

Law and Borders

Leaving immigration policy to the states may sound scary. But not every state is Arizona, and immigration federalism can work.

In late 2013, the California legislature and Governor Jerry Brown put immigration squarely on their agendas. The governor signed bills limiting police cooperation with federal immigration enforcement, expanding access to in-state tuition benefits for unauthorized immigrant students, and clarifying that all individuals who met the requirements to practice law in California were eligible for law licenses, regardless of immigration status. At the same time, he vetoed a bill that would have permitted lawful permanent residents to sit on juries. He observed that jury service, like voting, was “quintessentially a prerogative and responsibility of citizenship.” California, it seems, has been having its own immigration debate.

This localized immigration lawmaking, which has been happening across

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the country for the better part of a decade, might seem like a novel issue of our time, brought on by the federal government's inability to reform a supposedly broken immigration system. In reality, states and cities have always found ways to shape, unsettle, and complicate national immigration policy.

California's struggle to define immigrants' place in the political community goes back at least as early as the late nineteenth century, when immigration-related turmoil in the state helped push Congress to simultaneously protect the civil rights of non-citizens and restrict Chinese immigration. In 1994, California played the role performed by Arizona today. Sixteen years before Arizona's Senate Bill 1070 sought to use state and local police powers to clamp down on illegal immigration, California voters passed Proposition 187, which attempted to prevent unauthorized immigrants from receiving social services and health care and attending public schools. The initiative roiled national public opinion and prompted litigation in federal court by progressive groups, an effort that succeeded at the trial level but ended when Democrat Gray Davis replaced Republican Pete Wilson as governor and abandoned the defense of the law.

As these events suggest, immigration federalism can produce both pro-immigrant and pro-enforcement policies. Arizona's recent enthusiasm for enforcement, shared by states such as Alabama, Georgia, and Oklahoma, represents only part of the picture. On the other side are numerous cities and states across the country in line with California's current integrationist orientation, which are adopting policies to resist federal immigration enforcement (Chicago and Washington, D.C.) and to extend benefits such as in-state tuition and drivers' licenses to unauthorized immigrants (Illinois and Maryland). The complexity is visible even within states. Take New York, where New York City ensures access to all city services regardless of immigration status, but where the state legislature in Albany recently rejected a bill that would have extended financial aid to unauthorized students enrolled in higher-education programs. Whatever happens at the federal level, the country will continue its debate through the institutions of federalism, often through the passage of state and local laws that reflect competing visions of immigrants' place in the polity.

When we adopt this holistic perspective, it becomes clear that the resistance by progressive organizations and Democratic politicians to the immigration federalism practiced by the likes of Arizona does not amount to a rejection of immigration federalism per se, but rather of the expansion of enforcement through state and local police departments. Indeed, progressives have found much to dislike in federal immigration policy. The Obama Administration has presided over very high numbers of deportations and deployed new technologies to enhance its ability to identify removable immigrants. Accordingly, some

advocates invoke the Tenth Amendment and state autonomy—traditionally conservative rallying cries—to justify state and local resistance to federal programs.

The question thus becomes whether it is possible to have the “good” federalism without the “bad.” Does embracing federalism when it produces progressive outcomes mean accepting it in all of its manifestations? Intellectual integrity might demand it, but politics and law might not. In a narrow, doctrinal sense, it may be possible for progressives to have large slices of their cake and eat it, too. On the enforcement side, the Supreme Court in 2012 significantly curtailed state authority to use local police powers to help enforce federal law. In *Arizona v. United States*, the Court held that federal statutes and the Administration’s enforcement priorities pre-empted most of Arizona’s S.B. 1070, which the Court concluded fell outside the zone of permissible cooperation. Moreover, even

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though Tenth Amendment claims are unlikely to find favor in court, states and localities still retain some autonomy to resist participation in federal immigration enforcement. Even more importantly, many measures that seek to integrate immigrants—like in-state tuition and identification laws—are very unlikely to run afoul of the Court’s

pre-emption analysis in *Arizona*. Legally speaking, then, it may well be possible to mute Arizona-style federalism while amplifying the California kind designed to protect immigrants’ interests.

But my concern here is not with this sort of strategic, lawyerly approach to immigration federalism. After all, Republicans could deploy the same full-throated defense of federal power made in the challenge to S.B. 1070 to quash pro-immigrant activity through federal legislation. More fundamentally, I argue that we have a *national* interest in working out difficult moral and public policy matters, like immigration, through state and local institutions—for three reasons.

First, the varied approaches to immigration both within and among states reflect ideological diversity that our political system should channel and even facilitate, not suppress. Granted, this diversity does not always reflect uniquely or genuinely local interests and is often nationally coordinated with advocacy groups or partisan networks. But this diversity nonetheless reflects legitimate democratic disagreement: Are unauthorized immigrants lawbreakers or rights-bearing members of the community?

Second, regardless of how these ideologies align in any given jurisdiction, states and localities face institutional imperatives—sometimes imagined, other

times real—that can cause their interests to diverge from those of the federal government. The growth of immigrant communities implicates states’ and localities’ interests in schools, law enforcement, public benefits, and political participation. A coherent immigration policy takes these interests into account.

And third, it would be a mistake to assume that the federal government has a monopoly on virtue, even—especially—on an issue that Supreme Court doctrine and public discourse traditionally cede to it. In fact, when it comes to matters such as integration policy, states and localities actually *should* be in the lead. More generally, a federalist debate can check, curb, and improve federal policy, even if in some instances it becomes appropriate for the federal government to take control. The rub is that identifying those instances depends on one’s ideological orientation, which makes it difficult to defend the case for a “progressive” or “conservative” federalism without sometimes abandoning structural principles in favor of political preferences or other substantive values.

Taken together, these principles mean that states and localities should be recognized as having substantial space to participate in debate through policy-making, including in ways traditionally left to the federal government acting alone. Defining the contours of that space is the central task for a theory of immigration federalism—a theory we need as the immigration debate forges ahead, with Congress or without. Despite the current congressional impasse, mayors, governors, the President and his executive branch, and interest groups are all hashing out the details of our immigration regime. That the Supreme Court weighed in on immigration federalism for the first time in three decades only makes it all the more crucial to develop a constructive policy approach to immigration federalism.

For the political strategist, understanding the dynamics of immigration federalism will help identify where the next political battles will be fought, and around what sorts of issues. For the policy wonk, embracing immigration federalism will be crucial to identifying the problem-solving potential of different intergovernmental relationships and regulatory arrangements. And for the “small-d” democrat, accepting immigration federalism will help give voice to variable public opinions on matters of fundamental national importance.

Federalism As the New Nationalism

To put the dynamics of immigration federalism in context, it’s helpful to pull back and examine federalism more generally. In a recent symposium in the *Yale Law Journal*, various scholars (myself included) explored how state and local politics and institutions increasingly shape our national politics and policy. As Heather Gerken writes in introducing the symposium’s central conceit—of “federalism

as the new nationalism”—the institutions of federalism can serve as “tool[s] for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power. State power, then, is a means to achieving a well-functioning *national* democracy.”

This national democracy does not depend on the federal government always taking the lead; often, the federal government’s role in advancing debate will be secondary or complementary to activity at the state and local level. In many circumstances, immigration included, the federal government may itself have an interest in a decentralized debate. This is not to say that local concerns do not exist, or that the only value of decentralized government is in its facilitation of national conversations. Rather, it is to suggest that robust state and local institutions can and do contribute meaningfully to national integration and debate. Most moral and policy debates are nonlinear, and the institutions of federalism provide a framework for working out conflict and problem-solving over time.

This version of federalism has been on vivid display in recent years in the evolution of public opinion and policy in both conservative and progressive directions. On the conservative end of things, federalism has been central to shifting national discourse on gun rights (toward greater protection) and abortion rights (toward greater restriction). Activists have concentrated resources in receptive jurisdictions to advance their agendas in ways that would not have been possible if the target had been federal institutions alone.

The trajectory of the movement for marriage equality has been similar. It is by now commonplace to acknowledge the centrality of federalism to the advancement of same-sex marriage. Anti-marriage-equality referenda notwithstanding, progressive advocates have been able to work through and with local and state officials to make same-sex marriage a concrete legal practice, rather than just a subject of conjecture. State courts, simultaneously calling on their own traditions and drawing on developments in other courts, have rigorously tested the arguments in favor of same-sex marriage prohibitions and mostly found them wanting.

All of this activity has helped shift public opinion on the question and opened up space for the federal government to act. It did so most dramatically when the President and Attorney General Eric Holder decided to stop defending the Defense of Marriage Act (DOMA) in court. With that decision, the federal government put its considerable weight behind the argument that numerous state and local lawmakers had already accepted: that equality principles required recognition of same-sex marriages. Scholars continue to debate whether Justice Kennedy’s opinion in *United States v. Windsor* striking down DOMA depended

on federalism or on equal-protection doctrine. But there is no question that developments in the states affected how the Court framed its conclusion that denying federal recognition to same-sex marriages constituted an assault on dignity and a constitutional violation.

Today, we may well be seeing a similar dynamic at work in the debate over drug policy. The Colorado and Washington referenda permitting the production and recreational use of marijuana have prompted the federal government to rethink its drug enforcement priorities. The Department of Justice has shown a cautious willingness to let the state experiments play out. Federal officials and national politicians may not yet be willing or able to support drug legalization, but many law enforcement professionals and politicians at the federal and local levels alike have a keen interest in having states de-escalate the drug policy debate by experimenting with legalization.

Federalism thus offers a vehicle for interest groups and political parties to advance concrete agendas and to turn political ideas into law. As Gerken frames it, the system gives dissenters the opportunity to govern. [See “A New Progressive Federalism,” Issue #24.] And as I have argued, institutionalization of an idea, or its transformation into regulation or bureaucratic practice, can help reveal whether that idea is just the result of an ephemeral political moment or a more lasting policy possibility.

This is not to say that federalism offers the optimal system of government. For one thing, it can be inefficient. It can also thwart the federal government’s best-laid plans. To take a notable current example, the refusal of numerous states to set up health-care exchanges under the Affordable Care Act or accept federal funds to expand Medicaid has complicated the act’s implementation.

But how do we know when the federalist debate has become destructive rather than constructive, such that a national institution like Congress or the Court should step in to consolidate a national norm or assert national power? We are on the verge of such a reckoning over same-sex marriage—it seems only a matter of time before the Supreme Court puts an end to the federalism dynamic by holding that the Constitution requires recognition of same-sex marriage by all states. But even the easy progressive response to this dilemma—that national institutions should step in to protect individual rights—raises more questions than answers. In debates percolating throughout the federal system over immigration, abortion, and gun rights, the very question is what actually qualifies as an individual right. In the face of this difficulty, it may be more constructive to emphasize a different point: Even after “nationalizing moments”—moments when one branch or another of the federal government claims control over an issue and declares a national standard—consensus can unravel, if it ever truly

existed. Federalism provides a framework for managing the aftermath of such turning points.

The Renationalization of Immigration Policy

I return now to immigration federalism, to identify what is left of it after *Arizona*—a significant nationalizing moment—and to highlight why federalism should be of value to those interested in good immigration policy, regardless of their politics. Throughout the litigation against Arizona’s S.B. 1070, the federal government emphasized its longstanding practice of welcoming cooperation from state and local police in identifying and even detaining non-citizens who might be removable—a practice the Immigration and Nationality Act itself acknowledges and facilitates. But even though most of S.B. 1070’s sanctions mirrored prohibitions that exist in federal law, for the Obama Administration, the state’s attempts at “cooperation” went too far.

Arizona enacted S.B. 1070 in a particularly oppositional way, condemning federal failure to enforce the law and boldly articulating an attrition-through-enforcement strategy for addressing unauthorized immigration, an approach later championed by Mitt Romney during his 2012 election campaign. As Pratheepan Gulasekaram and Karthick Ramakrishnan have shown in the *NYU Law Review*, Republican partisan identity explains why particular jurisdictions have adopted measures like S.B. 1070. Similarly, the lawsuits against those measures by a Democratic Administration also reflect partisanship.

But this focus on partisan competition can obscure as much as illuminate, and not just because immigration remains among the few issues that divide each party and that can sustain interparty coalitions. In a 2010 poll by the Pew Research Center, for example, 45 percent of Democrats surveyed nationally approved of S.B. 1070 as a whole, and a majority of Democrats approved of the provision that required police to verify immigration status and detain those unable to prove lawful status. The Administration’s interests in the lawsuit also were not strictly partisan. In addition to reclaiming the debate over immigration reform in order to push legalization as an alternative to attrition, the Administration was also likely motivated by concern over the potential for racial profiling and harassment of non-citizens and Latinos—a concern not exclusive to Democratic Departments of Justice. Meanwhile, the institutional interests of the Department of Homeland Security (DHS) in not having its enforcement agenda driven by state and local preferences infused the government’s arguments in the case. In its brief to the Supreme Court, the government characterized Arizona as a “rival decisionmaker” rather than a cooperative partner.

Despite striking down most of S.B. 1070 and putting its weight behind the federal government’s power to define the law and control the extent of its enforce-

ment, the Supreme Court’s opinion in *Arizona* did not push state and local police out of the enforcement game altogether. Whether enforcement-oriented states will use the power they have left remains to be seen. The Court may have taken some of the wind out of pro-enforcement politicians’ sails, revealing S.B. 1070 and similar laws to be expressive rather than genuine law enforcement measures.

The Court did leave in place the law’s centerpiece: section 2(B), or the so-called “show me your papers” provision, which requires police to inquire into the immigration status of a person with whom they come into contact for other reasons, if there is reason to believe he or she is in the country unlawfully. But even two years later, it remains unclear how robustly that power can and will be exercised. Spotty data collection has made it hard to assess the law’s implementation, and it does not appear that high-level state officials have made a concerted effort to guide it. The primary investigation of the law’s enforcement to date—a multipart report by the *Arizona Daily Star*—uncovered “a patchwork of enforcement policies” that makes it difficult to determine whether police are implementing the law or “committing the widespread civil-rights violations that activists feared.”

The federal government should play the role of funder and coordinator rather than the driver of our national immigration policy.

Implementing section 2(B) may not be worth the bureaucracy’s time. As the *Daily Star* investigation revealed, the Tucson police chief has characterized S.B. 1070 as putting police “at odds with elements in our community,” and Tucson and other police departments have encouraged their officers to focus their questioning on suspects, not victims and witnesses of crimes. What’s more, those police who work closely with federal immigration officials and receive federal grants to promote border security seek to maintain good relations with their federal counterparts—which includes not overburdening them with low-priority targets. In jurisdictions where police have ramped up to enforce section 2(B), activists seeking to monitor police activity have remained vigilant, but the anecdotal picture emerging suggests that section 2(B) was mostly a political move and not a worthwhile policing strategy. Indeed, Alabama and South Carolina appear to have abandoned their own analogues in the wake of federal lawsuits.

We can take at least two lessons from the early aftermath of *Arizona*. Perhaps the intensely political nature of these measures actually justifies allowing them to play themselves out; fits of political pique will often give way to pragmatic exercises of discretion. Such a preference for political contestation would not

obviate the need for targeted lawsuits to prevent and punish civil rights violations such as racial profiling—a possibility the Supreme Court acknowledged. And the litigation brought by the United States and the ACLU has been as crucial to the political conversation as to the legal one. But the survival of section 2(B) in litigation, followed by its potential demise through implementation, should also point toward a second lesson—that we can learn much more about what’s at stake in immigration enforcement through institutional practice than from theoretical arguments about the proper spheres for federal versus state action.

Enforcement Federalism and Civil Rights

Balancing the interests of immigrant communities with the goals of federal and local law enforcement may ultimately depend on coming to terms with state and local involvement in—and resistance to—enforcement. On the one hand, the combination of section 2(B)’s survival and the federal government’s statements that it values state and local cooperation underscores the need to equip state and local police with the ability to enforce immigration laws with the interests of immigrant communities in mind.

Among the arguments made by advocates and police associations against laws like S.B. 1070 was that states and localities have no role to play in immigration enforcement because they are not trained in the complexities of immigration law. But post-*Arizona*, immigration federalism will continue to be the product of negotiation and intergovernmental relations. The federal interest in cooperation, combined with the difficulty of controlling police discretion, suggests that it may be counterproductive to try to wall police off from immigration enforcement. Rather than continuing to insist that state and local police don’t have the expertise to enforce immigration laws, the federal government should instead enhance their capacity to assist federal enforcement officials in proportional and fair ways. This training could include better knowledge of immigration laws and federal enforcement priorities, and it should include best practices for interacting with immigrant communities, especially given that state and local police encounter those communities far more regularly than federal officials.

At the same time, states and localities can also help temper federal enforcement excesses, but only if we acknowledge the value of local autonomy. The latest and most significant development in federal immigration enforcement, the Secure Communities program, may be diminishing the need for direct and informal cooperation—though certainly not in ways that satisfy immigrants’ rights advocates or police officials resistant to cooperation. Under the program, DHS has access to fingerprint data sent by state and local law enforcement to the FBI for criminal background checks—data it can then use to identify poten-

tially removable non-citizens. Often, DHS will follow up by issuing a detainer, or a request to a local law enforcement agency, to hold an individual for up to 48 hours until DHS can take custody. While the program does not directly involve state and local officials in identifying and arresting people for immigration violations, it does transform non-immigration arrests into potential encounters with federal immigration officials. As Anil Kalhan has written in the *Ohio State Law Journal*, not only has the program facilitated the removal of low-level offenders in addition to serious offenders, it deprives states and localities of the choice of whether to be involved in immigration policing and creates an impression among immigrants that *any* interaction with police could have immigration consequences.

The federal government contends that the law requires the FBI to share the data it receives from police departments with DHS. Here, progressive advocates take the side of the states and localities—call them the anti-Arizonas—that resist federal enforcement policy with the goal of fostering immigrants’ trust in police. States like California and Connecticut and cities such as Chicago, Philadelphia, and Washington, D.C. have enacted laws that direct police to honor only certain narrowly defined detainers. These ordinances follow in a tradition that dates back to the 1980s sanctuary movement that sought to shelter refugees from Central America and eventually evolved into mostly city-based non-cooperation policies under which bureaucrats were restrained from conveying immigration status information to the federal government.

In substance, the anti-detainer ordinances arguably reflect more extreme forms of federalism than the position taken by Arizona; the former seek to thwart federal enforcement, whereas the latter sought to enforce federal law, albeit in a way that diverged from the Administration’s view of it. Though an attempt by the federal government to require states and localities to honor detainers would raise constitutional concerns (thanks to the Rehnquist Court’s federalism), and some courts have begun to find detainers themselves unlawful, Congress can curtail non-cooperation through pre-emption legislation, asserting federal supremacy over state and local views. Under current federal law, in fact, governments may not prohibit their subdivisions and employees from voluntarily conveying immigration status information to the federal government. Cities such as New York have in turn responded by adopting privacy policies that restrain workers from initiating status inquiries in the first place—a “Don’t Ask, Do Tell” way around federal law. These dynamics reflect how localized communities can be more protective of immigrants’ rights than the federal government—whether it’s run by Republicans or Democrats—and why a tradition of resistance to federal priorities can serve progressive as much as conservative ends.

In the immigration setting, scholars such as Kevin R. Johnson, Mike Wishnie, and Gulasekaram and Ramakrishnan have argued that the real problem with Arizona-style laws is not that they interfere with federal enforcement, but that they violate the civil rights of citizens and non-citizens alike. State and local enforcement measures increase the risk of racial profiling and enable the surveillance and harassment of immigrants, Latinos, and their communities—a concern Justice Kennedy highlighted in *Arizona*. In a recent contribution to the *Duke Journal of Constitutional Law and Public Policy*, Lucas Guttentag argues that civil rights concerns cut across the federalism debate in a way that should lead to pre-emption of state and local enforcement laws like Arizona's, but also to authorization of laws that promote the integration of immigrants, such as California's non-enforcement law. The comprehensive federal scheme governing the treatment of aliens against which state and local laws must be judged, he argues, includes civil rights laws dating back to the nineteenth century that require equal treatment of aliens and citizens.

It should go without saying that state and local immigration laws that violate civil rights statutes and constitutional principles are invalid. But the very content of these rights is part of what is being contested on federalism's ideological playing field. Does immigration enforcement constitute discrimination? Is the fact that enforcement *might* create race-based externalities enough to characterize local enforcement laws as irredeemably discriminatory, even if the civil rights laws do not contemplate freedom from enforcement as a protected right? Or must proof of these civil rights costs be adduced? Was Arizona's S.B. 1070 motivated by racial animus? Does local resistance to enforcement promote the federal interest in equal treatment of non-citizens as the government understands it? And what exactly are the rights of unauthorized immigrants—a question that's far from being settled in constitutional doctrine?

Each of these questions could generate a healthy legal debate, not to mention a complicated political one. But the fluid nature of the concept of civil rights in the immigration setting, coupled with the difficulty of proving discriminatory intent, points to the importance of taking the battle over immigrants' place in the polity to each level of government on the merits.

Beyond the Enforcement Debate

The political turmoil and litigation surrounding Arizona's law have helped fuel the impression that immigration federalism amounts to a debate over enforcement policy. To some degree, every pro- or anti-immigrant position taken at the state or local level could have an enforcement consequence, either by discouraging immigrants from remaining in a jurisdiction, or by drawing them

there in search of favorable treatment. But a full understanding of the national conversation over immigration requires that we consider the broader range of immigration-related work being done at the state and local level, much of which is targeted at addressing the needs of immigrant populations and integrating new arrivals into sometimes-ambivalent environments. From extending state health and higher-education benefits to unauthorized immigrants; to providing robust support for language instruction, financial services, and other integration programs; to enacting local laws to punish and prevent exploitation, state and local governments use their bureaucracies to anchor immigrants' place in the community, often in ways the federal government does not or cannot.

States and localities sympathetic to immigrant populations have adopted policies with both expressive and pragmatic benefits for unauthorized immigrants. Twenty states, some traditionally Democratic, others traditionally Republican, have declared certain unauthorized high-school students eligible for in-state tuition. A handful of states permit unauthorized immigrants to apply for drivers' licenses. Most permit recipients of Deferred Action for Childhood

Arrivals—a form of relief from removal the Obama Administration has made available to certain unauthorized immigrants who arrived as children—to do the same. Among the first initiatives Bill de Blasio announced after his inauguration as mayor of New York City was the creation of a city identification card for unauthorized immigrants meant to facilitate daily life, a practice already adopted in major cities such as Los Angeles, San Francisco, and Washington, D.C., as well as smaller locales such as New Haven, Connecticut, and Princeton, New Jersey. And with California in the lead, other state bars are now considering whether unauthorized immigrants otherwise qualified for admission can become members.

As with the non-enforcement policies discussed above, Congress may well be able to pre-empt many of these measures with its broad immigration power, which includes the power to determine the terms and conditions of immigrants' presence in the United States and prevent states from facilitating the ongoing presence of unauthorized immigrants. Staving off such efforts should involve a healthy defense not only of immigrants' rights, but also of states' and localities' prerogatives to chart their own course, especially when it comes to their own institutions.

Apart from these high-profile initiatives, states and localities, along with the private sector, perform much of the day-to-day work of immigrant integration.

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States such as Illinois and Maryland have created offices or task forces for new immigrants. These offices provide umbrellas and infrastructure for the work that many other states and localities also perform on an ad hoc basis, including improving non-citizens' access to health and welfare services through translation and language training, as well as cultural awareness training for bureaucrats, language education for adults, and elimination of barriers to immigrants' acquisition of state professional and employment licenses. These sorts of policies are even more immune to pre-emption concerns than those that seek to shield or extend rights to unauthorized immigrants.

In the immigration reform debates of the last decade, some policy entrepreneurs have called for the United States to adopt an integration policy as well as an immigration policy, in part out of a progressive desire to complement and offset the federal government's enforcement orientation with a more civic-minded approach to immigration. But states and localities are ultimately better positioned than the federal government to perform this work because of the institutions under their control, and because of the relevance of local conditions and the particularities of different immigrant populations to facilitating integration. To prevent integration policy from becoming an ideologically driven project, the federal government should play the role of funder and coordinator, rather than the driver of national policy, leaving our national integration strategy to the institutions of federalism already deeply embedded in the enterprise.

In addition, rather than think of cooperative immigration federalism as being exclusively about enforcement, we might enlist state and local expertise to assist in the implementation of any future legalization program. We might also take seriously the idea recently floated by Governor Rick Snyder of Michigan—a Republican—to recruit immigrants to Detroit to help revitalize it. This idea recalls a short-lived campaign by Tom Vilsack when he was governor of Iowa to create immigrant enterprise zones by seeking exemptions from federal quotas to attract immigrants to the state to reverse its population decline. These intergovernmental admissions strategies would require congressional authorization, as well as guarantees that the immigrants recruited had mobility rights. But regardless of whether these are good ideas, they reflect the possibilities that come into play when we recast states and localities as competent in immigration policy and reframe cooperation as an approach aimed at harnessing the benefits of immigration, not just policing its costs.

The Shifting Terrain of Immigration Federalism

It is hard to predict the direction immigration federalism will take in the aftermath of *Arizona v. United States*. The Supreme Court has significantly limited but

not eliminated Arizona-style federalism, and a great deal of legal and political space remains for integrative federalism. The extent of autonomous state and local activity will be a function of partisan dynamics in each state. But institutional interests will also drive state and local innovation and adaptation, as administrators, law enforcement, and executives work to foster good relations with and enhance the prospects of immigrant communities, even in the face of public ambivalence. Finally, the particular positions states and localities take will depend on how much they learn and adapt, and how much demographic change alters the politics of the immigration issue. In the 1970s, Texas enacted a law denying unauthorized children access to public schools, prompting the Supreme Court's landmark 1982 decision striking it down and articulating the equality interests of children of unauthorized immigrants in *Plyler v. Doe*. Today, however, Texas extends in-state tuition benefits to unauthorized students and has not followed Arizona's trajectory, despite being a profoundly Republican state.

How the federal government will manage immigration federalism also remains to be seen. Perhaps the growing localized resistance to Secure Communities, the FBI-DHS data-sharing program, will prompt the Administration to refashion its enforcement policies, just as S.B. 1070 led to a strong federal reaction. If Congress manages to enact immigration reform, what is left of the momentum behind Arizona-style ordinances could dissipate further, if reform provides a path to legalization. That said, as a trade-off for legalization, Congress might authorize Arizona-style enforcement measures ostensibly to prevent future illegal immigration, and the political opposition to legalization that will likely survive any congressional reform could manifest itself in state and local laws and practices designed to obstruct legalization.

Though Congress is indispensable to lasting immigration reform, other constitutional players, including states and localities, have been setting the terms of our immigration policy of late. Progressive advocates, pragmatic policy wonks, and citizens who believe in democratic pluralism have strategic, if not principled, interests in understanding and even embracing the dynamics of immigration federalism in all of its forms. The United States consists of myriad overlapping political communities that simultaneously map onto and transcend jurisdictional boundaries. Federalism offers a means through which we might come to a compromise among those communities over competing conceptions of immigration policy and the national good. ■