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Immigration Policy through the Lens of Optimal Federalism

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Abstract:
The controversial immigration bill S.B. 1070 enacted by the Arizona legislature utilizes local police to enforce Arizona's interpretations of immigration rules. Meanwhile, the "Utah Compact" suggests that all aspects of immigration policy should be handled by the federal government, not by states or localities. In the midst of this contentious debate, this article uses an "optimal federalism" framework to examine the appropriate locus for immigration policy. It compares economies and diseconomies of scale across enactment, implementation, and enforcement institutions, in order to determine the appropriate level of government for addressing these institutional aspects of immigration policy. It concludes that due to significant economies of scale in each institutional phase, the federal government should have some dominant role across all phases. However, significant diseconomies of scale appear in both the implementation and enforcement phases, which imply that state and local governments should play important though limited roles in implementing and enforcing immigration policy. The article then offers a complex combination of federal, state, and local authority, in the pursuit of an effective and equitable immigration policy.

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I. Introduction

The enactment of Arizona Senate Bill 1070[1] on April 23, 2010, stirred emotions on many sides of the immigration debate. President Barack Obama warned that the bill could "undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe."[2] Meanwhile, Arizona Governor Jan Brewer defended the bill, stating that "decades of federal inaction and misguided policy have created a dangerous and unacceptable situation,"[3] to the point that the state government of Arizona could not "stand idly by as drop houses, kidnappings and violence compromise [Arizona's] quality of life."[4]

This act focused the immigration debate on the question of federalism: what role should state and local governments play, if any, in immigration policy? Supporters of the bill suggest that states can use their broad police powers to protect their citizens from threats posed by illegal immigrants.[5] Others, such as the authors and signatories of the "Utah Compact," assert that "immigration is a federal policy issue between the U.S. government and other countries—not [states] and other countries."[6] Based on a sequence of U.S. Supreme Court cases, some assert that immigration policy is within the "exclusive" domain of the federal government.[7] Others dispute this claim, based on theories of constitutional interpretation and pragmatism.[8]

Concluding that this constitutional debate is unsettled, this article suggests that principles of federalism should be considered in determining the proper allocation of authority on immigration policy. While others have applied federalism to their analysis of immigration, this article uses a different approach: it applies the Optimal Federalism framework.[9] In this framework, analysis is divided into three phases: enactment, implementation, and enforcement. In each phase, identification of economies

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[1] Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 2010 Ariz. Sess. Laws 0113 (2010).
[2] Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, April 24, 2010, at A1.
[3] Janice K. Brewer, Governor, State of Arizona, *Statement By Governor Jan Brewer on Senate Bill 1070* (April 23, 2010), *available at* http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf.
[4] *Id.*
[5] *See* Kris W. Kobach, *State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists* (2004), *available at* http://www.cis.org/StateEnforcement-LocalEnforcement.
[6] *The Utah Compact* (2010), *available at* http://utahcompact.com/index.php. Other states, such as Indiana, have also begun to follow Utah's lead in proposing a similar compact toward immigration. *See* Kelly McConkie Henriod, Utah immigration proposal catching on in Indiana, other states, DESERET NEWS, February 12, 2011, *available at* http://www.deseretnews.com/article/700109359/Utah-immigration-proposal-catching-on-in-Indiana-other-states.html.
[7] *See* discussion *infra* Part III.
[8] *Id.*
[9] *See* Dale B. Thompson, *Optimal Federalism Across Institutions: Theory and Applications From Environmental and Health Care Policies*, 40 LOY. U. CHI. L.J. 437 (2009) [hereinafter *Optimal Federalism Across Institutions*]. For further discussion of this framework, *see* discussion *infra* Part V.

and diseconomies of scale[10] enables the determination of the appropriate scale of government to handle that phase of the policy. Applying this framework to immigration policy, this article concludes that due to significant economies of scale in each institutional phase, the federal government should have some dominant role across all phases. However, significant diseconomies of scale appear in both the implementation and enforcement phases, which imply that state and local governments should play important though limited roles in implementing and enforcing immigration policy. The article then offers a complex combination of federal, state, and local authority, in the pursuit of an effective and equitable immigration policy.[11]

Following this introduction, this article provides some foundational background on immigration, and then examines the constitutional debate on immigration federalism. Next, it describes the Optimal Federalism framework, and then applies that framework to determine the optimal scale of immigration policy across each institutional phase.

II. Background on Immigration

A. What is immigration policy?

This article is concerned with immigration policy as the governmental actions that provide incentives and the opportunity for a resident of another country to attempt to relocate to the United States, along with governmental actions that may lead to the exiting of a non-citizen from the United States. Under this definition, there are a wide range of aspects to immigration policy. It can include aspects from identifying legislative goals for an immigration policy to patrolling borders, and from calculating annual limits on immigration to employment eligibility verification.

Some distinguish between laws affecting immigrants (or alienage law) and laws affecting the immigration process.[12] However, while this may be a helpful classification, we must recognize that in essence, immigration laws and alienage laws are two sides of the same coin: laws affecting the rights of aliens once they are in the United States create significant incentives for initially entering or later

[10] An economy of scale occurs when the average costs of a policy decrease with increasing scale, whereas a diseconomy of scale is where the average costs rise with increasing scale.

[11] The approach recommended by this article is based on what a long-run equilibrium immigration policy should look like. This article does not address issues such as how to handle current residents that would be needed to be addressed in a transitional period.

[12] *See*, for example, Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: SB1070 and Other State Regulation of Immigration through Criminal Law*, Arizona Legal Studies Discussion Paper No. 10-25, 7-8 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685 (making the distinction that immigration laws are seen by them to be under exclusive federal authority, while alienage laws may be within the jurisdiction of states).

leaving.[13] Because of this, a full analysis of immigration policies must also include alienage laws.

B. Recent Immigration Policy History

Over the past sixty years, Congress has passed a number of different immigration policy acts. In 1952, Congress enacted the Immigration and Nationality Act[14] which set up a system for controlling entering and leaving the United States, and this act has been amended a number of times. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA)[15] which creates a system for regulating the employment of immigrants. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[16] the welfare reform act that also allowed states to deny many welfare benefits to immigrants. That year, it also passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[17] which included the establishment of 287g programs, under which state law enforcement officers could help enforce federal immigration laws. In 2002, in the wake of the attacks of 9/11, Congress enacted the Homeland Security Act,[18] part of which transferred federal authority from Immigration and Naturalization Services to three agencies within the Department of Homeland Security: United States Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). Finally, in 2005, the REAL ID Act[19] was passed, and it was designed to prevent states from issuing drivers licenses without proper immigration documentation.

Nonetheless, pressures due to high unemployment rates, soaring government deficits, and terrorism concerns have led to many calls for more comprehensive immigration reform. For example, from 2005 to 2006, Spencer Abraham and Lee Hamilton co-chaired a task force on "Immigration and America's Future." The Task Force's report called for sweeping changes in immigration policy, including a "re-designed system" based on three categories of immigration – "temporary, provisional,

[13] *See* Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 581 (2009) (claiming that recent state laws "pointedly deny essential services of employment, housing, and welfare benefits to immigrants often forcing them to relocate or self-deport").
[14] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 210 (1952).
[15] Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).
[16] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996).
[17] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[18] Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135 (2002).
[19] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

and permanent;" "mandatory employer verification;" "secure documents;" and "smart borders."[20] Over the past five years, a number of immigration reform bills have been introduced in Congress,[21] but none have been enacted. The resulting climate is has been labeled one of "Federal Inactivity."[22]

Into this vacuum, a number of state legislatures have enacted legislation affecting immigration policy.[23] For example, Arizona has enacted the Legal Arizona Workers Act in 2007,[24] penalizing employers for hiring illegal immigrants, and most recently Senate Bill 1070.[25] During 2006 and 2007, the city of Hazleton, Pennsylvania, enacted a sequence of ordinances setting up penalties for employing undocumented aliens, and requiring renters to provide documentation.[26] During the same time period, the city of Farmers Branch, Texas, similarly enacted ordinances placing penalties on landlords who rented to undocumented aliens.[27] A number of lawsuits have been filed in response to these state and local immigration acts, leading to court decisions including *Chicanos Por La Causa v. Napolitano*,[28] *Lozano v. City of Hazleton*,[29] and *United States of America v. State of Arizona*.[30] The two earlier cases reached opposite conclusions based on differential application of the "Savings Clause" of IRCA, but the

[20] MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER xvii-xviii (2006), *available at* http://www.migrationpolicy.org/ITFIAF/finalreport.pdf.

[21] Such as the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, introduced in the U.S. House of Representatives five different times: H.R. 2671, 108th Cong. (2003); H.R. 3137, 109th Cong. (2005) ; H.R. 842, 110th Cong. (2007); and H.R. 3494, 110th Cong. (2007); and H.R. 2406, 111th Cong. (2009).

[22] McKanders, *supra* note 13, at 583.

[23] *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008) (claiming that "recent state and local involvement often is attributed to the perceived need to address unauthorized migration in the face of the federal government's failure to do so"); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 570 (2008) (predicting that "Congress's inability to pass comprehensive immigration reform in recent years likely means that states and localities will continue to be highly active in" immigration law); and Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1561 (2008) (noting that the "usual explanation for the intense state and local interest in immigration law is that the federal government is stymied in enforcing immigration laws").

[24] Ariz. Rev. Stat. Ann. §§ 23-211 to 23-216 (2008).

[25] *Supra* note 1.

[26] *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484-5 (M.D. Pa. 2007).

[27] *See* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 861-2 (2008).

[28] 544 F.3d 976 (9th Cir. 2008) (holding that the Legal Arizona Workers Act was permissible under the Savings Clause of IRCA).

[29] 496 F. Supp. 2d 477 (M.D. Pa. 2007) (holding that Hazleton's ordinances were preempted under the Immigration and Nationality Act).

[30] 703 F. Supp. 2d 980 (D. Ariz. 2010) (preliminary injunction granted, enjoining enforcement of four sections of Senate Bill 1070). Other states such as Oklahoma have enacted similar laws that have likewise been challenged in courts. For example, *see* Robert Boczkiewicz, *Appeals Court Won't Change Ruling that Bars Oklahoma from Enforcing Parts of Measure*, THE OKLAHOMAN, April 20, 2010, at A1. For other arguments against the Oklahoma legislation, *see* Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?* 23 GEO. IMMIGR. L.J. 293 (2009).

battle over the constitutional role for state and local governments in immigration policy has not been settled.

III. Constitutional Analysis of State Legislation: Federal Preemption and Dominance

Federal power over immigration derives from a number of sources. These include the enumerated constitutional power over Naturalization,[31] the power to conduct foreign affairs,[32] the Foreign Commerce Clause,[33] and the Necessary and Proper Clause.[34] In additional to these constitutional clauses, Congressional and federal executive power over immigration is supported by two doctrines: the plenary power doctrine and the political question doctrine. Under the plenary power doctrine, "Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."[35] Under the political question doctrine, courts are unwilling to provide a remedy when they determine that the subject matter is political, and hence properly within the scope only of a political body instead of a judicial one.[36]

The applicability of these doctrines for immigration law was first asserted in the *Chinese Exclusion Case* of 1889.[37] In this case, the court asserted that because these were issues of national security and sovereignty, the Federal Government was supreme in the field of immigration policy. Quoting Chief Justice John Marshall in Cohens v. Virginia,[38] the court declared, "'The people have declared, that in the exercise of all powers given for these objects, [the government of the Union] is supreme. It can then in affecting these objects legitimately control all individuals or governments within the American territory.'" [39] Furthermore, the court saw the immigration issue as a political one: "If there be any just ground of complaint on the part of China, it must be made to the political department of our

[31] U.S. Const. art. I, § 8, cl. 4.
[32] U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War ... .").
[33] U.S. Const. art. I, § 8, cl. 3.
[34] U.S. Const. art. I, § 8, cl. 18.
[35] Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).
[36] *See* Marbury v. Madison, 5 U.S. 137, 166 (1803) (noting that "The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.").
[37] Chae Chan Ping v. United States, 130 U.S. 581 (1889).
[38] Cohens v. Virginia, 19 U.S. 264, 414 (1821).
[39] *Chae Chan Ping*, 130 U.S at 605.

government, which is alone competent to act upon the subject."[40]

Based on these Constitutional clauses and doctrines, there have been a number of claims that "Courts and scholars largely agree that the power to regulate immigration is exclusively federal."[41] Frequently, these claims cite the U.S. Supreme Court's statement in *De Canas v. Bica* that the "Power to regulate immigration is unquestionably exclusively a federal power."[42] Under this view, any acts by a state or local government may be preempted because of the federal government's exclusive authority over immigration.

On the other hand, others argue that there is still room for state and local government action affecting immigration policy. Kris Kobach noted that the quotation from *De Canas* is frequently taken out of context.[43] The following sentence in the case states, "But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."[44] Based on this sentence, Kobach notes that the court is differentiating between "legislative enactment and executive enforcement." [45] As a result, Kobach finds that the court is leaving open an opportunity for states to participate in enforcement of immigration policy.[46]

Clare Huntington argues that the relevant federal authority in immigration law is based upon "statutory preemption," instead of "structural preemption."[47] If structural preemption applied, there would be no opportunity for state and local governments to play any role, as recommended by Michael Wishnie.[48] Huntington argues however that there is no enumerated power over the entire field of

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[40] *Id*. at 609.

[41] Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006). *See* also Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 567 (2001) (concluding that "States possess no power to regulate immigration, and the federal government may not devolve by statute its own immigration power"); and Chin & Miller, *supra* note 12, at 4-5 (2010). Chin and Miller do however find some room for state authority due to their distinction between immigration law and alienage law, as noted above.

[42] De Canas v. Bica, 424 U.S. 351, 354 (1976) (in which the Supreme Court upheld as constitutional a California state statute that prohibited employers from hiring illegal immigrants; note however, that Congress addressed this issue directly in IRCA in 1986).

[43] Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 231 (2005).

[44] *De Canas*, 424 U.S. at 354

[45] Kobach, *supra* note 43, at 231.

[46] *Id.*

[47] Huntington, *supra* note 23, at 808-25 (2008). Huntington also discusses dormant preemption, but finds it does not apply.

[48] *See* Wishnie, *supra* note 41.

immigration, and that the *De Canas* quote frequently cited is dictum.[49] Instead, Huntington concludes that statutory preemption, under which "the Constitution permits the national and subnational levels of government to share authority over a subject"[50] while still subject to the Supremacy Clause, is the relevant approach.[51] Under this approach, state and local governments can engage in immigration policy, as long as their acts are not specifically preempted by federal law.

In addition to these arguments against complete exclusivity, there is another argument against application of the political question doctrine to support federal exclusivity in the immigration context. The general principle behind the political question doctrine is that, if a political body makes a choice on a political question – i.e. one dividing costs and benefits among constituents – that is excessively harmful, the wronged party has an alternative avenue of redress, in the place of a judicial remedy: the ballot box. Because of this, in the long run, political bodies representing a particular constituency will evolve to properly represent the political preferences of their constituencies.

However, this argument depends on a particular assumption: that the political body is composed of representatives of its constituents. However, in the immigration context, due to fiscal and employment impacts, the relevant constituency of the federal government may be the states themselves. While the Senate is composed of two representatives of each state, members of the House of Representatives are elected to represent a district,[52] while the President is elected[53] through a more national campaign. Consequently, it is possible that the Senate may not provide enough of a check on federal immigration power to protect some individual states (who may bear a disproportionate share of the burden of immigration) from the "tyranny of the majority" that concerned Alexis de Tocqueville in *Democracy in America*[54] and James Madison in *Federalist Paper #10*.[55] As a result, courts cannot simply rely on the political question doctrine to foreclose the consideration of federalism principles to protect states in the context of immigration.

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[49] Huntington, *supra* note 23, at 812 and 822.
[50] *Id.* at 810.
[51] *Id.* at 825.
[52] Which can be an entire state, but most of the time are distinct subdivisions of states.
[53] Granted the ultimate selection process is via electors of individual states.
[54] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Book I, Chapter 15, *available at* http://xroads.virginia.edu/~HYPER/DETOC/1_ch15.htm.
[55] James Madison, *The Federalist No. 10*, *available at* http://www.constitution.org/fed/federa10.htm.

IV. Previous Applications of Federalism Theory in Immigration

If we are not limited to complete exclusivity of federal authority on immigration policy, then federalism principles may serve as a helpful guide to allocating responsibility over immigration policy. There are a number of general theories on the application of federalism. One theory encouraging state participation is the "laboratories of democracy" first espoused by Louis Brandeis.[56] Under this theory, allowing a number of states to experiment with different methods to achieve the same goal enables the determination of the optimal method, which other states can later adopt. On the other hand, another theory of the "race to the bottom," also discussed by Brandeis,[57] suggests that state responsibility should be limited.[58] There is also the notion of "cooperative federalism"[59] where "the federal government does not directly regulate behavior, but instead financially supports states that implement policies consistent with federal goals, while at the same time permitting the states to choose the means to achieve those goals."[60]

Previously, federalism principles also have been applied specifically to immigration policy. The idea behind 287g agreements under IIRIRA[61] is one of cooperative federalism. With these agreements, Congress is providing a mechanism under which state government enforcement resources can be utilized to enforce federal law.

A number of scholars have discussed federalism principles in the context of immigration. Rick Su suggests that there are "three different understandings of our federalist structure: as dueling sovereigns, transacting parties, and overlapping communities."[62] Under the first understanding, Su suggests that the Court may find similar constraints to federal authority in immigration as it has in Commerce Clause jurisprudence.[63] Under his second approach, Su suggests that "cooperative bargaining" may lead to the

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[56] New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[57] Louis K. Ligget Co. v. Lee, 288 U.S. 517, 557–60 (1933) (Brandeis, J., dissenting).
[58] *See* also McCormick, *supra* note 30.
[59] For more on cooperative federalism, *see* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) (examining the problems in implementing federal policies through state and local officials and examining the constitutionality of delegation); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997) (discussing the political reality and constitutional history of cooperative federalism, as well as arguing for invalidation of insufficiently supported delegation of federal power to the states).
[60] *Optimal Federalism Across Institutions*, *supra* note 9, at 443-44.
[61] *See* discussion *supra* Part II.B.
[62] Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT'L L. 179, 180 (2008). Su also presents the notion of "localism" instead of federalism as a key concept in immigration law in, Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008).
[63] *Id.* at 190-1.

"recognition that state and local governments are often better situated than the federal government with regard to enforcement or integration costs."[64] Under his third approach, the purpose of federalism is to "reconcile … [federal and state governments'] simultaneous claims upon the same individuals in and outside their jurisdiction."[65]

Lina Newton and Brian Adams empirically examine state immigration legislation over the period of 2006-2007.[66] They conclude that most of state immigrant legislation of this period is consistent with "cooperative federalism" principles.[67] They note that many of the acts passed by state legislatures were done under traditional state powers, but these acts' close relation to immigration issues led them to be "*de facto* immigration legislation."[68]

Based on notions of "popular sovereignty"[69] and the "de facto obsolescence of federal exclusivity,"[70] Cristina Rodriguez utilizes a "functional" approach to immigration policy, emphasizing that the primary role of state and local governments is to "integrate immigrants, legal and illegal alike, into the body politic."[71] Consequently, Rodriguez suggests that, for immigration policy, we should "develop legal doctrines and lawmaking presumptions that simultaneously facilitate power sharing by the various levels of government and tolerate tension between federal objectives and state and local interests."[72] This structure would enable state and local governments to integrate immigrants through policies consistent with federal policy, while also "restrain[ing] courts ... from preempting efforts by lower levels of government to manage the convergence of the global and the local that today's immigration represents."[73]

Peter Schuck[74] presents a number of insights from federalism. He begins by pointing out the

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[64] *Id.* at 197.
[65] *Id.* at 200.
[66] Lina Newton & Brian E. Adams, *State Immigration Policies: Innovation, Cooperation or Conflict?* 39 Publius 408 (2009).
[67] *See id.* at 408 (noting that "federal immigration laws often delegate tasks to state and local agencies or are structured to grant options for state participation").
[68] *Id.* at 425.
[69] Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 641 (2008). Rodriguez's notion of a "de facto regime" is consistent with arguments made by Peter Spiro previously. *See* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INTL. L. 121 (1994) (claiming that "as a practical matter, immigration is now largely a state-level concern"); and Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997)
[70] *Id.* at 576.
[71] *Id.* at 571.
[72] *Id.* at 610.
[73] *Id.* at 641.
[74] Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007).

"Myth of Greater State Hostility to Immigrants."[75] In particular, he points out that there did not seem to be a "race to the bottom," as states that could have reduced benefits for immigrants under the 1996 Welfare Reform Act, the PRWORA, chose not to do so.[76]

With the possibility that states might adequately protect immigrant rights, Schuck argues for "Delegating More Immigration Policy Development and Implementation Authority to the States."[77] One avenue where states could have more authority is through "Employment-Based Admissions."[78] To enable this, Schuck suggests the use of a proposal formulated by Davon Collins of "decentralized employment-based immigration ("DEBI")."[79] Under this model, states could trade entitlements of visas, depending on their local labor market needs. Congress would determine the total number of visas available, according to employment-based categories. The efficiency of this model derives from the proposition that "the relatively few states with low unemployment rates and a high demand for foreign workers would be more keenly aware of these needs, more eager to fix the problem, and more nimble in finding ways to do so than the federal government would."[80] In addition to differential assessment of benefits across states, there is also a differential burden of costs: "the burdens imposed by immigrants -- such as increased demand for public benefits and services, and downward pressure on wage rates -- are disproportionately felt at the state and local level, which suggests that states are in the best position to assess and manage the tradeoffs among conflicting public goals peculiar to their polities."[81]

Next, similar to Kobach,[82] Schuck argues that enforcement of immigration laws requires the "extensive participation of state and local officials, ... [s]pecifically, ... on state and local [personnel], data networks, detention facilities, initiatives, and tactics."[83] He concludes that, on their own, "federal immigration officials [would be] practically impotent."[84] Noting the "egregiously lax enforcement" of

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[75] *Id.* at 59.
[76] *Id*. However, some have found a significant change in access to benefits after PRWORA's definition of "qualified" immigrants. *See* Pamela A. Holcomb, Karen C. Tumlin, Robin Koralek, Randolph Capps, Anita Zuberi, *The Application Process For TANF, Food Stamps, Medicaid and SCHIP: Issues For Agencies and Applicants, Including Immigrants and Limited English Speakers* (2003), available at http://www.urban.org/UploadedPDF/410640.pdf.
[77] *Id*. at 67.
[78] *Id*. at 68.
[79] *Id*.
[80] *Id*. at 70.
[81] *Id*.
[82] *See* Kobach, *supra* note 5.
[83] Schuck, *supra* note 74, at 72.
[84] *Id*.

employer sanctions,[85] Schuck further argues that state and local officials may have much stronger incentives to actually enforce immigration laws, because the "adverse political and fiscal effects of these concentrations are disproportionate in these states."[86]

However, Schuck does note a number of the civil liberties and anti-discriminatory concerns that may be raised in the course of state and local enforcement of immigration laws.[87] Nonetheless, Schuck suggests that these concerns "do not imply a rejection of enhanced state and local participation; rather, they imply the need to rectify those conditions directly through policy or administrative changes"[88] such as better and more effective oversight of state and local police.

Meanwhile, Keith Aoki and John Shuford propose an alternative government level for immigration policy.[89] They suggest that "immigration policy formulation and implementation occur on a regional basis, federally created with strong federal oversight."[90] Their proposal would necessitate the creation of a new set of regional institutions for enacting, implementing, and enforcing immigration policy.

V. Another Approach: Optimal Federalism

These previous applications of federalism provide a number of useful and beneficial insights into immigration policy. However, these insights derive from analyzing specific components of immigration policy, and so a more complete view of the institutions supporting immigration policy may offer other suggestions. Also, while it is beneficial to understand immigration policy from a "de facto" and "practical" standpoint, it may also be helpful to consider the implications of federalism from a normative, long-term equilibrium perspective.

One technique to more completely examine the institutions behind policy from a normative, long-term perspective is to apply the Optimal Federalism framework.[91] In this framework, policies are analyzed across three different phases: an enactment phase, an implementation phase, and an

[85] *Id*. at 78.
[86] *Id*. at 80.
[87] *Id*. at 74-5.
[88] *Id*. at 75.
[89] Keith Aoki & John Shuford, *Welcome to Amerizona – Immigrants Out!: Assessing 'Dystopian Dreams' and 'Usable Futures' of Immigration Reform, and Considering Whether 'Immigration Regionalism' is an Idea Whose Time Has Come*, forthcoming FORDHAM URB. L. J. (2011); also *available at* http://ssrn.com/abstract=1695228.
[90] *Id.*
[91] *See Optimal Federalism Across Institutions, supra* note 9.

enforcement phase.[92] In the enactment phase, a governmental institution "determines goals, powers, and constraints of a policy."[93] In the implementation phase, an institution then "defines mechanisms, incentives, and penalties for those targeted by the policy."[94] Finally, in the enforcement phase, an institution "monitors and ensures compliance of individuals targeted by policy."[95]

The next step in applying the Optimal Federalism framework is to examine economies of scale and diseconomies of scale across each of these institutional phases. The framework suggests a number of factors to be considered when identifying economies and diseconomies of scale for each phase.[96] Comparing these economies and diseconomies enables the determination of the optimal scale of the policy.[97] For example, assume that you are considering a policy that could be allocated between national and state governments. Then, the dominance of economies of scale means that the optimal scale is at the national level, while the optimal scale will be at the state level if diseconomies are more significant.

This framework was previously utilized to examine environmental and health care policies. In analyzing policies for endangered species and wetlands, the framework suggested a significant division of responsibility across federal and state governments. This analysis concluded that the federal government should be responsible for "enacting protection of endangered species, … [and for] establish[ing] baseline protections" for both species and wetlands.[98] On the other hand, "states should be responsible for establishing additional levels of protection and for data collection relevant to protecting species and wetlands, ... [along with] issuing both species and wetlands permits."[99] Meanwhile, for health care policy for the poor, the federal government should be responsible for "providing financial support and oversight," while states should be responsible for "contracting with

[92] Karla McKanders uses some of these institutional concepts in a descriptive manner (enactment and enforcement), while also splitting enforcement into interior and exterior enforcement. *See* McKanders, *supra* note 13, at 581. Also, as noted above, Kris Kobach uses these same terms (enactment and enforcement) in a critical manner, distinguishing between impermissible enactment by states versus permissible enforcement by states. *See* Kobach, *supra* note 5, at 231. While these terms are used, neither author uses them as an analytical framework to completely analyze federalism implications for immigration across all institutions.

[93] *Optimal Federalism Across Institutions, supra* note 9, at 450.

[94] *Id.*

[95] *Id.*

[96] *See id.* at 451-5.

[97] This analysis does assume the pre-existence of institutional structures at the different levels of scale. Consequently, Aoki and Shuford's recommendation of the use of regional institutions (s*ee* text at footnote 90), which would require the expenditure of substantial transaction costs to create them, is beyond scope of this article.

[98] *Optimal Federalism Across Institutions, supra* note 9, at 480.

[99] Id.

health plans to serve Medicaid populations, enrolling beneficiaries, and collecting encounter data to properly set capitation payments."[100]

These previous analyses demonstrate that the Optimal Federalism framework can help us develop a strategic mix of governmental institutions in order to carry out a policy. This framework highlights the contributions of individual institutions on the performance of a policy. In doing so, it also provides a better understanding of the institutional resources offered by different levels of government. Given the great need for a workable immigration policy, and the substantial resource requirements in order to develop and carry out that policy, the Optimal Federalism framework may provide valuable insights on the efficient construction of an immigration policy.

Another advantage is that this framework operates as a theory of "penumbral"[101] Constitutional interpretation. Judge J. Harvie Wilkinson III has argued that courts should be hesitant to find "judicially enforceable substantive rights only ambiguously rooted in the Constitution's text."[102] When rights are not clearly stated in the Constitution, a Court that finds them is in essence declaring that these rights exist in the shadow of other constitutional rights. Wilkinson cautions that before concluding that a specific penumbral right exists, the Court should consider "principles of federalism."[103]

Penumbral issues are prevalent in constitutional analysis. They arise when the Court is trying to determine whether there is a personal right to an abortion;[104] whether there is a personal right to "bear handguns at least for self-defense;"[105] and whether the federal government has the power to prohibit the possession of guns in a school zone.[106] In the case of immigration, while the federal government does have the exclusive power to "establish a uniform rule of naturalization,"[107] this article argues[108] that it is not clear whether the power to determine immigration policy lies in the penumbra of this and other federal powers. Consistent with Wilkinson's caution, this article then suggests that the Optimal Federalism framework can help us better determine the boundary between light and shade in the authority over immigration policy.

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[100] Id. at 481.
[101] *See* Griswold v. Connecticut, 381 U.S. 479,483 (1965) (in which the Court held that there was a "right to privacy" in the "penumbra" of the Constitution).
[102] J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257 (2010).
[103] Id. at 254. *See* also id. at 304-22.
[104] *See* Roe v. Wade, 410 U.S. 113 (1973).
[105] Wilkinson, *supra* note 102, at 264 (criticizing the Court in District of Columbia v. Heller, 554 U.S. 570 (2008)).
[106] *See* United States v. Lopez, 514 U.S. 549 (1995) (finding that Congress exceeded its power under the Commerce Clause).
[107] U.S. Const. art. I, § 8, cl. 4.
[108] *See* discussion *supra* Part III, including the argument put forward by Clare Huntington.

VI. Applying the Optimal Federalism Framework to Immigration

In applying the Optimal Federalism framework, we need to specify the different components of an "immigration policy," and then determine to which institution (of enactment, implementation, and enforcement) each component belongs. We first define what constitutes an "immigration policy," and then examine each institution for this policy. With this foundation, we then ascertain the optimal scale of immigration policy across each institution by comparing economies and diseconomies of scale.

A. Defining an Immigration Policy, and Determining the Role of Each Institution

Overall, an immigration policy is where a sovereign nation-state permits non-citizens to establish a domicile in order to fulfill national objectives. These objectives could be for labor market reasons, political reasons, cultural reasons, family reasons, or others. In this article, we will focus primarily on labor market and family reunification[109] aspects. This policy will consist of determining the rules in which individuals can enter, assessment of the needs that could be fulfilled via immigration, determinations of whether particular individuals should be allowed to enter or remain, overall enforcement of the policy, funding of that enforcement, and other aspects.

As noted above, the enactment institution specifies the goals, powers, and restraints of a policy. For an immigration policy, enactment will include a specific explanation of the particular goals of the policy, including the fulfillment of identified labor market needs and family reunification objectives.[110] Goals will also include the identification of groups that the nation will wish to exclude, such as those who commit violent crimes before they achieve full citizenship status. They may also include the goal of spreading the burden imposed by immigrants on the individual localities in which they reside. The powers will consist of the power to let an immigrant enter the country, along with the power to prevent unauthorized entry. Some government entity will also be given the right to remove immigrants from the country. The enactment institution will also define rights of individuals under the policy, including immigrants themselves and those affected by the presence of those particular immigrants. These individual rights act as restraints on governmental powers. An additional restraint is through the budget constraint: the enactment institution will determine the amount of funding available for managing the

[109] Some have recently argued that family reunification should be given a lower priority. For example, *see* THE BROOKINGS-DUKE IMMIGRATION POLICY ROUNDTABLE, BREAKING THE IMMIGRATION STALEMATE: FROM DEEP DISAGREEMENTS TO CONSTRUCTIVE PROPOSALS (2009), *available at* http://www.duke.edu/web/kenanethics/immigration/BreakingtheImmigrationStalemate.pdf (recommending that Congress should "Restrict Eligibility for Family-Sponsored Visas," 4).

[110] Again, this framework could be extended to include the fulfillment of important cultural benefits from immigration also.

intake of immigrants, and other expenses related to the immigration policy.

Implementation is when an institution defines the methods of carrying out a policy. Given the goals specified by the enactment institution, an implementation institution develops specific rules for achieving those goals. For immigration, implementation tasks include developing procedures for handling individuals that wish to immigrate, and procedures for handling unauthorized potential immigrants. These procedures must not only meet national interests, but also protect the rights of individual immigrants and those people (such as family members) who may be impacted by an immigration decision.

Implementation also includes developing procedures for handling the training of enforcement agents, along with providing support for enforcement such as the creation and maintenance of immigration databases. Implementation for immigration includes determining numerical standards: in this case, we need to determine how many immigrants[111] should be permitted to enter the country over a given time period. This number should be calculated based on satisfying the objectives of the policy specified during the enactment phase. As stated above, we will focus primarily upon labor market needs and family reunification, and so this number should correspond to the residual demand for labor above that supplied by current residents, along with projected needs for family unity.

While enactment is about specifying the overall goals of a policy and implementation is about determining how to achieve those goals in general, enforcement is about dealing with individuals affected by a policy, through both detection and prosecution efforts. Enforcement of immigration policy can begin with an agency examining a potential immigrant's application to enter the country. Enforcement will also include detection of potential immigrants who are entering or remaining in the country contrary to the immigration policy. This will include both patrolling the borders, and enforcement actions in the interior of the country. When potential immigrants are suspected of being in the country illegally, their prosecution will consist of deportation hearings and possible appeals.

Thinking more broadly, enforcement for immigration can also include working cooperatively with immigrants on an individual basis, to ensure achievement of the policy goals. It can therefore include the community integration activities recommended by Rodriguez.[112]

[111] This calculation could include distinguishing between different labor categories of immigrants.
[112] *See* text at notes 71 through 73 *supra.*

B. Optimal Scale for Enactment

We now turn to examining the optimal scale for enacting an immigration policy. To do this, we examine economies and diseconomies of scale in this process. A frequently cited concern about immigration is the need for consistency in the policy. If each state could enact its own policy, then the resulting matrix of immigration options would lead to "chaos."[113] There could be multiple effects of this situation. Some immigrants might be discouraged from immigration because the system would seem too confusing. As a result, the overall quality of the immigrant pool could be reduced. Meanwhile, others could possibly use the confusion to "game the system," by initially immigrating through a state with lax standards, but then, once in the United States, migrating to a different state into which they would have been unable to enter initially as an immigrant. Michael Olivas has concluded, "We do not want fifty Border Patrols any more than we want fifty foreign policies in the immigration context, and such a shift would leave the United States worse off in every respect."[114] As a result, there are some significant benefits from having an immigration policy that is consistently defined at the national level. This would be a strong economy of scale in enactment.

On the other hand, as noted in the article introducing the Optimal Federalism framework, there is a related diseconomy of scale in enactment: when trying to enact a single policy at a national level, "it will be more difficult to get political agreement, both within interest groups and among interest groups."[115] We have seen this prediction fulfilled over the past few years, as Congress has failed to enact any comprehensive immigration reform despite many calls for it.[116]

However, this failure to enact immigration reform could be due to Congress trying to do too much in the legislation. In using the Optimal Federalism framework to analyze immigration policy, one of the lessons that stands out is that Congress seems to blend the enactment phase with the implementation phase in its legislation.[117] In previous immigration legislation, Congress has included a number of details, such as the maximum number of immigrants allowed each year, [118] that properly

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[113] Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and what the Federal Government must do about it*, 39 LOY. U. CHI. L.J. 1, 39 (2007).

[114] Michael A. Olivas, *Immigration Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 35-36 (2007).

[115] *Optimal Federalism Across Institutions, supra* note 9, at 482.

[116] *See* discussion *supra* Part II.B on this period of "federal inactivity."

[117] This concern is also related to the literature on rules versus standards. *See*, *e.g.*, Louis Kaplow, *Rules versus Standards: an Economic Analysis*, 42 DUKE L.J. 557 (1992).

[118] Congress has included quotas or revisions of quotas in immigration acts since 1921. The 1921 Emergency Quota Law set a national-origin based ceiling of three percent of the "number of foreign-born persons of such nationality resident" under

belong in the implementation phase. Calculating these numbers requires a careful analysis of a significant amount of data, which is something that administrative agencies are better equipped to handle. For instance, in water quality policy as embodied in the Clean Water Act,[119] Congress identified that the goal of this policy should be to make national water bodies (including rivers, streams, and lakes) "fishable and swimmable."[120] Congress however left to the U.S. Environmental Protection Agency the task of developing numerical effluent standards for each individual industry that discharges into water bodies.

The Abraham and Hamilton Task Force criticized the use of the enactment process to set numerical caps for immigration, recommending that "fixed, statutory ceilings as the framework for immigration must give way to [new] methods."[121] They suggest that these decisions should be turned over to a new "independent federal agency to be called The Standing Commission on Immigration and Labor Markets."[122]

Congress should focus more exclusively on using the legislation to define overall goals, powers, and constraints of the immigration policy, and leave implementation details to an administrative agency. By doing this, finding the political agreement necessary to enact immigration legislation would be simplified, because it will be more likely that representatives of different states will have more consistent beliefs in the overall goals of an immigration policy, although their beliefs may differ significantly in how it should be implemented. For example, it will be easier to get agreement that the goals of the policy should be to satisfy labor market demands for different skilled workers and to deport potential immigrants who commit aggravated felonies,[123] rather than deciding that the maximum numbers of "employment-based" immigrants in one particular year is 140,000 and of "family-

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the 1910 Census. An Act to Limit the Immigration of Aliens into the United States, Pub. L. 67-5, ch. 8, § 2(a), 42 Stat. 5 (1921). The national-origins formula was eliminated in the Immigration and Nationality Act of 1965, but quotas remained. *See* An Act to Amend the Immigration and Nationality Act, and for Other Purposes, 89 Pub. L. 236, 79 Stat. 911 (1965).

[119] *See* Clean Water Act Amendments of 1995, H.R. 961, 104th Cong., 1st Sess. (Feb 15, 1995), in 141 Cong. Rec. D 612 (May 16, 1995). For more on the institutional structure of water quality regulation, s*ee* Dale B. Thompson, *Beyond Benefit-Cost Analysis: Institutional Transaction Costs and the Regulation of Water Quality*, 39 NAT. RESOURCES J. 517 (1999) [hereinafter *Beyond Benefit-Cost Analysis*].

[120] *Beyond Benefit-Cost Analysis, supra* note 119, at 536, *citing* 33 U.S.C.A. §1251 (a) (2).

[121] MIGRATION POLICY INSTITUTE, *supra* note 20, at 29.

[122] *Id.* at 31.

[123] Some recommend restricting the classification of "aggravated felonies" to only "Level 1" offenses. *See* Michele Waslin, *ICE'S Enforcement Priorities and the Factors that Undermine Them* (2010), *available at* http://immigrationpolicy.org/sites/default/files/docs/ICE_Enforcement_Priorities_110910.pdf

sponsored" immigrants is 480,000.[124] Simplifying the legislative package therefore may enable Congress to more successfully address needed changes in immigration policy.

The prior article on Optimal Federalism suggests another significant economy of scale in enactment: the difficulty of state legislatures to consider beneficial externalities from immigration.[125] With immigrants creating new demands for goods generated by entire national economy, there will be some "benefits … accru[ing] to non-constituents"[126] of a state legislature. It is likely[127] that a state legislature would not take these benefits into sufficient account. In contrast, a national legislature would consider these benefits because the broader base of the national body means that these benefits do accrue to their constituents.

On the other hand, it has been noted frequently that the costs of immigration, such as the costs of medical care and education, are typically borne more acutely by the particular localities in which the immigrants reside.[128] Peter Schuck has recognized both the beneficial externalities and the unequal bearing of costs in immigration. He writes:

> The concentration of the undocumented in a small number of states ... means that the adverse political and fiscal effects of these concentrations are disproportionate in these states. This is most evident in the fiscal mismatch under which most tax revenues generated by immigrants, both legal and illegal, flow to Washington, and many other benefits of immigration (say, lower consumer prices) are also enjoyed nationally, while almost all of the costs (say, burdens on locally-funded social services, adverse effects on low-skilled Americans, and immigrant crime) are borne locally.[129]

This situation can create a diseconomy of scale in enactment. In Congress, we may have some legislators who receive significant benefits from immigration while bearing little of the cost, and other legislators who bear substantial costs while receiving perhaps reduced benefits. As a result, it may be more difficult to enact an immigration policy at the national level.

Nonetheless, a national legislature does have mechanisms to address this possible diseconomy of

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[124] Immigration Act of 1990, Pub.L. 101-649, § 201 (c) & (d), 104 Stat. 4978 (1990). These (140,000 and 480,000) are the primary numbers, but they may be adjusted somewhat under formulae given in these sections.
[125] *See Optimal Federalism Across Institutions, supra* note 9, at 452.
[126] Id.
[127] A political entrepreneur may arise to represent non-constituents, but it is more direct and therefore more likely for political representatives to act on behalf of their own constituents. For more on political entrepreneurs, *see* Dale B. Thompson, Political Entrepreneurs and Consumer Interest Groups: Theory and Evidence from Emissions Trading (2002) (unpublished manuscript, on file with author).
[128] Note too that localities will also receive a number of localized benefits from immigration, such as increased sales and property tax revenues, or the rejuvenation of neighborhoods affected by middle class flight.
[129] Schuck, *supra* note 74, at 79-80.

scale, through its power to tax and transfer. In Medicaid policy, transfers to particular states are utilized because "coverage for low income groups may be difficult to finance in states with high proportions of these groups."[130] In a similar manner, Congress could allocate tax revenues to states bearing more of the costs of immigration. There is an additional economy of scale here, because "taxes can be collected from a broader base, thereby reducing distortionary effects."[131]

The following table summarizes these economies and diseconomies of scale in enactment:

Enactment Phase	
Economies of Scale	*Diseconomies of Scale*
Need for Consistency of Immigration Policy	More Difficult to get National Political Agreement
Significant Externalities in Benefits	Costs Borne Locally, but can Utilize Transfers
Less Distortionary Taxes	

The significant economies of scale in the need for consistency and the externalities in benefits suggest that an immigration policy should be enacted at the federal level. However, in order to minimize the diseconomies of scale, this legislation should focus on enactment issues and not implementation issues. It should also utilize general-revenue-tax-funded transfers to compensate states that bear more of the education and health care costs of immigration.

C. Optimal Scale for Implementation

Implementation will involve determining the rules and regulations for handling individual immigrant cases, calculating the appropriate number of immigrants to be permitted to enter the country over a given time period, and constructing and maintaining an immigration database. Federal agencies – initially the Immigration and Naturalization Services and now the Department of Homeland Security – have been primarily responsible for drafting regulations of immigration procedures.[132] These procedures are designed to improve the efficiency of the immigration process while also protecting the rights of parties involved. It is likely that these needs would be consistent across the states, and so it would be unnecessary to adjust these policies for local differentiation. Consequently, there should be a significant economy of scale on this aspect of implementation, because there would be "no need for replication of effort across states."[133]

On the other hand, there will be significant diseconomies of scale in calculating the appropriate

[130] *Optimal Federalism Across Institutions, supra* note 9, at 474-5.
[131] *Id.* at 452.
[132] For examples, *see* Title 8, Chapter I, Subchapter B: Immigration Regulations, of the Code of Federal Regulations.
[133] *Optimal Federalism Across Institutions, supra* note 9, at 453.

number of immigrants. Abraham and Hamilton's Task Force rightly criticize the current approach of having fixed statutory limits on the number of immigrants permitted to enter the country in a given year. As they note, these numbers should fluctuate "based on labor market needs, unemployment patterns, and changing economic and demographic trends."[134] They recommend creating a federal agency – the "Standing Commission on Immigration and Labor Markets" - to examine these myriad needs in order to determine the appropriate numbers of immigrants.

However, we need to recall that "implementation might benefit from the use of local knowledge."[135] State and local agencies already collect data on local labor markets, unemployment, and demographic trends for other regulatory purposes. Consequently, there will be an economy of scope in using non-federal agencies to collect the data for calculating appropriate numbers of immigrants. Moreover, just as we have seen in the case of markets for health care,[136] labor markets are inherently local by nature, that function quite differently from region to region. As a result, local knowledge about these labor markets will greatly improve the ability to make accurate interpretations of this data. Because this "local knowledge will be more available for decentralized implementation groups,"[137] there is a significant diseconomy of scale for calculating numbers of immigrants.

Similarly, there are significant diseconomies of scale for determining a recommended level for meeting family reunification purposes. State and local agencies are likely to already have a number of interactions with immigrants where family context is an important factor, such as applying for welfare or health care programs for children, or registering children for school. During these interactions, state and local agency staff can acquire information about immigrants' needs and opportunities for family reunification. This information will be essential in order to calculate a recommended level of immigration to achieve the goal of family reunification, and because it is collected and best interpreted by state and local staff, there is another diseconomy of scale in implementation.

Additionally, states may be better prepared to interpret this information, in weighing the tradeoffs between more family unity and other effects such as the impacts on local labor wages and greater needs for social services. States and local governments will be directly impacted by both the benefits of these policies including improved communities, along with their costs. As a result, these

[134] MIGRATION POLICY INSTITUTE, *supra* note 20, at 31. Recall also that these numbers should address the need for family reunification.
[135] *Optimal Federalism Across Institutions, supra* note 9, at 453.
[136] *See id.* at 475-77.
[137] *Id.* at 453.

non-federal agencies may better assess the appropriate tradeoffs in determining a recommended level of family-based immigration.

Nonetheless, as noted above,[138] if non-federal agencies are solely responsible (collectively) for determining the appropriate number of immigrants, they may not fully account for all of the benefits that immigrants bring, because many of these benefits occur as positive externalities for other states. Consequently, there also will be an economy of scale in oversight for the calculation of the appropriate number of immigrants.

As for the database of immigrants, there will be significant economies of scale in maintaining this database to enable its use in enforcement.[139] As part of the enforcement process, an enforcement agent (who might be an employer) would need to verify information about immigration status from the database. If immigration databases are constructed and maintained by individual states, then there would be a need to search each state database. This could be problematic if the record structure of the state databases were inconsistent: someone would need to write scripts that permit searches of each database's records for the same relevant information. These scripts would need to be adjusted regularly, as the local record structure might be altered. Furthermore, updating these databases for removal of immigrants would also require significant coordination. As a result, creating and maintaining these databases at a federal level will be significantly more efficient.

The following table summarizes these economies and diseconomies of scale in implementation:

Implementation Phase	
Economies of Scale	*Diseconomies of Scale*
Development of Immigration Procedures	
The Effects of Positive Externalities on Calculating Appropriate Levels of Immigration	Using Local Labor Market Information to Calculate Appropriate Levels of Immigration
	Collection and Interpretation of Information on Needs and Opportunities for Family Reunification
Creation and Maintenance of Database	

Thus, the substantial economies of scale in determining immigration procedures and database management suggest that these aspects of an immigration policy should be handled at the federal level. However, the important task of determining the appropriate level of immigration should perhaps reside

[138] *See* discussion this sub-Part..

[139] The Abraham and Hamilton Task Force note that establishing this database will be essential to enforcement of any immigration policy. *See* MIGRATION POLICY INSTITUTE, *supra* note 20, at 46-50.

primarily with the states, collectively. This determination requires the collection and interpretation of data on local labor markets, along with assessments of immigration needs to fulfill family reunification objectives, tasks where diseconomies of scale are dominant. However, the presence of beneficial externalities from immigration means that this state and local determination should take place under the oversight of a federal agency.

This oversight could occur in a manner similar to what is used currently for Medicaid policy. The implementation of Medicaid with specific health benefits offered to qualifying low income beneficiaries is primarily done at the state level.[140] However, state Medicaid programs are supported by federal matching grants. The federal Centers for Medicare and Medicaid Services oversees state applications for these matching grants, to ensure compliance with federal Medicaid legislative objectives. Recall that, due to inconsistent burdens and benefits from immigration,[141] we may wish to utilize a fiscal transfer to states bearing more of the costs of immigration. An individual state's calculation of its interpretation of the appropriate level based on its own data could be one of the criteria used to evaluate that state's claim to federal support. Just like the Centers for Medicare and Medicaid Services, a federal immigration agency responsible for overseeing this transfer could use its authority to ensure that these beneficial externalities are considered in calculating appropriate levels of immigration.

D. Optimal Scale of Enforcement

Enforcement of an immigration policy will include actions taken both at national borders and in the interior of the country. These are steps done to detect possible violations of the immigration policy. Enforcement will also include prosecution of individuals suspected of violating the policy.

Border actions include both the processing of individuals wishing to enter the country, and patrolling the borders to prevent unauthorized entry.[142] For both of these, there are significant economies of scale. Many have expressed concerns about the need to protect civil rights and prevent discrimination in interactions between potential immigrants (who may actually be citizens) and enforcement agents.[143] As a result of these concerns, training of enforcement agents must be

[140] *See Optimal Federalism Across Institutions, supra* note 9, at 471-2.
[141] *See* discussion *supra* Part VI.B.
[142] The framework adopted here could also be extended to address the proper approach to handling "cyclical migration," *i.e.* where an authorized immigrant would like to enter the country, stay for a limited time and then leave, but then return later. The author would like to thank Juan Pedroza for this suggestion.
[143] *See*, *e.g.*, Wishnie, supra note 41.

"comprehensive [and cover] immigration law, ethics, and civil rights."[144] Additionally, these agents must be able to endure "physically demanding" work, "operate in dangerous environments," be "proficient with an array of technologies," and be able to pass foreign "language proficiency tests."[145] With such extensive training requirements, it is noted that applicant fields must be very broad to yield successful agents.[146] Consequently, economies of scale arise here due to "centralized savings in [recruiting and] training enforcement agents."[147]

There are other economies of scale associated with border actions. Processing of an individual applying to enter the country needs to be done in a manner to ensure compliance with the legislative objectives. Consistency in processing will help ensure this compliance, and consistency is improved with larger scale.[148] Furthermore, one of the purposes of patrolling borders would be to ensure national security. If a state provided these services, other states would receive benefits from this state's actions, but these benefits would not be captured by the patrolling state. The presence of these positive externalities from border patrol therefore implies another economy of scale in enforcement.

For enforcement in the interior, there are significant diseconomies of scale. Many have suggested that a more extensive system of employer verification is necessary to properly enforce an immigration policy.[149] They suggest that if the principal reason for unauthorized immigration is for employment, then the only effective solution in the long run is to reduce employment opportunities for unauthorized immigrants. The question then would be, how should we construct an employer verification system?

Our experience with water quality policy suggests that such a system should be designed to take advantage of significant diseconomies of scale in conducting these monitoring efforts. For water quality, individual facilities submit their own monthly monitoring reports, and state agents conduct oversight through yearly audits and other means.[150] In a similar manner, rather than having a federal agent collect all immigration employment information and process it, individual employers should collect this information from their potential hires and then verify eligibility with the immigration database provided at the national level, as noted above. Meanwhile, state enforcement agents would

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[144] *See* MIGRATION POLICY INSTITUTE, *supra* note 20, at 57.
[145] *Id.*
[146] *See id.* (noting that "It takes 30 applicants to field one Border Patrol agent.").
[147] *Optimal Federalism Across Institutions, supra* note 9, at 454.
[148] *See id.*, pointing to the economy of scale from "more even enforcement."
[149] *See, e.g.,* MIGRATION POLICY INSTITUTE, *supra* note 20, at 45-53.
[150] *See Beyond Benefit-Cost Analysis, supra* note 119.

then conduct oversight of these employer reports. There will be significant economies of scope in having state agents do these tasks, because state agents already interact with these employers for other regulatory purposes such as ensuring worker health and safety, enforcing environmental regulations, and administering workers' compensation. State agents are also "more likely to have local knowledge"[151] and a more lasting relationship with these employers. As a result, state agents will be more likely to know when additional scrutiny is needed, and will be "more likely to induce compliance"[152] by employers. Additionally, these interactions between state agents and employers would also provide opportunities for the state to collect information on labor market trends, needed for implementing this policy, as noted above.[153]

Another component of interior enforcement could be the use of law enforcement agents (FBI agents, state troopers, or local police). Kris Kobach has argued that local police provide a "quintessential force multiplier" for enforcing immigration law.[154] Others argue however that there are a number of problems with using local police. Some point to the previously noted concerns with civil rights and discrimination. Also, others point out that fear of immigration consequences may deter the reporting of crime, thereby increasing the crime problem in immigrant communities.[155] These concerns lead the Abraham and Hamilton Task Force to recommend that immigration enforcement be done almost exclusively through federal agents.[156]

As noted by Kobach, there are significant diseconomies of scale in using law enforcement agents. When an alleged perpetrator is in custody, an enforcement agent can generate economies of scope by also checking that individual's immigration status.[157] Because local police officers are the ones primarily responsible for enforcing other laws, these economies of scope will be largest at the local level. On the other hand, concerns over civil rights, discrimination, and deterrence against reporting crime suggest that economies of scale may be present here also. Nonetheless, a properly designed system may enable capturing these economies of scope while also minimizing the potential for civil

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[151] *Optimal Federalism Across Institutions, supra* note 9, at 454.
[152] *Id.*
[153] *See* discussion *supra* Part VI.C.
[154] *See* Kobach, *supra* note 5.
[155] *See, e.g.,* MIGRATION POLICY INSTITUTE, *supra* note 20, at 68.
[156] *See id.*, at 45-70 (placing substantial limits on the use of local and state enforcement agents).
[157] Something similar to this approach is being attempted through the "Secure Communities" program of the U.S. ICE. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens* (2010), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf.

rights violations, discrimination, and deterrence of reporting.

Jennifer Chacon suggests[158] that these concerns should be addressed by increasing the application of the exclusionary rule, by improving the availability of civil damages, and by increasing the use of "internal agency disciplinary measures"[159] against law enforcement agents who violate civil rights. In addition, we could use a more structural approach to minimize these potential negative effects. One way would be to connect the goals expressed during enactment with the definition of the scope of authority of law enforcement agents to check immigration status. Assume that a legislative goal would be not to permit non-citizen immigrants who commit aggravated felonies or who participate in drug trafficking to remain in the country. Under this structural approach, we would limit agents' authority to check immigration status to only people in custody who have been alleged to perpetrate an aggravated felony or participated in drug trafficking.[160] This limitation would greatly reduce the potential negative effects of using local police to supplement immigration enforcement.

Another step in enforcement would be prosecution of possible violators in a deportation hearing. As noted above, there is an economy of scale from "more even enforcement,"[161] and so the benefits from a consistent deportation hearing process would suggest that this component would be best handled at the federal level.

Finally, we should also consider the opportunities for more cooperative enforcement. Long-term stability of communities can be greatly improved by successfully integrating immigrants into those communities.[162] Local and state agency staff are likely to have more opportunities for and more knowledge about activities and organizations that enable this integration process. In a similar manner to labor market enforcement, these staff may also be able to collect more information to improve their assessment of family reunification needs, during the process of aiding community integration. Superior local knowledge, opportunities, and economies of scope during community integration thus provide additional diseconomies of scale.

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[158] *See* Jennifer M. Chacon, A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 Duke L.J. 1563, 1624-32 (2010).
[159] *Id.* at 1630.
[160] This suggestion is consistent with "Recommendation #11" of the Abraham and Hamilton Task Force: "The Task Force recommends that the role of state and local police in immigration enforcement be limited to identifying, holding, and transporting removable aliens who are legitimately arrested for involvement in non-immigration offenses during normal police work." MIGRATION POLICY INSTITUTE, *supra* note 20, at 67.
[161] *Optimal Federalism Across Institutions, supra* note 9, at 454.
[162] *See* Rodriguez, *supra* note 69.

The following table summarizes these economies and diseconomies of scale in enforcement:

Enforcement Phase	
Economies of Scale	*Diseconomies of Scale*
Border Patrol: Centralized Recruitment and Training, and National Defense Aspects.	
	Employer Verification: Oversight using Local Knowledge and Longer-term Relationships. Connection to Labor-market Need Analysis.
Concerns about Civil Rights, Discrimination, and Deterrence from Reporting. Concerns can be Minimized by Limiting Authority.	Economies of Scope from using Local Police to Check Immigration Status.
Deportation Hearings Benefit from Consistency.	
	Community Integration: Local Knowledge and Opportunities. Connection to Family Reunification Assessment.

Thus, the combination of both economies and diseconomies of scale in enforcement suggest we should have a mixed approach, utilizing not only federal but also state and local enforcement agencies. Certain aspects should be strictly federal: border patrol and conducting deportation hearings. However, verification of employment eligibility initially should be done at the lowest level – the employer. Employer verification should be overseen by state agents who can utilize their local knowledge and long-term relationships with employers, leading to economies of scope. This process will also support the collection of labor-market data needed to implement this immigration policy. Meanwhile, local police should be authorized to check immigration status, but only the status of those accused of aggravated felonies or participating in drug trafficking. If a criminal is found to be in the country illegally, local police can then notify the federal deportation agency for further processing. Finally, community integration should be pursued vigorously at the state and local level. This process similarly supports the collection of information for assessing needs to enable family reunification.

VII. Conclusion

Some may say that all immigration policy should be the exclusive provenance of the federal government. However, for those willing to consider the relevance of federalism principles, this article suggests significant but limited roles for state and local governments in implementing and enforcing immigration policy. Using the Optimal Federalism framework, this article separates analysis of the optimal scale of immigration policy into three phases: enactment, implementation, and enforcement. It finds significant economies of scale in each phase, suggesting a somewhat dominant role for the federal

government across all phases. However, significant diseconomies of scale appear in both the implementation and enforcement phases. These diseconomies imply that state and local governments should play important though limited roles in implementing and enforcing immigration policy.

In the end, the Optimal Federalism framework suggests a complex division of responsibility for immigration between federal, state, and local governments. Enactment should be performed by the federal Congress. This legislation should be designed to address the goals, powers, and constraints of the immigration policy. Goals probably should include explicit statements about the need for immigrants to address labor market deficiencies across specific skill levels, and to enable family reunification. This legislation probably also should include statements of specific criteria that could make an immigrant ineligible to remain in the country, such as committing an aggravated felony or participating in drug trafficking. While the legislation should do these things, we can reduce diseconomies of scale by not attempting, in the legislation itself, to perform implementation tasks such as specifying a specific annual ceiling on immigration.

The federal government also should play a significant role in implementation, in drafting regulations to handle immigrant entry and deportation processes, along with creation and maintenance of an immigration database. However, states should also participate in implementation, with the primary responsibility for determining, collectively, annual levels of immigration. This determination depends critically on fulfilling labor market needs, and states have better information on local labor markets. It also depends on properly assessing needs for family reunification, and states and local governments have better information on the needs and opportunities for reunification. However, federal oversight of this calculation, perhaps through administration of a federal transfer system, should also be included to ensure that states internalize the positive externalities from immigration.

The federal government should also lead in enforcement. Processing of individual applications to immigrate, and border patrol should be performed exclusively by the federal government. Nonetheless, states should play a significant role by administering an employer-based employment verification system. Administration of this system by the states would take advantage of economies of scope, local knowledge, and long term relationships. It would also improve the implementation process by enabling a feedback loop in the collection of local labor market needs, performed by the states. Furthermore, local police should also aid in enforcement. While many have raised concerns about civil rights, discrimination, and deterrence from reporting crime, the economies of scope from using local

police are too strong to forego. However, an effective employer verification system would enable us to reduce the scope of authority for local police in checking immigration status. A limitation on police authority to check the immigration status only for those in custody for commission of aggravated felonies or participating in drug trafficking would enable us to achieve legislative objectives while also addressing these concerns. Finally, local and state agencies should be vigorously involved to more successfully integrate immigrants into their local communities.

This article shows that federalism is not just about "laboratories of democracy" or "races-to-the-bottom." The Optimal Federalism framework demands that we closely scrutinize federal, state, and local institutions to identify economies and diseconomies of scale. After identifying these, we can design a policy that achieves political objectives at the lowest cost, by utilizing the varied resources of all levels of government. In doing so, we are aided by a structure that clarifies the analysis by narrowly examining a single institution, but also provides a comprehensive perspective on the various aspects of policy formation.

With this comprehensive view, we can identify structural obstacles to policies, such as Congress's inclusion, during the enactment phase, of implementation details such as annual immigration ceilings, which should properly be addressed by an administrative agency during the implementation phase. This perspective also allows us to see connections across institutional phases, such as the need to connect immigration policy goals specified during enactment with limitations on immigration enforcement activities conducted by local police. We also realize that we can improve the functioning of this immigration policy system by connecting related responsibilities – and therefore also information flows – across different phases. For example, assigning responsibility to a state administrative agency to perform both the task of collecting labor market information for determining appropriate immigration levels along with the task of overseeing employer verification of employment eligibility will create the opportunity for a feedback loop for refining the estimates of these appropriate immigration levels. We see a similar opportunity in linking the assessment of needs for family reunification with efforts to improve community integration by immigrants.

Thus, the Optimal Federalism framework allows us to better understand the wide range of institutions supporting an immigration policy, and the connections between them. With this understanding, we can develop an improved immigration policy that will bear as its fruit a more resourceful and dynamic nation.