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**BACKGROUND PAPER**

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**FEDERALISM AND IMMIGRATION**

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Immigration policy has generally been considered a part of national foreign relations and as such to require exclusive central government control. Even in federations, subnational units have been afforded only limited discretion in the area. That appears now to be changing, and globalization is allowing the possibility of greatly expanded subnational participation in immigration decisionmaking. That participation will allow a greater degree of preference satisfaction among subnational units at the same time that it should work to the ultimate benefit of immigrant groups.

This background paper examines the new potential for federal arrangements in three distinct areas of immigration law and policymaking: immigrant rights, immigration benefits, and immigration enforcement. Immigrant rights include the treatment of aliens for purposes of civil and criminal law, as well as the implications of alienage for public social services and other benefits. Immigration benefits are comprised of the granting of permission to enter into territory as well as to acquire citizenship. Immigration enforcement includes border and entry control as well as the enforcement of the terms of lawful entry.

The paper examines possible approaches in each area against three models of federalism: central government hegemony, cooperative federalism, and devolutionary federalism. Central government hegemony represents a system in which subnational units have only an indirect, peripheral role in immigration decisionmaking. In the cooperative federalism model, the central government retains primary control and supervision over immigration decisionmaking, but enlists subnational authorities as junior partners and allows them some discretion to assert or account for particular subnational needs. The devolutionary model finds the central government ceding primary control to the subnational unit.

There appears to be a general trend among federations away from central government hegemony towards a cooperative federalism model. The question is whether it is preferable - or even possible - to adopt a more completely devolutionary approach to immigration policymaking.

**Types of Immigration Decisionmaking and Recent Trends**

Immigrant rights. Immigrant rights fall into two basic categories. First are civil

rights, including the rights to protection by and before the law, in other words, the right to personhood. Examples include the procedural rights afforded defendants in criminal prosecutions, and the right to use the law to protect against misdeeds by others (including for instance contract and labor laws). Subnational authorities have little latitude with respect to the application of most of these rights. That is not the result of central government hegemony so much as it is of international law. Civil rights are now human rights, and those rights are governed not at the national but rather at the international level.

Most social rights are not as yet clearly mandated by international law. Such rights include rights to social services such as health care, to poverty programs, and to public education. With respect to these rights, decisionmaking may be allocated to the national government or to subnational units. Outside the immigration context there has emerged a significant debate as to which level of government will better administer social programs.

Within the immigration context, the issue here is whether aliens (legal and illegal) will be eligible for state-sponsored social programs. In Germany, the Länder have long enjoyed the power to determine social benefits levels for aliens. At least in the United States, the issue was until recently approached on a model of central government hegemony; that is, the federal government alone was empowered to decide how alienage would affect eligibility, even for locally funded programs. This has changed in recent years. As part of 1996 welfare reform legislation, state governments in the United States were for the first time authorized to condition eligibility for certain important programs on citizenship status.

Immigration enforcement. Immigration enforcement consists of border control and both the execution of provisions for the removal of aliens who have entered illegally or violated the terms of legal entry. In most states, immigration enforcement has proved the exclusive domain of the central government, through the enforcement elements of immigration ministries. An important exception to this general approach is found in Germany, where the Länder have been responsible for undertaking deportations. In other countries, subnational authorities have been able to exert indirect influence over deportation decisions, at least where deportation determinations are contingent on subnational criminal law and other processes; for instance, a state or provincial court judge has sometimes had the power to determine deportability through sentencing discretion. Federal enforcement authorities may also informally allocate enforcement resources in accordance with subnational sentiments; this has been true in the United States, where enforcement has been more rigorous in the Southwest, where anti-alien sentiment has been occasionally intense, than in the Northeast, which has proved consistently friendly to immigrants in recent years.

The model of central government hegemony over immigration enforcement is also being reexamined. As part of the major 1996 U.S. immigration reform legislation, the Justice Department is authorized to enter into agreements with state and local governments under which the latter will be deputized to investigate, apprehend, and detain aliens whose presence in the United States is unlawful. State and local law enforcement may also be authorized to enforce immigration controls during a period of "mass influx", as determined by the Attorney General.

Neither of these new provisions of U.S. law has yet to be activated, although some localities have explored the possibility of undertaking deputization

agreements. In Germany, meanwhile, deportation by some Länder of aliens denied asylum has proved controversial. But the trend does seem to be away from exclusive central government control and towards at least a cooperative model of immigration decisionmaking. Yale Law School's Peter H. Schuck has written an important recent article advocating further participation by state-level authorities in immigration enforcement.

One type of subnational involvement in immigration enforcement that should not be counted as part of this trend: attempts by central government to dictate subnational assistance in the enforcement of immigration controls. Such attempts were witnessed at least in the United States in the mid-1990's (when a number of localities enacted laws prohibiting cooperation with federal immigration authorities), but appear since to have dissipated.

Immigration benefits. Immigration benefits consist of the grants of various rights with respect to entry and presence, i.e., whether to allow initial entry and on what terms that entry is permitted (most notably, whether the presence is temporary or permanent). The category of immigration decisionmaking also includes naturalization powers and their administration.

As with immigration enforcement, immigration benefits have (in the twentieth century at least) largely remained within the exclusive preserve of central governments. Central governments alone have decided which classes of potential immigrants should be admitted and on what terms. Most important among these determinations is that regarding the qualifications for permanent immigrants. In the United States, subnational authorities have not been consulted on the matter of immigrant admissions. Classes afforded permanent residency have been determined on the basis of aggregate national needs and capacities, with little direct account of subnational variations. In the past, this has been most apparent with respect to admissions on account of professional skills.

But in this category as well the model of central government hegemony is eroding. Increasingly, national governments are taking account of variable subnational needs that may be met with immigrant skills. In Australia and Canada, this has translated into programs under which provinces are eligible for extra quotas of skilled immigrants as provided in formal agreements between central and subnational authorities. In Canada, there is also the substantial participation of Quebec in matters relating to immigration to that province. Quebec now maintains several independent overseas offices whose responsibilities include promoting immigration. The province has been permitted to calculate its own "point system" for skills-based immigration, and to maintain an "investor immigrant" program separate from a national Canadian counterpart; indeed, the provincial version is perceived to be in competition with the national program. In the United States, there is at yet no formal participation by state governments in determination of immigrant levels and priorities.

Naturalization appears to continue as an exclusively national responsibility, as both to policymaking and administration. This has not always been the case, however. In the United States before 1906 state authorities were afforded parallel administrative responsibilities for naturalizing aliens.

### **Assessing Models of Immigration Federalism**

There thus appears a discernible trends towards greater subnational participation

in each of the three categories of immigration decisionmaking. The question remains whether the trend is a desirable one.

Exclusive federal control over immigration decisionmaking made sense in a world of hostile, competitive nation-states. Immigration has almost inherently implicated foreign policy; by definition it involves the treatment of citizens of other states. This has made immigration and the treatment of aliens generally a sensitive issue in state-to-state relations in the Westphalian system.

As was true with the rest of foreign policy, there were significant structural advantages in allocating immigration policy to a centralized agent capable of processing immigration decisions as part of the general mix of foreign relations considerations. Otherwise, subnational units could act on preferences that could upset the sensitive balance of bilateral relations, with possibly catastrophic consequences. (Indeed there are many historical examples from the nineteenth and early twentieth centuries of subnational authorities acting against national interests and prompting serious foreign policy controversies.) This presents the strongest explanation for the traditional dominance of central governments over immigration policy.

But central government hegemony has always come at the cost of suppressing variations in subnational preferences and of constraining flexibility. In the United States, this has typically worked against the interests of immigrants (resident, undocumented, and potential). At its peaks, anti-alien sentiment is typically geographically concentrated and more intensely felt than counterbalancing neutral or favorable opinion elsewhere. Where central government control is exclusive, localized anti-alien sentiment is channeled into the central government, even though it may not reflect national majorities.

Two major bouts of extreme restrictionism in the United States, one at the end of the nineteenth century (exemplified by the Chinese Exclusion laws), the other in the mid-1990's, can in fact be tied to anti-immigration politics in California. As a politically powerful state unable to act on its own, California was able to effect its anti-alien preferences through national legislation.

Against the foreign policy imperative, the suppression of subnational preferences was lamentable but necessary. In recent years, however, the balance has shifted. First, relations between nation-states (at least in the democratic world) are no longer shadowed by the threat of serious hostilities. Thus the risks of subnational activity implicating foreign relations has been diminished. Second, national government authorities are now more likely to understand that when a subnational unit within a federation takes action within the sphere of its authorities, that unit is acting on its own. There is less inclination today to ascribe responsibility to the national government for the conduct of the subnational unit.

These developments both explain and justify expanded subnational activity in foreign policy generally, and immigration matters as a subset thereof. They should mark the end of central government hegemony over immigration. That is not to say that responsibility for immigration policy should or even can be transferred to subnational units, however. But the most likely future models will be either cooperative or devolutionary federalism.

Immigrant rights. The devolutionary possibilities are greatest with respect to immigrant rights. Contrary to the entrenched federalist inclinations of rights

advocates, immigrants may actually fare better - in aggregate - if social benefits determinations are transferred to the subnational level. This is borne out by the American experience with the 1996 welfare reform act. At the time, the removal of decisionmaking on welfare and elderly healthcare provision was deplored by immigrant advocates in the United States, who forecast a "race to the bottom" in which all immigrants would be deprived of benefits. In fact, almost all states responded with generous eligibility criteria for aliens. Subnational officials may be more responsive to alien immigrant preferences (especially insofar as they are tied to citizen immigrant communities), and may be concerned with international reputation in a competitive global economy.

To allow complete subnational control over immigrant rights would pose the danger of substantial deprivations in some cases. However, that danger is substantially limited by the floor of international human rights, below which neither national nor subnational authorities may sink. By way of implementing those international obligations, national governments should continue to circumscribe the discretion of subnational authorities to determine immigrant benefits. But especially with respect to social programs in which subnational governments have already been vested with general control, allowing control of alien eligibility determination could follow as of course.

Immigration enforcement and benefits. Control over immigration and enforcement and immigration benefits are complicated by the baseline freedom of movement within federations. Control over enforcement and benefits cannot be completely devolved because of the "weak link" problem. That is, where there are no restrictions on movement among subunits after entry, some central supervisory control need be exercised, failing which one subunit will be able to set entry standards for all others. This difficulty is now being played out on the stage of the European Union, in which the price for complete internal freedom of movement has been the significant cession of national control over immigration policy to the Schengen Group.

Immigration enforcement and benefits thus cannot move to a model of devolutionary federalism. However, there are important possibilities for both in the realm of cooperative federalism, as evidenced in recent developments.

Federal authorities cannot transfer complete control of immigration enforcement (especially border control) to subnational units, on the risk that one subunit would emerge a derelict. Montana might not care about uncontrolled immigration, and abandon border controls; with free movement, that would prejudice the preference of other states for limited immigration. But that danger does not preclude subnational supplementation of federal enforcement. A subnational unit that is sensitive to high level of undocumented immigration could be empowered (as is now possible under U.S. law) to assist in immigration control. That would vindicate a subnational preference at little cost to other subunits, and could deflate anti-alien sentiments that might otherwise rise to the national level.

The flip side is cooperative federalism on the benefits side. Some subnational units will vary from the national mean towards a preference for greater immigration, as is true in some American and Canadian farm states. That preference can be vindicated through targeted immigration benefits, such as special skills immigration now undertaken in Canada and Australia with provincial government participation. This form of cooperative federalism could be significantly expanded by conditioning immigrant status on a reasonable duration

of residence in the targeted area after entry. Thus, the immigrant visa of a doctor admitted under a special program for rural areas would be conditional on her remaining in that area for a period of, say, five years. Similar mechanisms are in place in the United States for immigration based on marriage and investment, to protect against fraud. The system would allow each subunit an optional quota of immigrants the qualifications of whom it could determine according to its particular needs.

So framed, cooperative federalist approaches to immigration benefits would increase the efficiency of immigration controls. It would likely increase immigration levels overall, working from the floor of levels determined on a national basis. It would also benefit units within federations that have been under served by immigration.

Finally, while the "weak link" difficulty precludes the full devolution of naturalization standards, there may be possibilities for cooperative federalism with respect to administration of the naturalization process. Naturalization is administered in Germany by the Länder, as was true in the United States before 1906. The United States has witnessed large naturalization backlogs in recent years. These backlogs could be reduced if state governments were afforded a role in facilitating naturalization, with appropriate supervision from federal agencies.

	<b>central government hegemony</b>	<b>cooperative federalism</b>	<b>devolutionary federalism</b>
<b>immigrant rights</b>	all rights and social services set at national level; subunits not permitted to discriminate against non-citizens	national government sets floor on rights and benefits, but allows some discretion by subunit to use alienage as eligibility criteria	subunits not constrained by national government (but may be by international law)
<b>immigration enforcement</b>	national government executes all border control and interior enforcement	national government maintains primary responsibility, as supplemented by voluntary subunit contributions	subunits enforce immigration controls
<b>immigration benefits</b>	national government sets levels and criteria for immigrants	national levels and criteria supplemented by subunit controlled immigration	subunits set levels and criteria for immigration

## **Further Reading**

Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), Columbia Law Review, vol. 93, p. 1833 (1993)

Peter J. Spiro, Learning to Live with Immigration Federalism, Connecticut Law Review, vol. 29, pp. 1627-46 (1997)

Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignities, Virginia Journal of International Law, vol. 35, pp. 121-78 (1994)

Peter Skerry, Many Borders to Cross: Is Immigration the Exclusive Responsibility of Federal Government?, Publius: The Journal of Federalism, vol. 25, no. 3 (1995)

Kevin Tessier, Immigration and the Crisis in Federalism: A Comparison on the United States and Canada, Indiana Journal of Global Legal Studies, vol. 3, p. 211-244 (1995)

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