*The New York Times*, 1875). Coastal state governors, lawmakers, and immigration boards lobbied Congress with petitions, resolutions, and reports highlighting the need for federal relief from the costs of administration and immigrant care (Kapp, 1969; Hutchinson, 1981).

Despite these lobbying efforts, neither Republicans nor Democrats in Congress rushed to establish new federal regulations on immigration or national administrative capacities for screening and assisting new arrivals. Many national leaders were reluctant to enact any new federal policies that might slow European inflows or offend immigrant voters. After six years of inaction, New Yorkers were fuming:

The Federal courts have decided that the business of regulating immigration does not belong to the State...Congress has had ample time and opportunity to deal with the subject. For four years strenuous efforts have been made to secure action from that sluggish body, but it has treated its obvious duty with perverse neglect... The present situation is disgraceful and cannot last (*The New York Times*, 1882a).

Frustrated by federal delays, New York's Board of Emigration Commissioners sent shockwaves through Congress by threatening in 1882 to close down Castle Garden and to end all of its regulatory activities related to immigration. New York's threats finally forced Congress

to act by adopting the Immigration Act of 1882 which essentially provided national authorization for state policies that had been struck down by the Supreme Court. The new legislation used language from state statutes to restrict admission of “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge” (Garis, 1928; Tichenor, 2002). It also established a system of funding immigrant inspections and providing for immigrant welfare by assessing a head tax of 50 cents per newcomer.

In an agreement that was signed by the U.S. Secretary of the Treasury and the President of the New York State Board of Emigration in September 1882, the parties determined that:

[T]he party of the second part [i.e., New York] undertakes to examine into the condition of all passengers arriving by vessel from a foreign port at the port of New York; to ascertain who among them are convicts, lunatics or unable to take care of himself or herself without becoming a public charge, and report the same in writing to the Collector of the Port of New York. The party of the second part will also receive all alien immigrant passengers at Castle Garden or such other suitable place... and there provide such means for their accommodation as are now provided, including necessary interpreters, and shall provide at the hospitals and other public buildings... suitable accommodations for such alien immigrants as shall become sick, or in distress, or idiot, or lunatic, or a public charge, for a period not exceeding five years from the time such immigrant shall have arrived at the port of New York. The party of the second part shall so far as possible keep a record of all alien immigrants arriving at the Port of New York by vessel from a foreign port and the place from whence they came. The party of the second part shall also carry out such regulations as the party of the first part [i.e., the federal government] shall from time to time prescribe... (*The New York Times*, 1882b).

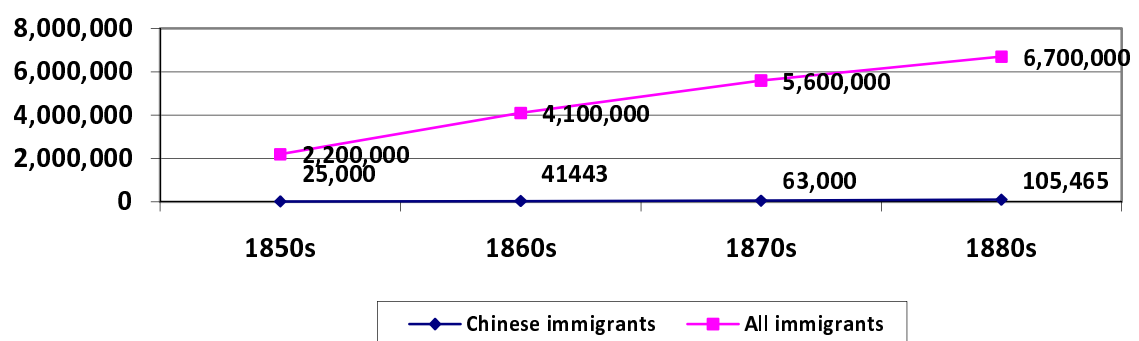
The agreement made it clear that states remained responsible for the administration of the immigration system, but the federal government now provided the requisite funding.

California and the Chinese Exclusion: The State that Defied the Nation

The conflict over the immigrant admissions system was resolved through federal action which added Congressional imprimatur and funding to state policies, but now a new immigration controversy was brewing that required the attention of Washington: “the Yellow Peril.”

The Chinese first came to California in the late 1840s at the time of the “gold rush” to work in the mines. After the Civil War, Chinese “coolie” labor became vital to the railroads which were caught in a fierce competition to reach the California Coast. Daniels (2006:91) reports that in 1860 there were about 35,000 Chinese in the United States. In 1870, their numbers had grown to 63,000 and by 1880 there were a total of 105,000 Chinese, 70 percent of whom lived in California, 27 percent in other Western states and only 3 percent lived east of Colorado. In fact, the Chinese population in California never exceeded 10 percent of the total population in the second half of the 19th century. Figure 3.1 (below) shows the growth of the Chinese population in the United States according to official sources relative to the growth of immigration overall.

Figure 3.1 All immigrants and Chinese Immigrants 1850-1980s



Although few in number, the Chinese were viewed with hostility from the very beginning, especially in the communities and in the occupations where they concentrated. Many of the Chinese arrived in the state in 1851, just as the gold rush was winding down, and sought work in mines that others had abandoned. Independent gold miners in California perceived Chinese and other non-European -especially Mexican and Chilean- competition in gold mining as “anti-American” and a threat. According to *The New York Times*, “throughout the whole mining region, there appears to be unanimous opposition to the Chinese and a determination to evict them at all risks” (*The New York Times*, 1852).

Among the first to reach California on the eve of the gold rush, Latino miners were experienced and well-trained in the field and as a result, the first to be targeted by white miners with pleas to the state legislature to impose a licensing tax on “greasers.” The legislature responded in 1850 with the Foreign Miners License Law which required “aliens ineligible for citizenship” to pay an impossibly high fee of \$20 per month for the privilege to mine (Johnson, 2000). Governor Bigler warned that there was a threat that the state’s gold would be transported to the Chinese Empire if immigration were not checked (*The New York Times*, 1852). Outraged by the unfairness of the tax, Latinos joined forces with French and German miners in protest and refused to pay but their protests were put down by white American militias. The tax was hastily repealed not because of its unfairness to aliens, but because “the advent of the whole mining population was then so recent, and the and the title of all parties so utterly baseless, that the most blushing effrontery did not venture to quarrel with the rights of any squatter of whatever name or breed” (*The New York Times*, 1852). In essence, according to the state, the main reason for the repeal of the original tax was because the state could not figure out who the proper owner of a claim was; once that bureaucratic limitation was resolved, the imposition of the tax was not only legitimate but warranted because through the tax, the rights

of foreign owners were recognized officially! In defense of the tax, the state noted that “[the Act] does not deny the right of the Chinamen to occupy and work the mines. Indeed, it explicitly legalizes such occupation by making it a source of revenue” (*The New York Times*, 1852). The paper even praised the state for legalizing the claims of the Chinese through the tax and castigated the American miners who violently opposed “the Celestials.” In the spirit of interstate competition, *The New York Times* naively suggested that if the abilities and talents of the Chinese were not welcome in California, the South would be able to accommodate them and provide lucrative employment there and proclaimed that “we trust that the enterprise and capital of the South will not neglect [this opportunity].” Undeterred by the specter of competition in Chinese immigration, in 1852 the California Legislature revised the tax to \$3 per month and in 1853 it raised it to \$4 per month and provided for an increase of \$2 for 1855 and each year thereafter (Hyung-chan, 1994:47-48).

California’s efforts to exclude the Chinese were assisted by the state’s Supreme Court decision in the *People v. Hall* (1854) in which Chief Justice Murray explained that the Chinese could not serve as witnesses in criminal cases against whites. According to Justice Murray, the key task confronting the Court in this case was to determine whether the 14th section of the Act of April 16th, 1850, regulating Criminal Proceedings which provided that “No black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man” also applied to Chinese and Mongolians. As Murray declared,

[W]e are of the opinion that the words “white,” “Negro,” “mulatto,” “Indian,” and “black person,” wherever they occur in our Constitution and laws, must be taken in their generic sense, and that, even admitting the Indian of this continent is not of the Mongolian type, that the words “black person,” in the 14th section, must be taken as contradistinguished from white, and necessary excludes all races other than the Caucasian.

The Justice also warned that any other outcome to this case could have detrimental consequences: “The same rule which would admit them to testify would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls” (*People v. Hall*, 1854; also See Tichenor, 2002:89-90). A second case that same year, *People v. Brady* (1854), affirmed the *Hall* decision and extended it to civil matters.

The popularity of the Foreign Miners Tax and the Court’s willingness to curtail the civil rights of non-whites provided the Legislature with the incentive to continue its quest to expel the Chinese from the state. Between 1852 and 1862, in a time when the entire country’s focus was on the Civil War, California was busy legislating the Chinese. In 1855, Governor Bigler declared that the state had too many Chinese inhabitants and the Legislature responded with the “Act to Discourage the Immigration to This State of Persons who Cannot Become Citizens.” The Act required shipmasters to pay a fee of \$50 for each passenger who could not be naturalized and the state was authorized to commence legal proceedings against shipmasters who did not pay the tax within three days of the vessel’s arrival. But the precedent set by the *Passenger Cases* a decade later, did not bode well for the Act: the law was nullified by the State’s Supreme Court in 1857 on the grounds that it violated the federal government’s authority to establish uniform rules regarding foreign trade (Hyung-chan, 1994).

One year later, California responded with yet another “Act to Prevent the Further Immigration of Chinese or Mongolians to this State.” In spite of constant legal battles which more often than not led to nullification of state laws, California continued its legislative quest to limit Asian immigration. In 1860, more than a century before Texas excluded undocumented immigrant children from its public schools, California barred Chinese children from public

education, authorizing the schools superintendent to suspend funding for any school that admitted them (Sandmeyer, 1991:50). In 1862, it passed the “Act to Protect Free White Labor Against Competition with Chinese Coolie Labor,” also known as “the California Police Tax” which imposed a head tax of \$2.50 per month on any Chinese 18 years old or older engaged in the production of rice, sugar, tea or coffee, or if the Chinese had not paid the California Foreign Miners’ License Tax.

In 1869, the completion of the transcontinental railroad brought thousands of Chinese migrants who had previously worked for the railroads to California towns in search of jobs. The unrest and violence that had been characteristic of the mining regions, now travelled to the urban centers. The slowdown of California’s economy in the 1870s also contributed to the racial tensions. As in the previous decades, the state was happy to accommodate the white population in any way possible at the expense of the Asian immigrants. In 1870, largely by example set by the City Council of San Francisco in its treatment of Chinese women, came the “Act to Prevent the Kidnapping and Importation of Mongolian, Chinese and Japanese Females for Criminal or Demoralizing Purposes” which imposed a fine of up to \$5,000 and two years imprisonment on shipmasters who brought in single Asian women “for demoralizing purposes” (Ringer, 1983). The law required bonds of Asian immigrants unless they could prove their “good character.” Another statute, which was upheld by federal courts, targeted the Chinese practice of disinterring the deceased and sending them to China for burning. The law required the permission of the local health official before a body could be removed from the local cemetery (Sandmeyer, 1991:55). Burial became an issue once again in 20th century Texas where local authorities refused to allow the burial of Hispanics in local cemeteries. By the 1880s, California prohibited marriage between Chinese and Blacks, Indians or Mulattos, had barred the Chinese from eligibility for fishing licenses and closed down Chinese schools. In 1885, the state’s political

codes were amended to allow segregation in schools, hospitals, public facilities, and elsewhere. Most of these laws were struck down by state or federal courts within a few years. Even the Supreme Court was impressed by California's persistence and ingenuity. In striking down one of the Chinese control statutes against Chinese women, the Court's decision remarked "it is a most extraordinary statute... It is hardly possible to conceive a statute more skillfully framed to place in the hands of a single man the power to prevent entirely vessels engaged in foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind."³³

California cities also participated in the anti-Chinese effort with unequalled enthusiasm. Not only did San Francisco close the Chinese school there, but the city passed a ban of the use of carrying poles for peddling vegetables in the market. Another ordinance aimed at Chinese neighborhoods, required 500 cubic feet of air for every lodger within rooming houses. In 1873, the city decided to tax laundries that used horse-drawn carriages with a \$4 annual tax; those who did not use a carriage had to pay \$20 per year. Chinese firecrackers and other ceremonial elements such as gongs were banned by San Francisco in 1873, while in 1875 the city decided to regulate the size of shrimping nets which effectively reduced the catch. In the same year, the Mayor vetoed a law requiring all those arrested by the police to shave off their hair, on the grounds that it was a violation of the Burlingame Treaty and the Civil Rights Act. In 1880, the city passed an anti-ironing ordinance which aimed at shutting down night-time laundries. Even Chinese theaters were targeted: they were prevented from operating in late hours by an ordinance which prohibited theatrical performances between 1:00am and 6:00am (Sandmeyer, 1991).

³³ Chy Lung v. Freeman, 92 U.S. 275 (1875)

Chinese women became an easy target for San Francisco's city council. On the justification that most Chinese women came to the United States for immoral purposes, the city determined that regulating Chinese women came under state and local policing powers and in 1860 it set up a commission to investigate Chinese prostitution. In 1865, the city had Chinese public housing removed from the city to a location where it would not be offensive to white residents. Within a few months, the city passed another ordinance that declared all such housing as centers of prostitution. In a move reminiscent of recent events in Hazelton, Pennsylvania, the City of San Francisco determined that landlords who provided housing to Chinese women could be held liable and fined (Sandmeyer, 1991:52).

In spite of the constant constitutional challenges to state alien laws that the Chinese community financed, many Western states followed California's example and enacted such laws of their own. The exclusion of Chinese as witnesses from criminal and civil suits was adopted soon after the *Hall* decision in California, even though Sacramento repealed the statute in 1872. Western states such as Washington, Oregon, Idaho and Montana also sought to impose restrictions on Chinese claims to mines as well as mining licensing fees similar to those in California. The barring of Chinese from the witness stand made it almost impossible for them to challenge abuses and injustices they suffered at the hands of white miners from loss of property to loss of life (Aarim-Heriot, 2003). The taxes and fees were held to be unconstitutional by the Supreme Court in 1870; however, the civil rights restrictions continued with the approval of the Courts.

Even employer sanctions and punishment of businesses for hiring certain classifications of aliens is not a new, late 20th century idea. California's second Constitution which was passed in 1879 barred municipalities and corporations from employing Chinese and Asians, allowed for the physical segregation of Asians in towns and cities and permitted local governments to pass

ordinances to that effect, and barred “non-citizenable” aliens from land ownership and inheritance. In 1889, the Montana Constitutional Convention considered a resolution to bar businesses from employing Asians. According to the resolution,

[N]o corporation now existing or hereafter formed under the laws of the State, shall after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolian... No Chinese shall be employed on any State, County, municipal or other public work within the state, except as punishment for a crime... The Legislature shall discourage by all means within its power the immigration to this State of all foreigners ineligible to become citizens of the United States (*The New York Times*, 1889).

The Chinese Exclusion at the National Scene: State-Federal Conflict

With the Civil War over, Washington became keen on involving the United States in the imperialism game that European powers were involved in. The Far East acquired great geopolitical importance in this dawning era of power politics and the United States was determined to be a competitor. Anson Burlingame arrived in China in 1862 with instructions to “sneak in the wake of other Powers, and fatten from the harvests they sow with toil, without doing any of the labor” (*The New York Times*, 1862). The enthusiastic liberalism of the era led the United States government to seek free market opportunities in Asia. In a dinner honoring the Chinese delegation which was on its way to Washington, DC, New York Governor Fenton noted that,

[O]ur desire is to enlarge intercourse with all nations through commerce, Christianity and good will. Our institutions lead us to the recognition of freedom for others as well as for ourselves and we hail every opportunity for developing this national sentiment, and extending to the Chinese the genius, liberty and industry of our people in exchange for their skills in mechanical arts and peaceful polity (*The New York Times*, 1868).

During the same event, Anson Burlingame proclaimed amid cheers that “the East which men have sought since the days of Alexander, now itself seeks the West” and participants toasted to “ancient and modern civilization comingling in the Pacific” (*The New York Times*, 1868). The banquet celebrated the conclusion of the Burlingame Treaty with China which among other provisions established “the inherent and inalienable rights of man to change his home and [state] allegiance” (Burlingame Treaty, 1868; also see Tichenor, 2002:93).

A festive, liberal mood prevailed in New York and the East coast on the eve of the Burlingame Treaty, but in California and other Western states, the “comingling” of East and West over the Pacific was certainly an unacceptable proposition. As *The New York Times* reported in its hopeful, liberal tone, the treaty would render obsolete state laws against the

Chinese. "These laws have been the work of state legislatures. It is to this Treaty, made by the nation, and to the National Legislature, and to the national Courts that those who are unjustly affected by those statutes will look for protection" (*The New York Times*, 1869). The paper further references a court case in Idaho where Chinese miners sought to have the foreign miners tax there nullified. The state judge dismissed the case on a technicality but expressed hope that all these anti-Chinese laws that had developed under the influence of California would soon become unconstitutional because of the implementation of the Burlingame Treaty. For California and many Western States that was precisely the problem. And at stake, was the racial purity of the country.

The passage of the Burlingame Treaty raised the alarm on the West Coast. In August 1870, four months after the death of Anson Burlingame and a few months before the state immigration convention in Indianapolis, San Francisco hosted an Anti-Chinese Convention, largely the work of local labor leaders from the Order of the Knights of St. Crispin (Sandmayer, 1991; Healey, 1905). In complete disregard for national policy, the Convention presented a letter to the leadership of the Six Chinese Companies, San Francisco's main Chinese organization, which stated that "we do not consider it just to us, or safe to the Chinamen, to continue coming to the United States, and request them to give such notice to the public authorities of the Chinese Empire." Not wanting to repudiate liberal ideals and stepping well into foreign policy territory, the Convention noted in a very disingenuous explanation that the unjust nature of Chinese immigration lay in the fact that Americans did not have equal access to China, *not* to racial factors. "We have for twenty years, even before the Burlingame Treaty, been permitting your people to come among us and enjoy the commercial benefits of our country...Our people cannot enter into the interior of your country and quietly enjoy the advantages of your government" (Healey, 1905:26). Presaging events of the decade to follow,

the letter warned that, “we live up to agreement with our treaties and abolish them when they become oppressive; such must be the case with the treaty we have made with China, as our national election is fast approaching and will turn upon that, as well as other questions agitating the labor interests of our country” (Healey, 1905:26).

The role of organized labor in inciting and sustaining the anti-Chinese movement in California and nationally is quite complex (Burgoon, et.al, 2008); however, a letter sent to the *New York Tribune* in 1871 by California labor leader Henry George condemning the liberal federal policies toward China and promoting Chinese exclusion, in conjunction with the use of Chinese workers brought in from the West to break a strike in Massachusetts, helped introduce the debate to the East Coast. The entire country started to follow instances of agitation and violence in California and when riots erupted in Chico in 1871, the *San Francisco Chronicle* reprinted anti-Chinese articles and quotations from papers across the United States (Sandmeyer, 1991). In the wave of the 1873 California state elections, labor organizers were involved in setting up chapters of a new organization, the People’s Protective Alliance, which advocated the abrogation of the Burlingame Treaty. The efforts of the Alliance did not go unnoticed by California Democrats who proclaimed in their Convention that “we regard the presence of the Chinese in our midst as an unmixed evil” (Sandmeyer, 1991:49). The Democratic victory in the 1875 election made it clear to the Republicans and independents that they too had to address the Chinese issue head on (Tichenor, 2002; Sandmeyer, 1991).

In 1875, Congress, walking a tightrope between the demands of foreign policy and the loud protestations of California, made its first foray into Chinese immigration control, starting with targeting Chinese women. The Act reassured the Chinese that “the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary, as

provided by section two thousand one hundred and sixty two of the Revised Code,” but sought to placate California by finding that:

[T]he importation into the United States of women for the purposes of prostitution is hereby forbidden; and all contracts and agreements in relation thereto, made in advance or in pursuance of illegal importation and purposes, are hereby declared void; and whoever shall knowingly and willfully hold, or attempt to hold, any woman to such purposes, in pursuance of such illegal importation and contract or agreement, shall be deemed guilty of a felony (Immigration Act of 1875).

As Congress soon realized, the Page Act (Immigration Act of 1875) was too little too late for California and the Western states. The Supreme Court and state courts decisions invalidating one state anti-Chinese regulation after another, was too much to bear. The vociferous protestations emanating from the West continued unabated. Senator Booth of California boomed in the halls of Congress on the unfairness of the national government’s neglect of this peculiarly Western problem, noting that “if in New York, Iowa or Georgia there were 100 Chinese male adults to every 150 voters, the Mongolian problem would be regarded as supremely important” (*The New York Times*, 1878a). The relevance of the statistic is quite questionable and designed to provide an inflated impression of the size of the Chinese population who in any event could not vote and thus did not present a political threat to the white majority. The argument thus really rested on an implied cultural threat: the Chinese would soon outnumber and overpower white males.

Representing the views of the Eastern establishment which had started to move away from the purely liberal position to a more cautious and culturally informed one, the paper agreed that the problem was particularly vexing, but blamed California’s Congressional delegation and state leaders for the protracted debate because they had not provided any accurate statistics as to the numbers of “the Mongolian invaders.” Gone were the times when *The New York Times* applauded the “comingling of East and West” (*The New York Times*, 1869)

or the advice to let the Chinese to carry off California gold to China because “it enables the Chinese trader to enlarge his commercial dealings with mankind, and ultimately it returns to us with interest” (*The New York Times*, 1852). The paper now recognized the cultural threat looming in the West, but it also understood Washington’s dilemma. State, city and customs records were not quite reconcilable: if Chinese had no families in the United States and few of them arrived according to customs records, how could San Francisco proclaim that its Chinese population was in the upswing? And how could Congress break the treaty with China on the basis that the number of Chinese arrivals was unsustainable, when they could not even ascertain how many Chinese actually lived in the United States? “Nobody can insist that California should be forced to bear a burden that can be honorably and justly lightened; but the first step toward lightening it should include a trustworthy account of what it is,” advised the paper (*The New York Times*, 1878a).

The federal leaders were clearly stalling for time. The U.S. could not argue that China had somehow violated the Burlingame Treaty which would have allowed for its nullification from the part of the United States. The United States had to convince the Chinese to agree to treaty alterations (*The New York Times*, 1876). But the politics were fast turning against openness with China. The national Democratic Party had enthusiastically embraced the anti-Chinese agenda in 1876, but the Republicans were far more ambivalent. Efforts by California republicans to introduce an anti-Chinese plank to the party’s platform were met with resistance from Northerners who stuck with their more egalitarian agenda (Tichenor, 2002:99). House Democrats and Senate Republicans formed a Joint Committee to Investigate Chinese Immigration which heard testimonies, mostly from anti-Chinese groups. The Committee’s findings, published in 1877, were predictably anti-Chinese and Congressional Democrats rushed to pass resolutions to get into new negotiations with China over the treaty. Congressional

Republicans kept stalling for time, but California politics threatened to force their hand: on the eve of the 1878 election, a new party rose in the state with a strong anti-Chinese message (Tichenor, 2002:102-103).

The Workingmen's Party of California (WPC), founded by Denis Kearney, represented a major political threat to the two main parties in a way that the Chinese themselves never were. The WPC took ownership of the Chinese issue, calling for the abatement of Chinatown on public health reasons. Rev. Issac Kulloch, Mayor of San Francisco and a WPC member declared in pamphlets and speeches that "the Chinese must go, peacefully if we can, forcibly, if we must" (WPC, 1880). In WPC meetings, "the idol of the crowd was Denis Kearney, an eloquent but ungrammatical Irishman, who had a practice to wind up each of his harangues with the words, "The Chinese must go!" and who often supported direct violent action against "the capitalists" but also against the Chinese (Hicks, 1937). In spite of its revolutionary rhetoric, the WPC immediately realized that a great opportunity to implement its plans lay in the Constitutional Convention of 1879 and it fought hard to get a majority of delegates. WPC in collaboration with the Grangers did in fact get significant representation to the Convention and the anti-Chinese provisions of the state's second Constitution are credited to them (Hicks, 1937). The same year, a state referendum on Chinese exclusion received near unanimous support from voters. According to Governor Perkins, "Out of a total vote of one hundred and sixty-one thousand four hundred and five only eight hundred and eighty-three votes were "for" such immigration" (Perkins Inaugural Speech, 1880; also see Tichenor, 2002:105). The Governor also made it clear that "the question has ceased to be a political issue with us [Californians]. Men of all parties are in perfect accord that immigrants from China are a curse to this country and that some

adequate restriction upon their coming ought to be imposed without delay" (Perking Inaugural Speech, 1880).³⁴

California had done all it could to protect the country from the Chinese problem; as Governor Perkins proclaimed, it was the federal government's turn to act: "While we must look to the General Government for the complete redress of this evil, the people have attempted, in the new Constitution, to find some relief through the action of the State Government, by directing certain measures to be applied" (Perkins Inaugural Address, 1880). Developments in California and the West continued to worry Congress and national leaders were scrambling for a solution. The U.S. Attorney General introduced a new judicial doctrine which promoted the view, first espoused by Justice Curtis, that because acts of Congress and foreign treaties were of equal standing in the Constitution, they could each invalidate the other; thus, "a Treaty may supersede an Act of Congress and an Act of Congress may supersede a prior treaty" (*The New York Times*, 1878b). An idea which may have fit the political dilemma of the time, but if

³⁴ In his speech, the Governor also noted: "It is seldom that the voters or citizens of an American community so generally agree upon a question of such importance as in this instance. The result cannot be fairly attributed to ignorance or prejudice; fully two thirds of the electors of this State are natives of the United States, and a majority of them are from the Northern and Western States of the Union. They are not affected by race prejudice. By education and association they have been well grounded in the principles of our free institutions, and fully appreciate the sacredness of individual liberty. In proposing to restrict immigration from China, they are not disregarding American precedents, nor running counter to the spirit of our republican government. They remember that this country was discovered, and has been developed, by people accustomed to the beneficent principles of the civil and the common law; that our civilization founded by such people is entirely different from, as it is much younger than, that which prevails in China, and which seems to hold those born under its influence with a power that cannot be broken.

An experience of thirty years has convinced them that immigrants from China do not and cannot assimilate with our people. They come hither without families, with no accurate ideas of free government or of Christian civilization; they retain their native dialects, their national prejudices, and even their race costumes. They take no interest in our political affairs, and manifest no desire to be identified permanently with the country, as do immigrants from other parts of the world. They are handicapped by labor contracts which reduce them to a condition worse than slavery, for the servitude cannot be abolished. Their contracts cannot be annulled by our laws, because they are founded upon the laws, customs, and religious prejudices of China. The result is to renew in another form the "irrepressible" conflict between free and servile labor, which has already cost us one civil war. Hence the people of California say: Here is a new problem in American politics."

implemented would have had serious implications for foreign policy commitments of the country.

Congress tried once more for a short-term fix to mollify California. In 1879, the House and Senate lame duck session passed the "Fifteen Passenger Bill" which prohibited the transport of more than fifteen Chinese passengers on a vessel and instructed the President to notify China that a portion of the Burlingame Treaty had been rendered obsolete (Daniels, 1995). The bill was a direct violation of the Burlingame Treaty and President Hayes vetoed it insisting that the only way to overcome this impasse was through negotiations with China not through unilateral action which could jeopardize the country's foreign policy objectives in the Far East. The pressure from the West and from Congress was intense and it forced Hayes to send a delegation to China to seek treaty renegotiation (Tichenor, 2002:105; Hicks, 1937).

Hayes' delegation signed two new treaties with the Chinese on November 17, 1880: one on immigration and another on commerce. The new immigration treaty allowed the United States to bar the entry of Chinese laborers at will if Washington determined that that "their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof" (Malloy, 1910; *The New York Times*, 1881). Although the treaty enabled the U.S. to significantly curtail Chinese immigration, the need for the Chinese to save face and the glimmer of liberal spirit that Washington still maintained, ensured that complete and absolute prohibition was not on the agenda. Some Chinese could still make it into the United States and Washington was now required by treaty to protect them from abuse and ill-treatment while they resided within American territory. In his letter to the President, Secretary of State Evarts emphasized the importance of the commercial treaty. The immigration agreement, a concession to California, received scant attention other than to say-quoting directly from the treaty- that "the Chinese

Government has recognized in the United States Government the right to regulate, limit and suspend the introduction into its territory of Chinese labor whenever in its discretion such introduction shall threaten the good order of any locality or endanger any interests of society” (*The New York Times*, 1881). The commercial treaty, on the other hand is analyzed section by section discussing the advantages of “enlarged intercourse” with China.

Treaty signed and delivered, President Hayes did not bother with addressing the issue of the Chinese much further. As far as the national government was concerned, the case was closed. In his farewell address to the nation, President Hayes admonished that “the best and surest guarantee of the primary rights of citizenship is to be found in the capacity for self-protection which can belong only to a people whose right to universal suffrage is supported by universal education.” The President also went through a laundry-list of foreign affairs accomplishments from resolving issues with Great Britain, to establishing relations with Greece and Turkey, to hopes for a “more quiet and peaceful border” with Mexico. The issue of the treaty with China and the anti-Chinese chorus emanating from California was not mentioned once (*The New York Times*, 1880b).

In 1882, anti-Chinese bills were enthusiastically proposed in Congress with House and Senate competing to develop the most stringent version. The first attempt at outright exclusion has vetoed by President Arthur on the grounds that it violated the treaty with China. A puzzled *New York Times* reported that during the debates, none of the opponents of the bill mentioned that it would violate treaty obligations; the arguments made against the bill centered mostly on human rights and fairness. Arthur’s position that the bill was a violation of the treaty with China was “novel information,” presumably the result of his “technical knowledge” of the treaty details. One of Arthur’s objections was that at the time of the negotiation of the 1880 treaty, neither the U.S. government nor the Chinese government had expected that Congress would

pass a bill barring the Chinese from the country for twenty years (*The New York Times*, 1882). The response from California was loud and clear: the state's Democratic Party issued resolutions proclaiming that "it is the duty of the general government to... extend its strong arm" to protect the country against the Chinese (Tichenor, 2002:107). The second time around, agreement was reached. Before the end of 1882, Congress had passed and the President signed the Chinese Exclusion Act which turned the treaty into the law of the land: Chinese immigration into the country was practically banned for a period of ten years, new provisions for the deportation of Chinese were instituted, and a new requirement for Chinese to carry government certificates of residency was implemented (Tichenor, 2002:107; Davis, 1893).

The case was not closed in California, however, and it was starting to become more of an issue on the Eastern seaboard. At a time when anti-Chinese organizations and politicians in California were ready to use any means necessary, including force, to remove the Chinese from the state, the revised treaty required that the U.S. government would protect Chinese residing in the United States from any abuse:

If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty (Butler, 1902).

In the assessment of Western states, the treaty did not go far enough.

While the West continued to riot against the Chinese, in the East all attention was in Boston where the Courts had to decide on a new and important question: are Chinese barred from the United States on the basis of their race or their nationality? In 1882, a British ship arrived in Boston; aboard the ship was Ah Shong, a native of Hong Kong and a British subject. The big question now in front of the Court was "whether by the Act of May 6, 1882, Congress intended to exclude from our shores laborers who are Chinese by race and language or who are

not and never were subjects of the Emperor of China, or resident within his dominions” (The Federal Reporter, 1883:635; also *The New York Times*, 1883a). In quoting sections of the Burlingame Treaty and the amendments that followed as well as decisions by the federal circuit court, Judge Nelson determined that “the inhibitions of this act are not to be construed as applying to persons of the Chinese race who are not and never were subjects or residents within the Chinese Empire” (*The New York Times*, 188a). The idea that residents of Hong Kong could be excluded from the treaty because of a technicality in the definition of “Chinese laborers” did not sit well with the West Coast. Senator Miller (CA) responded with letters to the Treasury and the State Department alleging that the Hong Kong authorities are providing false certificates to Chinese, dressed them as upper-classmen and put them aboard steamers destined for San Francisco where they would become coolies and laborers. The scheme, Senator Miller charged, was fully approved by the Government of China (*The New York Times*, 1883b)

The federal government’s response to the Rock Springs massacre that occurred two short years later was more fuel for the flames at the state level. In September 1885 riots erupted at coal mines in Rock Springs, Wyoming Territory. According to the Encyclopedia of the Great Plains, this was one of more than 153 riots that erupted in the region during this period (Wishart, 2004: 142). The dispute was between Chinese and white miners over who had a right to work in a specific area of the mine and over a proposed strike. In the violence that broke out, 28 Chinese were killed, 15 wounded and 79 homes were burned, while the surviving Chinese fled town.³⁵ A week later, the Chinese were escorted back to town by federal troops. Feeling the pressure from China, President Cleveland issues two consecutive proclamations for the violence to end. The proclamations were followed –with Congressional accord- by an agreement to compensate the Chinese for their property loss. China had pushed for

³⁵ The white miners accused of the anti-Chinese violence were release from jail within a few days (*The New York Times*, 1885)

compensation for damages resulting from previous riots in Montana, Denver, Colorado, Oregon City, Oregon and Redding, Bloomfield, Boulder Creek and Nicholas, California, and in Tacoma and Eureka, Washington, all places where forced expulsions had taken place (*The New York Times*, 1886c). Even *The New York Times* was doubtful of the appropriateness of indemnification for the Chinese: the treaty required that the government provide protection, the paper argued, which the government did by sending in federal troops. Compensation was over and above treaty requirements. Pressured by states and Congressional proponents of Chinese expulsion, Garfield rescinded the indemnity offer within weeks (*The New York Times*, 1886d).

In 1886, California organized another anti-Chinese convention and counties were instructed to send one delegate for every 5,000 people in their territory. True to the spirit and purpose of the meeting the first resolution of the Convention was that “no man now employing or patronizing the Chinese shall be placed on the Committee of Resolutions” (*The New York Times*, 1886). This created considerable problems as the use of Chinese labor was quite widespread, so after some deliberation, the resolution was abandoned in favor of focusing on more pressing matters. The main objective of the Convention was to put pressure on Congress to act. The delegates produced a memorial to the national legislature which denounced violence, but advocated hiring ships to deport the Chinese, demanded the removal of the Chinese Six Companies from San Francisco and that Chinese become ineligible for all privileges of citizenship (*The New York Times*, 1886).

The resolution presented to Congress noted that “the people of the State of California are, with a unanimity of sentiment unparalleled in history, opposed to the presence of Chinese in their midst and are likewise, opposed to the further immigration of that race into the United States.” The Convention further noted that Californians’ opposition to the Chinese is not the

result of fancy or a recent development but rather “the result of more than 80 years experience,” and it underscored that the presence of the Chinese in the state is “an invasion not an immigration” (*The New York Times*, 1886). What made the immigration of the Chinese an invasion, according to the convention delegates, was that they were mostly single men without families, who did not share white customs and could not be assimilated. The Chinese secretly followed their-own laws in defiance of American law and owed allegiance to a foreign power which in the assessment of the convention was “dangerous.” In all, the laundry list presented to Congress included ten reasons why Chinese exclusion was vital to the interests of the state and the nation (*The New York Times*, 1886).

Other states and territories followed suit with complaints of their own. A report from Idaho Territory declared that Chinese immigration was “the gravest and most momentous question that the people of the Pacific Slope have to grapple with,” memorialized Congress to abrogate the Burlingame Treaty once and for all and enforce the “total exclusion of the Chinese” as “the Chinaman is directly antagonistic to the white race.” In the wake of the rising international labor movement, Idaho was also concerned that Chinese contract labor is a menace because there may be links to “communistic elements from abroad” (Report of the Governor of Idaho, 1886). Similarly, a report from the Governor of Washington Territory from 1887, which was submitted to Congress a year after major anti-Chinese riots in Seattle in February of 1886, blamed the Chinese for the riots and insinuated that much of the anti-Chinese violence was perpetrated by the Chinese themselves. The report described the Chinese as a menace and proclaimed that “the antagonisms between the Americans and the Chinese are inherent and incurable” (Report of the Governor of Washington, 1886).

In the same year, the Washington Territory was shaken with news of anti-Chinese violence which came a year after Chinese were forcibly expelled from Tacoma. The Seattle Chief

of Police presided over a crowd of “hoodlums” who marched into Chinatown, barged into people’s homes and forced them to pack up. They were escorted by the crowd and the police to the Port and told to embark on the boat to San Francisco. Eventually, the Mayor of the city called in the state militia to help protect the Chinese. Similar events with private actors taking the deportation of Chinese in their hands took place in Olympia, Washington and Portland, Oregon. The conveners of the meeting declared that they did not want to use violence; their intention was “to remove the Chinese, their goods and themselves and their chattels on board a steamer sailing for San Francisco and say to them: ‘God bless you. You are not wanted here; depart in peace.’” In a resolution passed by the territorial authorities, the Chinese were given until March 24, 1886 to leave Oregon, while in Washington territory, angry anti-Chinese activists advocated the impeachment of the territorial Governor Squire for sending the militia to protect the Chinese. An outraged *New York Times* proclaimed that ends do not justify the means: as much as the need to remove the Chinese was valid and widely shared, violence was not the way to go about it. Furthermore, the paper argued resonating debates of the 21st century, removing the Chinese from their jobs does not benefit anyone, because whites would not be willing to do the work that the Chinese do at the prevailing wages (*The New York Times*, 1886b).

Congress was caught between China’s demands to honor treaty obligations and the government’s foreign policy ambitions to become a commercial great power, and the agitation in the Western states which were uncontrollable. President Cleveland responded with yet another renegotiation of the treaty with China. The new treaty barred Chinese labor for another twenty years with a clause that allowed the U.S. to extend the prohibition until 1928. The Bayard-Zhang Treaty also prohibited the return of Chinese laborers to the U.S. for twenty years, unless they could show that they had assets worth at least \$1,000 or immediate family living in America. The United States government on its part would protect Chinese people and

property in America. During the ratification debate, the Senate sought to include a provision that would bar the re-entry of Chinese residents who had been granted certificates in 1882. China made it clear that it would not approve the treaty if such a provision was included and the negotiations fell through. The treaty was never ratified (Tichenor, 2002:107). With the elections fast approaching and Western votes hanging on the issue of Chinese exclusion, Congress was ready to act. Grover Cleveland had won a narrow victory in 1884, while losing electoral votes in California, Colorado, Oregon and Nevada. A month before the national election, Cleveland had put his name on a new exclusion law. The 1888 Chinese Exclusion Act, also known as the Scott Act, barred the entry of any Chinese person with the exception of government officials, teachers, students and travelers. China's objections notwithstanding, Congress voided the certificates that were part of the 1882 law (McCain, 1994).

California was still not satisfied. In 1891, Governor Markham made it clear that he expected more from the federal government in terms of enforcing the Chinese Exclusion Act:

All political parties in this State agree upon the propriety of the exclusion of the Chinese, and are anxious that the law forbidding their importation shall be strictly enforced. The law is being constantly violated, and the influx of these people is very great. Congress should be requested to take steps to enforce the law as it stands, to remedy the present law wherever it may be found defective, and to extend the date as far beyond 1892 as possible. Provision should be made for guarding the borders now almost wholly unprotected (Markham Inaugural Address, 1891).

Although the Chinese exclusion measures had virtually banned the immigration of Chinese, the agitation in the states continued. Since the 1880s, the objective was no longer to stoop the Chinese from coming but to find ways to send them back. More bills were introduced in Congress in an effort to satisfy states' thirst for more restriction. In 1890 the House introduced a bill that required the enumeration of all Chinese and the issuing of certificates of residence to them (HR 6420). The idea was to get a complete count of the Chinese who were

lawfully present in the country and guard against the illegal importation of Chinese laborers from Mexico or through Great Britain (Li, 1916). The bill was met with united opposition from the Chambers of Commerce in Boston and New York which saw further restrictions as the death knell to commerce with China. The resolutions condemned the bill as “absurd, barbarous, un-Christian and cowardly.” The Senate tabled the bill but more efforts ensued (*The New York Times*, 1890). In the same year, Congress issued concurrent resolutions urging the President to make bilateral agreements with Mexico and Great Britain to “prevent the unlawful entry of Chinese laborers through Mexico and Canada” (Li, 1916:68). The U.S. Customs officials felt the pressure from both sides: Congress and states putting pressure on them to control illegal entry of Chinese laborers through the Northern and Southern borders. Customs scrambled to comply. In May 1890, Datus Coon, the Special Inspector dispatched to San Diego cabled the Department of Treasury that “the Chinese are coming right along despite the work the Customs Department tries to do... I have filed this month alone thirty complaints in the United States Commissioner’s court for violations of the Scott exclusion act... That this act is a failure is true as to its execution” (Li, 1916:69).

The inauguration of the 52nd Congress in 1891 saw at least twelve bills related to Chinese restrictions (Li, 1916). Yielding to the demands of the states, the new focus was on the Chinese residents of the country rather than on Chinese immigration. California Congressman Geary of the Foreign Relations Committee reported HR 6185 which he introduced to the floor by accusing the Chinese government of violating the bilateral treaties with the United States and then defending in the American courts the rights of Chinese who entered the country illegally and in contravention of the treaties. Another Californian, Congressman Cutting, joined Geary in saying that more restrictions were necessary to ensure that “this unassimilable and undesirable race” would not pour through the Mexican and Canadian borders (Li, 1916:71). The Senate also

felt the looming deadline of May 6 when the old act expired. Here, the debate was led by Senator Dolph of Oregon and Senator Felton of California. The main objective of both was to get the most restrictive bill possible reported out of the Senate, one not unlike the House version. Senator Sanders of Montana argued that contrary to what the House seemed to think, the purpose of this bill was not to protect “American religion or civilization;” this was a bill aimed at protecting American industry and “could be defended on economic grounds” (Li, 1916:73). Dissenting voices coming from Ohio, Minnesota and North Carolina pointed out that the U.S. still had treaty obligations and the bill had to be mindful of that. Senator Sherman of Ohio noted diplomatically that the bill included “severe restrictions which would read very strangely in a law of the United States;” Senator Davis from Minnesota, on the other hand, was far less concerned about decorum: he condemn the bill as “a rank, radical, unblushing, unmitigated repudiation of every treaty obligation” (Li, 1916:72). Senator Morgan of Alabama observed that given their small numbers, the Chinese could not possibly be considered competition to white residents in California therefore a bill that would risk angering China was not warranted. Even some Westerners, like Senator Teller of Colorado found the House version of the bill unpalatable arguing (in awkward English) that “while the Chinaman is objectionable and the legislation in relation to him ought to go upon the theory that he is to be excluded, I do not myself think that we can afford to pass harsh and unreasonable laws. The Chinese who come with our consent are entitled to the rights of domicile” (Li, 1916:73).

The Geary bill passed the House on April 25, 1892 with the title “A Bill to Prohibit the Coming of Chinese Persons into the United States.” The bill as amended by the Senate and then further amended in Conference with the House, required that every Chinese person in the United States should procure a certificate of residency from the Internal Revenue Service. To receive the certificate, Chinese residents had to prove that they legally resided in the United

States by producing white witnesses to testify on their behalf. Presaging recent 21st century developments in the states, those found in violation of the law were to be held without bail. To charges that the law reversed the widely held notion of presumption of innocence, Congressman Geary replied that much like people who want to sell tobacco or liquor must have a license, so should the Chinese have a license to residency (Li, 1916). California had won: the Geary Act was signed into law on May 5, 1892 implementing the most stringent restrictions ever to be placed on a non-slave population in the United States.

Chapter 4: The State and Immigrant Professionals: Restrictions on High-End Alien Workers

Federal immigration law during the 19th and early 20th centuries was centered on racial and ethnic criteria for admission. Much of the intention of the restrictionist legislation that was enacted since the Chinese Exclusion Act of 1882 was to keep out racially “undesirable” groups who could dilute the American “great race” as envisioned by Madison Grant (1916) and his admirers. The Immigration Act of 1917 practically barred all Asians from immigrating to the United States. It was followed by the National Quota Laws (1921 and 1929) and the National Origins Act (1924) which severely limited admissions from all non-Western European countries. The national laws also had provisions that targeted other morally and socially “undesirable” groups such as polygamists and anarchists (Immigration Act of 1903), convicts, “lunatics,” “idiots,” and those likely to become a “public charge.” Generally, the federal immigration system was concerned with keeping out of the country racial and social outcasts, but it adopted a liberal “laissez-faire” stance towards all others. The federal law, in its racially-specific liberalism, did not make any further economic or class-based distinctions; rather, it welcomed anyone who met the established racial criteria regardless of skill, occupation, profession or trade.

This type of liberalism which welcomed European middle class artisans and craftsmen to American society came in direct conflict with the interests of local craft and professional associations across the country which suddenly found their ranks inflated with immigrants. In the tradition of guilds and artisan organizations of earlier eras, professional organizations of the late 19th and early 20th century viewed themselves not only as they guardians of professional standards but also as the guards who controlled entry to the profession. In the political and

economic context of the era, these organizations sought to create and maintain monopoly rights over the market. Racial politics were surely important among middle-class white natives, many of whom shared Madison Grant's vision of a culturally pure America free of racially inferior people. Thus the unskilled immigrant masses were seen as a cultural menace that could lead to the dilution of the racial purity of the nation. However, native middle-class professionals faced a second threat: Western European, racially acceptable, skilled workers who sought entry to the American market (Kazin, 1995). For these groups, the federal immigration laws did not address the economic threat they were facing; only states could provide relief.

This chapter discusses the role of states in enacting restrictions on alien professionals during the period between 1920 and the late 20th century. The first section provides an overview of state activity in this domain during the 20th century. The second section is an analysis of state restrictions during the interwar period, while the third section discusses the post-WWII era. Finally, the fourth section explains how states justified these restrictions legally and how these justifications centered on moral not economic terms.

States and the Protection of American Professionals from “Alien Invaders”

Craft and professional associations of the early 20th century were quite insular and restrictive in nature. Already in the late 19th century, professional associations became concerned with protecting their market through strategies of monopolization and clear demarcation of their turf (Murphy, 1988; Abbott, 1988; Larson, 1977; Collins, 1976). By the 1880s, craft unions in some states had successfully pressured legislatures to regulate apprenticeships and on-floor training (Thelen, 2004). Regulation of non-citizen artisans and professionals and restrictions to their entry in the local market became important strategies for these groups in their effort to protect market-share and revenue. Lobbying the state and local authorities for protection proved a successful strategy. States that would hardly ever acquiesce to the demands for protection emanating from labor unions complied with enacting certification and credentialing requirements and with other restrictions on who could become a member of a profession.

Under pressure from various professional groups, trade organizations and other similar outfits, states were quick to respond to calls for protectionism and exclusion of aliens from professional occupations. The Great Depression intensified the urgency for this type of legislation, but its enactment continued long after the economy improved. The interwar period was rife with instances of state legislative restrictions on immigrant professionals and the pattern continued unabated after WWII and through more recent decades. Organizations feeling the pressure from immigrant competition and the potential for loss of market share and income, requested legislative relief from states.

A typical example from this era is that of physicians who pressured states to restrict entry of highly qualified European refugees into the profession. European refugees displaced by Hitler's inroads into Eastern Europe had begun flocking to American shores as of the mid-1930s. Among them were many professionals, doctors, scientists and engineers. Professional groups starting to feel the pressure from foreign competition acted swiftly: in 1939, the president of the Medical Society of the State of New York declared that "the law of self-preservation impels American doctors to demand reasonable restriction on [alien] admission to practice here [in New York]." Expressing the anxiety among his society's members, Dr. Townsend also noted that "many of our delegates feel that our hospitality has been abused. Despite natural sentiment and sympathy, the law of self-preservation demands a curb on the over-crowding of communities already sufficiently supplied with physicians." In a prime illustration of Rogers Smith's (1997) point that liberal and ascriptive logics can coexist and be cognitively accepted, during the same meeting, the Society passed a resolution condemning discrimination against any qualified American physician on the basis of race, creed or nationality and in response to a plea from a female physician they also declared that the meeting should include at least one female delegate (New York Times, 1939).

Even actors felt the pressure from foreign competition. In 1934, actors appeared in front of the House Immigration Committee requesting that restrictions be placed upon foreign performers. Supported by Representative Dickstein of New York, the actors demanded that alien performers be put under the provisions of the alien contract laws and barred from entering the country. Actors complained that the importation of foreign "stars" by American production companies had led to "an invasion of foreign performers" which forced native performers to go on the dole (*The New York Times*, 1934).

Economic threat, however, was not the only reason for restrictions on alien professional employment. In the context of successive wars and later on the Cold War, national security rationales guided the decision to ban immigrants from teaching in public schools. The banning of teachers from public schools and universities started during the hysteria of WWI but continued to recent decades until the sheer shortage of teachers in urban schools made the employment of foreigners a necessity. The Great War caused great anxiety among Americans that immigrant teachers in public schools could be enemy aliens propagandizing American children. States scrutinized the textbooks used in the study of German and put all teachers of the German language under the microscope (*The New York Times*, 1917a). New York State's legislature passed its first ban on the employment of alien teachers in the state's public schools in 1918. It was introduced after a number of immigrant teachers in New York City public schools refused to sign an oath of allegiance that the city's board of education required (*The New York Times*, 1917b). The only ones to object were members of the state's Socialist Party with little impact (*The New York Times*, 1918a). In the same year, the Public Safety Commission of Minnesota passed an order banning alien teachers in "public, private, parochial, normal schools" and at the state's universities (*The New York Times*, 1918b).

Among the few professions in the interwar era advocating an open-door policy and no restrictions on the importation of foreign competition were college educators. At the Annual meeting of the American Association of University Professors (AAUP) in 1934, educators urged the passage of resolutions to encourage Congress to liberalize the 1924 quotas so that academics be exempt from the national origins system. The AAUP leadership also advocated the end to the ban on alien teachers that many states had imposed during WWI. Acknowledging that the Depression had taken its toll on the profession, the association leaders argued for

better planning and pay cuts rather than restrictions on the importation of “brains” (*The New York Times*, 1932).

Another common rational for foreign exclusion from professional occupations was the strongly held belief that immigrants are more likely to be criminals than are native-born Americans. Especially in the 1920s, many immigrant groups did not share the enthusiasm for Prohibition and a number of immigrants were involved in bootlegging operations which ran inner-city gangs. The “100 percent American” morality of the era emphasized the association of foreignness with illegal behavior and activity. A wave of violence in 1919 further reinforced this perception. State legislatures took the opportunity to use their legislative authority against immigrants: in Wyoming, for example, such was the hysteria over immigrant violence, that the new law prohibited immigrants from possessing “any dirk, pistol, shot gun, riffle, or other fire arm, bowie knife, dagger, or any other dangerous or deadly weapon” (Higham, 2004:268). This law also excluded immigrants from hunting, butchering and other occupations which required the use of sharp instruments or fire arms.

The tacit support of Congress which never challenged these state practices encouraged states to continue in their quest to restrict alien access to profession. However, it was mostly the ambivalent stance of the Supreme Court that allowed for the continuation and expansion of these restrictions. For many decades- until the 1970s, in fact-the Supreme Court maintained a nuanced position on the issue of state restrictions on alien employment. Not only was this practice never discussed as a violation of the plenary power doctrine the way other state practices were, but the Court seemed to be of the mind that the Constitution protected an individual’s right to work but not necessarily to be employed in a field of choice. In a landmark 1915 decision, the Supreme Court invalidated an Arizona law requiring businesses that

employed five or more people to limit their immigrant hires to no more than 20 percent of total employees. In the same decision, the Court invalidated a New York state law which excluded immigrants from public works employment. Writing for the Court, Justice Hughes noted that:

[I]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure... If [the right to work] could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.”³⁶

As a result, as long as states did not ban aliens from the labor market completely, the Court allowed them to enact restrictions focused on specific professions.

The only defense that immigrants had against state employment restrictions came from international treaties that the United States had signed with other countries. For example, the Supreme Court invalidated a local ordinance in Seattle that barred noncitizens from receiving pawnbrokers’ licenses on the grounds that it was in violation of the 1911 Gentlemen’s Agreement with Japan which secured Japanese citizens’ rights to “carry on trade, wholesale and retail and generally to do anything incident to or necessary for trade.”³⁷

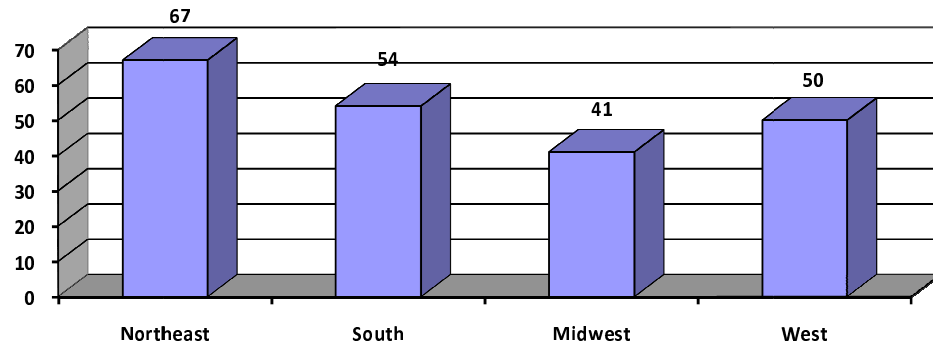
Free from federal preemption or any kind of extensive federal supervision, states began introducing professional employment restrictions for aliens early in the 20th century and the trend continued in times of war, recession, depression and economic expansion. Between 1929 and 1960, states had enacted more than 200 pieces of legislation pertaining to alien restrictions in the professions. Northeastern states where trade associations and unions played an important role in local politics led the trend in this type of restriction. From physicians, to pool-

³⁶ **Truax v. Raich** (No. 361) 219 Fed. Rep. 273(1915). Also see, *Truax v. Corrigan*, 257 U.S. 312 (1921). The case drew the wrath of Samuel Gompers and the unions as an anti-labor decision (Page, 1916). Also see *Yick Wo v. Hopkins* 118 U.S. 356 (1886) where the Court did not buy San Francisco’s rationale for a ban on laundries housed in wooden structures.

³⁷ *Asakura v. Seattle*, 265 U. S. 332

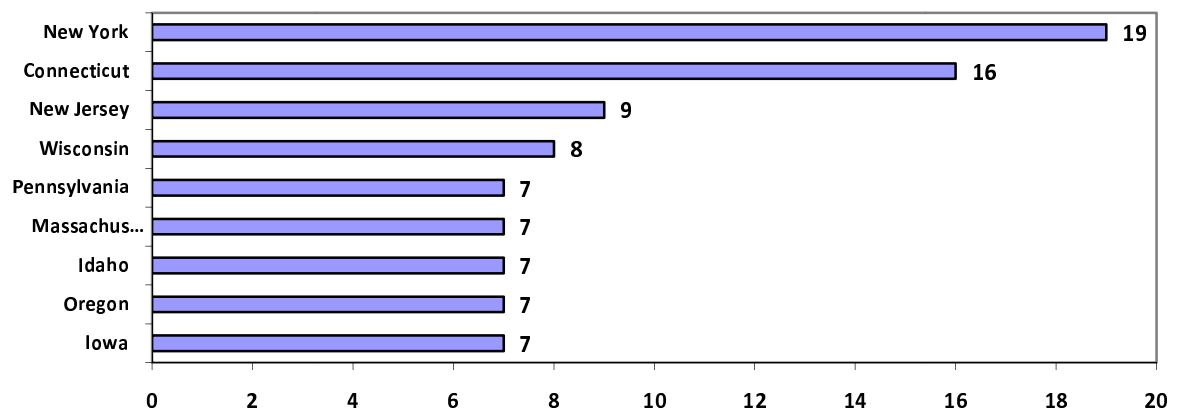
house operators to peddlers and hawkers a broad spectrum of professions sought and received the protection of the state from “alien invaders.”

Figure 4.1 Regional Distribution of Alien Professional Restrictions-Number of Relevant Enactments (1929-1960)



As Figure 4.1 (above) illustrates, one-third of laws of this type (67 laws in total) were enacted in the Northeast states; the South, although not a popular destination for immigrants during this period, was in second place in number of restrictive laws, followed by the West and the Midwest. Although the activity was quite widespread, with all 50 states passing at least one restriction on alien professionals, as Figure 4.2 shows, New York, New Jersey, Connecticut, Wisconsin and Pennsylvania topped the list followed by Massachusetts.

Figure 4.2 States with the Highest Number of Restrictive Laws on Alien Professionals (1920-1960)



Michigan, a rising industrial center attracting machinists and engineers, was also eager to accommodate guild politics, but so were states such as Iowa, Oregon and Idaho where immigration was limited. Map 4.1 below demonstrates the regional distribution of these most active states.

Map 4.1 States with Most Restrictions on Alien Professional Employment (1920s-1930s)



Restrictions on Immigrant Professionals during the Interwar Era

State efforts to restrict alien employment during the difficult years of the inter-war era started with Asian and Mexican (especially farm labor) minorities but did not end there. Already in earlier decades states had made forays into alien professional restrictions. State laws restricting the rights of aliens to hunt (Pennsylvania), to sell liquor (Maryland), to use firearms (Hew Hampshire, California), to apply for a peddler's license (Massachusetts) had all been challenged in federal courts and all had been upheld as legitimate use of states' police powers.³⁸ Federal courts even upheld Pennsylvania's ban on aliens owning dogs! According to Pennsylvania, dogs were used to hunt birds and prey and since hunting was prohibited to aliens, so was owning a dog (Pennsylvania County Court Reports, 1918).³⁹

As the Great War gave way to the tension of the interwar period, states continued to introduce new restrictions on the employment of immigrant professionals and the Court upheld them as constitutional. Protectionist measures were enacted to bar immigrants from a variety of professional occupations. Between 1929 and 1939, states in all regions of the country, including Hawaii, debated and often implemented laws that required various professionals from lawyers to itinerant barbers and embalmers to be citizens. Virtually every state regulated alien access to at least one type of professional employment, most often accounting. Map 4.2, below, shows the states that instituted the most restrictions on foreign professionals during the inter-war years.

³⁸ *Heim v. McCall* (1915) 239 US 175,36 Sup. Ct. 78 (employment in public works); *Patsone v. Commonwealth of Pennsylvania* (1914) 232 U.S. 138, 38, Sup. Ct. 281 (hunting); *Trageser v. Gray* (1890) 73 Md. 250, 20 Atl. 905 (license to sell liquor); *State v. Rheume* (1922) 80 N.H. 319, 116 Atl. 758 (use and possession of fire arms); *Commonwealth v. Hana* (1907) 195 Mass. 262, 81, N.E. 149 (peddler's license); *Ex parte Romeris* (1924, Cal) 226 Pac, 914 (concealed weapons)

³⁹ *Pennsylvania v. Preoziki* 28 Pa. Dist. 352 (1918)

Map 4.2

States with Most Restrictions on Alien Professional Employment (1920s-1930s)



In the 1930s, states passed statutes barring immigrants from a variety of professional occupations including: accountants, architects, barbers, cosmetologists, physicians, optometrists, pharmacists, embalmers and morticians, real estate brokers, surveyors and engineers, school teachers. A number of states made employment in various professions conditional upon an alien's declaration of intent to naturalize: Florida required accountants to naturalize within six years of receiving their license, while Hawaii expected naturalization in two years and New York in eight. For physicians, similar requirements ranged from six years for New Jersey to ten years in New York (University of Pennsylvania Law Review, 1934-1935:74). Many states required declaration of intent to naturalize for employment in the public sector but also in various private occupations.

The legal profession was also highly regulated in terms of entry; however, in the case of lawyers, the restrictions on alien employment were decided by state courts responsible for determining the rules of the local bar associations with the tacit approval of state legislatures

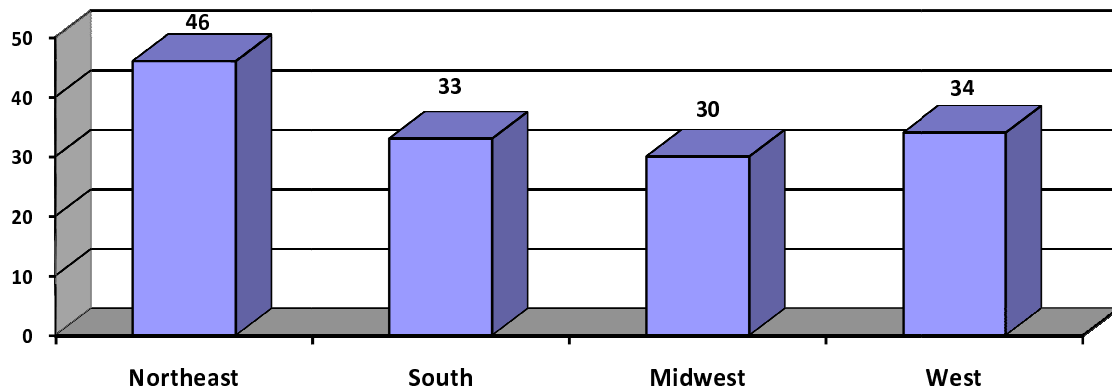
who never challenged the practice. Courts and bar associations refused the admission of aliens into the legal profession on the premise that immigrants, even those educated by American universities and law schools, could not appreciate the spirit of American legal institutions and thus taking an oath to uphold the Constitution was suspect on their part. Also, bar associations claimed that lawyers were officers of the court which in itself is a public institution and part of the common property of citizens. Aliens were of suspect character and therefore should not be allowed into occupations that required public trust. Aliens were unfit for the practice of law because “they lack the competence, integrity and morality which distinguishes the citizen lawyer” (Knoppke-Wetzel, 1974:885). In the WWII era, bar associations even claimed that in the case of war, an alien lawyer may need to be incarcerated or interned for security reasons and that could have a negative effect on clients. Well into the 1970s, thirty eight states and the District of Columbia had citizenship requirements for attorney’s which often excluded even declarant aliens.⁴⁰

Between 1929 and 1939, virtually every state in the Union had enacted some form of legislation prohibiting aliens from engaging in some profession or occupation either in the public or the private sector. By 1939, there were at least 145 laws on the books at the state level regulating alien employment in various professions. The Northeast enacted somewhat more regulations of this type followed by the Western states; however, by far the most such restrictionist laws in the country (16 in total) were enacted in the state of New York. In fact, New York had twice as many alien employment restriction laws on the books than the next most

⁴⁰ Alaska, Washington and California were the first to abolish citizenship requirements in the early 1970s. The Supreme Court decision in *In Re Griffiths* [*In re Griffiths*, 413 U.S. 717 (1973)] declared these types of requirements unconstitutional; however, state bars continued to discourage aliens from applying to be admitted to the profession (Knopke-Wetzel, 1974).

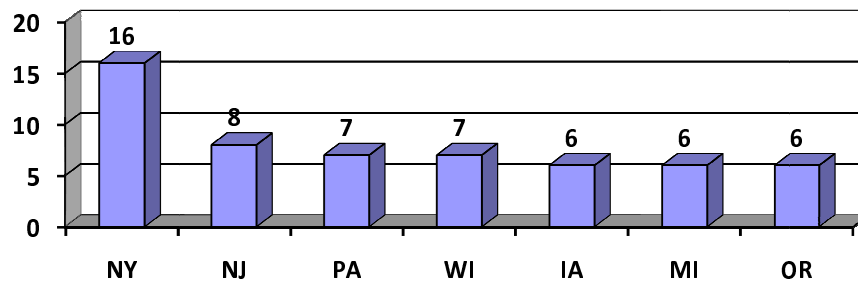
restrictive state, its neighbor New Jersey. Figure 4.3 shows the distribution of these laws by region.

Figure 4.3 Regional Distribution of Alien Professional Restrictions (1930s)



The states with the most laws restricting the employment of aliens in the professions were New York (16), New Jersey (8), Pennsylvania (7),

Figure 4.4 States with the Largest Number of Professional Employment Restrictions (1920s-1930s)



Wisconsin (7), Iowa and Michigan (6) (Figure 4.4).

Table 4.1 below shows in detail the various alien employment restriction statutes that states introduced in the interwar period.

Table 4.1 State Statutes Restricting Alien Employment in Various Professions in the Interwar Era	
State	Statute
Alabama	Ala. Code (Mitchie, 1928) § 16 (accountants must be declarants)
Alaska	Alaska Laws 1929, c.30 (public works)
Arizona	Anti-alien labor act of 1914 (struck down in <i>Traux v. Raich</i> , 239 U. S. 33 (1915)) Ariz. Laws 1931 c. 31 (public works)
California	Cal. Gen. Laws (Deering, 1931) Act 5886§2 (optometrists) Cal. Gen. Laws (Deering Supp. 1933) §5886, 2 (pharmacists) Cal. Gen. Laws (Deering 1931) Act 6430§1 (public works) Cal. Gen. Laws (Deering, 1931) §2070(3) (private detectives) Proposal to bar aliens from being union officers (1939)
Colorado	Colo. Laws 1925, c.159 (court reporters) Colo. Laws (Mills, 1930) §5503 (pharmacists)
Connecticut	Conn. Gen. Stat. (Supp. 1931) §117b (preference for citizens in public works) Conn. Gen. Stat. (1930) §3661 (airline pilots) Conn. Gen. Stat. (1930) §2825 (pharmacists)
Florida	Fla. Comp. Laws (1927) § 2932 (accountants must naturalize in six years) Fla. Comp. Laws (1927) §2422 (osteopaths) Fla. Comp. Laws (1927) §3408 (physicians) Fla. Comp. Laws (1927) §3465 (podiatrists)
Georgia	Public Service Commission Regulation October 1, 1929 (license to drive vehicles for hire) GA Code Ann. (Michie, 1926) §1754(58) (architects) GA Code Ann. (Michie, 1926) §1762,22 (pool room operators)
Hawaii	Hawaii laws 1923, no. 158 (accountants must naturalize in two years)
Idaho	Id. Code (1932) § 53-606 (barbers) Id. Code (1932) § 53-1205 (cosmetologists) Id. Code Ann. (1932) §53-202 (accountants must be declarants) Statute prohibiting corporations from employing any non-declarant aliens (invalidated in <i>In Re Case</i> , 20 Idaho 128, 116 Pac. 1037 (1911)) Id. Code Ann (1932) §53-402 (architects) Id. Code (1932) §53-606 (auctioneer)
Illinois	Ill. Rev. Stat. (Cahill, 1933), c.110a (accountants must be declarants)
Indiana	Ind. Ann. Stat. (Burns, Supp.1929) §13696 (accountants) Ind. Ann. Stat. (Burns, Supp. 1929) §13886 (engineers and surveyors)
Iowa	Iowa Code (1931) c.9§1905 (accountants) Iowa Code (1931) §1905:b8 (architects) Iowa Code (1931) §2585:b13 (barbers) Iowa Code (1931) §2585-613 (auctioneers) Iowa Code (1933) c37 (license to sell alcohol) Iowa Code (1931) §1551c-2 (employment agency operators)
Kentucky	KY. Stat (Carroll, 1930) §3941e-4 (accountants)

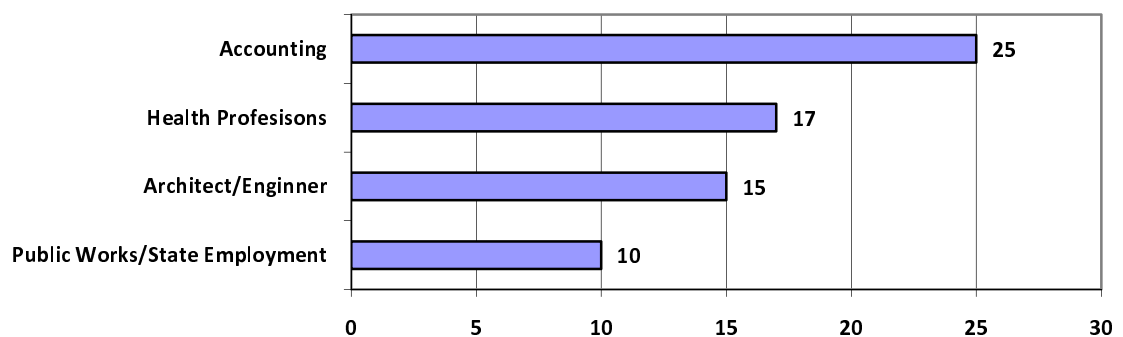
	KY. Stat (1930) c.168§5 (architects)
Louisiana	LA. Gen. Stat. (Dart, 1932) § 9335 (accountants)
Maine	Me. Rev. Stat. (1930) c.23§7 (pharmacists)
Maryland	Md. Ann. Code (Bagby, 1924), art. 75a§6 (accountants) Md. Ann. Code (Bagby, 1924), art. 93§53 (executors)
Massachusetts	Mass. Gen. Laws (1932) c. 149 §26 (citizens preferred for state, county and local public employment) Mass. Laws 1932, c. 272 (fishing/gaming) Mass. Gen. laws (1932) c.112§87B (accountants) Mass. Gen. Laws (1932) c.101§ 22 (peddlers)
Michigan	Mich. Comp. Laws (1929) §8651 (accountants) Mich Comp Laws (1929) § 7620 (public school teachers) Mich. Comp Laws (1929) §8658 (architects) Mich. Comp. Laws (Supp. 1933) §8714-5 (cosmetologists) Mich. Comp. Laws (1929) §6783 (optometrists) Mich. Comp. Laws (1929) §8716 (private detectives)
Minnesota	Minn. Stat. (Mason, 1929) § 7323 (auctioneers)
Mississippi	Miss. Code Ann. (1930) §4666 (engineers and surveyors)
Montana	Mont. Rev. Code (Choate, Supp. 1927) §5653 (public works; aliens employed only in emergency) Mont. Rev. Code (Choate, 1921) §3241 (accountants) Mont. Rev. Code (Choate, Supp, 1927) §3159 (optometrists)
Nebraska	Neb. Laws 1933, c.93§5 (license to sell alcohol)
Nevada	Nev. Comp Laws (Hillyer, 1929) §252 (accountants)
New Hampshire	N.H. Pub. Laws (1926) c. 270§3 (accountants) N.H. Pub. Laws (1926) c.210§18 (pharmacists)
New Jersey	N.J. Comp. Stat. (Supp. 1930), 968 (physicians must naturalized with 6 years) N.J. Comp. Stat. (Supp. 1930), §185-1962 (school teachers) N.J. Comp. Stat. (Supp. 1930), c76, 1931 (public works; declarants only if necessary) N.J. ordinance of Nov. 12, 1917 (license to drive vehicles for hire) N.J. Laws 1933, c. 168 (boiler inspectors) N.J. Comp. Stat. (Supp. 1930), §1367 (pharmacists) N.J. Comp. Stat. (Supp. 1930) 966§127-131 (physicians) N.J. Comp. Stat. (Supp. 1930) 96 (private bankers)
New Mexico	N.M. Stat. Ann. (Courtright, 1929) § 98-106 (optometrists) N.M. Stat. Ann (Courtright, 1929) §57-401 (fishing/gaming) N.M. Stat. Ann. (Courtright, 1929) §108-101 (accountants)
New York	N.Y. Cons. Laws (Cahill, Supp. 1933) c.15 §1478 (architects) N.Y. Cons. Laws (Cahill Supp. 1930), c 15§1492 (accountants) N.Y. Cons. Laws (Cahill, Supp. 1933) c.15§1306 (dentists) N.Y. Cons. Laws (Cahill, Supp. 1933) c.15§1452 (surveyors & engineers) N.Y. Cons. Laws (Cahill, 1930) c.15§1353 (pharmacists) N.Y. Cons. Laws (Cahill, 1930) c.15§1256 (physicians) N.Y. Cons. Laws (Cahill, Supp. 1930) c.15§1259 (physicians must naturalize within 10 years) N.Y. Cons. Laws (Cahill, Supp. 1930) c.51§440 (real estate brokers must naturalize within 5 years) N.Y. Cons. Laws (Cahill, Supp. 1930) c.15§1492 (accountants must naturalize within 8 years) N.Y. Labor Law of 1909§ 14 (public works; upheld in Heim v. McCall, 239 U. S. 175 (1915)) N.Y. Cons. Laws (Cahill Supp. 1930); c32 §222 (only citizens of NY State employed in

	state projects) N.Y. Cons. Laws (Cahill, 1930), c.15§1306 (court reporters) N.Y. Cons. Laws (Cahill, Suppl. 1933) c.46, §§293,295 (embalmers and undertakers) N.Y. Cons. Laws (Cahill Suppl. 1933) c. 2a§84 (license to sell alcohol) N.Y. Cons. Laws (Cahill, 1930) c.21§71 (private detectives) N.Y. Cons. Laws (Cahill, 1930) c.15§1326 (veterinarians)
North Carolina	N.C. Code Ann. (Michie, 1931) §7024 b (accountants) N.C. Code Ann (Michie, 1933) c 319 (license to sell alcohol)
North Dakota	N.D. Laws, 1925, c.2 (accountants must naturalize within one year) N.D. Laws, Supp. 1925§557a-8 (accountants)
Ohio	Ohio Code Ann. (Throckmorton, 1930) §654(3) (insurance agent) Ohio Code Ann (Throckmorton, 1930) §1304 (pharmacists)
Oklahoma	Okla. Stat. (1931) §4310 (accountants) Okla. Stat. (1933) §342 (license to sell alcohol)
Oregon	Ore. Code Ann. (1930) §§19-201, 19-202 (no Chinese or alien draft-dodgers in public works) Ore. Code Ann. (1930) §40-512 (fishing/gaming) Ore. Code Ann. (1930) §65-316 (airline pilots) Ore. Code Ann. (1930) §68-305 (architects) Ore. Code Ann. (1930) §49-802 (employment agency operators) Ore. Code Ann. Second Spec. Sess., c17 (license to sell alcohol)
Pennsylvania	Comm. Penn. Laws 1909, No. 261, p. 466 (hunting; upheld in <i>Patsone v. Pennsylvania</i> , 232 U. S. 138 (1914)) PA, Stat. Ann. (Purdon 1931), tit. 30§240 (fishing/gaming) Tax imposition for corporations employing aliens (invalidated in <i>Fraser v. McConway & Torley Co</i> , 82 Fed., 257 (D. Pa. 1897)) PA. Stat. Ann (Purdon 1931), tit. 43§151 (only citizens on public works unless funds derived from assessments of benefits) PA. Stat. Ann. (Purdon, 1933) tit. 63§478c (embalmers and undertakers) PA Stat. Ann (Purdon, 1933) tit. 47§95 (license to sell alcohol) PA Stat. Ann. (Purdon, 1933) tit. 63§436 (real estate brokers)
Rhode Island	R.I. Laws 1927, c.1029 (physicians and surgeons) R.I. Laws, 1928, c.1235§ 2 (optometrists) R.I. Ordinance of City of Providence, c.93§4-1920 (license to drive vehicles for hire) R.I. Laws 1925, c.794 (pharmacists) R.I. Gen. Laws (1938) c.277§2 (optometrist)
South Carolina	S.C. Code (Michie, 1932) §7090 (accountants) S.C. Code (Michie, 1932) §7070 (engineers and surveyors)
South Dakota	S.D. Comp. Laws (1929) §8194g (architects) S.D. Comp Laws (1931) c. 216, §3 (embalmers and undertakers) S.D. Comp. Laws (1929) §7846 (dealers of poisons) S.D. Comp. Laws (1939) §1700107 (employee of the state)
Tennessee	Tenn. Code (1932) §7084 (accountants) Tenn. Code (Williams, Shannon, Harsh, 1932) §2513 (school teachers) Tenn. Code (Michie, 1932) §7932 (optometrists)
Texas	Tex. Laws 1929, c.38 (school teachers) Tex. Stat. (Vernon Supp. 1931) art. 2880a (teachers must be citizens or declarants) Tex. Stat. (Vernon, Supp. 1931) §5221a-I (employment agency operators) Tex. Stat. (1933) c.116 (license to sell alcohol)
Utah	Utah Rev. Stat. (1933) §79-2-1 (accountants) Utah Rev. Stat. (1932) §79-121 (pharmacists)
Vermont	Vt. Laws 1927, c.106 (pharmacists)

	Vt. Laws 1931, No. 132 (accountants)
Virginia	VA. Code (Michie, 1930) §567 (accountants) Va. Code (Michie, 1930) §3145g (architects) Va. Code (Michie, 1930) §182 (junk canvassers and pawnbrokers)
Washington	Wash. Rev. Stat (Remington, 1932) §8271 (architects) Wash. Rev. Stat. (Remington, 1932) §10150 (optometrists)
West Virginia	W.V. Code Ann. (Michie, 1932) §2958 (architects) W.V. Code Ann (Michie, 1932) §2324 (employment agency operators) W.V. Code Ann (Michie, 1932) §2421 (fire bosses in coal mines; mine foremen)
Wisconsin	Wis. Laws (1933) c. 290 (physicians and surgeons) Wis. Laws (1931) §151.02 (pharmacists) Wis. Laws (1931) §158.08 (auctioneers) Wis. Laws (1931) §159.08 (cosmetologists) Wis. Laws (1931) §156.02 (embalmers and undertakers) Wis. Laws (1933) c. 207 (license to sell alcohol) Wis. Laws (1931) §175.07 (private detectives)
Wyoming	Wyo. Rev. Stat. Ann. (1931) c. 23§165 (coal miners must exercise due diligence to get final naturalization papers) Wyo. Rev. Stat. Ann. (Courtright, 1931) §37-104 (embalmers and undertakers) Wyo. Rev. Stat. Ann. (Courtright, 1931) §114-106 (engineers and surveyors)
Source: 83 U. of PA L. Rev. 1934-1935. "Constitutionality of Legislative Discrimination Against the Alien in his Right to Work"	

The most commonly regulated fields during the inter-war era were accounting, health-related professions (physicians, dentists, podiatrists, and pharmacists), architects and engineers and public employment (Figure 4.5).

Figure 4.5 Number of States Regulating Various Professions (1920s-1930s)



However, states did not fail to offer protection from immigrant competition to embalmers, private detectives, airline pilots (how many of those were there in 1934?), pool room operators, barbers, cosmetologists, peddlers, auctioneers and a number of other professional groups with

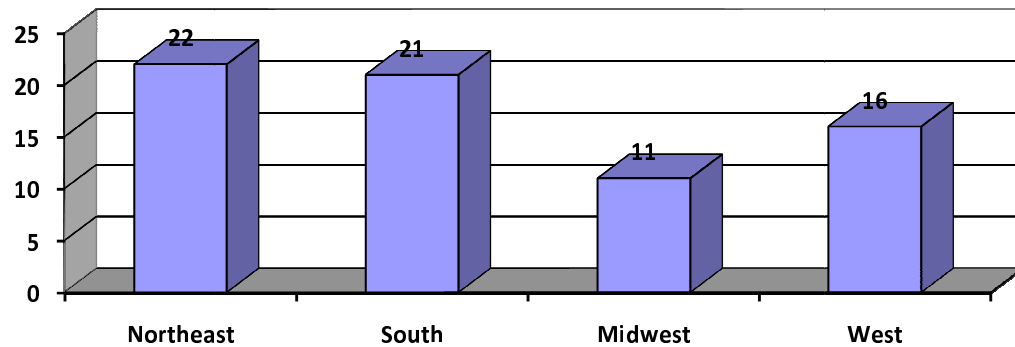
local political power. At a time of scarce employment, states and localities positioned themselves firmly in favor of the citizen-professional and against the foreigner competitor.

Restrictions on Immigrant Professional Employment in the Early Post-War Era

Once the war started, states expanded their exclusion of immigrants in the professions, often using the practice to target racial groups. In Los Angeles, the County Board of Supervisors fired all Japanese-American employees; Imperial County passed an ordinance requiring that all enemy alien residents be fingerprinted and ordered to abandon their farms, while Portland, Oregon revoked the business licenses of all Japanese residents in the city. The California State Personnel Board deemed that enemy aliens be barred from all public sector employment and the state's Department of Agriculture revoked their licenses to handle produce (Kashima, 1997). In 1942, California Governor Olson followed suit by proposing to revoke business licenses from all enemy aliens, including Jewish refugees, in the state; however, the proposal was rejected as unconstitutional by the state's Attorney General Earl Warren (*The New York Times*, 1942).

The end of the war signaled the beginning of a new round of anti-immigrant initiatives targeting the labor market. Even the few states such as Kansas and Missouri that had not been active in this domain during the interwar period, joined in the action once World War II was over. Between 1940 and 1957, states enacted at least 69 laws restricting immigrant access to professions ranging from medicine to lobster fishing. As shown in Figure 4.6, the Northeastern states –led by late comer Connecticut– and the South continued to be in the forefront of legislating immigrant access to the professions, while other regions followed suit.

Figure 4.6 Regional Distribution of Alien Professional Restrictions (1940-1960)



At times, these efforts came in direct conflict with the federal government's refugee policy: Hungarian refugees (many of them professionals) who fled after the 1956 Russian takeover of Hungary, came face to face with state restrictions on the employment of aliens in various professions (Life, 1957). Skilled refugees were often unable to find jobs in occupations of their choice because of state exclusionary laws. In spite of the conflict with federal priorities and intentions, state laws continued to be enacted in the 1950s providing protection from immigrants to a variety of professional occupations.

As Table 4.2 (below) indicates, Connecticut was the most aggressive state in enacting alien professional restrictions during this period. However, there is no specific pattern to the type of professions that states sought to protect, even though health-related professions and accounting continued to be among the most favored. These data provide a small window into the interest group politics at the state level, indicating which professional groups had substantial power in what states. It is not surprising that Nevada, in a period when it was developing its casino industry, chose to exclude aliens from ownership and operation of gambling devices; or that Connecticut and Massachusetts, both states with a strong fishing industry, prohibited aliens from the fishing of lobsters. Similarly, it is not surprising that states

chose to keep public sector employment from police to public school teaching for citizens as well. It is interesting, however, to see that smaller groups such as funeral home owners and embalmers also had the ear of the state. Equally fascinating is the fact that legislative protections for the legal profession which were non-existent in the interwar period, started to appear in the post-war era. Many educated and credentialed individuals were among the refugees of WWII and it is possible that in the post-war era the legal profession begun to feel the competition from this group.

Table 4.2 State Statutes Restricting Alien Employment in Various Professions in the Early Post-WWII Era

State	Statute
Alabama	Ala. Code tit. 46§§1 (1940)(certified public accountant) Ala. Code tit. 46§§97 (1940) (optometrist)
Arizona	Ariz Rev. Stat. §§34-301 (1956) (public works) Ariz Rev. Stat. §§32-721 (1956) (certified public accountant) Ariz Rev. Stat. §§34-301 (1956) (dentist)
Arkansas	Ark. Stat. Ann. §§72-611 (1947) (physician) Ark. Stat. Ann. §§71-602 (1947) (certified public accountant) Ark. Stat. Ann. §§72-718 (1947) (registered nurse)
Colorado	Colo. Rev. Stat. Ann. §§91-1-7(1) (c) (iv) (1953) (physician) Colo. Rev. Stat. Ann. §§2-1-9(2) (1953) (certified public accountant)
Connecticut	Conn. Gen. Stat. §§4371(1949) (osteopath) Conn. Gen. Stat. §§4402 (1949) (physiotherapy technician) Conn. Gen. Stat. §§4428 (1949) (nurse) Conn. Gen. Stat. §§4465 (1949) (pharmacist) Conn. Gen. Stat. §§4508 (1949) (optometrist) Conn. Gen. Stat. §§4539 (1949) (funeral director) Conn. Gen. Stat. §§4556 (1949) (chiropracist) Conn. Gen. Stat. §§4586 (1949) (hairstylist and cosmetologist) Conn. Gen. Stat. §§4635 (1949) (certified psychologist) Conn. Gen. Stat. §§4617 (1949) (architect) Conn. Gen. Stat. §§348 (1949) (custodian of institutional patients) Conn. Gen. Stat. §§4869 (1949) (hunter, trapper or fisherman) Conn. Gen. Stat. § 20-361 (sanitarians) Conn. Gen. Stat. (1963) (attorney) (162 Conn., at 253, 294 A.2d at 283- original statute dating to 1892) (invalidated by <i>In Re Griffiths</i> , 413 U. S. 717 (1973))
Delaware	Del. Code Ann tit. 24§§1151 (1953) (oral hygienist) Del. Code Ann tit. 7§§2407 (1953) (lobster fishing)
Florida	Fla. Stat. Ann. §458.05 (Supp. 1956) (physician)
Georgia	Ga. Code Ann. §§84-2003 (1955) (peddler) Ga. Code Ann. §§84-1603 (1955) (pool room operator)
Hawaii	Hawaii Rev. Laws §§451 (1945) (government official and employee)

Idaho	Id. Code Ann. §§33-1303 (Supp. 1957) (school teacher)
Illinois	ILL. Ann Stat. c43 §102 (Smith-Hurd, 1944) (commissioner, secretary, or inspector of the liquor commission) ILL. Ann Stat. c125 §27 (Smith-Hurd, 1944) (deputy, sheriff, special constable or special policeman)
Indiana	Ind. Ann. Stat. §§12-509 (Burns, 1956) (retailer of alcoholic beverages)
Iowa	Iowa Code Ann. §116.09 (1949) (certified public accountant)
Kansas	Kan. Gen. Ann. §65-1811 (1949) (barber)
Kentucky	KY. Rev. Stat. Ann. §§243-100 (Baldwin, 1955) (transporter or retailer of alcoholic beverages) KY Rev. Stat. Ann §244.090 (Baldwin, 1955) (employee of retailer/transporter of alcoholic beverages)
Louisiana	La. Rev. Stat. §§37.7 (Supp. 1955) (attorney)
Maine	Me. Rev. Stat. Ann. (1954) C.68§56 (pharmacist)
Massachusetts	Mass. Ann. Laws (1949) c 130§38 (fishing lobsters) Mass. Ann. Laws (1954) c 101§22 (peddler and hawker) Mass. Ann. Laws (Supp. 1956) c 112§55 (veterinarian)
Michigan	Mich. Comp. Laws (1948)§338.856 (embalmer)
Minnesota	Minn. Stat. Ann. (Supp. 1955) §150.04 (dentist)
Missouri	Mo. Rev. Stat. (Supp. 1956) § 327.030 (architect)
Montana	Mont. Rev. Codes Ann. (Supp. 1957) §66-1003 (physician)
Nebraska	Neb. Rev. Stat. (1950) §76-406 (executive officer, manager, majority stockholder of corporation)
Nevada	Nev. Comp. Laws (Supp. 1949) (owner or operator of gambling device)
New Hampshire	N.H. Rev. Laws (1955) c. 311§2 (attorney)
New Jersey	N.J. Rev. Stat. Ann.(Supp. 1956) §45:8-35 (professional engineer)
New Mexico	N.M. Stat. Ann. (1954) §67-3-3(chiropractor) N.M. Stat. Ann. (1954) §67-10-10 (physical therapist) N.M. Stat. Ann. (1954) §67-24-8 (real estate broker)
New York	N.Y. Educ. Law (1955) §§ 6905 (registered nurse) N.Y. Educ. Law (1955) §§7502 (certified short hand reporter) New York Education Law § 3001(3) (McKinney 1970) (school teacher)
North Carolina	N.C. Gen. Stat. (Supp. 1955) §90-171.3 (practical nurse)
North Dakota	N.D. Rev. Code (1943) §20-0110 (hunter)
Ohio	Ohio Rev. Code (Baldwin 1953) §4729.08 (pharmacist)
Oklahoma	Okla. Stat. Ann. (1949) Tit. 59§805 (licensed electrologist)
Oregon	Ore. Rev. Stat. (1953) §697.040 (collection agency)
South Carolina	S.C. Code (1952) §56-983 (nurse)
Tennessee	Tenn. Code Ann. (1955) §68-817 (optometrist)
Texas	Tex. Rev. Stat. Ann. Art. 28916 (Supp. 1956) (school teacher)
Utah	Utah Code Ann. (1953) §58-20-3 (registered sanitarian)
Vermont	Vt. Rev. Stat. (1947) §6-534 (state employee)
Virginia	Va. Code Ann. (1950) §54-841 (pawnbroker)
Washington	Wash. Rev. Code (1952) §18.18.050 (cosmetologist)
West Virginia	W.Va. Code Ann. (1955) §2958 (architect)
Wisconsin	Wis. Stat. Ann. (1955) §149.04 (registered nurse)
Wyoming	Wyo. Comp. Stat. Ann (1945) §37-204 (certified public accountant)
Source: 57 Columbia L. Rev. 7, 1012-1028 (1957) "Constitutionality of Restrictions on Aliens' Right to Work"	

The efforts to exclude immigrants from professional categories continued at the state level into the 1970s. Carliner (1977) counted 388 state restrictions on alien professional employment still in effect in the early 1970s. In 1975, New York was called upon to defend its requirement that public school teachers be American citizens. No longer able to defend its ban on the premise of excluding enemy aliens from teaching to protect American children, the state still made a cultural argument claiming that it had a compelling state interest to ensure that its teachers could “transmit the American heritage to students” (*The New York Times*, 1976). The federal district court in Manhattan struck down the state law as unconstitutional, but on appeal, a deeply divided Supreme Court upheld the constitutionality of the New York statute.⁴¹ Three years previously, Connecticut had lost the battle over its restrictions on non-citizen attorneys when the Supreme Court shot down the state’s rationale that as officers of the court, lawyers should be citizens.⁴²

⁴¹ *Ambach v. Norwick*, 441 U. S. 68 (1979)

⁴² *In Re Griffiths*, 413 U. S. 717 (1973)

The Legal Justification of Immigrant Exclusion from the Professions

Although the pleas from professional associations were typically framed in economic terms, arguing that competition from immigrants could affect their market and revenue potential, states typically used communitarian and moral justifications for their protectionist legislation. Thus the exclusion of immigrants from “the common occupations of the community”⁴³ was justified as the state’s sovereign right and responsibility to protect “the character and needs of its political community” which –of course- excluded aliens by definition (Hull, 1983).

A restricted understanding of “political community” would generally include position in government, high level officials and elected posts, employment that could influence the nature of the political community and the local political system. After all, that is what the Founders had in mind during the Constitutional debates when discussing whether immigrants should be allowed to run for public office. However, that is not the interpretation of community that states used when enacting employment restrictions for aliens. States often argued that some occupations are very closely linked to the general welfare that for public safety and security reasons it is in the public interest to keep them in the hands of citizens. Noncitizens “as a class are naturally less interested in the state, the safety of its citizens and the public welfare,” declared the Rhode Island state courts in 1922 in upholding the state’s restrictions on immigrants’ driving motorbuses.⁴⁴ Similarly, aliens were not allowed to operate pool houses because billiards was associated with crime and since aliens had a greater proclivity towards

⁴³ *Patson v. Pennsylvania*, 232 U.S. 138 (1914)

⁴⁴ *Gizzarelli v. Presbrey*, 44 RI 333, 335, 117 A. 359, 360 (1922)

crime than native-borns, they could not be trusted with run businesses of that type.⁴⁵ Restrictions supported on the grounds that immigrants were dangerous, untrustworthy or anti-social and thus unfit for employment that required the public trust prevailed until the 1970s.

Another common argument states made in support of alien employment restrictions was based on deservedness: citizens owned the public sphere and the government operated as their trustee. Citizens therefore had a superior claim to public sector jobs than did aliens because they shared in ownership of public property (Knoppke-Wetzel, 1974). The implicit and often explicit public association of immigrants with crime made it even easier for states to defend these exclusions.

Until the 1970s, the Supreme Court promoted the view that as long as states do not completely prevent immigrants from the means of making a livelihood, they have the authority to carve out specific spheres within the labor market to which immigrants have no access. According to the Court's rationale, states cannot use their police power to completely preclude immigrants from making a living; however, as long as there is some room in the labor market for non-citizens, states can enact protectionist measures at will (Hull, 1983). In response, states have used a variety of justifications for denying immigrants access to professional occupations. Some states have claimed a compelling state interest over the specific type of occupation (e.g., fishing or hunting), while on other occasions, governments have located their interest in a specific position (e.g., civic service jobs). States have also justified restrictions on the basis of their police powers arguing that only citizens should be employed in sensitive or dangerous occupations or in jobs whose purpose is to protect the health, morals and welfare of the community (Columbia Law Review, 1957). On the basis of the latter, states have tried to justify

⁴⁵ *Ohio Ex Rel. Clark v. Deckebach*, 274 U. S. 392 (1927)

restrictions on hawking and peddling, manufacturing and selling soft drinks, selling liquor, selling lightning rods, driving vehicles of public transport, or holding stock in public corporations.

Chapter 5: The Challenge of Mexican and Undocumented Immigration during the Great Depression and the Early Post War Era

The Chinese Exclusion Act and subsequent exclusionary treaties with Japan resolved the first “yellow peril” in the West, and even though pressure to deport Asians continued, the hysteria that had overtaken San Francisco and other Western towns in the heyday of the Asian crisis subsided. A second anti-Asian hysteria followed in the early years of the 20th century targeting the Japanese. Once the Asian problem was resolved, states and localities soon turned their attention to a new target: the “Mexican problem” became a constant concern for Western and Southwestern states during the uneasy times of the inter-war period. The “Mexican problem” of the interwar period, became the “undocumented immigrant” problem in the post WWII era. Since the 1960s, states have been devising new ways to battle undocumented immigration. Many of these new policies are eerily reminiscent of old solutions dating as far back as the 19th century.

Unlike the Chinese and Japanese “problems” which preceded it, the “Mexican problem” involved more than immigrants: once the United States signed the Treaty of Guadalupe Hidalgo with Mexico in 1848, it inherited more than the rich lands between Texas and California; the native Latino population, a blend of mestizos, Indians and Spaniards went part and parcel with the new territories. “Other-whiteness” or “off-whiteness,” the classification of Latinos as “white” but not quite the same as Caucasians, allowed Hispanics to evade the predicament of Asian immigrants who were legally precluded from naturalization and political incorporation until the 1940s (Olivas, 2006). However, “other-whiteness” also served as a pretext for political

marginalization and social segregation at the state and local level. In combination with the prevailing notion of Mexican immigrants as “sojourners” and “transient” migrant workers who neither belonged in the state nor intended to stay, “other whiteness” ensured that non-European immigrants were several steps removed from equal status in local society (Gutierrez, 1995).

In the case of Mexicans, their “whiteness” was narrowly affirmed in an 1897 case which clarified that under the 1848 Treaty of Guadalupe Hidalgo, Mexicans were indeed eligible for naturalization. In *re Rodriguez*, the federal government argued that Mexicans could not be naturalized because they were neither white nor black, the racial classifications recognized by federal law at the time as eligible for naturalization. The U.S. District Court made a valiant effort to fit Latinos into one of the two recognized racial categories of the time, noting that

[A]s to color, [Rodriguez] may be classified with copper colored or red men. He has dark eyes, straight black hair, and high cheek bones... [but because he] knows nothing of the Aztecs or Toltecs, [he] is not an Indian... If the strict scientific classification of the anthropologist should be adopted, [he] would probably not be classed as white.

However, yielding to the stipulations of the treaty, the judge acknowledged that his hands were legally tied on this matter because the Treaty of Guadalupe Hidalgo “affirmatively confer[red] the rights of citizenship upon Mexicans, or tacitly recognize[d] in them the right of individual naturalization.”⁴⁶ This decision allowed Mexicans to escape the fate of Asian-Americans even though they faced significant de facto and often de jure discrimination in economic rights, property law, education, and access to services (Wilson, 2003).

Although the treaty of Guadalupe Hidalgo granted citizenship to Mexicans and along with it a certain measure of “whiteness,” states in the Southwest, such as California, Arizona and Texas made concerted efforts to re-classify Mexicans as “colored” and find ways to strip them of

⁴⁶ *In re Rodriguez*, 81 Fed. 337 (W.D. Texas, 1897)

their citizenship rights (Rodriguez, 2007). States devised a variety of laws to supplement Jim Crow which were designed to place restrictions on Latinos; according to Rosales:

[E]ven though new codes did not avowedly target Mexicans, laws regarding vagrancy, weapon control, alcohol and drug use, and smuggling were partially designed to control Mexican immigrant behavior. In addition, education policy, private-sector housing, and labor segmentation combined with the judicial web to keep Mexicans powerless and easier to control (Rosales, 1999:4).

States had already started legislative efforts to isolate and exclude Latinos in the 1920s: restrictive land covenants, segregation of schools and public facilities were directed at all Latinos in the Southwest, regardless of their citizenship status. Unlike alien land laws which were targeting Asians who could not be naturalized because they were not white as the law required, restrictive land covenants were designed to exclude all non-whites including Latinos and African-Americans, from white neighborhoods. According to Albert Camarillo, in 1920 about 20 percent of municipalities in the Los Angeles had instituted such covenants; by 1946, more than 80 percent of them had passed relevant ordinances and many deeds of the era had clauses that read: "No portion of the herein described property shall ever be sold, conveyed, leased, occupied by, or rented to any person of any Asiatic or African race ...nor to any person of the Mexican race" (Camarillo, 1999; also see, Montejano, 1986; Camarillo, 1984). A similar clause from Cuesta La Honda Guild, a homeowners association in Oakland, California that survived as a relic of the past until 2007, specified that "no lot or plot or building in this tract shall be occupied or resided upon by persons not wholly of the white Caucasian Race except servants or domestics employed by and domiciled with a White Caucasian owner or tenant" (Scott, 2007).⁴⁷

Along with barriers to residence, localities found ways to exclude immigrant children from public education. In many communities, schools considered immigrant illiteracy an

⁴⁷ Restrictive covenants were outlawed in the state of California in 1948 (Rodriguez, 2007).

acceptable price to pay for increasing the per-pupil funding available to native-born white children (Ferg-Cadima, 2004; San Miguel, 1987). Even where immigrant children had access to public schools, segregation based on race acted as another impediment to quality schooling and learning. State laws endorsed racial segregation explicitly in the case of Asians and under *Plessy v. Ferguson*, states provided separate schools for Chinese, Japanese and Korean children. For Hispanics whom the law recognized as “white,” segregation was justified on linguistic terms, and couched in the special educational needs of children who were not proficient in English. Segregation, sanctioned in state laws and preserved in culture and tradition, was a major target of immigrant advocates, especially in the Southwest from Texas to California. In addition, Mexican migrants-including American citizens- were caught victims of antiquated state and local legal systems which did not recognize migrant and transitory workers as residents and thus excluded them from state and local benefits. These people often found themselves in no-man’s land, American citizens without recognized state citizenship anywhere. As *The New York Times* reported,

[T]he results of this situation are often a mere passing on of the migrant from community to community, with his condition dropping to a level where he may become a spreader of disease and contagion, a social outcast whose children are left uneducated for lack of clothes to attend school, and a threat to any community where he chances to reside (*The New York Times*, 1940).

Mexican immigration, both legal and undocumented dates back to the turbulent years of World War I (Ngai, 2004). The number of new immigrants to the United States dropped precipitously after the enactment of the National Origins Act and the National Quota Law of the 1920s and local employers in the Southwest and elsewhere turned to Mexicans to fill labor needs. The competition among states for cheap labor only grew in the years after the conclusion of the Great War. By the late 1920s, 43 percent of miners in Arizona, 59.9 percent of railroad workers in western states and half of the entire population of El Paso, Texas and other

border towns were Mexicans. The competition for Mexican labor heated up in the early 1920s: as the economy grew, demand for immigrant labor from Midwestern industries was so strong and so many immigrants left the Southwest for Chicago and Detroit that the Texas legislature passed the Emigrant Agent Act imposing a fine of \$1,000 on labor recruiters who sought to divert immigrant labor from the state to northern destinations (Rodriguez, 2007:146).

But the tide changed once the Great Depression hit the nation: demand for labor declined as the economy deteriorated and more and more Americans found themselves without jobs or any source of income. Cheap Mexican labor –a mainstay in Southwestern farms during earlier periods- became a source of contention in this dire economic climate. Not only did Mexicans add to the labor supply and put further downward pressure on wages, but they competed for meager welfare and charity resources. The quest to get Mexicans off social welfare programs and to exclude immigrants from various professions and occupations so as to protect native workers became central themes in the states of the Southwest and the calls for help reached Washington. As Camarillo noted,

Mexicans, it was argued, were a drain on welfare coffers and they took scarce jobs away from unemployed American citizens. They were [in the United States] as illegals, and according to many officials, including President Herbert Hoover, Mexicans were a chief source of the economic distress in the Southwestern and Midwestern communities in which they were concentrated (Camarillo, 1999).

During this time period, a forced repatriation program sanctioned by states led to the removal of about half a million people, citizens and immigrants alike.

The demand and competition for Mexican labor rose again with the onset of WWII as farmers in many states found themselves lacking in stoop labor. American farm workers were drafted to the war effort and a panic set in that the crops across the South and the Southwest were in danger. State pressure led the federal government to negotiate and sign the bracer

agreement with Mexico, the first major guest worker program of the modern era. Between 1942 and 1964, long after the war ended, farms across the country imported Mexican braceros for stoop labor. However, the fixed terms of the agreement which required the implementation of numerous labor protections did not sit well with agricultural interests in the states. In response, Southwestern states encouraged undocumented immigration of Mexican workers and federal authorities such as the INS were complicit in the importation of this unregulated labor force.

Since the reform of the federal immigration system in 1965, the flow of both legal and undocumented immigration has grown exponentially. Immigration legislative activity at the state level has also kept up pace with the immigration trends. States have actively tried to discourage undocumented immigration both by enacting a variety of restrictive and punitive measures targeting undocumented immigrants and by lobbying the federal government to implement similar measures and to close off the Southern border. The main anti-immigrant argument deployed at the sub-national level is that undocumented immigrants make use of public resources in the form of healthcare, public services and education to which they contribute little. In effect, states are subsidizing the cheap labor that local businesses utilize, a double benefit for business. At the same time, states have faced significant pressure from agricultural interests but other industries as well to turn a blind eye to undocumented immigration. This chapter tells the story of states' ambivalent relationship with undocumented immigration in the 20th century.

State-Federal Collaboration in the Mexican Repatriation Campaign of the 1920s-1930s

During the Great War, European immigration dwindled and states had to turn to Mexico for a source of cheap labor. However, the enthusiasm for Mexican workers did not last long. The Great Depression strengthened anti-immigrant sentiment across the country. Restrictionism had been boiling for decades, but its main target had been Asian immigrants. Now, Latinos came to the center of attention with more than 100 organizations lobbying Congress for more restrictions (Columbia Law Review, 1939:1214; Hearings Before the Senate Subcommittee of the Committee on Immigration, 1937:15). As of 1929, on the orders of President Hoover, the Immigration and Naturalization Service (INS) began a campaign of repatriation of Mexicans. Between 1931 and 1934, about one-third of the total Mexican population of the United States, more than half a million people, were either deported or “repatriated” to Mexico; of those, 60 percent were estimated to be American-born children (Rodriguez, 2007; Balderrama and Rodriguez, 1995). In Southern California alone, more than seventy-five thousand of the area’s three hundred and sixty thousand Mexican inhabitants were removed.

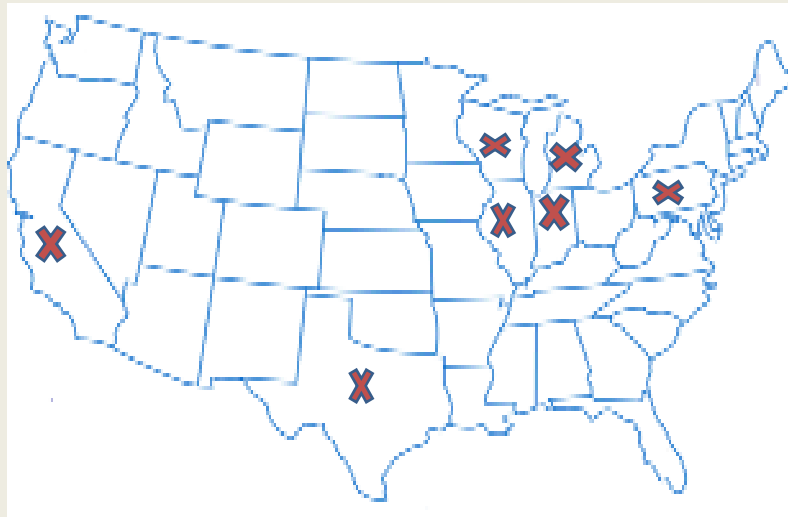
Individuals and families were targeted on the basis of color, not nationality: “proximity to the Mexican border, the physical distinctiveness of mestizos and easily identifiable barrios influenced immigration and social welfare officials to focus their efforts on Mexicans” (Ruiz, 1999:29). Available data at the time indicated that immigrant reliance on state relief agencies was lower or equal to that of American citizens: according to the Works Progress Administration (WPA), only 5 percent of the relief agencies’ case load comprised of immigrants, while the New York City Emergency Relief Bureau found that only 12 percent of the immigrant population as opposed to 15.1 percent of citizens received relief from the City (Corrington, 1937; as in

Columbia Law Review, 1939). However, that did not stop states from targeting aliens and reinforcing the impression that immigrants dominated the welfare rolls.

The Mexican repatriation project introduced a new era in state-federal collaboration in immigration enforcement. States and local governments, from Southern California to Gary Indiana, participated in the program. City officials in Chicago, Detroit, towns in Indiana and most Southwest cities and towns used a variety of tactics to expel Mexicans from within the city limits. Among them, using the fear of the “*migra*” (as Spanish-speakers often refer to federal immigration officials) to their advantage, city officials printed misleading, fake notices and articles in local papers warning Mexicans that federal authorities were about to start a new sweep. Many such tactics were employed, ranging from devious scare campaigns whereby federal agents made arrangements with metropolitan newspaper editors to print articles warning of imminent immigrant sweeps to offering free one-way train travel to Mexico for those who would leave voluntarily. The aim of the campaign was to force Mexicans to “voluntarily” move out of these towns and return to Mexico (Ano Nuevo Kerr, 1976; Kiser and Silverman, 1979; Vargas, 1993). In Los Angeles, immigration officials and local police trawled the Mexican neighborhoods with vans which they filled with Mexicans and drove them to the border.

While these deportation drives were more frequent and more numerous in Southwest cities, they also took place in the Midwest, in places such as Chicago, Detroit, St. Paul, Minnesota, Bethlehem, Pennsylvania and Gary and East Chicago, Indiana (Vargas, 1993; Kiser and Silverman, 1979; Ano Nuevo Kerr, 1976; Humphrey, 1941). Map 5.1 below depicts the states where repatriation efforts were most extensive.

Map 5.1 States with Most Involvement in Mexican Repatriation (1929-1934)



In Los Angeles,⁴⁸ which set up the most ambitious repatriation effort in the country (Rodriguez, 2007), local authorities congratulated themselves for their ingenuity: according to Carey McWilliams,

[T]he repatriation program is regarded locally as a piece of consummate statecraft. The average per family cost of executing it is \$71.14, including food and transportation. It cost Los Angeles County \$77,249.29 to repatriate one shipment of 9,024. It would have cost \$424,933.70 to provide this number with such charitable assistance as they would have been entitled to had they remained- a saving of \$347,468.41 (McWilliams, 1933:323).

The Los Angeles Committee on Coordination for Unemployment Relief and the Department of Charities supported the repatriation program because the jobs Mexicans held were necessary for “needy citizens” (Sacramento Bee, 2005). Local authorities enthusiastically prepared to deport all unemployed Mexicans, but federal authorities brought to their attention that many of

⁴⁸ In 2006, California’s State Legislature passed a bill (SB 670) to apologize for the state’s involvement in the Mexican repatriation effort of the 1930s (*Sacramento Bee*, 2005). A companion bill that would have authorized a Committee to investigate offering restitution to those who were forcibly repatriated was vetoed by Governor Schwarzenegger but the state will erect a monument to the victims of the repatriation as part of its apology.

them were American citizens, either by birth or by naturalization. The county authorities then devised a new strategy: repatriation was made a condition for receiving public assistance. Regardless of their nationality or citizenship status, Latinos who signed up for welfare were in reality signing up for a one way train ticket to Mexico. Eerily reminiscent of recent *The New York Times* (2008) exposés from Arizona and other border states where private deportations by hospitals have become frequent, McWilliams notes of some cases where Latino patients were carried out of the Los Angeles County Hospital and transported to the border (McWilliams, 1933).

In Texas, such was the repatriation flow that the roads leading to the border suffered from extreme congestion because of the repatriating crowd. Between 1929 and 1932, the years when the program was in full swing, Texas border towns were filled to capacity with departing families. So thorough was Texas in its repatriation efforts, that in many towns of the Rio Grande valley, few Mexicans remained after 1932 (McKay, 1982). Thousands of people were deported from El Paso, but also from East, West and Central Texas.

In Gary Indiana, during the years of the economic boom, the steel mills had recruited Mexicans and Mexican-Americans from Kansas, Texas and other southern states, often as strike-breakers to weaken local unions (Taylor, 1930). Mexican workers were often housed in overpriced, company-owned boarding houses, sectioned off from white populations and under the supervision of company foremen. During the Depression years, in response to an International Institute/YWCA report which noted that Mexicans were the poorest ethnic group in the region, with the highest unemployment rates and the most health problems, local organizations took on the promotion of a repatriation project (Betten and Mohl, 1973). In editorials by local officials, the *Saturday Evening Post*, a highly read local paper, and the *Chicago*

Herald-Examiner, advocated repatriation as a solution to the regions unemployment problems. In the views promoted in the papers “the large alien population is the cause of unemployment [in the region]” and “the most un-assimilable of aliens” (Betten and Mohl, 1973:377-378). The head of U.S. Steel and President of the Chamber of Commerce in Garry was the main spokesman for the repatriation initiative. The local newspapers even suggested that local Mexican communities were fully onboard with the repatriation project and were excited about the prospect of returning to Mexico. The enthusiasm for repatriation was so great in the northern plains, that according to some accounts, even though the area was home to only 3.6 percent of all Mexicans in the United States, Indiana, Michigan and Illinois were responsible for 10 percent of all repatriated Mexicans (Taylor, 1934:48; also see Humphrey, 1941).

In 1931, the state of Michigan took action against “undesirable aliens” by passing legislation barring them from entering the state. According to the law,

[A]ny person of foreign birth who obtained admission to the United States illegally or who comes within the classification “undesirable alien” as defined by the laws of the United States is disqualified from becoming a legal resident [and prohibited from] sojourning at all within the territorial limits of the state” (Michigan Public Acts, 1931, No. 241:418-419; as in Stanford Law Review, 1954:305).⁴⁹

In Detroit, the state’s initiative was followed through with a repatriation program which was engineered and carried out by the State Welfare Department which saw in repatriation the perfect solution to reducing the size of welfare rolls in the state: “with steady increases in the county relief lists,” the Department noted, “the problem of adequate care is becoming ever harder to solve; and it is obvious that any reduction in the relief load effective through repatriation service will be a significant factor toward the solution” (Humphrey, 1941:498; Repatriation, Michigan Welfare Department, n.d.). In the midst of the Great Depression, while

⁴⁹ The Michigan law was invalidated by federal courts in *Arrowsmith v. Voorhies*, 55 F. 2d 310 (E.D. Mich., 1931)

the federal government sought ways to provide relief to suffering Americans, in Michigan and other states, continued dependence on welfare for Mexican families was viewed as grounds for repatriation; families who refused to participate in the repatriation program were threatened with reduction in benefits or complete expulsion from the welfare aid program. The State Welfare Department defined repatriation “in technical language” as “the alien who by reason of his age or physical condition is unable to become rehabilitated in the economic condition today” (Humphrey, 1941).

The Michigan Welfare Department learned from Los Angeles: it worked closely with the Mexican Consulate in Detroit and federal immigration authorities to ensure the greatest number of repatriations. The Department created a “Mexican Bureau” which processed the application for aid of all Latinos. Local aid agencies were instructed to send all Latino information seekers to the Mexican Bureau and its guidelines stated that “any Mexican applying for relief should be referred for transport” (State Welfare Department Bulletin, as in Humphrey, 1941:502). The state even set aside \$75,000 to \$100,000 for the repatriation program.

President Roosevelt put an end to the repatriation campaign in 1933. All in all, during the years of the Great Depression joint local, state and federal efforts resulted in the forced repatriation of almost half a million people. The repatriation was conducted without regard for people’s citizenship status, health, age or economic condition. There was only one objective: remove as many Mexicans from the country as possible.

World War II and the “Bracero” Debate: States and the Use of Undocumented Labor

The year 1940 found California locked in a battle over welfare relief for migrant workers who had moved to the state from the Midwest after the Dust Bowl. The state sought to increase residency requirements from three to five years for such migrants arguing that its budget could not do more; California also appealed to the federal government for relief. In its battle with Unions, California has become very aggressive in the years leading to WWII. Worker strikes in San Francisco in 1934 had prompted a series of immigration raids and deportations (Higham, 2004). Even on the East Coast, workers were not immune from retaliatory immigration round-ups: in 1929, the Hindu community of Patterson, New Jersey became the target of immigration raids when it became known that unionization efforts were taking place in the town. However, California was taking its anti-union war one step further: in 1939, the legislature proposed a new law (S.B. 445) that would bar non-citizens from officer positions within the Unions. The sponsors of the bill insisted that this law was necessary to protect “the peace and safety of the state” (Columbia Law Review, 1939:1221).

The War soon changed the labor dynamics in the states of the West and the South where agriculture was a primary industry: as men became drafted to fight the War in Europe and in the Pacific, farms were in dire need of workers. In the Deep South, even women who had worked on plantations as sharecroppers for centuries, could now move off the farms and live in nearby villages on remittances that their soldier-husbands sent home every month. Plantation owners and farmers had to compete with each other for farm labor and the price of labor increased significantly (Woodruff, 1990).

With the war starting for the United States, Washington first had to handle issues of national security and refugees from Europe before turning to labor concerns. European refugees were pressuring for more relaxed quotas and greater immigrant admissions. By February 1940, more than 657,000 people had registered with American Consulates in Europe requesting permission to immigrate to the United States. Almost half of them were in Germany (*The New York Times*, 1940b). The number of prospective European immigrants was more than 10 times the quotas set by the National Origins Act.

Centralization and tightening of immigration policy became top priorities for the Administration. Among the first directives of the Roosevelt Administration in 1941 was to require passports for visitors from Canada, Mexico, Cuba and European possessions in the Caribbean. The new measure was seen as necessary to protect the country against “the fifth column menace,” that is, traitor infiltration from Europe (*The New York Times*, 1940d). The real fear that Nazi infiltrators could enter the country through Mexico set the U.S. on high alert. Within months, the federal government had moved to centralize immigration policy in ways never seen before: all aliens over the age of fourteen were required to register with federal authorities and provide fingerprints. Foreign seamen who entered American ports were also to be registered and fingerprinted. Within four months, almost five million aliens had been processed. The Alien Registration Act (also known as the Smith Act) also prescribed stiff penalties for anyone convicted of acts against the government of the United States.⁵⁰

⁵⁰ According to the Act: Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or Whoever organizes or helps

At the local level, the response was swifter. States had started to institute alien registration legislation of their own even before the federal law was enacted. In Pennsylvania, a state with a sizeable German population, the state enacted alien registration regulations in 1939 requiring not only that aliens be registered with authorities annually but that they carry their alien identification cards on their persons at all times. Immigrants were expected to show their card to police officers upon demand and a valid alien registration card was required for the procurement of official documentation such as drivers' licenses (Stanford Law Review, 1954; Kuhn, 1941).⁵¹

Mexican-Americans and Mexican immigrants came to sharp relief in 1941 after the Pearl Harbor attack. Once the United States entered the war, Washington decided that understanding more about this population was of vital importance to national security. Their ties to the southern neighbor where Germany and the German Nazi party had official representation became of vital concern to U.S. officials. Mexico and Germany had extensive commercial ties in the 1930s especially since Germany needed Mexican oil to fuel its military machine. Once the war started, German propaganda in Mexico increased markedly, a major

or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof-- Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. (54 *Statutes at Large* 670-671 (1940)).

⁵¹ In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Supreme Court invalidated the Pennsylvania law as unconstitutional. In the Court's description, "the Pennsylvania Act requires every alien 18 years or over, with certain exceptions, to register once each year; provide such information as is required by the statute, plus any "other information and details" that the Department of Labor and Industry may direct; pay \$1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or agent of the Department of Labor and Industry, and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one. The Department of Labor and Industry is charged with the duties of classifying the registrations for "the purpose of ready reference," and furnishing a copy of the classification to the Pennsylvania Motor Police. Nonexempt aliens who fail to register are subject to a fine of not more than \$100 or imprisonment for not more than 60 days, or both. For failure to carry an identification card or for failure to show it upon proper demand, the punishment is a fine of not more than \$10, or imprisonment for not more than 10 days, or both."

point of worry for the United States (Salinas, 1997). National agencies started commissioning studies of the people they called “Spanish-speakers,” “Mexican-Americans,” or “Latino population.” Through the Office for the Coordination of Inter-American Affairs (OCIAA), the federal government monitored cases of discrimination directed towards Mexican-Americans and Mexicans in the Southwest and took steps to develop a program to address some of these issues as part of its Good Neighbor policy (Scruggs, 1963; Kingrea, 1953).

At the same time as Washington sought to understand its Latino citizens, Western and Southern states started to feel the pressure of labor shortages. Many male workers in agriculture and industry were drafted to the military, while defense industries competed for the remaining labor force, including women. Those who did not enlist or get drafted sought high-paying, union jobs in major cities (Massey, Durand and Malone, 2002). California declared that it missed its repatriated Mexican population: “[Mexicans] were adaptable in the agricultural field,” noted Dr. George Clemens of the Los Angeles Chamber of Commerce. “They were impossible of unionizing; they were tractable labor. Can we expect these white transient citizens [from the Midwest and the South who arrived in California after the Dust Bowl] to fill their place? ... Being American they are going to demand the so-called American standard of living” (*The New York Times*, 1940c). Not only were the available labor force made up of American citizens with full political rights and open to unionization, but males became enlisted and women and children did not need to work as they could live off the benefits and salary their male family members drew from the armed forces.

Farmers in California, Arizona and Texas, but also in the Deep South and the Pacific Northwest found themselves in a new situation: as Herbert Dalton, the USDA War Board Chairman observed in 1942, “the tremendous drain upon farm labor by the war industries

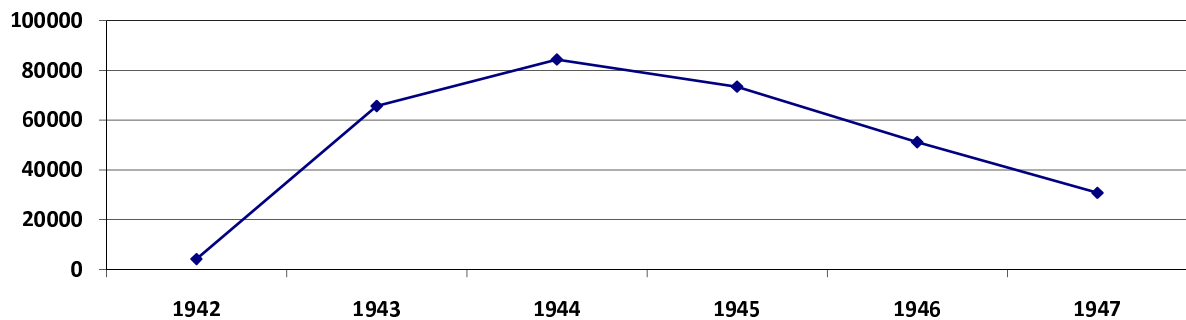
selective service and evacuation of Japanese and enemy aliens has created a critical problem in virtually all farming sections of California” (Watsonville Register-Pajaronian, 1942). In addition, many parts of the Coast in California, Oregon, Washington, as well as parts of Arizona were declared as military zones, “off-limits” to civilians, which further impacted the fishing industry and other agricultural sectors. California, fearing the loss of the crops due to labor shortages and war-related limitations, was in a state of panic. Governor Olson who had initially advocated for the revocation of business licenses of all enemy aliens, had a quick change of heart as labor shortages loomed. Olson even appealed to the War Relocation authorities pleading for the release of Japanese farmers so that they can be allowed to work in military zones, employed as seasonal workers. Federal authorities also allowed some German and Italian farmers to return to the fields in response to pressure from the state (U.S. Commission on Wartime Relocation, 1997:181-182; Martinez, 1995:193-194).

Washington’s initial reaction to state demands for foreign labor from Mexico was dismissive. Requests by Arizona, California, Texas and New Mexico were denied (Rasmussen, 1951:14). But the states insisted, circulating proposals that mimicked the guest worker program which was in effect during World War I. Representatives from Texas, Arizona and California farm bureaus presented their proposals to an interagency committee in May 1942 which rejected regulations of wages and work hours such as those the federal government was discussing with Mexico, arguing that they were “socialistic” (Scruggs, 1963).

Following the repatriation experience, states and Washington both sought to devise a program that would allow flexibility; old arguments about the fairness and appropriateness of contract labor were quickly set aside (Calavita, 1992). The result was a contract labor system that allowed for the importation of Mexican workers from South of the border to work

specifically in agriculture. The War Emergency Farm Labor Program of 1942-1947 popularly known as the “bracero” program, from the Spanish word for manual worker, was designed to provide flexibility and a seemingly unending source of cheap labor. Between 1942 and 1945, 168,000 Mexican workers came to the United States to work as seasonal workers through the bracero program (Rodriguez, 2007; Massey, Durand and Mallone, 2002). Figure 5.1, below shows the annual laborer admissions through the bracero program between 1942 and 1947, the first phase of the program.

Figure 5.1: Annual Laborer Admissions During the War Emergency Farm Labor Program, 1942-1947 (Rasmussen, 1951:199)



In 1942, the United States negotiated a formal agreement with Mexico which President Truman’s Commission on Migratory Labor later on described as “a collective bargaining situation in which the Mexican Government is the representative of the workers and the Department of State is the representative of our farm employers” (President’s Commission on Migratory Labor 1951:50, as in Calavita, 1992:19). The United States bargained hard for flexibility but Mexico was still sore from domestic reaction to the repatriation program and the publicized abuses its citizens suffered in the hands of state officials. In accordance with the bilateral agreement, workers were supposed to receive wages of no less than 30 cents per hour and Mexico insisted on a number of other protections including collective bargaining and representation. Mexico was also adamant about excluding Texas from the bracer program: it had received many reports

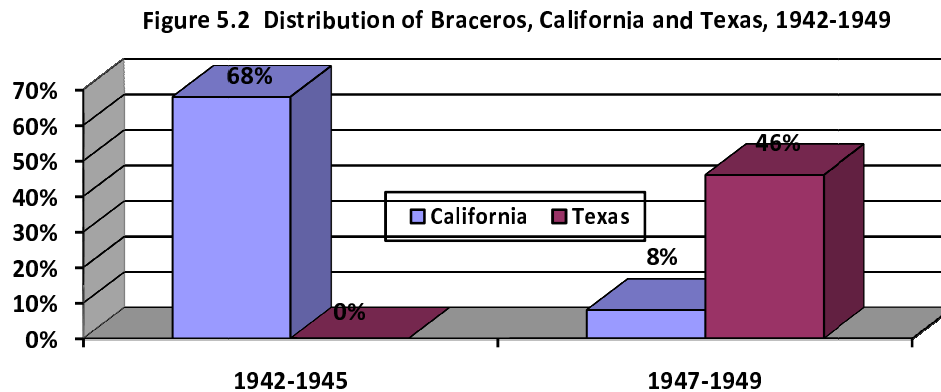
over the years that Texas farmers were especially abusive towards Mexican farm-workers, with many instances of discrimination (Calavita, 1992). The Mexican Consulate in Texas announced that no braceros would be authorized to work in the state because of the “extreme, intolerable racial discrimination” that prevailed there (McWilliams, 1990[1949]:270).

Table 5.1 The Evolution of the Bracero Program	
August 4, 1942 (P.L. 77-45)	Bilateral agreement between the U.S. and Mexico puts in place the War Emergency Program (WEP) Texas blacklisted from WEP
P.L. 521	Sets appropriations for WEP (expired July 1, 1947)
April 28, 1947 (P.L. 40)	Liquidates the WEP as of December 31, 1947; braceros required to leave the U.S. by January 30, 1948
February 21, 1948 P.L. 893 (1948)	New agreement with Mexico over braceros Transfers responsibility of the program to US Employment Services
1948-1951	Ad hoc extension of bracer program under complete administrative authority, no legislative oversight Texas receives braceros
July 1951 (P.L. 78)	Re-authorization of the bracero program; it is extended four times through 1959
1951	Migrant Labor Agreement with Mexico (stipulated that U.S. government is the guarantor for Mexican labor in the U.S.; no contracting of “wetbacks” permitted)
March 20, 1952 (P.L. 283)	Willful import, transport and harboring of undocumented aliens becomes a felony
1952-1954	Six Congressional hearings over the bracero program ⁵²
1954	Operation “Wetback”
March 1954	Conclusion of negotiations for agreement renewal with Mexico
March 16, 1954 (RJR 355)	President Eisenhower signed into law an amendment to P.L. 78 which made unilateral recruitment the U.S. official policy
1964	End of the bracer program; replacement is H-2 program

⁵² The hearings included testimony from: the National Farmers Union, the Wisconsin Governor’s Commission on Human Rights, the National Farm Labor Union, the Agricultural and Mill Workers union, the National Education Association, the CIO, the Textile Workers Union, the federal Security Agency, the Fruit and Vegetable Producers Association, the GI Forum of Texas, the Congregational Christian Churches, the Friends of the Committee on national Legislation, the American International Association for Economic and Social Development, the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, representatives of the U.S. State Department, the National Council of Churches of Christ, the National Consumers League, representatives from the Texas Bureau of Budget, the National Child Labor Committee, the US DOL, the NAACP, the Meat, Canery and Farm Workers Union, the American Council for Human Rights, the NJ Department of Labor and Industry, the AUW, the Council of State Governments, the Florida Sugar Producers Association, the Jewish Labor Committee, representatives of Indian tribes, the National Catholic Rural Life Council, the USDA, and the Workers Defense League (Congressional Hearings on Migratory Labor, 1952).

Texas was livid and alarmed by Mexico's brush off. However, the state's appeals to the federal government to do something about the blacklisting went nowhere, so the state took matters in its own hands. In 1943, Texas formally appealed to Mexico and asked for workers but the Mexican government refused to entertain the request. The state's response to Mexico's announcement that it would not allow workers into Texas was a swift and politically astute ploy. Governor Coke Stevenson prodded the state legislature to enact a "Caucasian Race" resolution which stated that Texas in an effort to "assist the national policy of hemispherical solidarity," and contribute to "stamp[ing] out nazism and preserv[ing] democracy" would not allow discrimination on members of the Caucasian race. American jurisprudence recognized Latinos as "other whites" and thus members of the Caucasian race, but that had never prevented formal and informal discrimination against them. Further to placate Mexico and under pressure from the U.S. State Department, Governor Stevenson also established a Good Neighbor Commission whose responsibility was to monitor and address cases of discrimination and abuse against Latinos in the state (Texas State Archive Online, n.d.; Foley, 1999; Scruggs, 1963). Stevenson also noted that he was in support of anti-discrimination legislation to protect Hispanics: "Meskins is pretty good folks," declared the Governor; "if it was niggers, it'd be different" (Dobbs, 2005:33). The Good Neighbor Commission soon raised the alarm about the treatment of Mexican workers in the state. Pauline Kibbe, a member of the Commission. Charged that Texas "had been negligent in rectifying the unsavory conditions under which Mexicans had labored and had too long hidden behind the battle cry of states rights" (Kibbe, 1953:197; as in Garcia, 19880:48). Mexico kept Texas on the blacklist for the bracero program until 1947 when the program was renegotiated; according to Mexican officials, resolutions, proclamations and committees were far from convincing as efforts to address discrimination. Texas had to include "laws, wholesome propaganda and penalties" (Scruggs, 1963:256). Eventually, the pressure

from Texas paid off: between 1947 and 1949, 46 percent of braceros went to the state (Figure 5.2).



Although states felt an immediate relief with the announcement of the bracero program, local perception was that the agreement was less than ideal for Southwestern farmers. The restrictions attached to the program negotiated with Mexico did not sit well with the states whose agricultural interest groups sought an “open borders” policy with no provisions about the treatment and pay of migrant workers. In spite of pressure for more migrant workers, the requests for certifications and visas in the Southwest were much lower than anticipated. U.S. Ambassador to Mexico Messersmith warned Secretary of State that,

[I]n spite of the hue and cry from some of the border-states about their need, they have not requested any certification of workers for that area. This is an indication to you and some that some of the states are not interested in getting workers under the agreement but are more interested in trying to break down the agreements so as to get workers under arrangements which are quite impossible (Messersmith, 1943 as in Scruggs, 1963:254).

With the end of the war in 1945, enlisted men returned to the labor force and in the late 1940s demand for Mexican labor through the bracero program experienced a slight decline only to grow again in the 1950s as the economy expanded. At the same time, the number of undocumented immigrants crossing the border to work in Southern and Southwestern farms

started to climb. The two governments were in on-going negotiations over how to handle the issue of undocumented immigration but for the most part, the objections were pro forma: in Mexico, especially, the only genuine objections to the bracero program and to undocumented immigration came from the Catholic Church. On the American side, states with large agricultural interests supported the farm bureaus' demands for minimal regulations and legal restrictions while the federal government sought to balance pressure from the states against its own efforts to preserve the Good Neighbor Policy with Mexico (Craig, 1971). The continued growth of undocumented entry, especially in Texas, presented a difficult challenge for the U.S. government: expanding the bracero program was not an option for Mexico's political elites, but its elimination would only exacerbate the problem of undocumented entry.

One suggestion coming from the Mexican side on how to combat undocumented entry was summarily dismissed by the American side. In 1946, in a letter to the American Embassy in Mexico City, Mexican Foreign Minister Tello noted that:

[W]ithout presuming to suggest any action to the Government of the United States, yet if the problem [of undocumented entry] were attacked at its economic source, imposing sanctions on American employers who employ illegal entrants, the result would promptly come about that Mexican workers would not in the future embark upon a venture made both difficult and unprofitable (quoted in Scruggs, 1961:151).

Although American officials in Washington privately acknowledged the merit of the Mexican side's proposition, the idea was rejected because of the anticipated resistance of the farming interests in key Southwestern states (Scruggs, 1961).

The states, solidly behind the agriculture industry, were going in the opposite direction: encouraging undocumented immigration was seen as an efficient way to meet the demands of agriculture without the hassle of regulation. The head of the Chamber of Commerce in McAllen, Texas even suggested to federal authorities that the labor needs in Texas could be met easily "merely by the Border Patrol... relaxing their vigilance on the deportation of so-called

wetbacks,” while members of a South Texas farm association complained about the rising number of deportations noting that in earlier periods, the Border Patrol used to be more selective in its deportations, “concentrate[ing] their efforts on deporting only those who were bad citizens” an arrangement that “has worked very nicely for our farmers down here” (Calavita, 1992:34-35). Furthermore, Congress members from Texas strongly objected to INS plans to round up undocumented immigrants in 1947, noting that such a move during harvest season could jeopardize the crops and the country’s agricultural production (*The New York Times*, 1947).

P.L. 40 (April 28, 1947) provided for the end and liquidation of the bracero program by December 31, 1947. Renewed negotiations stalled on the issue of Mexico’s blacklist on Texas, the size of the program and the problem of undocumented entries and legalizations at the border which were of great concern to Mexico (Kim, 2004). Agricultural states and farmers organizations objected to the conclusion of the program, arguing that due to on-going labor shortages, the crops would be in danger. The pressure on the State Department to renew the agreement with Mexico was enormous. By 1950, the sense of urgency was so high that a statewide committee to investigate labor shortages was created in California which eventually led to the establishment of the President’s Commission on Migratory Labor (Kim, 2004). The State Department initiated negotiations with Mexico for a new agreement, but for three years, the program operated under administrative extensions authorized by the executive branch with minimal legislative involvement. In fact, PL 893 of 1948, transferred responsibility for the program to US Employment Services and when the law expired in 1949, the program continued to operate completely outside of legislative supervision (Calavita, 1992:27).

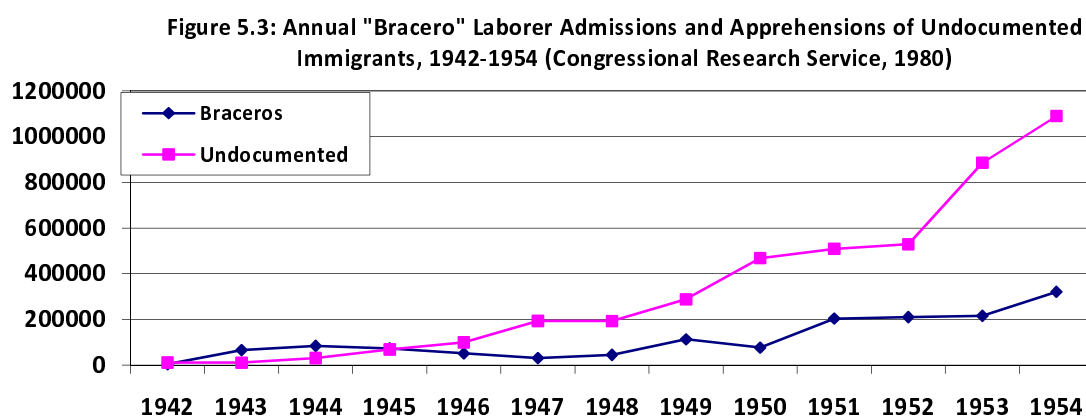
Absent directives from Congress or the White House, the INS was reluctant to deport undocumented workers in the Southwest, especially so during the harvest. Only when the Mexican authorities threatened to stall negotiations on the renewal of the agreement did U.S. immigration authorities initiate deportation efforts. An attempt to increase immigration enforcement in the Lower Rio Grande Valley of Texas in 1950 in response to Mexican pressure was met with strong reaction from local communities which derided the INS as taking the side of Mexico. Similarly, in 1951 when Mexico signaled its intent to back out of negotiations, the INS initiated a new rounding up campaign in the same area and airlifted captured undocumented immigrants into the Mexican interior (Calavita, 1992).

Many critics of the bracero program have noted that with the elapse of the WEP in 1947, the number of abuses directed at braceros and undocumented workers increased markedly as growers were able to negotiate individual agreements with the laborers. Mexican Consular services in the United States reported complaints from braceros in Kansas City Missouri, in Minnesota, Texas, California and in several other southwestern cities and towns. Mexican authorities also brought to the attention of the United States government that a great number of braceros were abrogating their contracts: braceros in Arkansas, Texas and Mississippi facing terrible living and working conditions, "skipped" their contracts and went looking for higher paying, better jobs in the cities. Much of the problem was that federally-owned labor camps were being leased directly to growers and with as few as 50 inspectors, the U.S. Department of Labor could hardly keep up with its responsibilities. In 1953, the California Department of Housing had under its jurisdiction 4,818 labor camps when there were probably over 6,000 such camps in the state. Still the Department of Housing was able to inspect only 2,375 camps in that year (Garcia, 1980).

During this period, the federal government used a little known provision of the Immigration and Naturalization Act (INA) of 1917 to legalize undocumented immigrants. According to the Act's 9th proviso, U.S. immigration authorities were allowed to temporarily admit "otherwise inadmissible aliens" at their discretion (Kim, 2004). The 9th proviso was used to turn undocumented immigrants into legal temporary farm workers, a process known as "drying out the wetbacks" (Calavita, 1992). INS with the collaboration of states and agricultural interests, rounded up undocumented immigrants, drove them to the border and processed them as legitimate braceros there (Kim, 2004; Calavita, 1992). As Idaho's State Employment Service noted approvingly in 1949, "the U.S. INS recognizes the need for farm workers in Idaho and... withholds its searches and deportations until such time as there is not a shortage of farm workers" (President's Commission on Migratory Labor, 1951:76; also see Calavita, 1992:33).

Any efforts by the INS to deport migrant workers were met with opposition and derision in the states: in February 1950 when the INS increased its monthly apprehensions by 30 percent, Texas growers responded by calling the agency a "Gestapo" outfit and charging it with "crimes against humanity." Texas Congressman Lloyd Bensen, a member of a farming family himself, called for an investigation of immigration authorities upon reports that they searched homes for undocumented immigrants (*The New York Times*, 1951). Representatives from Southwestern states, including known restrictionist Patrick McCarran voted for reductions in the appropriations for the INS, stating that "on this side of the border there is a desire for these wetbacks... The agricultural people, the farmers along... the border in California, in Arizona, in Texas... want this help. They want this labor..." (U.S. Senate, 1953:245-246 as in Calavita, 1992:36).

The practice of legalizing undocumented workers at the border had severe unintended consequences: as more Mexicans became aware of the practice, the incentive to enter the United States illegally grew stronger and so did the flow of undocumented workers (Kim, 2004; Calavita, 1992). Between 1947 and 1949, the United States legalized approximately 142,000 undocumented immigrants; in 1950, 96,000 undocumented were legalized and paroled to farmers (Calavita, 1992:28). The admissions through the bracero program between 1948 and 1954 averaged 169,000 entries annually, while the average for Border Patrol apprehensions of undocumented immigrants neared half a million a year.⁵³ In the early post-war era, the number of apprehensions far exceeded that of legal admissions indicating that the undocumented immigrant population in the United States was significantly larger than the legally admitted bracero population (Figure 5.3).



Although the majority of undocumented workers were employed in agriculture, every industry used unauthorized immigrant labor. The use of undocumented immigrants was so

⁵³ In the absence of any credible data on the real number of undocumented immigrants in the country at any given time, apprehensions have typically been used by federal authorities and social scientists alike as a convenient proxy. Apprehensions data are questionable for many reasons: first, people tried to enter and were apprehended multiple times in a single year; also the efforts of the INS and the Border Patrol to apprehend undocumented immigrants were not equally intensive every year but rather varied depending on political and other factors. In recent decades, apprehension data along with census information have been the basis for complex modeling of the undocumented population.

widespread in the Southwest that according to a report by University of New Mexico sociologist Lyle Saunders, even local government and state agencies employed undocumented workers. “Almost anyone who needs help of any kind will hire a ‘wetback’- farmers, contractors, businessmen, housewives, city governments, county governments and even the International Boundary Commission,” noted the report, and this practice was widespread across the Southwestern states. The report also charged that the Social Security Administration did not require identification before issuing social security cards to immigrants and state employment agencies referred them to jobs “right along with citizens,” without inquiring as to their legal status (*The New York Times*, 1951). The President’s Migratory Labor Committee Report (1951) also noted that contractors used state employment agencies to hire undocumented laborers.

During the renegotiation of the bracero program, Mexico held a tough stance on stipulations concerning undocumented immigration. The Mexican authorities understood that the labor provisions of any bracero treaty could not be effectively enforced unless the parallel flow of undocumented immigrants could be curbed. If US authorities were willing to tolerate contract “skipping” and even encourage undocumented immigration by ad-hoc legalizations and “drying out wetbacks” operations, Mexico was powerless to protect its workers against abuses and unfair labor practices. Mexican negotiators insisted that the re-authorization of the program must include penalties for employers who hired undocumented workers. The problem had to be dealt with at the employment supply source, they argued. Penalizing workers would not work as a way to reduce undocumented immigration unless employers, under threat of fines and imprisonment, stopped hiring “wetbacks” (Calavita, 1992; Garcia, 1980).

Although the idea of employer sanctions was positively received by President Truman, Congress was not in the mood to honor Mexico’s demands. The collapse of negotiations and

Mexico's abrogation of the treaty in 1948 spurred an intense debate over who is responsible for the problem of undocumented immigration. The Truman Administration tried to underscore the urgency by insisting that without employer sanctions as part of the new law, Mexico could close the border and the United States could see its supply of cheap labor dwindle. After much debate on Capitol Hill, Congress presented the President with S.1851 which became P.L. 283. The new law recognized as a felony "the willful importation, transport or harboring of undocumented immigrants". It also authorized the INS to search private property within a 25 mile radius from the border; for private homes, the Agency still needed warrants.

The new law was too little to mollify Mexican concerns. Although "harboring" of undocumented immigrants became a crime, Congress under pressure from Texas and other agricultural states took great pains to water down the statute. P.L. 283 included an amendment known as the "Texas proviso" which specifically determined that employing undocumented immigrants will not be considered "harboring" and therefore employers had nothing to fear. An attempt by Illinois Senator Douglas to introduce an amendment which would make employment a felony was voted down in the Senate immigration subcommittee. In Texas, it was clear that even the diluted version of the law was too much: testimony in Congressional hearings noted that "in Texas, a grand jury composed rather largely of farmers will not indict their fellow farmers in the matter of wetback traffic on the basis of a felony" (Congressional Hearings, Testimony of Archbishop Lucey, 1952:18). But even Texas growers realized that the days of the free flow of undocumented immigrants were soon coming to an end. In a meeting of the Southern Texas Growers Association held in 1951, members recognized that "the days of the wetback are over" and discussed the role they expected the Federal government to play in resolving migratory labor issues (Congressional Hearings, Testimony of Archbishop Lucey, 1952:18).

Operation Wetback: The Second Repatriation Program

As the stand-off with Mexico continued, American authorities under pressure from Southwestern states considered unilaterally opening the border and allowing Mexican workers to enter in order to meet the demands of agriculture and other industries dependent on foreign labor. In California alone, Mexican workers could be found in foundries, railroads, ceramic companies, brick-layering, garbage disposal, meat-packing and food processing plants, fertilizer plants and auto-body shops (Garcia, 1980:190). Not everyone agreed with a unilateral resolution to the problem: a number of legislators in Washington feared that it would both anger Mexico and exacerbate the problem of undocumented immigration. California Congressman John Shelley was quite clear in his castigation of an open-border policy: “apparently [the U.S. government’s] reasoning is that if we simply remove all restrictions on border crossing, all crossing will be legal and we will, therefore, wipe out the wetback problem” (Congressional Record, 1954:1387; also Garcia, 1980:85). However, P.L. 78 provided a stop-gap solution to the difficult relationship with Mexico by making the United States government the official labor contractor for Mexican workers. With that settled, the United States could now turn to the issue of undocumented immigration which continued to grow in the early 1950s.

Truman’s Commission on Migratory Labor had provided extensive documentation of the presence and role of undocumented workers in agriculture in Texas, New Mexico, Arizona and California and noted the effects that “wetbacks” had in terms of suppressing wages and displacing native workers (Calavita, 1992). On the heels of the report, *The New York Times* did an extensive five-part expose that ran on the front page of the life of undocumented workers in agriculture, calling it “peonage” and making direct comparisons to slavery (*The New York Times*, 1951a, 1951b, 1951c). According to the paper, “the wetbacks... constitute an economic and

social problem of the first magnitude" (*The New York Times*, 1951b). The recession of 1953 led to a more intense Labor campaign against undocumented immigration in which unions were joined by prominent Latino organizations such as the GI Forum of Texas. The focus was on exploitation of the undocumented labor and on wage effects for native workers (Calavita, 1992:48).

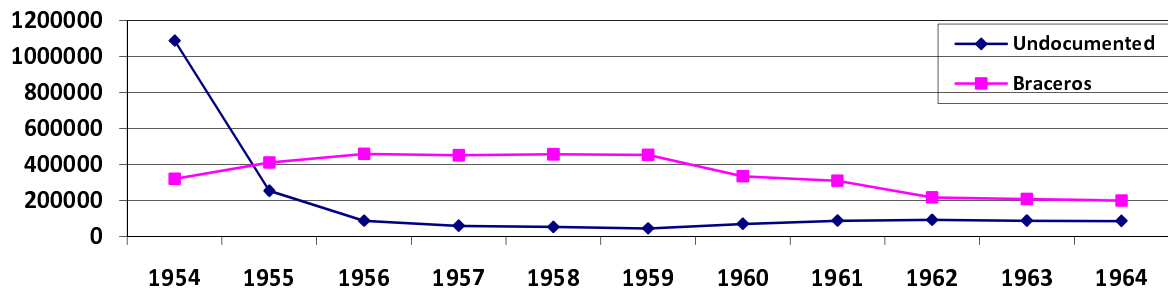
In 1954 the United States announced a special operation to detain and deport undocumented workers. The operation, later dubbed "Operation Wetback," was to take place along the Southern border starting in California and Arizona. The climate in the states had changed significantly over the past year and even though farmers were concerned about losing their cheap and unregulated labor supply, the campaign to publicize the evils of undocumented immigration had brought the problem to their door. Farmers associations in California were particularly concerned about the public relations effect that their resistance to the INS operation would bring. Furthermore, they were granted assurances that their demands for legal braceros would be honored and that they would even keep their "specials," that is undocumented workers who had received special training. Federal authorities had offered to "dry out wetbacks" in both Arizona and California, but local sources assured them that labor supply was adequate and no such measures would be necessary (Garcia, 1980:184). A split within the industry between the farmers in the Southwest and those in other regions also threatened the cohesion of the farmer coalition: farmers in northern states complained that the Southwest had an unfair advantage because of the "wetbacks" (Garcia, 1980:187). Furthermore, the growers understood that the round-up would help force the employer sanctions issue to the back burner at least for a while. Only in the lower Rio Grande Valley of Texas were farmers up in arms about the sweep, arguing that they preferred the use of undocumented immigrants over braceros. In California and

Arizona, farmers provided lists to the INS with undocumented immigrants and identified the locations where they were employed (Garcia, 1980).

The states and local governments were also more than happy to work with INS on the round up. In June 1954, the agency sent letters to the governors of California and Arizona requesting their support and active cooperation. Local law enforcement agencies were requested to offer personnel and time for the round-up. Similar letters went to the Chiefs of state police and highway patrol. The California Peace Officers Association volunteered its members to participate in the operation, the Los Angeles County Sheriff and the city's chief of police each assigned 16 officers to the cause and issued alerts to all police stations within their jurisdictions. In all, the INS conducted raids in California, Arizona, Nevada, Utah, New Mexico, Texas, Oklahoma, and also in Chicago, St Louis, Kansas City, Memphis and Dallas. INS agents praised local law enforcement noting that they "has rendered assistance far in excess of what could be expected." In one case, the local police department offered to help conduct a raid at a movie theater that played Spanish-language movies. The police plan was to guard the exits while INS would round-up the people inside (Garcia, 1980:189)

In all, Operation Wetback was deemed a resounding success, leading to the deportation of more than one million people in the span of less than a year. As Figure 5.4 (below) indicates, that scale of effort was not to be repeated for the duration of the bracero program.

Figure 5.4 Annual Bracero Laborer Admissions and Apprehensions of Undocumented Immigrants, 1954-1964 (Congressional Research Service, 1980)



The tactics employed during “Operation Wetback” were familiar ones from the repatriation effort of the interwar era. The INS and local authorities put ads and articles in newspapers as well as billboards that specified: “NOTICE: The United States Needs Legal Farm Workers! The Mayor of your town can arrange for your contracting. WARNING: The era of the Wetback and the Wire-cutter has ended! From this day forward any person found in the United States illegally will be punished by imprisonment” (Garcia, 1980:184). Undocumented immigrants were put on Greyhound buses destined for the border and even asked to pay for the fare. Only if the worker could not pay the ticket did the INS step in and reimbursed the bus company for the cost (Garcia, 1980:193).

In fact, the INS relied heavily on media coverage of the operation, both to publicize it within the immigrant community, to get the support of American public opinion and to keep retractors at bay. The agency was very sensitive to the potential for criticism and accusations of abuse and newspaper accounts of “unfortunate events,” such as abuses of immigrants in the hands of the police, caused the agency great headaches. Latino organizations did protest the abuse of Mexican-Americans and on occasion Japanese-Americans but these protestations did not receive much media attention (Garcia, 1980).

After the conclusion of Operation Wetback at the end of the summer of 1954, the bracer program continued its expected course bringing hundreds of thousands of Mexican temporary workers to states across the country. Table 5.2 shows the number of braceros recruited by state in 1958.

Table 5.2 Number of Foreign Migrant Workers by State in 1958			
State	Number of braceros		Number of braceros
Texas	122,699	New Jersey	1,683
California	93,250	New York	1,588
Arkansas	25,357	Washington	1,049
New Mexico	20,194	Virginia	720
Arizona	18,187	Oregon	510
Michigan	14,372	Missouri	390
Florida	11,172	North Dakota	170
Colorado	6,093	Ohio	125
Wisconsin	3,194	Kansas	95
Montana	3,020		
<i>Source: United States Senate, Committee on Labor and Public Welfare, Subcommittee on Migratory Labor (1960)</i>			

The demand for foreign farm workers continued strong well into the 1960s. Competition across states for primacy in agriculture made the lower wages of Mexican laborers a very attractive proposition that growers desired. As the *Long Islander* noted, New York has relied on migrant farm labor to be competitive in agriculture: “[migrant farm workers] have helped the state maintain its rank as one of the Nation’s leading farm production states” (Long Islander, 1956; as reported in U.S. Senate Migratory Labor Report, 1960:14).

Chapter 6: The New Challenges and New Destinations of Undocumented Immigration in the Closing of the 20th and the Dawn of the 21st Century

State activism and lobbying efforts continued into the late 20th century and the first decade of the 21st century. Demographic change and especially the migration of Latino new arrivals in new destination states which had not experienced immigration for about two centuries introduced new players to the immigration policy domain. In the past two decades, the immigration debate is no longer dominated by the “big six” large immigrant receiving states of California, New York, Texas, Illinois, Florida and New Jersey. Questions about how best to resolve immigrant-related challenges have now surfaced in smaller states in the Southeast and Southwest like Georgia, North Carolina, Colorado and Utah. In these states the growth of the immigrant population, especially the rise in the numbers of undocumented immigrants, has been exponential.

As we will discuss in Chapter 8, large immigrant-receiving states came into sharp conflict with the federal government in the 1990s over immigration policy and especially undocumented immigration. The “big six” introduced new immigrant legislation, lobbied the federal government extensively and even sued federal authorities in an effort to force Congress to enact immigration laws consistent with state preferences and compensate states for the costs associated with undocumented immigration. However, since 2000 the “big six” have taken a considerably different stance on immigration and especially unauthorized immigrants. As more immigrants in these states become naturalized and eligible to vote and immigrant advocates acquire more influence, the “big six” have been forced to view the challenges of immigration as another social policy issue rather than a problem to be managed and resolved by Washington (Filindra and Kovacs, 2008). That has reduced the amount of confrontation between the “big

six” and federal authorities. At the same time, the large immigrant-receiving states have produced important innovations in this domain, extending new positive rights to undocumented immigrants such as in-state tuition benefits for college-bound undocumented children. States have supported efforts to introduce this type of benefit at the federal level and encouraged Congress to pass legislation (the DREAM Act) that would help undocumented students who complete a college education to adjust their status and receive legal permanent residency.⁵⁴

In the 2000s, changes in the population dynamics brought new states face-to-face with the challenges of immigration. Georgia, the Carolinas, Colorado, Utah and states in the Midwest experienced unprecedented growth in their immigrant residents. The legislative response in these states resembled efforts in the “big six” during the 1990s and in earlier periods. Restrictive immigration bills abounded both at the state and the local level and the new destination states began pressuring the federal government to enact new immigration restrictions to help alleviate problems associated with undocumented immigration. Most new destination states became enthusiastic proponents of restrictive legislation: among others, new employer restrictions laws have been introduced, immigrant exclusions from public housing has been implemented, and laws that preclude undocumented immigrants from receiving reduced tuition rates at state colleges have been enacted. Many state level proponents of exclusionary legislation have viewed this activity as the only way to force undocumented immigrants out of their state. In some cases, states have actively collaborated with federal authorities in the enforcement of civil immigration law, signing up for ICE’s 287(g) program and having state police units trained on the enforcement of immigration regulations.

⁵⁴ The DREAM Act was introduced in 2009 by Senators Richard Durbin (D-IL), Richard Lugar (R-IN), Russell Feingold (D-WI), Edward Kennedy (D-MA), Patrick Leahy (D-VT), Joe Lieberman (I-CT), Mel Martinez (R-FL), and Harry Reid (D-NV) in the Senate and Representatives Howard Berman (D-CA), Joseph Cao (R-LA), John Conyers, Jr. (D-MI), Lincoln Diaz-Balart (R-FL), Mario Diaz-Balart (R-FL), Zoe Lofgren (D-CA), Devin Nunes (R-CA), Jared Polis (D-CO), Ileana Ros-Lehtinen (R-FL) and Lucille Roybal-Allard (D-CA) in the House of Representatives. The bill has been introduced every year since 2001.

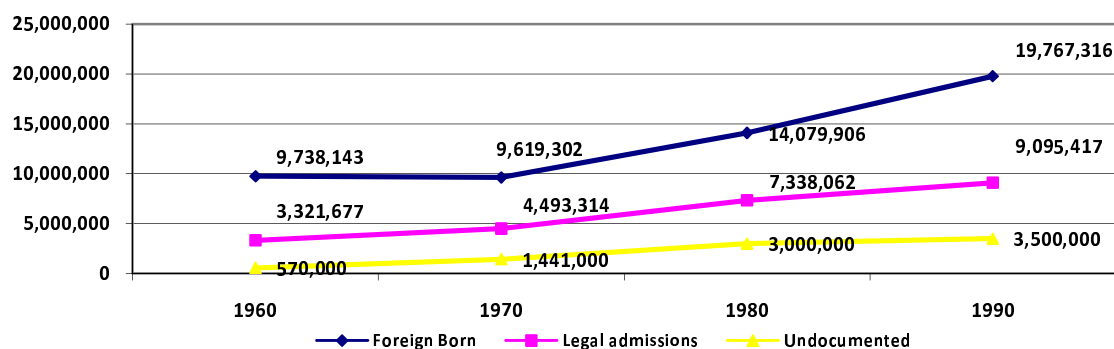
This chapter discusses in detail the demographic changes that have produced this shift in the immigration debate away from the “big six” to new immigrant destination states. The data from U.S. CIS, the Census and the Pew Hispanic Center document the rapid increase of undocumented immigration in many states outside the “big six” during the 1990s and especially in the first decade of the 21st century. Not surprisingly, immigration-related legislative activity has also increased in these new destination states as local legislatures grapple with the challenges of the new population.

The last part of the chapter discusses the case of Virginia, a “new destination” state where immigration has been a hot issue in the past several years. The state has enacted a number of laws designed to put pressure on the undocumented population but in doing so it has exposed new cleavages. Cities such as Arlington with large immigrant populations are concerned about immigrant integration and enhancing cooperation and good will between local police and immigrant communities. On the other hand, suburban communities favor exclusionary measures which would prevent day laborers and other undocumented immigrants from living and working within town borders.

Undocumented Immigration in the 1990s: The “Big Six” and Beyond

If there was hope that the immigration reforms of the 1960s which opened the door to legal immigration for professionals and family members would help to curb the flow of undocumented immigration, that expectation was soon dashed as the number of undocumented entrants continued to climb. Legal and undocumented entries soared throughout the period between 1965 and 1990: as legal immigration increased steadily, undocumented immigration doubled with each passing decade. By 1990, according to the U.S. Census, there were approximately 3.5 million undocumented immigrants in the country (Center for Immigration Studies, 2006 reporting U.S. INS data). Figure 6.1 (below) shows the number of foreign-born, legal immigrants and undocumented aliens by decade since 1960.

Figure 6.1. Foreign-born, Legal Immigrants and Undocumented Entrants, 1960-1990 (U.S. Immigration & Naturalization Service)



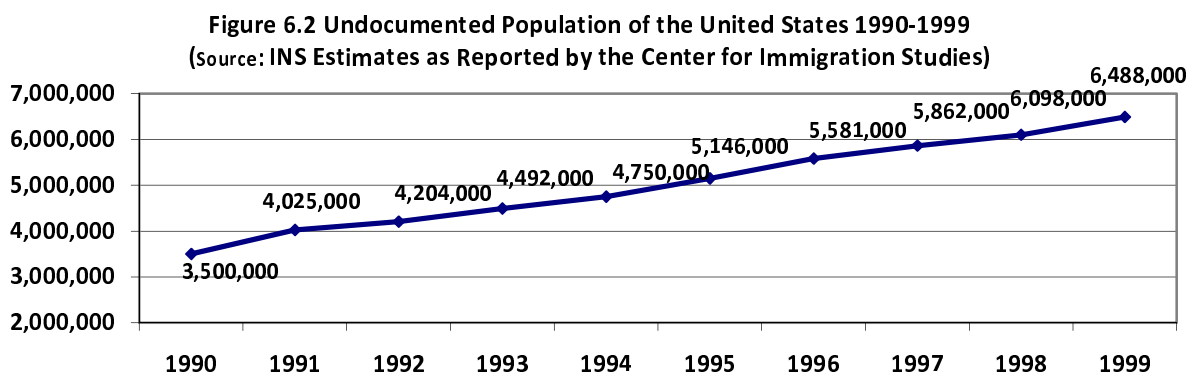
In 1960, prior to the liberalization of the immigration system, the total foreign-born population of the United States stood at below 10 million. Thirty years later, there were almost 20 million foreign-born residents in the country. Of those, only 7.2 million were naturalized citizens; the remaining 12.5 million (63 percent of the total) were either legal permanent residents (LPRs) or unauthorized entrants. Between 1980 and 1989, more than 6.2 million people became LPRs; between 1990 and 1999 the number rose to 9.3 million, an increase of 150

percent. The largest states of the Union were the ones where the majority of immigrants concentrated. Six states, California, New York, Texas, Florida, Illinois, and New Jersey together attracted almost 75 percent of all legal entrants in the 1980s and 1990s (Table 6.1).

State	1980-1989		1990-1999	
	Number ('000)	Percent	Number ('000)	Percent
California	1,993	31.9	2,911	31.3
New York	1,993	16.7	1,394	15.0
Texas	541	8.7	823	8.8
Florida	399	6.4	722	7.8
Illinois	322	5.2	453	4.9
New Jersey	308	4.9	460	4.9
<i>All other states</i>	687	26.4	2,549	27.3

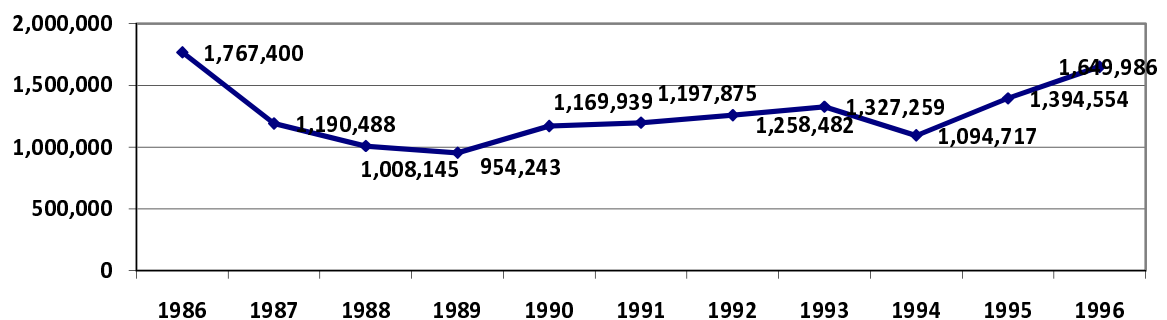
Source: Office of Immigration Statistics, Department of Homeland Security. 2003 (September) "Mapping Trends in U.S. Legal Immigration: 1980-2003"

Not only did legal immigration grow in the 1980s and 1990s, but so did undocumented immigration. Neither the liberal policies of the 1960s nor the restrictions blended with amnesty of the 1980s had much of an effect on unauthorized entries. The much touted Immigration Reform and Control Act (IRCA) of 1986 seemed powerless to prevent undocumented immigrants from streaming through the Southern border. As shown in Figure 6.2., each year throughout the 1990s, the estimated number of undocumented immigrants rose in leaps and bounds.



Border apprehensions of undocumented immigrants continued to be high in the late 1980s and throughout the 1990s. In the immediate aftermath of IRCA, apprehensions dropped below one million per year giving Congress and the INS a sense of accomplishment (Figure 6.3). However, apprehensions of would-be undocumented immigrants resumed their growth trajectory in 1990 and so did the recriminations at the federal level. Representative Charles Schumer of New York, one of the authors of the House version of the IRCA legislation accused the Bush Administration that it was not taking the legislation seriously when it provided a “shoestring budget” for enforcement purposes (New York Times, 1990a).

Figure 6.3 Border Apprehensions 1986-1996 (Source: U.S. Immigration Service)



Similarly to legal permanent residents, the majority of undocumented entrants in the 1990s resided in the large immigrant receiving states. In 1990, 80 percent of all undocumented immigrants lived in one of the large six immigrant receiving states while in 2000 the top six included two-thirds of all undocumented entrants. California was host to 42.2 percent of all undocumented immigrants in 1990 and by 2000 only a quarter of unauthorized entrants resided in the state. More than one-in-ten undocumented aliens lived in Texas and about one tenth of all resided in either New York or New Jersey (Table 6.2). The growth rate of undocumented immigration in the big-six states between 1990 and 2000 ranged between 51 percent in New York to 268 percent in New Jersey; however, across the rest of the nation, the undocumented immigrant population grew by 289 percent.

Table 6.2 Undocumented Immigrant Population by State of Residence, 1990-2000					
State	January 1990		January 2000		Growth rate (%)
	Number ('000)	Percent	Number ('000)	Percent	
California	1,476	42.2	2,510	25	70
New York	357	10.0	540	6	51
Texas	438	12.5	1,090	13	149
Florida	239	6.8	800	6	235
Illinois	194	5.5	440	5	127
New Jersey	95	2.7	350	4	268
All other states	701	20.0	2,730	41.0	289

Source: Office of Policy and Planning, U.S. Immigration & Naturalization Service, Department of Homeland Security. http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf; Office of Immigration Statistics, Population Estimates. 2009. "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008" (http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf)

Although the big-six states had the largest concentration of undocumented immigrants in the 1990s, a second tier of states, mostly in the South and West, also experienced large increases in the size of their undocumented population. As shown below in Table 6.3, between 1990 and 2000 undocumented immigration in North Carolina and Georgia grew by an astounding 692 percent and 570 percent respectively while in Colorado it topped at 364 percent. In other Western states such as Arizona, Washington and Nevada the growth rate in undocumented immigration was greater than 200 percent. By the early 1990s, the INS apprehended undocumented aliens even in Alaska (Associated Press, 1992).

Table 6.3 Undocumented Immigrant Population by State of Residence, 1990-2000 (Second-tier states)					
State	January 1990		January 2000		Growth rate (%)
	Number ('000)	Percent	Number ('000)	Percent	
Arizona	88	2.5	283	4.0	221
Massachusetts	53	1.5	87	1.2	64
Virginia	48	1.4	103	1.5	114
Washington	39	1.1	136	1.9	248
Georgia	34	1.0	228	3.3	570
Colorado	31	0.9	144	2.1	364
Nevada	27	0.8	101	1.4	274
North Carolina	26	0.7	206	2.9	692

Source: Office of Policy and Planning, U.S. Immigration & Naturalization Service, Department of Homeland Security. http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf

Mexicans made up a significant majority of the undocumented population everywhere, but the composition of the unauthorized population differed significantly from location to location. California's undocumented population came mostly from Mexico while New York had significant pockets of undocumented Italians, Poles, Ecuadorians, natives of the Caribbean and South Americans. New York was also home to several thousand undocumented Israelis (New York Times, 1993a).

Describing the dilemma that arose from the growth of authorized and undocumented immigration, the conservative *Washington Times* in 1990 declared it "the city of the Angeles has a hellish tale." The paper noted that the city was home to more than 1.5 million undocumented immigrants not including 900,000 who were amnestied under the provisions of IRCA. Local schools were burdened by the presence of immigrant children who did not speak English and required special bilingual education programs while local hospitals had to provide healthcare for children born to undocumented mothers. The costs to the city were enormous and the paper mentioned no positive effect from the inflow of immigrants, only "a cautionary tale for other urban areas with rapidly growing immigrant populations, including New York City, Miami, Newark, Chicago, Houston and Washington, D.C" (Washington Times, 1990a).

Concerns over IRCA: The Discrimination Factor

In the 1980s, Congress made an attempt to tackle the problem of unauthorized entry head on. The 1986 Immigration Control and Reform Act (IRCA) took the two prong approach of legalizing millions of undocumented immigrants already in the country while at the same time instituting stiff penalties for employers who hired undocumented labor. The 1986 amnesty program which was included in IRCA may have helped with the adjustment of status of 2.5 million undocumented aliens, but it did not resolve the issue of undocumented entry. Neither did the employer penalties also included in IRCA (Fix and Zimmermann, 1994). Federal restrictions may have made it more difficult for undocumented to secure employment in the United States, but with fake identification cards and social security numbers easily available, the task was not impossible. A counterfeit permanent residency card (a “green card”) sold for as little as \$35 to as much as \$300 in 1989 (New York Times, 1989a).

IRCA’s provision that to be penalized employers must “knowingly” hire undocumented immigrants operated as a potent loophole since employers were not required to verify the authenticity of the documents that their workers provided. The “Operation Wetback” experience notwithstanding, when employers were able to easily identify and turn in undocumented workers, it was once again up to federal authorities to secure proof that employers knew the immigration status of their workers and hired them anyway. The option of the shadow, cash economy was there too: undocumented workers took jobs as day laborers, field workers or service personnel in the hospitality industry, often with employers who paid in cash and kept no records. As Wayne Cornelius, Director of the Center for U.S.-Mexican Studies at the University of California San Diego told *The New York Times* in 1989, “like the undocumented workers already here who didn't qualify for amnesty, the new arrivals have not

become unemployable in this country because of employer sanctions. It's just that their range of job options may have been reduced somewhat" (New York Times, 1989a). Cornelius also noted that "there is not a single documented case of successfully using employer sanctions laws to reduce the population of illegal immigrants anywhere in the world" (Cornelius and Montoya, 1983:142).

In spite of IRCA's ambitious goals, Congress made modest appropriations for immigration enforcement; as a result, in California a total of seventy federal agents were expected to monitor the hiring practices of more than half a million employers in Los Angeles alone. Sensitive to political considerations, federal authorities tended to concentrate their enforcement efforts on smaller businesses rather than large companies who had friends at the state capitol and could mount length and expensive legal defenses (New York Times, 1989a). Data released by Congressman Schumer's office (D-NY) in 1989 showed that the agency was able to perform compliance inspections only in 0.2% of employers (New York Times, 1989b).

The failure of IRCA was extensively documented in two studies released in 1990 by the RAND Corporation and the Urban Institute (Fix, 1991; Juffras, 1991). One study documented the overburdening of the INS and its administrative inability to meet its employer enforcement responsibilities. The long-term effectiveness of the employer penalties provisions of IRCA were in jeopardy because of the agency's administrative weakness, the study announced. The second study reaffirmed that the INS was the weakest link in the enforcement of employer sanctions and concluded that after a brief decline, the number of undocumented immigrants in the U.S. continued to rise as demand for cheap workers in agriculture continued to be high (Fix, 1991). The study also admonished that "if the intent was to generate a large decline in the flow,

employer sanctions appear to have been unsuccessful and Congress may wish to weigh the cost of continuing the program against its current level of effectiveness” (New York Times, 1990a).

States also issued their own studies of the effects of employer penalties which drew significant attention at the local level. A study conducted by the California Fair Employment and Housing Commission was equally blunt: after IRCA, employers were more likely to discriminate against Latino job candidates (New York Times, 1990d). Authorities in New York State followed up with another study with similar conclusions: IRCA did not work (Heritage Foundation, 1990) and the city’s director of the Office of Immigrant Affairs told the New York Times that “the sanctions became an excuse for people to discriminate under the cover of meeting their legal obligations” (New York Times, 1992d). A survey in San Francisco spurred the investigation by the Commission; the survey found extensive patterns of abuse and discrimination among city employers (San Francisco Chronicle, 1990). The Massachusetts Immigrant & Refugee Advocacy Coalition in found similar patterns in the Boston labor market, forcing the local INS director to defend his office’s practices and the legitimacy of IRCA (Boston Globe, 1990). The General Accounting Office (GAO) also weighed in with its own findings which indicated a pattern of racial discrimination as a result of IRCA: the law made employers more hesitant to hire racial minorities or people with an accent (GAO, 1990). An outraged *Wall Street Journal* editorial compared IRCA to Jim Crow, stating that this was the first law “since Jim Crow where the government is so closely aligned with a process that produces discrimination” (Wall Street Journal, 1990).

State Efforts to Regulate Immigration: Legislative Activity in the States in the 1990s

The growth of undocumented immigration in combination with what was widely assessed as inadequate federal action put pressure on state legislatures to provide local solutions to the problem. The Reagan-era IRCA (1986) failed to resolve the problem of undocumented entry while George Bush Sr.'s Immigration Act of 1990 increased caps in legal immigration and created a lottery program without introducing any significant immigration control provisions. For states, "acting in good faith [and providing services to immigrants]... the failure of the federal government [to keep its] promises under the law" constituted a major point of contention and a serious political and economic challenge (California AJR8, 1993). In another resolution, California strenuously complained that "the state of California and other states have incurred... extensive fiscal responsibilities... for immigrants entering the United States as a result of federal immigration and refugee policies" (California SJR5, 1994), while elsewhere the state charged that "the federal government is responsible for immigration policy and should bear the costs..." The situation left states with large immigrant populations in a bind: what was the best way to handle the economic, social and political costs of the undocumented immigration crisis?

Across the U.S. and more so in the six large immigrant-receiving states, proposals on immigration-related issues abounded. According to data from Lexis-Nexis State Capitols, between 1990 and 1999, states introduced 2,712 immigration related bills of which more than 300 became law. Table 6.4 shows the number of immigration-related bills introduced and enacted by state. All fifty states introduced some immigrant-related bill during this ten year period, with wide variations across the country. On average, states introduced 271 bills per year: New York had the highest average of 45 pieces of legislation annually, followed by

California at 30 bills per year. The lowest annual average was in Wyoming which introduced but a single immigration-related bill per year. Although much of the immigration activity in the 1990s has been associated with the “big-six” immigrant-receiving states, in reality only 37 percent of all bills were introduced in these states; two-thirds of all legislative efforts took place elsewhere. In terms of enactments, states averaged 36 immigration laws a year, which included memorials and various types of resolutions urging the federal government to take action on immigration control. Similarly, more than two-thirds of all enactments (69.3%) took place outside of the big-six states.

Table 6.4 Immigration-related bills introduced and enacted by state, 1990-1999				
State	Introduced		Enacted	
	Total	Mean	Total	Mean
California	302	30	62	6
New York	455	45	13	1
Texas	69	7	22	2
Florida	115	11	5	0.5
Illinois	83	8	11	1
New Jersey	97	10	7	1
All other states	1688	169	256	26
<i>Source: Lexis-Nexis State Capitols</i>				

Aside of the big-six states, a number of other states were highly active in immigration-related legislation over the same period. Hawaii, in fact, was the most active state in the nation even though it enacted few of the bills that were introduced. Massachusetts coming out of the Dukakis administration during which the state experienced an expansion in its welfare system and correspondingly in its debt, was also engaged with the issue of immigration, and so was Minnesota, a state with large refugee resettlement programs (Table 6.5). Although these second tier states were highly active in introducing immigration-related legislation, they enacted far fewer laws during this period than did the large big-six states.

Table 6.5 Immigration-related bills introduced and enacted by state, 1990-1999 (second-tier states)				
State	Introduced		Enacted	
	Total	Mean	Total	Mean
Arizona	67	7	15	1.5
Massachusetts	152	15	10	1
Virginia	51	5	19	2
Washington	62	6	11	11
Georgia	27	3	7	1
Colorado	9	1	7	1
Nevada	22	2	14	1
North Carolina	20	2	4	<.5
<i>Source: Lexis-Nexis State Capitols</i>				

Among the second-tier of immigrant receiving states, Massachusetts had the highest enactment rate during this period, followed by Arizona and Nevada. North Carolina, Georgia and Colorado—although they considered several bills during the 1990s, passed the fewest pieces of immigration-related legislation.

State legislatures and local governments battled with a number of immigration-related issues during the 1990s. Chief among them was the cost of providing public services to undocumented immigrants. However, states also debated whether legal immigrants should be included under the government's protective welfare umbrella. Special immigrant populations such as refugees involved even more challenges for states who acted as resettlement communities. Localities were often faced with complaints about day laborers, many of whom undocumented immigrants, whom local residents viewed with suspicion and concern.

The response to the challenges of the immigrant population varied significantly across localities. Some communities sought to provide assistance to immigrants and set up a system to help in their integration into the community. Other localities followed a strategy of physical as well as legal exclusion: collaborating in INS raids and later on in the enforcement of civil immigration law, banning day laborers from the streets, and enacting additional employer penalties. States were particularly keen on identifying immigrants in the prison population and

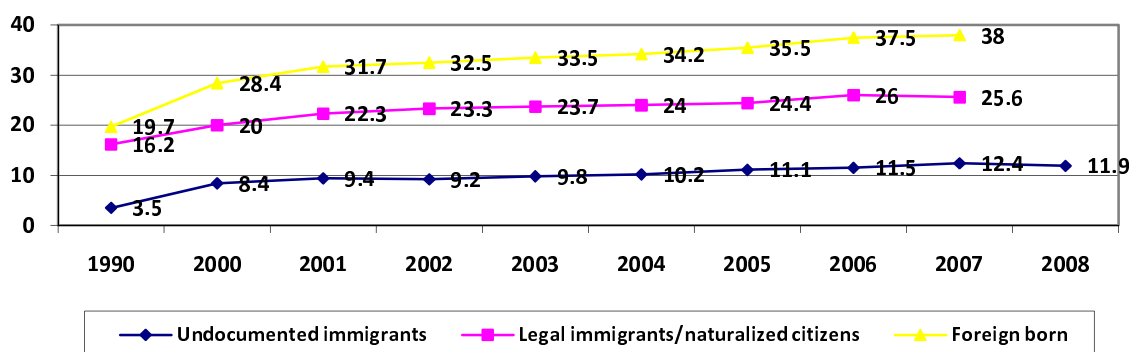
transferring them to INS custody- a major cost savings issue for sub-national governments. States also debated the exclusion of legal immigrants from welfare benefits programs and California's Proposition 187 went as far as to exclude undocumented immigrants from all public services, including public education, non-emergency healthcare and welfare. In an effort to force federal action and recoup some of the costs of undocumented immigration, states even sued the federal government in the 1990s. The lawsuits made it clear that as far as states were concerned, immigration was the exclusive responsibility of Washington and the costs of caring for, educating and incarcerating undocumented immigrants constituted an unfunded mandate.

On the other hand, efforts were made to incorporate immigrants- even the reviled "illegals." The debate over in-state tuition for undocumented immigrant children began in the 1990s in California while Massachusetts had habitually included all immigrants without concern for status in its benefits programs. In some states, immigrants were portrayed as a benefit while elsewhere they were a drain in the system and a threat to the community's cohesion and culture.

The New Immigrant Destinations of the New Century

The turn of the century brought more immigrants and more challenges to states and localities. Between 2000 and 2007 the foreign born population of the country grew from 28 million to 38 million, about one million people per year. By 2007 the unauthorized immigrant population in the country had increased to 11.8 million, only to decline slightly in 2008 to 11.6 million (Hoffer, Rytina and Baker, 2008). The Pew Hispanic Center reported that the undocumented immigrant population dropped from a high of 12.4 million in 2007 to 11.9 million in 2008 (Passel and Cohn, 2008). Figure 6.4 shows the annual growth in the foreign born population and the undocumented immigration in the United States between 2000 and 2008.

Figure 6.4 Foreign-born, Legal Immigrant and Undocumented Immigrant Population 2000-2008 ('000) (Source: U.S. Census Bureau)



The “big-six” immigrant receiving states continued to attract large numbers of immigrants during this period. In 2008, sixty percent of all undocumented immigrants resided in the country’s large states and urban centers while 40 percent was divided among the 34 other states. Among the “big six,” the undocumented population in Texas grew by 54 percent between 2000 and 2008 while in California the growth rate stood at 25 percent. However, the

fastest growth rates occurred in the rest of the country: in the rest of the Union, undocumented immigration rates increased by 70 percent between 2000 and 2008 (Table 6.6).

Table 6.6 Undocumented Immigrant Population by State of Residence, 2000-2008					
State	2000		2008		Growth rate (%)
	Number ('000)	Percent	Number ('000)	Percent	
California	2,510	25	2,860	25	14
New York	540	6	640	6	18
Texas	1,090	13	1,680	14	54
Florida	800	6	840	7	5
Illinois	440	5	550	5	25
New Jersey	350	4	400	3	14
All other states	2,730	41.0	4630	40	70

Source: Office of Immigration Statistics, Population Estimates. 2009. "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008"
http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf

Many of the second tier immigrant receiving states experienced major increases in their undocumented immigrant population during the first decade of the 21st century. Georgia's undocumented population grew by 105 percent in eight years while Arizona's and Nevada's increased by 70 percent (Table 6.7).

Table 6.7 Undocumented Immigrant Population by State of Residence, 2000-2008 (Second-tier states)					
State	2000		2008		Growth rate (%)
	Number ('000)	Percent	Number ('000)	Percent	
Arizona	283	4.0	560	5.0	70
Massachusetts	87	1.2	n/a	n/a	n/a
Virginia	103	1.5	n/a	n/a	n/a
Washington	136	1.9	n/a	n/a	n/a
Georgia	228	3.3	440	4.0	105
Colorado	144	2.1	n/a	n/a	n/a
Nevada	101	1.4	171	2.0	70
North Carolina	206	2.9	380	3.0	46

Source: Office of Immigration Statistics, Population Estimates. 2009. "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008"
http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf; Office of Policy and Planning, U.S. Immigration & Naturalization Service, Department of Homeland Security.
http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf

Legislative Activity in the 21st Century

The state legislative activity in the immigration field continued unabated in the new century. The terrorist attacks of 2001 –perpetrated by foreign nationals-became intertwined with the immigration debate, raising the alarm at the state and national level that the immigration system may be the weakest link in the country’s national security apparatus. States were called on to implement the federal REAL ID rules of 2003 which required states to use very strict procedures in checking the identification of applicants for drivers’ permits and to produce drivers’ licenses and IDs that could not be easily forged.

In recent years, all states have been getting involved in immigration policy-making regardless of the size and impact of their foreign-born population. According to NCSL, 46 states had immigration legislation pending in 2007, up from 32 states in 2006. In 2008, a total of 39 states from Maine to Hawaii debated the issue. In 2006, states enacted a total of 84 immigration-related laws while in 2007 the number tripled to 240. In 2008, states passed 190 laws related to immigration (Table 6.8).

Table 6.8: Immigration-Related Bills at State Level (2006-2008)			
	2006	2007	2008
Proposed	570	1,562	1,267
Enacted	84	240	190
Vetoed	6	12	12
Number of States	32	46	39
<i>Source: National Conference of State Legislatures (2006, 2007, 2008)</i>			

Data from Lexis-Nexis show that overall immigration-related legislative activity in California and New York was substantially lower in the 2000s than it was in the 1990s while it increased

somewhat in other “big six” states. However, in all other states, the number of bills considered almost doubled and so did the enactments (Table 6.8).

Table 6.9 Immigration-related bills introduced and enacted by state, 2000-2008 (March 2008)				
State	Introduced		Enacted	
	Total	Mean	Total	Mean
California	195	22	43	5
New York	317	36	22	2
Texas	153	17	36	4
Florida	152	17	17	2
Illinois	172	19	39	4
New Jersey	121	13	6	1
All other states	2,893	321	497	55
<i>Source: Lexis-Nexis State Capitols</i>				

In the second tier immigration-receiving states, Arizona, Colorado and Virginia experienced the highest growth in enacted legislation, while Massachusetts has been the least active (Table 6.10).

Table 6.10 Immigration-related bills introduced and enacted by state, 2000-2008 (second-tier states)				
State	Introduced		Enacted	
	Total	Mean	Total	Mean
Arizona	149	17	31	3
Massachusetts	147	16	5	1
Virginia	175	19	35	4
Washington	52	6	11	1
Georgia	62	7	13	1
Colorado	94	10	34	4
Nevada	31	3	12	1
North Carolina	65	7	13	1
<i>Source: Lexis-Nexis State Capitols</i>				

In terms of the substantive content of the legislation, the best source of detailed information comes from NCSL. The 1,562 bills that NCSL had identified by the end of 2007 covered the spectrum of policy areas, from employment and benefits, law enforcement, education to voting and legal services (National Conference of State Legislatures 2008). Table 6.11, below, shows the distribution of immigration-related proposals across subject area for

proposals and enacted legislation. It also shows the number of states that considered and enacted laws in the specific policy.

Table 6.11 State Immigrant-related Legislation Introduced & Enacted (2007)				
	Introduced Legislation		Enacted Legislation	
	Bills	States	Bills	States
Licenses/IDs	259	47	40	30
Employment	244	45	29	20
Law Enforcement	165	37	16	9
Resolutions	162	37	50	18
Public Benefits	153	40	33	19
Health	147	32	14	11
Education	131	34	22	17
Human Trafficking	83	29	18	13
Voting	53	23	0	0
Omnibus	29	8	1	1
Legal Services	20	12	3	3
Miscellaneous	116	34	14	12
Total	1562	50	240	46
<i>Source: NCSL, "2007 Enacted State Legislation Related to Immigrants and Immigration", January 31, 2008, p. 2.</i>				

As the graph shows, states have been most concerned with identification requirements, immigrant employment, health and welfare benefits and law enforcement issues while education is another area with significant activity. Many states also passed legislative resolutions urging Congress to act on a variety of immigration-related issues.

The section that follows discusses the immigration policy debate in Virginia, one of the new destination states that have experienced a high growth in undocumented and legal immigration in the past decade as well as a corresponding involvement in immigration lawmaking. The challenges that Virginia has to grapple with are similar to those experienced by other states and the solutions provided by the legislature have found resonance in other Southern states where restriction has been popular.

Virginia: A New Immigrant Destination with Old Immigration Rules

Scholars have classified Virginia as a “new destination” state (Massey, 2008). The foreign born population of Virginia grew by 84 percent between 1990 and 2000 but its undocumented population rose by 114 percent in the same period. According to the Migration Policy Institute, the foreign born population in the state grew an additional 34 percent between 2000 and 2005 while the number of undocumented immigrants increased from 103,000 in 2000 to an estimated 250,000-300,000 in 2005 a growth rate between 142 and 191 percent over five years (Pew Hispanic Center, 2006). Yet the state’s involvement in immigration policymaking dates as far back as the interwar era, if not earlier.

Virginia currently has 33 immigration-related statutes in effect with more being considered by the legislature every year. Between 1990 and 2007, the state had considered a total of 240 pieces of legislation relating to immigrants. In 2008, Democratic state legislators determine to push the state into the “blue” column in the Fall elections, introduced more than 100 immigration-related bills, most of them designed to exclude undocumented immigrants in various ways. The bills included measures to deny bail to undocumented aliens arrested on criminal charges as well as establish a special police task force to develop new solutions to the issue of enforcement of civil immigration law (Washington Times, 2008).⁵⁵ In the early part of the 20th century, Virginia followed the example of other states in restricting immigrant access to professional occupations. Noncitizens residing in the state could not work as accountants, architects, or pawnbrokers. Also in the tradition of early 20th century federal immigration statutes that excluded paupers and mentally ill (“morons” and “idiots”) from legal immigration

⁵⁵ *The Washington Times*. 2008. “Miller Supports Illegal Alien Impact Study; Poll Shows Most Residents Support Crackdown” (January 12, 2008)

to the United States, Virginia had enacted laws in 1950 requiring the state's Department of Mental Health to identify the immigration status and nationality of every person admitted to a state mental institution and report all aliens to federal immigration authorities (§37.2-827).

Already in the 1970s, undocumented immigration was an issue in Virginia even though the state was home to only 60,000 undocumented immigrants compared to California's one million. In 1977, Virginia required immigrants to provide proof of legal presence in the country in order to claim unemployment benefits (§60.2-617). The state also determined that immigrant farm-workers, regardless of their immigration status, were not eligible for unemployment compensation but employers were required to include these workers in their rosters for unemployment taxation purposes (§60.2-241).

In the 1990s, Virginia followed the trend and declared English the Commonwealth's official language (§1-511), and in the early 2000s the state made proof of legal residence a requirement for the issuance of driver's licenses or state identification cards (§46.2-328.1). Furthermore, the Department of Motor Vehicles was instructed to provide all information on noncitizen license applicants to the State Board of Elections to ensure that noncitizens are not registered to vote in state and local elections (§24.2-404; 24.2-410.1).

In 1977, Virginia passed employer sanctions legislation (§40.1-111). Almost a decade before IRCA, the state enacted a law which made it a crime for employers to "knowingly" hire undocumented workers punishable with one year in prison and a fine of up to \$1,000. The statute also required job applicants to provide documentation to prove their legal residence. Responding to public opinion polls signaling that the majority of Americans supported this type of initiative, Delegate Robinson (D) sponsored the bill touting it as the way to save 30,000 jobs for American citizens in the state (*The Washington Post*, 1977). However, even though the law

was presented as the solution to the state's undocumented immigration problem designed to "drive the illegal foreign workers out of the state's job market" (*The Washington Post*, 1977), it was never enforced in those early years (GAO, 1990).

Experience from four other states which had enacted similar legislation showed that enforcement was a challenge: not only were there jurisdictional issues and lack of clarity as to who was supposed to be enforcing an immigration-related statute, but proving that an employer "knowingly" hired undocumented immigrants was particularly difficult in the absence of federal standards. Furthermore, the INS opposed the enactment of state laws of this type arguing that state law enforcement had no training in immigration law and could not properly identify undocumented immigrants. In its first test, the Virginia law failed miserably. A Fairfax County judge dismissed charges against a local restaurant owner on the basis that the employer did not "knowingly" violate the law. The lawyers for the accused employer raised concerns of selective enforcement and discrimination noting that the INS had arrested several undocumented farm workers in the previous year, but the farmers who employed them were not prosecuted under the statute (*The Washington Post*, 1979).

As its foreign born population grew in recent years, the state has revisited issues of immigrant employment. In 2000, the state re-affirmed its exclusion of undocumented workers from unemployment benefits and prevented them from suing for any kind of compensation (§65.2-101, 65.2-502, 65.2-603). In January of 2006, at the height of the immigration debate in Congress with the Sennsenbrenner Bill on its way to the Senate for debate, Republicans and Democrats in the Virginia state legislature joined forces to introduce a number of new immigration initiatives, including a new employer penalties law that would fine employers with

\$10,000 per violation (Washington Times, 2006).⁵⁶ In addition to these exclusionary rules, immigrants were banned from state and local welfare and healthcare programs, while administrators overseeing public housing were given the authority to subpoena birth certificates and other identification documents from residents in order to ensure legal residency in the country (§15.2-2286). Echoing similar maneuvers dating back to the Chinese Exclusion era, the state also increased penalties to landlords for overcrowding in residential rental properties (§15.2-2286).

The debate over benefits for immigrants in Virginia emerged in the early 1990s when the issue became prominent in the “big six” immigrant-receiving states. In 1994 Governor George Allen (R) endorsed legislation that would prohibit undocumented immigrant children to attend public schools after the age of eighteen. The Governor’s office declared that “the Governor feels that taxpayers should not be obligated to provide educational opportunities above and beyond what is required for people who are not legal residents” (*The Washington Post*, 1994)⁵⁷. In larger cities such as Arlington and Fairfax the main concern was the use of Medicaid funding for the healthcare needs of undocumented immigrants: state authorities estimated that the cost of providing services to undocumented immigrants exceeded \$20 million in 1993, not including the cost for AFDC and other income support programs.

The issue of immigrant usage of social services became once again an issue in the early years of the new century even though Virginia had already excluded immigrants (including legal permanent residents) from its welfare rolls as a result of the implementation of the Welfare Reform Act of 1996. In 2005, Virginia’s Democratic Governor Mark Warner signed a law that made proof of residence a requirement for applicants for state and local welfare and healthcare

⁵⁶ *The Washington Times*. 2006. “Bills Targeting Illegals Get Bipartisan Boost” (January 20, 2006), p. B5

⁵⁷ *The Washington Post*. 1994. “Latinos Attack Va. Bill to Require Reporting of Illegal Immigrants.” (February 27, 1994), p. B1

programs including Medicaid (§63.2-503.1; 32.1-325.03). In spite of strong opposition from the American Civil Liberties Union (ACLU), the bill cleared the House with an 86-9 vote and it was unanimously passed in the Senate. The law, also sponsored by Delegate Aldo (R), drew opposition from several local officials in Arlington and Fairfax County as an unwarranted intervention in local affairs while community activists noted that program administrators do not have the resources to investigate applicants' immigration status. Arlington County Board member J. Walter Tejada (D) accused the state of targeting "the neediest [people]" and noted that local officials are the ones who "know best our community." Fairfax County Board of Supervisors Chairman Gerald Connolly echoed those same sentiments when he stated that the board opposed the law which imposed restrictions on how localities run local programs "created to address local needs and are supported with local-only funds" (Washington Times, 2005).

Law Enforcement and Corrections Initiatives in Virginia: Pitting the State against Localities

An enthusiastic “law and order” state, Virginia has required police and department of corrections officers to identify immigrant offenders in state and local jails since the 1950s (§37.2-827). All immigrant offenders must be reported to the state’s Central Criminal Records Exchange. State court clerks have also been required to provide court records about cases involving aliens to federal immigration authorities (§53.1-219). However, it was not until 1985 that the state enacted legislation providing for the transfer of immigrant offenders to federal custody (§51.1-220.1). Similarly, statutes passed in the 1980s require probation and parole officers to ask their clients about their citizenship status. State police is charged with reviewing the reports from probation and parole officers and reporting to federal immigration authorities all cases of suspected undocumented entry (§19.2-294.2).

Although traditionally a state very protective of gun ownership rights, for more than 20 years, Virginia has drawn the line with immigrants. A 1993 statute prohibits all aliens with the exception of legal permanent residents from owning, possessing or transporting assault firearms. The law also prevents dealers from selling such weapons to noncitizens (§18.2-308.2:1; §18.2-308.2:2). Two years later, the state banned the ownership and use of concealed weapons for aliens while in 2000, gun dealers were prohibited from hiring undocumented immigrants to sell firearms (§18.2-308; §18.2-308.2:3). In 2004, the state barred undocumented immigrants from owning, possessing, or transporting any firearm and in 2006 Virginia denied permission to any undocumented immigrant to apply for and receive a gun permit (§18.2-308.2:1).

In 2004, the state opened the door to collaboration with federal authorities in enforcement of civil immigration law, but efforts to introduce programs of state-federal collaboration in immigration enforcement date at least to the mid-1990s. In 1994, Republican lawmakers in the Virginia Senate introduced legislation designed to force state agencies to report undocumented immigrants to federal authorities (*The Washington Post*, 1994)⁵⁸. In the spirit of the immigration debate of the early 1990s which centered on the cost of providing social services to immigrants, the bill's sponsor, Senator Barry (R), told *The Washington Post* that the main driver behind the proposal was to assess the cost of undocumented immigration to the state and seek reimbursement from the federal government for those expenditures. According to Senator Barry, "we have to make an appeal to the federal government to either put an end to this tremendous influx of pregnant women and undocumented workers and children that are pouring into the commonwealth or to pay for it" (*The Washington Post*, 1994).⁵⁹ The bill eventually died in committee after immigrant and Latino advocacy groups waged an extensive battle against it in local media outlets.

Although the state itself did not sign on to the controversial 287(g) program run by the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE),⁶⁰ Virginia did pass legislation enabling police officers to arrest without a warrant undocumented immigrants committing a crime (§19.2-81.6). The state police leaders had objected to participation in 287(g) and declared that they would not enforce civil immigration law unless they were legislatively ordered to do so. The legislature obliged and did not limit its

⁵⁸ *The Washington Post*. 1994. "Illegal Immigrants Pose Issues of Cost, Conscience for Area" (April 25, 1994), p. A1

⁵⁹ *The Washington Post*. 1994. "Latinos Attack Va. Bill to Require Reporting of Illegal Immigrants." (February 27, 1994), p. B1

⁶⁰ Section 287(g) of the Immigration and Nationality Act (INA) enables states to enter into voluntary agreements of cooperation with the federal government for the purpose of bestowing on state and local police the authority to enforce national immigration law.

requirements to state police (*Washington Times*, 2006).⁶¹ Officers of the state juvenile justice system were also required to report to ICE any juvenile offender suspected of undocumented presence (§16.1-309.1 enacted in 2006). The state police planned to train troopers of its twenty four drug task forces across the state along with other key officers to enforce civil immigration law. However, the scope of the new law was too narrow for its original sponsor Delegate Albo (R) who expected to have all police officers in the state trained to enforce federal immigration law. Delegate Albo's ambition for his bill (H.B. 570) was "to get every single person who is here illegally" but he was forced to moderate his expectations on the advice of the state's Attorney General (Associated Press, 2004). The Virginia Justice Center, an advocacy group, was one of the first to condemn the bill. Its representative told *The Washington Post* that "the amount of damage that the passage of this law has already caused between the police and immigrant communities far outweighs any potential benefit," a sentiment echoed by immigrant activists and police officials across the country (*The Washington Post*, 2004b).

In an effort to ensure that the state receive the maximum possible compensation from the State Criminal Alien Assistance Program (SCAAP) instituted in 1994 by the Clinton Administration, a new 2006 law required the Director of the Department of Juvenile Justice to coordinate with the state's Department of Corrections in submitting requests for compensation to the federal government (§66.3.2). The state's Corrections Board was also required to maintain records about the nationality and citizenship status of all inmates and to provide incentives for local facilities to participate fully in SCAAP.

The issue of enforcement of civil immigration law drove a wedge across the state, pitting urban and suburban jurisdictions against each other. Peace, safety and cultural

⁶¹ *The Washington Times*. 2006. "Bills Targeting Illegals Get Bipartisan Boost" (January 20, 2006), p. B5

homogeneity (however defined) took a primary role in suburbia, while cities became more concerned with the practicalities of getting cooperation from immigrant communities in anti-crime efforts. Several local governments and police departments were enthusiastic about the opportunity to collaborate with the federal authorities and find ways to drive undocumented immigrants out of their jurisdictions. Between 2007 and 2008, nine local law enforcement agencies received training through the 287(g) program: the City of Manassas Police Department, the Herndon Police Department, the Loudoun County Sheriff's Office, the Manassas Park Police Department, the Prince William County Police Department, the Prince William County Sheriff's Office, the Prince William-Manassas Adult Detention Center, the Rockingham County Sheriff's Office and the Shenandoah County Sheriff's Office.

Herndon officials strongly promoted the drive to exclude undocumented workers from the city limits. The 2004 state law which gave local law enforcement permission to detain suspected undocumented immigrants up to 72 hours for the purpose of verifying their immigration status was viewed by many as a welcome development. According to David Kirby, a candidate for town council in 2004, undocumented immigration is to blame for overcrowding and a host of other problems: "It is causing the home values to depreciate, it is upsetting the people of Herndon and it is mostly caused by illegal aliens" (*The Washington Post*, 2004a). The issue that gave rise to the debate over undocumented immigration in Herndon was a familiar one from the 1990s: the presence of a growing number of day laborers. Some community activists sought to provide a center for the laborers, but many local residents opposed the idea citing safety and other concerns.

On the other hand, the city of Arlington, neighboring Washington, DC publicly declared that it did not plan to enforce the new state immigration law but rather continue with its policy

of “don’t ask, don’t tell.” On its front page, the conservative *Washington Times* castigated the city for its decision, noting that Arlington “is the only jurisdiction in the Northern Virginia suburbs that does not check the immigration status of residents receiving tax-funded county rent subsidies - a breach that an ICE official said opens the door to terrorists” (*Washington Times*, 2004a). However, the spokesman for the local police department noted that since the law does not mandate local law enforcement to arrest individuals on immigration charges, Arlington is not required to make such arrests or to enforce immigration investigations. According to the city’s policy, “the enforcement of the nation’s immigration laws is a primary responsibility of the federal government. Accordingly, the Arlington County Police Department shall not undertake immigration-related investigations and shall not routinely inquire into the immigration status of persons encountered during police operations.” An Arlington County Supervisor who held forums in the Latino community to educate the public about the new law, commented on the unfairness of the law stating that “this is the kind of law that makes a vulnerable community even more vulnerable... Immigrant communities are already reluctant to contact the police if they are victims of a crime or a witness to a crime. Now it will make the communities even more hesitant” (Associated Press, 2004b). Similarly, representatives from the Catholic Legal Immigration Network condemned the law as giving the police a free pass for racial profiling.

Conclusion

The growth of the immigrant population, both legal and undocumented, outside the boundaries of the “big six” expanded the immigration debate in the new century to the entire country. States that had not experienced immigrant inflows since before the Civil War now had to contend with the presence of large (and growing) pockets of mostly Latino immigrants. Since the battles over undocumented immigration of the early 1990s, the “big six” states have quieted down and mostly pursued a new, more integrationist strategy on immigration. As a result, much of the restrictionist movement has moved to the “new destination” states where the debate carries echoes of the past.

Virginia, one of the new immigrant destination states, has been at the forefront of the restrictionist movement in recent years with both Democratic and Republican legislators promoting crackdowns on undocumented immigrants, penalties to sanctuary cities, and steep fines for employers. Virginia has been an innovator in restriction: it was the first state in the country that sought to completely ban undocumented immigrant children from state colleges and universities, and has vociferously opposed the DREAM Act. The position of state legislators has been that “the federal government has left us holding the bag. If the federal government won’t enforce federal laws, we’ll enforce Virginia laws [and crackdown on undocumented immigrants]” (*Richmond Times Dispatch*, 2005).⁶² In recent years, a number of new restrictionist citizen groups have sprung up in the state focusing on lobbying the legislature to enact even more restrictive immigration laws.⁶³

⁶² *Richmond Times Dispatch*. 2005. “GOP Delegates Target Illegal Immigrants” (November 2, 2005), p. B1

Chapter 7: Who Pays for Immigrants? State-Federal Conflict over the Costs of Immigration in the 1990s

For states, the continual rise in undocumented immigration meant various problems. Immigrants found to be undocumented in the context of an unrelated arrest had to be processed and incarcerated until the federal immigration courts ordered their deportation and INS arranged for the removal. Often the issue was one of cost: Congress had not appropriated sufficient funding for the INS and the U.S. Department of Justice to perform their deportation functions. Immigration courts were (and continue to be) chronically overburdened with judges expected to conduct hearings and make decisions on dozens of cases each day (Holmes and Keith, 2009). In the view of the states, benefits from immigration such as consumption-related taxation should accrue to local coffers, but when it came to costs, immigrants were the charges of the federal government and it was Congress alone that had to find a way to pay for the required services and benefits or enforce restrictions on immigrant admissions.⁶⁴

Congress had created the Criminal Alien Apprehension Program (CAAP) in 1986 which according to Senator Sam Nunn (D) was designed to “identify, locate, and initiate removal proceedings against criminal aliens, ensure their expeditious removal and act as an effective deterrent against aliens seeking entry into the U.S. to engage in criminal activity” (U.S. Senate

⁶⁴ In the 1990s, undocumented immigrants were not eligible for various federally-sponsored benefits programs such as AFDC, SSI, food stamps, Medicaid, or Medicare. All legal immigrants were eligible for federal benefits up until 1996. Undocumented immigrants could receive emergency healthcare in hospital emergency rooms and hospital officials were prohibited from collecting information on patients’ immigration status. Labor services for pregnant undocumented women have traditionally been considered part of emergency care, but prenatal care has not and thus it is not covered under the emergency care federal regulation. Some states have offered prenatal care benefits to undocumented pregnant women using state and local funding exclusively. Furthermore, in the domain of education, undocumented immigrant children are allowed to attend public schools for free but did not have access to tuition-relief programs for college.

Committee on Government Affairs, 1993). In some cases, in an effort to expedite the process, local judges and police officials allowed INS agents and federal law enforcement agents to rake through city and county prisons with large immigrant populations in search of undocumented immigrants to be deported. However, these ad hoc measures resolved neither the overcrowding of jails with mostly non-violent immigrant offenders, nor the skyrocketing costs of housing deportable immigrants.

According to the INS, in 1990 there were more than 120,000 undocumented aliens in federal state and local prisons. Only 10,000 of those were deported in a given year; the rest had to remain in American custody until their deportation was arranged. In 1992, there were 11,000 immigrants convicted of a serious felony and awaiting deportation (U.S. Senate Committee of Government Affairs, 1994). The cost of incarceration between arrest and deportation fell on states and localities to absorb and the process could take months if not years. For San Diego County alone, one of the busiest immigrant entry points in the country, the cost of incarcerating undocumented immigrants topped \$15 million in the late 1980s (San Diego Union-Tribune, 1991a). Across the United States, the cost of providing various types of services to incarcerated undocumented immigrants run in the billions.

For smaller jurisdictions especially, the cost could be so prohibitive that localities had to choose between paying for incarceration, letting non-violent undocumented immigrants free, or letting citizen offenders charged with more serious crimes free. Already in 1990, Morris County, Kansas officials announced that instead of initiating deportation proceedings against arrested undocumented immigrants accused of minor infractions they would let them go because the cost of prosecution and incarceration far exceeded what the County budget could afford (*The New York Times*, 1990b). New York state officials faced the same dilemma: as the state's

Commissioner of Corrections Thomas Coughlin noted, many undocumented immigrants were “paroled into the streets” once their sentence was completed due to INS inaction and chronic prison overcrowding. By the Department’s calculations, about 35 percent of undocumented immigrants were let go once their prison sentences were completed (*The New York Times*, 1992a). On the other hand, Multnomah County, Oregon officials complained that because of federal requirements, they were forced to hold in local jails non-violent undocumented aliens while violent offenders who were U.S. citizens went free because of overcrowding. Undocumented workers were held in local facilities for 5-7 months after the end of their sentence awaiting for the INS to commence deportation proceedings (The Oregonian, 1990c). This was a common complaint in the 1990s: states and localities would opt for freeing non-violent offenders rather than hold them in jail until deportation proceedings took place. Even the INS freed those non-convicted undocumented immigrants who refused to voluntarily return to their homeland (U.S. Senate Committee on Government Affairs, 1993:8).

The issue became extremely polarizing in border towns and even more so in the absence of any reliable statistics as to the magnitude of the problem. Since local law enforcement could only investigate the immigration status of prisoners only after conviction, local communities were often unaware as to the number of undocumented immigrants housed in local jails at any given time. In 1990, the San Diego District Attorney conducted an unofficial and unscientific survey of his own, concluding that 41 percent of inmates in the county prison were undocumented. The number was picked up by a local paper and then local radio stations popularized it as an official statistic (San Diego Union-Tribune, 1991a). The response was overwhelming: residents called into radio shows concerned about the problem of undocumented felons and local officials wrote alarming letters to the editor. The Mayor of Encinitas, a school teacher, used the information in her letter to the editor of the local paper

which argued that “the most challenging problem faced today by San Diego County and Southern California is that of immigration, legal and illegal,” calling for severe restrictions on immigration and penalties for undocumented (San Diego Union-Tribune, 1990a).

The brewing discontent at the local and state level did not go unnoticed by federal lawmakers. The economy in California and other major states was weakening, the country was gearing for war and a national election was just around the corner. What to do with immigrants who were convicted felons became a bipartisan concern in Washington. In an effort to stem the state and local reaction expected to be negative and strong, national lawmakers proposed a number of new bills in Congress. An early response from the federal government came from New York Representative Chuck Schumer (D) who introduced H.R. 4440 in 1991 to direct the U.S. Department of Defense to turn over unused military installations to the INS to be used for the housing of undocumented immigrants undergoing deportation. Not to be outdone, New York Senator Al D’Amato (R) grabbed headlines by introducing S.2340 which in addition to transferring military facilities to the INS, sought to reimburse states for the cost of incarcerating undocumented immigrants to the tune of \$100 million. As Representative Schumer noted to *The New York Times*, “it’s a classic 1990’s problem where Federal Government cuts back, even in something that clearly is in its domain, and says to the states and localities, ‘You take care of it’” (*The New York Times*, 1992a). In a subsequent interview, Representative Schumer reiterated his outrage at the slow response from Washington,

[T]he Federal Government in the last decade has been willing to pawn off any problem on the states and blame them for it...They’re aware of this -- they just say they don’t have enough resources or ability to do what has to be done about illegal criminal aliens. But it makes no sense for the Federal Government to just put its head in the sand and say, ‘This is not our problem’ (*The New York Times*, 1992c).

The Department of Defense citing national security reasons quashed the proposals and the bills died in committee.

National lawmakers' initial response which went nowhere was too little, too late for states. A month before the Schumer proposal, New York's Democratic Governor Mario Cuomo had threatened to sue the federal government for failure to comply with a 1990 federal statute that required federal authorities to "take into custody any illegal alien who has been convicted of an aggravated felony and who has served enough time in state prison to be eligible for parole or work release" (*The New York Times*, 1992b). With Cuomo's approval, the state's Department of Corrections Commissioner and the Chairman of the Board of Parole wrote to the U.S. Attorney General and to the regional director of the INS to demand that the federal government take custody of all alien convicts. The New York officials estimated that the state's prisons housed at least 1,452 alien inmates and the cost of housing undocumented alien prisoners was \$38 million a year. Other states with large numbers of undocumented immigrant inmates closely followed the dispute between New York and the federal government. If New York estimated that 2.5 percent of its prison population was made up of undocumented immigrants, in California the number stood at 11 percent and in Texas at 4 percent.

New York was no stranger to legal action of this type: in the 1980s the state had itself been sued and forced by state and federal courts to take responsibility for *state prisoners* housed in *county* jails. In the state's view this was a similar issue of federalism: as New York State had assumed its responsibilities in the wake of legal action, so too would the federal government be forced to do the same. From a constitutional stand point, New York's gambit was tenuous; however in the court of public opinion it was a powerful maneuver that forced the issue on the top of a very crowded federal agenda. In the middle of an election year, New York was counting on public opinion to get Washington to act: a public opinion poll commissioned by FAIR and conducted by Roper released in May 1992 showed that 43 percent of respondents believed that their states were overburdened by the costs of immigration while 55 percent

supported a moratorium on all immigration. Indicative of things to come, already a few months before the infamous Los Angeles riots, 78 percent of Californians in the same poll felt that immigration was a burden on their state and 80 percent of the state's residents supported measures to limit the population (Miles, 1992).

The immigration issue had been extensively covered in newspapers and magazines across the country after riots in Los Angeles and Washington Heights, New York left the country reeling and raised more questions about racial tensions in America. Although neither President Bush nor his opponent Arkansas Governor Bill Clinton mentioned immigration in their speeches, across the land the salience of the issue was clear. The Republican Party plank advocated a "barrier" between the U.S. and Mexico while immigration advocacy organizations conducted studies and wrote reports about the resurgence of nativism in the country. Immigration as a concern was there to stay.

The First Round of Legal Confrontation: New York Sues the Bush Administration

On April 28, 1992 six months before the national election, the New York State Attorney General made headlines when he filed a lawsuit against the United States in the Federal District Court in Albany. The petition demanded that the federal government take custody of all 3,379 undocumented and other immigrants that were housed in state prisons in accordance with a 1990 federal law. The state charged that Washington's behavior left New York "with no choice but either to release the convicts back into the streets once they have served their terms, where they are often arrested for new crimes, or to continue housing them at a cost to the state of about \$100 million a year" (*The New York Times*, 1992c). New York's Commissioner of Corrections defended the state's action by explaining that New York's letter to the INS and to the Justice Department went unanswered and given the clear violation of federal law this was the only proper response available to the state.

Unlike California officials who had been known for radical nativist rhetoric and restrictive legislative efforts, or even more conservative neighbors such as New Jersey which excluded undocumented immigrants from public assistance and considered legislation to prevent them from obtaining drivers' licenses, New York was careful not to frame its action as an attack on immigrants. In the Big Apple, especially, within its multicultural mosaic population, immigrants were a force to reckon with. As *The New York Times* noted, in New York "[questioning] the value of immigrants in society [brings] usually an instant uproar." The paper even cited examples: the New York State President of the NAACP was forced to apologize when he commented that African-Americans in the state had been losing jobs to immigrants while Mayor David Dinkins publicly castigated a City Councilman who wrote to the city's Office of

Immigrant Affairs suggesting that the city authorities ask the INS to identify and deport undocumented immigrants (*The New York Times*, 1992d).

New York chose the right time for its action: a volatile election year, with President Bush down in the polls and two right-wing candidates, Pat Buchanan and David Duke, zeroing in on immigration and touting that the arrival of so many non-Europeans would “dilute” the country’s culture. Buchanan was not shy about his nativist views on immigration both before and after the 1992 election. In a *New York Post* column in 1990, Buchanan exclaimed: “who speaks for the Euro-Americans, who founded the U.S.A.? ...Is it not time to take America back?” (Anti-Defamation League, 1991); then, on a TV interview with David Brinkley the following year, Buchanan posed the following question: “I think God made all people good. But if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, which group would be easier to assimilate and would cause less problems for the people of Virginia?”⁶⁵

Seeing the writing on the wall, Florida Republicans in Congress introduced their own bill seeking to do what New York’s delegation failed to achieve. The goal was to provide a coordinated response to the crisis by putting the federal government at the helm and providing a centralized, uniform solution. The “Criminal Alien Deportation and Exclusion” amendment to the INA was introduced by Representative Lewis (R) of Palm Beach with strong bipartisan support. The aim of the bill was to expedite deportation proceedings by instructing the INS to deport immigrants upon conviction rather than after completion of their sentence. If immigrants were to be deported upon conviction, Representative Lewis reasoned, states and the federal government would not need to spend millions in incarceration costs (State Newswire, 1992). Clearly a stop-gap measure, the Lewis proposal provoked a snide response:

⁶⁵ More recently, on an interview on National Public Radio Buchanan stated, “unless we do something and make sure the things that unite us are elevated--like language and history and all the rest of it--we’re gonna lose our country, my friend” (NPR, 2000).

since the borders were porous and the federal government lacked the will to control them, how would these people be prevented from re-entering the United States once deported?

It took less than a year for the Federal District Court to reach a decision in New York's lawsuit. Barely a month into President Clinton's administration, the court declared that the federal government was under no obligation to take into custody alien prisoners housed in New York state facilities leaving New York with an annual bill of \$65 million. On the West coast, California's budget had projected \$250 million for the cost of incarcerating alien prisoners, a hefty price when the state was in the middle of a major economic recession. According to the Court's decision, differences in sentencing guidelines between states and the federal government meant that there was no standard understanding of what constituted "minimum sentencing;" therefore, the federal government was not required to assume responsibility for alien prisoners even if they had completed their sentence in the state. State officials were outraged by the decision, viewing it as unfair and inappropriate. "Why should the state of New York spend \$26,000 or \$27,000 a year to house an illegal alien?" asked the state's Commissioner of Corrections Thomas Coughlin. "It's a Federal crime to enter the country illegally, and the Federal Government has the responsibility to take that person and send him back to where he came from" (*The New York Times*, 1993c). The INS tried to fight back the charges raised by New York. The Service spokesman noted that the INS's responsibility was to deport criminals but it was not their job to prosecute, sentence or punish them for their criminal offense. But New York would have none of it. Commissioner Coughlin responded by accusing the federal authorities of "trying to slough off [their] own duties" and hinting at political obstacles, not administrative ones. "It's a resource issue from [the INS's] perspective. If they had the money, they would do the right thing, but they don't have the money" (*The New York Times*, 1993d).

California Takes the Helm: Intergovernmental Bargaining

Within a month of the conclusion of the trial in Albany, California had taken on the crusade to get federal compensation for the cost of incarcerating immigrant felons. But California did not intend to leave it at the incarceration issue: all immigration-related costs should be a federal responsibility, the state argued. Already in 1992 the state had passed legislation requiring a social security number for the issuance of driver's licenses. To immigration advocates, that was a clear sign that California was gearing up for a major effort to exclude immigrants and that those efforts were closely watched by other states eager to follow the state's example. According to Emily Goldfarb, Director of the California Coalition for Immigrant and Refugee Rights, "California passed a law last year, requiring a Social Security card in order to renew a driver's license, a law clearly intended to deny immigrants the right to drive a car. Now there's a legislative push in Illinois and New Jersey to pass similar laws" (Oregonian, 1993). California was ready to lead the anti-immigration charge.

The 1992 election brought a Democrat to the White House but a Republican had been in charge in Sacramento for two years. Clinton's presidency got marred by the immigration debate from the start: a number of top-level appointees to his cabinet were found to have employed undocumented immigrants as nannies or home cleaners. The "nanny-gate" scandal destroyed the nominations of Judges Zoe Baird and Kimba Wood for the position of Attorney General and created a long-running scandal in the press from which the Administration could hardly escape. Governor Pete Wilson was no stranger to controversy especially that surrounding immigration: not only was Wilson implicated in his own version of "nanny-gate" but as he moved to higher office his positions on immigration hardened. In the 1992 election, Wilson had supported a referendum that would cut welfare benefits drastically and exclude immigrants from public

assistance programs. In public speeches, Wilson had argued that in California there were tax-producers and tax-recipients and immigrants fell into the second group (Oregonian, 1993). Governor Wilson was also a big fan of the “immigration magnet” theory: the Governor charged that immigrants were “drawn by the giant magnet of federal incentives” coming to the U.S. not for jobs but to receive generous welfare cash benefits (Suarez-Orozco, 2001:45).

Wilson’s first order of business upon election was what to do with undocumented immigrants in California. Within weeks of his election, the Governor contacted California Senator Diane Feinstein to ask her to help the state recover from the federal government \$1.4 billion in spending on services and benefits for undocumented immigrants. Leon Panetta, a former California Congressman and now a key player in the Clinton Administration was also recruited to help. Noting that while Governor, Bill Clinton was a strong advocate against unfunded mandates, Wilson expressed optimism that the federal government would be responsive to California’s call for relief. Wilson even wrote a letter to President Clinton introducing three major proposals: “a constitutional amendment denying citizenship to children of illegal immigrants; a request that the federal government regain control of the nation’s borders; and relief from the federal mandates that reward illegal immigrants with health, education, and other benefits” (Pete Wilson Official Website, n.d.).

Wilson’s reputation as a fiscal conservative hang on this initiative: the Governor had proposed to close the gap in the state’s budget deficit by extracting these immigration-related funds from Washington. California Assembly Speaker Willie Brown (D) also welcomed the governor’s plans to get federal reimbursement for services to immigrants noting that “the thrust of my intentions and efforts in 1993 will be to try to position California so that Pete Wilson’s request for federal assistance becomes a reality” (San Francisco Chronicle, 1993). Dan

Stein of the Federation for American Immigration Reform (FAIR) was also fully supporting Wilson's plans and so was the state's legislature. Between 1993 and 1994 the legislature considered multiple resolutions related to immigration. One 1993 resolution considered by the Assembly pleaded for relief from federal "unfunded mandates" resulting from undocumented immigration. According to ACR 121, "these federal mandates cost the State of California as much as several billions of dollars every year... the economy of the State of California and its taxpayers are dramatically affected by these unfunded mandates... The state demanded that "the federal government provide immediate funding for the corrections mandates, of which the costs are more easily verified." California also capitalized on its emergent leadership position on the immigration issue to make the case for others: the resolution noted that "these unfunded federal mandates also place a severe strain on the budgets of several other states that have called upon the federal government to alleviate this fiscal burden" and even issued permission to Governor Wilson to sue the federal government for relief. AJR 8, enacted in February 1993, "memorialize[d] the President and Congress of the United States to assume responsibility for \$1.5 billion of the cost impact of its immigration and refugee policy on California's taxpayers and treasury."

On the issue of federal reimbursement for the incarceration of immigrant offenders, California took the baton from New York within weeks of the conclusion of the trial there. In March 1993, the California Joint Legislative Committee on Prison Operations and Construction issued a report documenting that 11 percent of the state's prison population was made up of immigrants and that the immigrant population in state and local prisons was increasing by 16 percent annually (Riverside Press Enterprise, 1993). According to the report, California's law enforcement spent between \$1 billion and \$1.5 billion per year to arrest, prosecute and process alien offenders. The incarceration costs alone run at about \$500 million a year (San Diego Union

Tribune, 1993). The report even recommended that California lead a coalition of 10 to 20 states with similar problems to force the federal government to take responsibility for housing immigrants convicted of serious crimes. The Committee Chairman, State Senator Presley (D) noted that the financial cost that the state had to shoulder in prosecuting immigrants was disproportionate to the type of crime these individuals committed. But the focus, according to the Senator should be to help the state's citizen population: "the resources we currently expend on criminal aliens we desperately need to concentrate upon home-grown justice issues."

The proposals kept coming. Another Democratic state lawmaker, Assemblyman Polanco (D) declared that as Chairman of the budget subcommittee in the state legislature he would eliminate all the funding earmarked for housing immigrant offenders because that funding should come from the federal government not the state budget. As a practical move this proposal was lacking since it would leave a gaping hole in the budget for corrections without any guarantees that the federal government would come through with funding, but as a public relations initiative it was on target. Polanco also urged the federal government to "aggressively enforce" a treaty with Mexico which specified that undocumented Mexican offenders could serve their sentences in Mexican facilities (United Press International, 1993). Kathleen Brown, California's State Treasurer and Democratic gubernatorial hopeful was equally enthusiastic about immigration control: she supported state initiatives to extract funding from the federal government for the housing of criminal immigrants. In Spring 1993, Brown had a lead of 20 points in the polls against Wilson and she was not about to let him make immigration his signature issue. Brown even sent a letter to President Clinton outlining a plan under which convicted alien felons would be deported to their home countries to serve their sentence there. According to the plan, Brown wrote, "every time we sign a treaty with another country, the treaty (should) include prisoner transfer provisions... 'Under these provisions, the country in

which the crimes were committed could demand that the convicts' country of origin incarcerate the prisoners for the terms to which they were sentenced..." With the negotiations for NAFTA taking place during this period, Brown sought to link trade and immigration by arguing that "foreign felons in U.S. prisons are exacerbating our budget and law enforcement problems...We will never get countries to take back their prisoners unless we have some leverage. NAFTA gives us that opportunity" (San Francisco Chronicle, 1993c).

Republican state legislators jumped on the undocumented immigrant wagon too: Assemblyman Conroy (R) introduced a bill to study the idea of building a prison in Mexico to house undocumented Mexican immigrants arrested in the United States because it would be cheaper to run a prison in Mexico where labor costs were much lower (Riverside Press Enterprise, 1993). Other proposals in the state legislature sought to make undocumented entry a misdemeanor under state law and undocumented re-entry a felony. Bills also sought to exclude undocumented immigrants from public education, housing and benefits, including AFDC, and require state prison officials to notify federal immigration authorities upon the arrest of undocumented immigrants. In September of 1994, two months before the midterm elections, the legislature passed and Wilson signed AB 2979, a bill requiring "every court of this state to cooperate with the United States Immigration and Naturalization Service (INS) to identify and place a deportation hold on any defendant convicted of a felony who is determined to be an undocumented alien subject to deportation."

California's push for anti-immigrant legislation was enthusiastically embraced by both parties. Local Republicans from Orange County introduced seven anti-immigrant bills and two resolutions in the state's legislature, while Democrats from the California Congressional delegation countered with five such bills in Congress. West Coast papers noticed the flurry of activity and commented on it. "As California's recession deepens, legislators are sponsoring a

rash of anti-immigrant bills reminiscent of the state's exclusionist policies of the past. This time the aim isn't just to keep newcomers out, but also to keep those already here in their place," concluded *The Oregonian* (Oregonian, 1993). Senator Feinstein (D) proposed a new fee to be applied on all border-crossers in an effort to come up with more fund for immigration-related initiatives. In a letter to the *San Diego Union-Tribune*, Senator Feinstein argued that "If we are serious about controlling illegal immigration, we must enforce the laws at the borders -- and that requires additional resources. Therefore, to adequately fund border enforcement, I have suggested a \$1 border crossing fee at all U.S. land borders and seaports." The Senator also praised Representative Hunter's (R) proposal to appropriate funding for 600 more Border Patrol agents (San Diego Union-Tribune, 1993b). FAIR's Dan Stein was enthusiastic about Feinstein's ideas calling the initiative "a major first step" and noting that Feinstein "needs a lot of positive reinforcement" (San Francisco Chronicle, 1993b). Latino and immigrant advocacy groups, with LULAC on the forefront, condemned proposals of this type but had no power to stop them from being introduced.

The calls for action issued in California came through loud and clear in Washington. In the summer of 1993, Congress conducted hearings to determine the size of the problem of criminal immigrants and how best to resolve it. Senator Bill Roth (R) admitted that "in directing [the] investigation, I became aware that we had a growing problem with criminal aliens. However, I did not imagine the problems were as bad as we found them to be." Senator Roth did not limit the scope of his analysis to the federal government but noted that "the roots of the problem are widespread with the need for change at all levels," identifying problems with federal funding, bureaucratic inertia and mismanagement but also local government lack of cooperation with federal authorities (U.S. Senate Committee on Government Affairs, 1994). Among the issues: the INS practice of providing undocumented immigrants with temporary

work authorizations and releasing them into the country while they awaited for their deportation hearing but also local “sanctuary” practices which discouraged the cooperation between federal immigration authorities and local police departments. With the hearings in progress, the General Accounting Office weighed in on the debate: it estimated that the cost of incarcerating criminal immigrants would reach \$1.4 billion in fiscal 1993-1994 when the INS had estimated a budget of about \$1 billion. Where would the rest come from became the big question in the already tense state-federal relations.

Feinstein’s plan and other Congressional recommendations were embraced by President Clinton. The White House was on board with the idea of major change in immigration control policy after having received letters from the Governors of New York, California, Illinois, Texas and Florida urging him to “restore a partnership with the states” on the immigration issue and find a solution to the unfunded mandates (*The New York Times*, 1993d). The Governors appeared open to the idea of a liberal immigration policy, just not on their dime. “If the federal government wishes to sustain a humanitarian foreign policy which fosters immigration and refugee admissions, then it must allocate the financial resources required to support this population once it has arrived,” they emphasized in their letter to Clinton. In July 1993, the White House leaked to the press ambitious plans to overhaul the country’s immigration control system so as to stem undocumented immigration and prevent terrorist attacks such as the World Trade Center bombing which had taken place only a few months earlier in February. The new proposal would add 600 more Border Patrol agents, encourage closer cooperation across immigration enforcement agencies and introduce “expedited exclusion” which would speed up asylum reviews. The plan would also include provisions to crack down on smuggling of drugs and people across the border as well as tough measures on cross-border gang activity (Associated Press, 1993).

Second Round of Legal Action: States Sue the Clinton Administration

For immigrant receiving states, the Clinton plan was nice to have, but it did not address the burning issue of how to pay for services to immigrants when the economy was deteriorating, unemployment increasing and state budget deficits growing. The pressing question of reimbursement for the cost of housing immigrant convicted felons was not answered in the plan, nor did the federal government seem to have any specific ideas on where that funding would come from. Neither were there any answers being offered on how states would recover the costs of other immigration-related unfunded mandates such as healthcare and education costs.

As Governor Wilson in California was contemplating his next move, Florida delivered a new surprise for Washington. In December 1993, Florida Governor Lawton Chiles (D) announced that he had ordered the state's Attorney General to plan a lawsuit against the federal government for the purpose of recovering the funds that the state had expended on immigrants since the 1980 Mariel boatlift. Governor Chiles was not a stranger to legal action any more than New York Governor Cuomo had been. In the 1980s, while serving in the U.S. Senate, Chiles had tried to initiate a similar action, but the courts determined that he had no standing to do so (*St. Petersburg Times*, 1993).

Chiles' office noted that since the INS and other federal agencies responsible for immigration policy were not stopping immigrants and refugees from arriving in the United States nor are they deporting them in an efficient manner, they should be responsible for the costs of their actions. As Chiles noted,

[I]f the United States government chooses to selectively enforce the law, it has a corresponding obligation to incur the costs associated with this selective enforcement... The

people of Florida should not be compelled to subsidize the entry of illegal aliens into the United States. Nor should they tolerate continued failure of the United States government to carry out its duty under the law (*The New York Times*, 1993d; State News Service, 1993).

The bottom line was that the state claimed to have spent \$739 million in 1992 on immigration-related services (no official, reliable statistics were available) and the figure for 1993 was estimated at \$884 million. And the numbers kept growing with every press release, report and communication raising doubts among INS officials. By March 1994, the state estimated that its immigrant-related expenditures in 1993 were upwards of \$2.5 billion (Associated Press, 1994). Florida demanded reimbursement. “We are committed to filing suit to try to force the federal government to take responsibility for its actions,” the spokesman announced (*St. Petersburg Times*, 1993).

State officials portrayed this legal action as a last ditch effort after having “exhausted the appropriate diplomatic channels of letters, visits and phone calls” and expressed confidence that the lawsuit would succeed. Not only was public opinion very sensitized to the issue of undocumented immigration, but judges were expected to become more sympathetic to the plight of the states, especially since the problem was economic not political.

The next year, 1994, did not start well for the White House that now had to develop strategies to deal with Florida’s lawsuit on top of managing a difficult midterm election. It did not begin well for Governor Wilson either: in spite of pleas and threats from state officials and the state’s delegation in Washington, the Administration did not include funding to compensate California for the costs of immigrant services, healthcare or welfare. The White House announced that it believed California’s cost estimates to be exaggerated; besides, the federal budget added 22 percent to the appropriations for the INS, 1,000 new Border Patrol officers and new asylum procedures, all of which would help with California’s demand to stem undocumented immigration. Federal recalcitrance meant that the Governor was faced with a

\$4.1 billion budget short-fall in an election year. Wilson was outraged, especially since he had structured the budget on the assumption that the federal government would honor California's demands: "how can the federal government expect the state to come up with the money for this failed federal policy?" he asked. "The budget fails to recognize the costs states are forced to incur because the federal government mandated we provide a variety of services to illegal immigrants" (San Francisco Chronicle, 1994a). The Governor's first response was that if he could not make up the budget shortfall any other way, he would be forced to cut healthcare and welfare benefits for legal immigrants. A few days later, Governor Wilson told CNN's "Moneyline" that he is thinking of following Florida's example and suing the federal government to recover immigration-related costs.

Congress was also consumed with the immigration debate but in a different way. The big issue was how to verify the real cost of immigration. Various restrictive immigration proposals introduced in 1994 cited a study by Donald Huddle of Rice University who conducted a series of field surveys for the INS and for a restrictionist group called Carrying Capacity Network. The study found that immigration displaced American labor and the cost of immigrant services in 1992 was \$45 billion above and beyond what the government received from them in tax revenues (Huddle, 1997). The Urban Institute pointed out the flaws in the Huddle study, while Julian Simon from the University of Maryland countered Huddles data with another study that showed that immigrants constituted a net benefit to the country (Simon, 1995). In a later evaluation, the GAO determined that the cost estimates "were based on assumptions whose reasonableness is unknown" since very little data are available on the actual use of public services and benefits by undocumented immigrants (Congressional Research Service, 2005b:3). The methodological details, however, were of little importance to members of Congress trying to promote restrictionist solutions to immigration. New plans kept being introduced: from

additional fencing on the U.S.-Mexico border to tamper-proof national ID cards, to revisions of the 14th Amendment to deny citizenship to American-born children of undocumented mothers. Representative Bob Stump of Arizona (R) walked on to the floor of the House with a bill that imposed legal immigration cuts of 75 percent and asked for endorsements. Within a few weeks, he had five dozen co-sponsors, a third of them Democrats. “Very few people turn me down after I educate them,” Stump noted triumphantly to the conservative *National Review* which criticized the GOP leadership for inaction on immigration (National Review, 1994). Political resistance from both sides of the aisle and economic reality made the vast majority of these proposals unrealistic and purely symbolic. Distracted by the up-coming election campaign, Congress was failing to come up with what states wanted.

In California, Assembly and Senate Democrats were not about to allow Governor Wilson to hijack the immigration issue at their expense. In the absence of federal consensus and with an election coming up, it was time for legislative action. Already in 1993, two prominent state Democrats Grace Napolitano and Richard Polanco had authored and published a report entitled “Making Immigration Policy Work in the United States” (Napolitano and Polanco, 1993). The paper outlined a number of Democratic proposals for how to resolve the immigration problem in the state. Realizing that immigration policy would be a hot button issue for the 1994 election, the Latino members of the Legislature were playing a complex game, trying to hold the line between restriction and immigrant incorporation causes. The issue of criminal aliens seemed safer to tackle on the restriction side. Based on the Napolitano and Polanco proposals, that same year, another Latino Caucus member, Senator Art Torres introduced SB 1258 which required the California Department of Corrections to identify undocumented immigrants convicted on any charges and begin transfer proceedings to federal authorities within 72 hours of conviction. The bill also memorialized “the United States

Congress to meet its obligations under the Immigration Reform and Control Act of 1986 and to reimburse California for the costs it has incurred in incarcerating undocumented immigrants convicted of felonies” (SB 1258, 1993).

Following SB1258, the tone of the debate turned decidedly more anti-immigrant while the cost issue took the back-seat to a more nativistic discourse. Governor Wilson fired back with a veto and an editorial in local newspapers explaining that the proposed legislation would only “invite disaster.” Wilson argued that the Torres bill would transfer undocumented immigrants convicted of a felony to the INS for deportation, but deportation would not prevent crime. Many of the deported convicts were likely to cross back into to United States and cause more crime. To illustrate his point, Wilson reminded Californians of the case of Ramon Salcido, an undocumented immigrant who murdered seven people in 1989. Salcido received the death penalty for his crimes. “Would you feel safe if Ramon Salcido were handed over to U.S. Immigration and Naturalization Service (INS) officials, then taken to the border and released?” Wilson asked in his letter. “In the experience of veteran Southern California peace officers, that would be tantamount to releasing Salcido (or any other dangerous convicted illegal immigrant) directly onto our streets.” The Governor went on to accuse Torres and 27 members of the state Senate that “in overriding my veto of Senate Bill 1258, ...whether from confusion or irresponsibility, voted to let loose Salcido and more than 17,000 other illegal immigrant criminals in state prison upon the unsuspecting communities of California... Without guarantee of incarceration in Mexico, deportation means that they are taken to the border and set free. Yes, free! And, of course, most of them promptly re-enter the United States illegally, returning to California and committing more crime.” (Wilson, 1994).

Governor Wilson had his own plan on how to resolve the immigration crisis in his state and the country and he was betting that this plan would revive his flailing gubernatorial

campaign and give him a firm base to launch a presidential bid in 1996 against Bill Clinton. The plan included a Constitutional amendment that would deny U.S. citizenship to children born to undocumented mothers, elimination of social services and benefits for all undocumented immigrants and a federal law that would allow the federal government to keep undocumented children out of public schools. Wilson would also like to see major changes in federal rules that required states to pay for emergency healthcare provided to undocumented immigrants as well as a tamper proof national identification card issued to citizens and legal residents which would be used to get driver's licenses, benefits or employment. Table 7.1 outlines the key elements of various immigration policy proposals put forth in 1994.

Table 7.1 Competing Immigration Policy Plans, Key Elements, 1994					
	Clinton Plan	Senator Simpson (R)	House GOP	Gov. Wilson	Florida
Add Border Patrol agents	Yes		Yes		
New fences and motion detectors on San Diego-Tijuana border	Yes				
Increase penalties for employers	Yes				
Encourage naturalization of LPRs	Yes				
Border fee	Yes				
Add judges to hear political asylum cases to eliminate backlog	Yes				
Reduce LPRs to 500,000 per year		Yes			
Use closed military bases to house immigrant convicts		Yes			
Issue national ID cards		Yes		Yes	
Return repeat undocumented entrants to the interior of Mexico rather than to border			Yes		
Cut aid to sanctuary cities by 20 percent			Yes		
Deport undocumented criminal immigrants	Yes		Yes		Yes
Make it easier to reject asylum cases			Yes		
Congress to reimburse states for costs of housing criminal immigrants				Yes	Yes
Congress to reimburse states for costs of providing services and benefits to all immigrants				Yes	Yes
Constitutional amendment to bar from U.S. citizenship children born to undocumented mothers				Yes	
Deny all benefits including education to undocumented immigrants				Yes	

While California engaged in internal and intergovernmental battles over immigration, Florida continued its public relations war on the Clinton Administration with more modest aims. In March 1994, Governor Chiles released a report entitled "The Unfair Burden, Immigration's Impact on Florida" which detailed how immigrants negatively affected the state's economy to the tune of \$2.5 billion. The cost estimates had tripled in the span of a few months. Another report released in Texas the following month estimated the costs of immigration there at \$4.6 billion for 1992 alone (Beachy, 1994). Chiles accused the federal government of having

[C]reated a nightmare for state and local governments in Florida that are forced to shoulder the enormous burdens caused by that policy...We've been trying to say the federal government's failure to accept responsibility for undocumented immigrants has placed a burden on us... It's depriving our citizens of services we can't give them.

State's Attorney General filed the threatened lawsuit against the federal government a week later.

Unlike Wilson in California, Florida's report took great pains to recognize the positive cultural contributions of immigrants to the state and to the United States (Times-Picayune, 1994). The "enemy" in the eyes of Lawton Chiles was the federal government, not immigrants. This conciliatory, pro-immigrant position made the Governor new friends among immigrant advocates. Even the National Council of La Raza (NCLR) was on board with state demands. "Fiscal evidence shows that the federal government reaps a windfall, while the states suffer because they have to pay for social services... That's a question of redistributing funds, not cutting," declared NCLR's spokeswoman Celia Munoz (*St. Petersburg Times*, 1994).

Although the tone of the discourse in Florida was decidedly more moderate, when it came to the issue of criminal immigrants, Governor Chiles' plan mirrored that of Art Torres in California. In a deal brokered with the INS, the state would free non-violent immigrant offenders on condition that they agree to deportation. Florida would grant them clemency and

commute their sentence if they agreed to return to their home country. The plan would help Florida free up prison capacity to house violent offenders and it would save the state \$40 million in incarceration costs for undocumented immigrant convicts. Both the Governor and the Attorney General of the State described the agreement with the INS as a clear sign of capitulation on the part of federal authorities who recognized their culpability on the issue of immigration costs. For Chiles, the agreement with the INS only improved Florida's chances of winning the legal battle with the U.S. government. But the rhetoric was not completely neutral. As Florida officials noted, "if a judge rules that the government has failed, then an injunction should be issued to halt the policies that have subjected Florida to an invasion of aliens" (*Palm Beach Post*, 1994).

As Congress announced earmarks to study the costs of undocumented immigration in the states, it was time for Illinois to enter the fray. The popular Illinois Governor Jim Edgar (R) had already told the U.S. Justice Department in January that the state expected relief from the federal government to help compensate for the costs of housing criminal immigrants. The state had spent \$43.5 million in 1993 in expenditures related to immigrant offenders. "If the federal government is going to tell us what we have to do for noncitizens, then I think the federal government ought to come up with the dollars to pay for it," Edgar remarked in a communication to Attorney General Janet Reno (*Chicago Sun-Times*, 1994). The Governor had already asked the Illinois delegation in Congress to support a bill proposed by California Congressman Gary Condit (D) which would require federal immigration authorities to take custody of all undocumented immigrant offenders or reimburse the states for housing them in state and local correctional facilities.

The Criminal Alien Federal Responsibility Act of 1994 (S. 1849) was introduced in the Senate by Florida Senator Bob Graham (D) and co-sponsored by Senators Alfonse M. D'Amato

(R-NY), Connie Mack (R-FL), Dianne Feinstein (D-CA), Richard Bryan (D-NV), Barbara Boxer (D-CA), John McCain (R-AZ), and Kay Bailey Hutchinson (R-TX). In the House, it was Condit who introduced HR 3872 which immediately found twenty cosponsors across party lines from California, Florida, Texas, New York, Illinois and Arizona.⁶⁶ Senator Graham was blunt about the fact that the federal government had abdicated its responsibility to the states on the issue of criminal aliens;

[T]he Federal Government should be a partner with State and local units of government and assist them in the effort to attack our Nation's crime problem; [but]the Federal Government has failed to accept its responsibility for immigration policy, and thereby, criminal aliens. Individual States have no capacity, either under law or in resources, to control access to illegal entrants to our Nation. Unfortunately, when the Federal Government does not adequately address its responsibility for illegal immigration, State and local government is often left with the burden of that failure..."

the Senator remarked in the Senate. States certainly agreed with Graham's conclusions.

According to Senator Graham in his introduction of the bill,

This legislation has the support of Florida Governor and former U.S. Senator Lawton Chiles, New York Governor Mario Cuomo, Texas Governor Ann Richards, California Governor Pete Wilson, Florida Attorney General Robert Butterworth, the National Conference of State Legislatures, the National Association of Counties and the Association of State Correctional Administrators" (S.1849, 1994).

State support was not enough; both bills died in committee.

Following California, Florida and Arizona, Texas was next to file a lawsuit against the federal government to recover \$1.5 billion in immigration-related costs in August 1994. Following Florida's example, Democratic Texas Governor Ann Richards cast the lawsuit as an attempt to recover costs from federally imposed unfunded mandates, rather than as an anti-immigrant crusade as the issue was being framed in California. Texas viewed the lawsuit as "a legal means to correct a glaring budget imbalance" noting that even undocumented immigrants

⁶⁶ Another Condit bill, H.R. 140, which was co-sponsored by 226 members of the House from both parties, promised to end the practice of federal unfunded mandates imposed on states and localities. The bill died in committee and so did no fewer than a dozen similar initiatives introduced around the same time.

paid federal taxes but the states did not directly benefit from that revenue. Texas Attorney General Dan Morales took pains to clarify that “while undocumented immigrants make contributions to the Texas economy, they also contribute substantially to the Federal coffers in the form of income taxes and Social Security payments, which are matched by businesses...the costs of delivering services to the immigrants is imposed upon the state and its communities” (*The New York Times*, 1994).

Within the Lone Star state, however, the immigration debate raged in ways reminiscent of California. Accusations that undocumented immigrants crossed into the state to take advantage of free public education in border towns were countered by arguments about the benefits of cheap labor to the state’s economy. In a state with a particularly large Hispanic population, the debate occasionally pitted Latino against Latino. Brownsville lawmakers complained that “we see the cars cross [the border] daily, drop off their kids at school, and then go back,” a sentiment echoed in Laredo (*Christian Science Monitor*, 1994). The cost of immigrants in public education had been a major complaint in Texas: in the 1970s the state changed its education code to exclude undocumented immigrant children from public primary and secondary education only to see its legislation invalidated by the U.S. Supreme Court in 1982 (*Plyler v. Doe*, 457 U.S. 202 (1982)).⁶⁷ In large metropolitan areas such as San Antonio, the

⁶⁷ The change in the Texas educational code in 1975 led to a series of legal challenges mounted against various school districts in the state by parents of undocumented children. The first lawsuit took place in Houston in February 1977 when parents filed suit in state district court challenging the law. In *Hernandez v. Houston ISD*, the state court sided with the state and the school district. In September of the same year, *Doe v. Plyler*, a new case out of Tyler, Texas with similar claims, was filed with the U.S. District Court for the Eastern District of Texas and the Court granted a permanent injunction prohibiting the enforcement of the new law at the Tyler Independent School District. The *Plyler* case was followed by *Garza v. Reagan*, a challenge to the enforcement of the restrictive code at the Houston ISD, *Roe v. Holm* in Ector County, *Boe v. Wright* in Dallas, and *Doe v. Lodestro* in Port Arthur. Only in Dallas did the Court side with the state in denying the plaintiffs an injunction; in all other cases, the state courts ordered the state to allow the enrollment of the undocumented children. In 1980, the Brownsville school district claiming that it could not afford the cost of educating undocumented immigrant children, filed a suit requesting that the court stop the enrollment of undocumented immigrant children to the local schools. The

issue was jobs and demand for labor, local lawmakers did not consider the costs of undocumented immigration as a major problem for urban centers.

In late April, there was the first sign of clear capitulation from the White House. In an announcement, President Clinton made it clear that the federal government had responsibility for immigrant offenders and should compensate states for some of the cost of housing them. The details of the plan were laid out by Leon Panetta, Clinton's budget director and former Congressman from California widely viewed as an advocate for California causes. Clinton's statement noted that "when people enter this country illegally and commit crimes while they are here, it is not fair to ask the states to bear the entire cost of their imprisonment... After many years of virtual neglect of the illegal immigration issue, our Administration is taking major steps to address this problem" (U.S. Newswire, 1994). This was the first time that a White House publicly admitted failure in immigration control enforcement.

Clinton's solution was a new program that would distribute \$350 million across seven states to help defray the cost of housing immigrant criminals. Florida Senator Bob Graham (D) applauded the Clinton plan but made it clear that it did not go far enough: "our goal is for the federal government to take full, not partial, responsibility," noted Graham in a statement to the press (*St. Petersburg Times*, 1994b). Panetta, on the other hand, was more concerned about the tone of the debate: "[immigration has] been an emotional issue throughout most of our history, and if we're not careful, obviously it could be used to inflame the public, and it could be made a political whipping boy... We have to do it as a partnership, and not as a finger-pointing exercise that tries to put the responsibility on one or the other," he warned.

injunction was granted at first, but U.S. District Judge Vela changed his ruling within days. At the appeals level at the Federal District Court for the Southern District of Texas, the cases were consolidated as *In Re Alien Children's Education Litigation*.

The Clinton plan received some positive feedback from Illinois and New Jersey both of which had announced plans to sue the federal government. Governor Edgar noted that he plans to work closely with the Administration, while New Jersey's Governor Christine Whitman (R) stated that she was reviewing the White House proposal very closely. New York had also expressed an interest in joining the Florida lawsuit against the federal government and it was now re-evaluating its options in light of the federal actions. However, the Clinton response was not convincing to California.

Fighting for re-election, Governor Wilson declared that he was not impressed by the Clinton plan and argued that these measures were not sufficient to keep him from filing a lawsuit against the U.S. government. By end of April, California had officially filed the lawsuit with the U.S. District Court in San Diego demanding \$377 million in annual incarceration expenditures as well as the timely deportation of immigrant felons. The plan was to file multiple lawsuits each with a separate claim and each following a somewhat different legal strategy. The total cost of immigration that California sought to recover was close to \$2 billion in education, social services, benefits, healthcare and incarceration. Recovering the costs of undocumented immigration was not an end in itself for the California Republican. For the Governor, immigration was his best bet for re-election. Wilson sought to use the cost of immigration as a tool to force the federal government to enforce existing immigration law and expel undocumented immigrants from the country. "The remedy sought is essential to the survival of the state of California...California has had enough, and it's time to stop illegal immigration," the Governor declared in filing the lawsuit. If Congress was required to bear the full cost, then it would be more open to restrictionist ideas, Wilson reasoned.

If the federal government were held accountable, they would quickly discover that the cost of ignoring the real and explosively growing problem of illegal immigration is far greater than

the cost of fixing it... Congress must be forced to bear the fiscal consequences for its immigration policy... If they feel the (financial) pinch in the federal budget, then and only then will they have an incentive to fix this policy that simply doesn't work,

he stated in a press conference (*San Francisco Chronicle*, 1994b; *Associated Press*, 1994; *San Jose Mercury News*, 1994). By June, Arizona Governor Fifi Symington (R) had filed his own lawsuit hoping to recover \$121 million from the federal government, while Texas, New Jersey and New York were coordinating with Florida with plans to join the lawsuit there.

Governor Wilson spent the summer traveling across the state and playing up the immigration issue. In the spring of 1993, Wilson trailed Brown in the polls by 20 percentage points; however, his message of “a tough Governor for tough times” combined with his anti-immigrant and anti-affirmative action plank propelled him to the lead by 9 points in the summer of 1994 (Scott, 1994). At the end of August, the Governor took out a full page ad in *The New York Times* where he stated that California had made every possible effort to resolve the immigration crisis. The state had passed legislation requiring proof of citizenship or immigration status to apply for a driver's license, had barred local governments from passing sanctuary protection ordinances, and it had supported the Border Patrol efforts in San Diego with its own National Guard units as part of “Operation Gatekeeper.” Wilson pleaded with the Administration to take full responsibility for controlling the border and expelling undocumented immigrants from the country, as well as having federal authorities take over the housing and incarceration of immigrant offenders and implement a tamper-proof national identification system.

Resolution to the Intergovernmental Conflict: The State Criminal Alien Assistance Program (SCAAP)

In an interim effort to quell the storm, the U.S. Department of Justice began handing out grants to states in the summer of 1994. Florida received the first \$200,000 followed by Illinois, Texas and then other states. The grants were part of an effort to link law enforcement databases in the states with INS databases so that Congress and the states could get a better and more accurate picture of the size of the undocumented immigrant population in American prisons. Each grant was described in detail in individual press releases issued by the U.S. Department of Justice: the Administration was trying to show that something was being done to address state complaints. The press releases were identical down to spelling errors. The only things that changed were the name of the state and the amount of the grant.

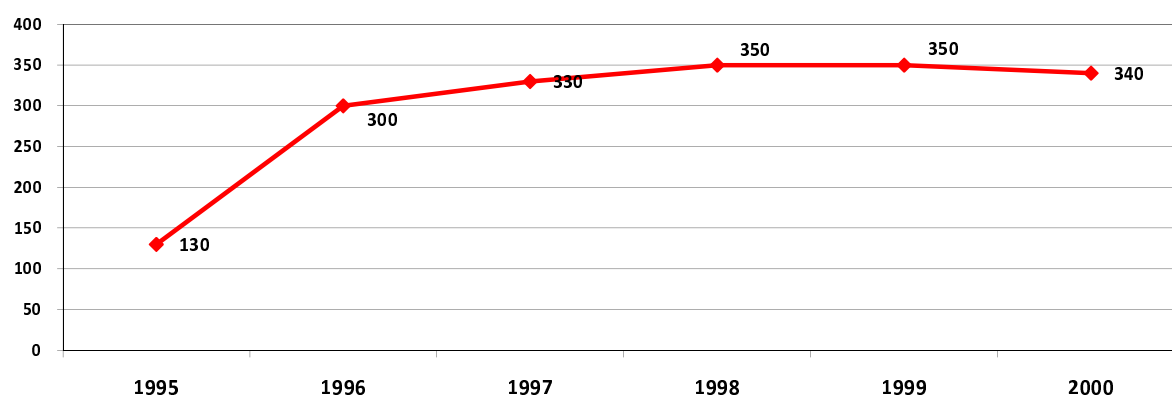
The Democratic Congress passed and the Clinton administration signed the State Criminal Alien Assistance Program (SCAAP) shortly before the 1994 elections that brought the Republicans into power.⁶⁸ The President praised the new omnibus crime bill known as Violent Crime Control and Law Enforcement Act of 1994 as “the toughest, largest and smartest federal attack on crime in the history of...[the country].” In a statement on SCAAP, President Clinton stated that,

[W]hen people enter this country illegally and commit crimes while they are here, it is not fair to ask the States to bear the entire cost of their imprisonment. This new program will help them considerably. After many years of virtual neglect of the illegal immigration issue, our administration is taking major steps to address this problem. First, we are making a substantial investment in efforts to reduce the flow of illegal immigration, primarily by toughening our border enforcement. That is the Federal Government's primary responsibility in this area. But we also need to help those States with large numbers of undocumented aliens to shoulder the resulting financial burdens” (Clinton, 1994).

⁶⁸ SCAAP was created by §20301 of the Violent Crime Control and Law Enforcement Act of 1994 and is currently codified in §241(l) of the Immigration and Nationality Act (INA). The program is administered by the Bureau of Justice Assistance (BJA), which is part of the Department of Justice’s (DOJ) Office of Justice Programs (OJP). The Department of Homeland Security (DHS) aids BJA in administering the program.

The new law targeted non-violent alien offenders for parole in exchange for deportation. States were responsible for identifying these individuals while the federal government was to reimburse states and local government for the cost of housing non-citizen inmates. Figure 7.1 below shows the amounts appropriated by Congress for the new program between 1995 and 2000.

Figure 7.1 Congressional Appropriations for SCAAP, 1995-2000 ('000)



From 1994 until 2003, the SCAAP program reimbursed states and local governments for arrest, incarceration and transportation costs for deportable undocumented immigrants charged with a felony or two or more misdemeanors. In 2003, the U.S. Department of Justice under John Ashcroft reinterpreted the rules applying to SCAAP. According to the new interpretation, states could only be reimbursed for the cost of processing undocumented immigrants convicted rather than simply charged with these offenses. Furthermore, the new regulations specified that the reimbursement request had to be made in the same year as the conviction. As a result of the reinterpretation of the rules, reimbursement funding for states declined dramatically after 2003.⁶⁹

⁶⁹ Congress made several attempts since 2003 to revise the statute so that reimbursement would be made for all undocumented aliens held in custody by states and localities regardless of conviction. H.R. 1512 was one such attempt to amend the Immigration and Nationality Act to return SCAAP to its originally

Conclusion

For a recipe instruction in an obscure 1st century BCE Latin poem by Virgil,⁷⁰ the phrase “E pluribus unum” (translated into English as “out of many, one”) has risen to great prominence in American culture, political thought and public rhetoric. Over time, this line from Publius Vergilius came to be associated with two fundamental facets of the American experiment: federalism and a pluralistic (or multi-cultural, as we would say today) national identity. In these three words, Americans have described how from a multitude of states they designed a single national system of government which preserved the structural and political integrity of the parts while endowing the whole with new, awesome powers. At the same time, “E pluribus unum” alludes to America’s social diversity, describing a country where people from many lands, many races and ethnic backgrounds came to form a new nation that is more than its individual parts. An immigrant nation, the United States has (sometimes reluctantly) opened its doors to people from every nook and cranny of this world, and overtime, these newcomers have been shaped by America and have also helped to shape America’s national identity in return. Yet, not until recently have federalism and immigration policy been brought together analytically, mostly because of a long-standing but erroneous assumption that immigration policy is the exclusive purview of the federal government (Filindra and Kovacs, 2009; Newton, 2009; Foner, 2008; Filindra and Tichenor, 2008).

The plenary power doctrine, introduced into Constitutional analysis in the 1870s, sought to describe and envision sovereignty in accordance with the understanding of the concept that

intended meaning. States and localities would be reimbursed for the cost of incarcerating criminal aliens who are either “charged with or convicted” of a felony or two misdemeanors regardless of when the incarceration and conviction occur. (<http://thomas.loc.gov/cgi-bin/query/z?r110:H06MY8-0053:>)

⁷⁰ It manus in gyrum/paullatim singula vires Deperdunt proprias/color est *E pluribus unum*. In translation: Spins round the stirring hand; lose by degrees/Their separate powers the parts, and comes at last/From many several colors one that rules.

prevailed in the late 19th century. In accordance with this perspective, the United States was viewed as a member of the community of independent nation-states each of which had complete and unchallengeable authority to determine its internal political, economic and social structures, including rules of social inclusion and exclusion. This assumption that national sovereignty means exclusivity has guided social science research in the domain of immigration for many decades, leading scholars of federalism to neglect immigration policy as a case of intergovernmental dynamics. However, as this study attests, states have always had an important role in the shaping of immigration regulations, both those intended to control immigration flows and those aimed at integrating immigrants in American society.

Not only have states been independent actors in the immigration domain devising their own rules for the treatment of immigrants, but after the enunciation of the federal plenary power, states have succeeded in influencing federal authorities and pressuring Congress to enact legislation consistent with state preferences. In many cases, the legislation that states sought from the federal government has been restrictive and punitive, but that is not always the case. In the 1880s, states fought hard for and achieved restrictions in the form of the Chinese Exclusion Act while in the 1990s pressure from states led to the enactment of PRWORA and IIRIRA. However, when state labor markets were in need of workers, as was the case in the 1940s, states have been successful in forcing the federal government to allow new flows of immigration and create new immigrant worker programs such as the bracero program.

As noted in Chapters six and seven, the past two decades have witnessed significant state and local activism in immigration policy as a result of the substantial growth in the legal and undocumented immigrant population. The involvement of states in this domain has also been highlighted by social actors involved in this arena on both sides of the debate. The activity

that has taken place in the past twenty years has not gone unnoticed among immigration law scholars (Rodriguez, 2008; Wishnie, 2001; Spiro, 1996). Along with the media, immigration scholars have realized that in the wake of the restrictionist federal reforms of 1996, states and localities have not taken a uniform stance on immigration and especially undocumented immigrants. Some states and communities have developed immigrant-friendly regulations including state-funded benefits programs, pre-natal care programs for undocumented mothers, migrant day laborer centers, sanctuary laws and in-state tuition options for undocumented immigrant children. More than 100 towns and cities across the country have declared themselves “sanctuaries” for undocumented immigrants in violation of federal law. Furthermore, ten states offer in-state tuition rates to undocumented immigrant children attending state colleges and universities, while others have developed prenatal healthcare programs for undocumented pregnant women. In the wake of the 1996 Welfare Reform Act (PRWORA) which excluded many low-income legal permanent residents from welfare and Medicaid, many states took it upon themselves to cover these populations with state-funded programs. These states have also heavily lobbied Congress to restore many of those benefits and have been partially successful in their efforts.

However, other places have responded in restrictive ways: they have passed English-only laws, increased employer sanctions, landlord ordinances and a variety of other measures designed to force immigrants- especially undocumented aliens- out of the community. Maricopa County (Arizona) Sheriff Joe Arpaio has made the news for his extreme methods of dealing with undocumented immigrants. Sheriff Arpaio has 160 officers trained by Immigration and Customs Enforcement (ICE) to enforce national immigration law under the controversial

287(g) program.⁷¹ On the East Coast, the town of Hazelton, PA has been involved in a lawsuit as a result of a city ordinance which penalized landlords if they did not verify that their tenants are citizens or legal U.S. residents. Hazelton is one of more than thirty Pennsylvania towns to have considered this type of ordinance. In addition to housing ordinances, other towns across the U.S. have tried to penalize employers for hiring undocumented immigrants.

Faced with these divided trends, Peter Spiro (1996) and Christina Rodriguez (2008) have advocated abandoning the plenary power doctrine as obsolete for the needs of modern day American society. Each scholar offers a somewhat different rationale for strengthening the role of states and localities in this domain. Spiro points to cases of intergovernmental conflict where pressure from states resulted in stringent federal restrictions, such as the Chinese Exclusion and Proposition 187. In these cases, federalism resulted in the nationalization of restrictions that only a handful of states wanted. Since they did not have the option to exclude immigrants on their own, these states were successful in forcing the federal government to implement exclusionary measures which of course applied to the entire country, penalizing immigrants regardless of where they resided. In this view, empowering states to impose immigration control measures will obviate the possibility for intergovernmental conflict over immigration. If states are free to devise their own immigration regulations based on local needs and demands, then some states will become more restrictive but others will be free to pursue more immigrant-friendly policies. Given different social and economic conditions at the state level, the hope is that there will always be some states that welcome immigrants so aliens will always

⁷¹ The officers are known to use racial profiling, stop Latinos for routine traffic violations and ask for identification and immigration status documentation and even conduct raids outside the county's jurisdiction to apprehend undocumented immigrants. Sheriff Arpaio's popularity among county residents hit 80 percent last year, but other local and state officials are concerned about his tactics (Arizona New Times, 2008).

have a home somewhere in the United States. Spiro even suggests that the need for immigrant labor may lead to a new “race to the top”: pressure from the international community and from domestic immigrant advocates could push restrictionist states to amend their ways and become more hospitable to new immigrants, even the undocumented. By contrast, if immigration remains an exclusively federal domain, then pressures for exclusion originating in one or a few electorally powerful states could lead to national-level restrictions making the entire country inhospitable to immigrants.

Similarly, Christina Rodriguez (2008:567) believes that the time has come for the United States to “devise a *modus vivendi* regarding participation by all levels of government in the management of migration” with states taking on a primary role in immigrant integration. Rodriguez develops a functional account of immigration policymaking in which she argues that immigration can be viewed an externality of economic development and as such it should be managed at the lowest possible level where the problem occurs. Much like Spiro (1996) she recognizes that different localities may pursue different strategies in the management of immigration but in her view “it is time... to capture in our immigration federalism doctrine the basic idea that those affected by immigration controls must have a say in the design and implementation of those controls, which will require including not only the residents of states and localities but also immigrants themselves” (Rodriguez, 2008:641). Rodriguez, however, is not clear on how immigrants can have a meaningful say in these decisions, especially in new destination states where most immigrants are years away from naturalization and the right to vote.

Well-intentioned as this perspective may be, by advocating a “down-shifting” of the immigration question to the state and local level it obfuscates the main issue at the core of the

debate. The key issue in the immigration debate is not one of economic costs and benefits; immigration is not an industry in the same way that manufacturing or agriculture are and discussing it in the language of externalities is a dangerous path to follow. Immigration is and has always been a question about American identity, who belongs to this country, who doesn't and under what conditions. Immigration policy brings up fundamental questions about rights and the "right to have rights," as Chief Justice Earl Warren would have put it.⁷²

Immigration is not simply an issue of policy amenable to the analytical tools of functional federalism. Determining which level of government should have decision-making authority vis a vis immigrants cannot be simply based on an economic logic and immigration cannot be conceptualized as an externality of economic development or as a sector of the economy to be managed and regulated by government. Immigration policy directly involves issues of individual civil rights and requires a discussion of Americans' understanding of (national) membership and their appreciation of what the presence of noncitizens means for American democracy. As Linda Bosniak (2006) has successfully argued, democratic theory of justice has no room for noncitizens and a new framework of membership is needed to accommodate their presence.

In this context, looking at noncitizens as a category may not be enough. Over the years, federal immigration law has created numerous classifications of immigrants and attached different rights and privileges to each category. Understanding the differences across these classifications and how they affect the lives of individual immigrants in the United States is extremely important but not sufficient in the discussion of immigration. Not only do we need to account for the various types of noncitizens that American immigration law has given life to, but

⁷² *Perez v. Brownell*, 356 U.S. 44, 64 (1958)

we also need to understand how the federal structure of the country affects and distorts the picture. If states and localities have the authority to determine immigrant rights and change the way they treat this population in accordance with local social and economic dynamics, then immigrants' relationship to the state will change as they move from one jurisdiction to the next. Is this lack of uniformity of rights consistent with the American conception of justice and equality? Is it appropriate for the nation to allow localities to make these types of decisions, especially under conditions of relaxed Supreme Court scrutiny?

Immigrant advocates who endorse a greater role for states operate from a position of liberal optimism: the hope is that in the long run, even restrictive states will change their ways and warm up to immigrants. The underlying assumption –or hope- in this view is that in the 21st century, systematic and longstanding discrimination patterns in specific parts of the country are a thing of the past. This is certainly the position that the Supreme Court seems to be taking. In a recent case concerning certain provisions of the Voting Rights Act of 1965 which require precertification of election rules for a number of areas in the South, the Justices seemed to believe that systematic discrimination is no longer a concern for the United States. Chief Justice Roberts questioned whether “Southerners are more likely to discriminate than Northerners” and Justice Kennedy was concerned about the violations of the Act to state sovereignty (Los Angeles Times, 2009).⁷³ The appellant in the case asserted that “the America that has elected Barack Obama as its first African-American president is far different than when §5 was first enacted in 1965... There is no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly

⁷³ *Northwest Austin Municipal Utility District No. 1 v. Holder* (2009)

incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country” (Coleman, 2008).⁷⁴

The position that America has become “color-blind” in the Obama era has been extended to include immigrant minorities. However, much of the recent research in immigration policy indicates that states are neither “color-blind” nor “status-blind” and that long-standing patterns of discrimination continue to exist. When it comes to immigration policy, Massachusetts is not Arizona or Georgia and New York Mayor Mike Bloomberg is not interchangeable with Sheriff Arpaio. The role of the federal government in ensuring uniformity of rights is thus essential. If the relationship between the noncitizen and America is to be based on some form of a social contract as suggested by Motomura (2006) then the country’s federal institutions, Congress and the Courts, must specify the parameters of that contract.

States still have an important role to play in immigrant integration. After all, immigrants go to local schools, live in communities, and use local services. Immigrant integration policies are part of the web of social policies that states provide and should be seen as such. As far as states and localities are concerned, immigrants should be another constituency with distinct needs much like the inner-city poor, the disabled, or the mentally ill. State and local policies and planning should then take shape within an inclusive framework established by the federal government and enforced by federal courts. The United States cannot and should not pay lip service to a liberal immigration regime which then disintegrates into a fragmented, localized, unaccountable system of restrictions. Doing it the other way around, with states and localities in

⁷⁴ http://www.scotusblog.com/wp/wp-content/uploads/2008/12/08-322_reply.pdf

charge of specifying noncitizen rights, comes in direct clash with our expectations of justice and democracy.

Appendix 1: List of Terms

AFDC	Aid for Families with Dependent Children; the welfare assistance program that existed prior to the 1996 reforms
CHIP	Children's Health Insurance Program; block grant funding children's health insurance established by the 1996 Welfare Reform Act
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
ICE	Immigration and Customs Enforcement; the federal agency responsible for immigration control
INS	Immigration and Naturalization Service; was replaced by ICE in 2002
IRCA	Immigration Reform and Control Act
PRWORA	Personal Responsibility and Work Opportunity Reconciliation Act of 1996; also know as Welfare Reform Act of 1996
SSI	Supplemental Security Income
TANF	Temporary Assistance for Needy Families; block grant that replaced AFDC in 1996

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