International Perspectives on Migration 9

Sasha Baglay
Delphine Nakache *Editors*

Immigration Regulation in Federal States

Challenges and Responses in Comparative Perspective

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Immigration Regulation in Federal States

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In 2008 Elspeth was awarded a Doctorate honoris causa by Lund University Sweden in recognition of her academic and policy activities in the field of European immigration and asylum law.

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Part I
Nature of Immigration Regulation: Theoretical Perspectives

Chapter 1
Introduction

Sasha Baglay and Delphine Nakache

In the past two decades, our home country of Canada has seen the emergence of a two-tiered immigration system, whereby selection of economic immigrants is exercised through federal as well as provincial/territorial programs. We were intrigued by this development and its implications, especially given that increased sub-national activity in immigration regulation has also been observed in other countries such as Australia and the US. Yet, we were surprised that little research has been dedicated to comparing how federal states deal with this so called "immigration federalism".[1] As immigration lawyers, we were particularly interested in the human rights implications of immigration federalism—an issue that received very scant attention outside of the US, although some debates are starting to emerge in other jurisdictions (see, Dobrowolsky 2013; Lewis 2010). Thus, we undertook this book project in order to gain a better understanding of the phenomenon of immigration federalism and its impact on non-citizens. Our research questions can be summarized as follows:

1. What are the main characteristics of immigration federalism, why and how has it developed? Are there any common trends across jurisdictions, especially when

[1] One recent book analyzes the role of sub-national jurisdictions in immigrant settlement and integration in Australia, Canada, the USA, Germany, Belgium, Switzerland and Spain. See: *Immigrant Integration in Federal Countries,* C. Jopke and L. Seidle, eds. (McGill-Queen's University Press 2013). In addition, some issues relevant to the discussion of immigration federalism have been explored in *Managing Immigration and Diversity in Canada: A Transatlantic Dialogue in the New Age of Migration*, Dan Rodriguez-Garcia, ed (Montreal & Kingston: Queen's Policy Studies Series, 2012).

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we compare traditional countries of immigration (such as Canada, the United States and Australia) with others (e.g., Switzerland, Germany)?
2. What are the implications of immigration federalism for immigration systems and non-citizens? Overall, does immigration federalism have a positive or negative impact on non-citizens' rights and immigration opportunities?

To explore these issues, we have structured the book in two parts. Part One introduces the reader to perspectives from three sets of literature—federalism, governance and non-citizens' rights—that, in our opinion, provide a necessary framework for understanding immigration federalism's multiple facets, its various institutional models and impacts on non-citizens. Part Two comprises six case studies: Australia, Canada, Germany, Switzerland, the United States and the European Union (EU). Although not a federal entity in a traditional sense, the EU was included because, similarly to federal states, this supranational organization faces important policy questions of choosing between centralized *vs.* decentralized models of regulation of various migration streams. In selecting federations for case studies, we have included countries that share some common characteristics, yet are diverse enough to be sufficiently representative of different issues related to immigration federalism. All five federations have high numbers of international migrants: they constitute 13% or more of total population (United Nations 2011). In all but one of the five countries (Switzerland), more than 75%t of all immigrants who arrived in the last two decades came from developing countries (Siemiatycki and Triadafilopoulos 2010, p. 2). However, these federations also have important differences. First, the United States, Canada and Australia have long histories as immigrant-receiving societies, whereas Germany and Switzerland have started receiving significant volume of immigrants (not counting intra-European migration) only since World War II (Seidle and Jopke 2012, p. 4). Second, two of the five countries (Canada and Switzerland) are dealing with more than one territorially concentrated cultural-linguistic community on their soil (see Houle's and Manatschal's chapters in this book). Third, there is significant variance in the degree of devolution in immigration regulation and its 'location' relative to the area of the immigration process in the examined jurisdictions. For example, in the US immigration federalism developed in immigration enforcement, while in Australia and Canada—with respect to immigrant selection and in Switzerland and Germany—in several areas of the immigration process (the chapters in this book, however, particularly focus on integration/naturalization policies).

In the next sections, we offer a definition of immigration federalism and discuss the complexities and tensions that underlie this concept. We then provide an overview of book chapters.

1.1 Immigration Federalism: A Definition

Although over the past several years, increasingly more literature has focused its attention on immigration federalism, no precise and unified definition of this concept has emerged yet. Some of the challenges of conceptualizing this phenomenon in a

single definition are due to the difference in the shapes, location and factors influencing immigration federalism in various jurisdictions.

The majority of current literature on immigration federalism emanates from the US (see, for example, special issues of *Law and Policy* 2011; *Tulsa Journal of Comparative & International Law* 2008; *Harvard Law Review* 2005; *New York University Annual Survey of American Law* 2002). So far, this literature has operated with an implicit understanding that immigration federalism denotes the involvement of multiple levels of government in immigration matters and is associated with the shift from a centralized to decentralized or devolved model of regulation (Varsanyi et al. 2012; Su 2008; Schuck 2007; Spiro 2002). While such a characterization captures the general nature of this new phenomenon, its association of immigration federalism with a developing devolution trend is more reflective of contexts such as Australia, Canada and the US. In these three countries, immigration has been traditionally associated with nation-building, foreign policy, and other areas of national interest, which deemed it naturally aligned with federal (i.e., centralized) rather than local regulation. Although sub-national entities have always played a role in the immigration process, their impact was felt mostly at the level of migrant's actual ability to integrate into a local community (e.g., depending on local employment, welfare, safety legislation). The fundamental questions of admission, membership in a nation, border control and enforcement have usually been determined in a centralized manner by federal legislation. Thus, in Australia, Canada and the US, for the most part of the twentieth century, the federal government has been the dominant player in immigration regulation, producing a unified model of immigrant selection and enforcement governed by an idea of immigration into a nation (rather than into a specific locality) (Reitz 2005; Spiro 2002; Baglay and Nakache 2013). In the last two decades, however, these three countries have seen the emergence of new actors—sub-national units (provinces, states, even cities and municipalities)—seeking to take a more active role in the immigration process.

In contrast to Australia, Canada and the US, in Germany and Switzerland, sub-national units such as Länder and cantons (respectively) have traditionally been responsible for the implementation of national immigration policy and have enjoyed significant autonomy in immigration-related matters. They have also played a prominent role in defining questions of belonging reflecting the idea that immigrant integration is a locally embedded process. For example, in Germany, although conferral of citizenship is under federal jurisdiction, Länder have traditionally overseen the naturalization process. In Switzerland, a naturalization application must be approved at three levels of authorities: local, cantonal and national. Thus, for these countries immigration federalism is not exactly a new phenomenon. In Germany, in fact, the renewed attention to immigration at the national level has potentially pointed in a direction of centralization. Similarly, in Switzerland, some steps have been taken to provide a national unification of integration standards, although they have not altered the key role of cantons in this area. These developments may be partially explained by a changing understanding of immigration in Germany and Switzerland: while traditionally not seeing themselves as countries of immigration, they are gradually acknowledging this reality and are making corresponding policy adjustments with the objective of providing more of a national framework for various aspects of the immigration process.

As the above discussion demonstrates, immigration federalism is not always associated with a devolutionary trend, but may also embrace centralization initiatives in historically decentralized immigration systems. Thus, immigration federalism may be seen as a 'shifting terrain' where the ratio of federal vs sub-national involvement fluctuates over time, and it may be appropriate to *define it as follows*: it refers to the powers and regulatory activities of federal/state/provincial/territorial governments in various areas of the immigration process as well as modes of interaction between various levels of government in the process of exercising their immigration-related activities.

Immigration federalism involves negotiation and re-negotiation of immigration visions and priorities between levels of government. Although the constitutional division of powers provides the parameters for federal/sub-national roles in immigration, the interpretation and utilization of such powers can change over time. For example, until the 1990s, Canadian provinces, which possessed the constitutional power to regulate immigration into their respective territories, had no interest in exercising it (except for Quebec, which has been involved in immigrant selection since the 1960s). In the US, the last decade has seen much academic and judicial debate on which level of government has the constitutional power to regulate various aspects of the immigration process and in particular about the proper authority of states and localities in immigration enforcement. In fact, as Chacón suggests in Chapter 10, a clear delineation between federal and sub-federal enforcement no longer exists. Thus, federal states may over time move along the centralization—devolution continuum under the influence of various factors, often specific to a given jurisdiction. These factors may include, for example, a model of federalism adopted in a given country, visions of national/local identities, the need to balance unity and diversity considerations, concerns over costs and resources, efficiency, national security, actual or perceived sentiment towards migration generally or towards certain groups of migrants, etc. Ultimately, the historic trajectory of immigration regulation in federal states can be seen as an attempt to answer two key questions:

1. What should be an optimal allocation of powers over each aspect of the immigration process?
2. Are interests of the host community as well as migrants better served by greater centralization or decentralization?

The current reality in federations examined in this book is that immigration federalism has created a multiplicity of regulatory regimes (among sub-federal units as well as between national and sub-national levels) in relation to one or several aspects of the immigration process: selection, settlement/integration or enforcement. For example, in the US, local action with respect to enforcement targeted mostly at undocumented migrants has resulted in a "multilayered jurisdictional patchwork" of immigration enforcement with significant variation across localities (from proactive to "don't ask, don't tell" to laissez-faire policy), demonstrating different attitudes to irregular migration (Varsanyi et al. 2012). In Canada, the two-tiered

federal/provincial system for selection of economic immigrants reflects different visions of what kind of skills and qualifications would make one worthy of admission. Similarly, in Australia, state sponsorship programs create locally defined definitions of "desirability." In Switzerland, varying cantonal integration policies reflect different notions of citizenship, correspondingly creating either more accessible or more restrictive pathways for formal inclusion of immigrants in local communities. Similarly, in Germany, a variation in practices, at times following partisan lines, has been observed in some matters administered by the *Länder* (e.g., issuance of residency permits).

From the perspective of local communities, such multiple regimes may be appropriate in order to reflect local needs and peculiarities. However, on the national scale, such diversity of local practices may pose questions related to policy coherency, efficiency, and equal treatment of individuals. From the perspective of non-citizens, these multiple regimes may create both advantages and limitations. Local policies that favour immigration and adopt inclusive notions of community membership could facilitate admission and integration of non-citizens. This is, for example, the case with PTNPs in Canada where some provinces have allowed for nomination of low-skilled workers—an option previously not available under any other independent immigration streams (see Chap. 5 in this book). However, local experimentalism and innovation may also transform into, borrowing Wishnie's (2001) phrase "laboratories of bigotry." Writing in the US context, Wishnie warned that devolution in immigration enforcement may lead to the race-to-the-bottom among states (in discriminatory measures against non-citizens) and overall erosion of the equality principle in various areas of non-citizens' rights, a position shared by Chacón in this book. Immigration federalism amplifies the notion that the treatment of non-citizens is locally defined and can vary across a given country. Hence, while we can still characterize non-citizenship status as a bundle of certain restrictions and protections applicable nation-wide, a more nuanced analysis of that status also requires consideration of non-citizen regimes in specific localities. As case studies demonstrate, these locally defined criteria may touch upon not only non-citizens' every-day activities (e.g., through employment safety, education, social security regulation), but also their access to permanent resident or citizenship status. For example, in Canada, low-skilled workers employed in Manitoba may apply for immigration under a provincial nominee program, while in Ontario low-skilled workers do not enjoy such an opportunity. In Switzerland, naturalization requirements are more onerous in German-speaking than in French-speaking cantons. This wide-ranging devolution that touches upon both every-day activities and membership policy is changing the very relationship between the state and the non-citizen. This relationship is increasingly shaped by several levels of legal regimes: local, provincial/state/cantonal and national. As Varsanyi (2008) pointed out, such devolution and multiplicity of regimes makes state power more permeating, including through greater involvement of non-state actors in 'policing' of non-citizens (for more on this see Pham 2008; Pham 2009).

We now turn to the overview of individual chapters.

1.2 Overview of The Book

1.2.1 Part 1: Three Discourses Informing Understanding of Immigration Federalism

Each of the chapters in Part One focuses on one set of literature—federalism, governance or non-citizens' rights—thereby providing an analytical lens for understanding immigration federalism in general and in specific jurisdictions. The relevance of these three discourses, when put together, can be explained as follows:

a. The literature on federalism outlines various models of federalism (see Chap. 2 for more details) and illuminates institutional and other factors shaping the relationships between levels of government. A model of federalism adopted in a given jurisdiction allows us to see what channels exist for sub-national units to provide their input into national policies, whether the two levels of government work cooperatively or whether one level dominates, and what would be the ideal type division of powers in relation to a given subject matter. These considerations not only help explain the past and current federal/sub-national relations in a given jurisdiction, but also how much room there is for centralization/decentralization fluctuations over time. For example, in Germany, the particular model of federalism characterized by coordination, joint decision-making and power sharing allowed states to be rather actively involved in federal policy-making on immigration.
b. While the literature on federalism provides a useful insight into the interaction of levels of government, it is equally important to account for other factors and actors involved in formation of policies and practices, as the literature on governance does. For example, in immigration context, such actors as municipalities, cities, local communities and even employers play a role in both shaping and implementation of immigration regulation. Thus, it may be more appropriate to view immigration federalism as a governance process. This characterization is particularly fitting for Switzerland and Germany, which are impacted not only by domestic factors, but also by EU regulation (see Chaps. 8, 9 and 11).
c. The literature on immigration law and non-citizens' rights adds one more dimension to the study of immigration federalism: the perspective of another–if not the most important stakeholder–the non-citizen. Frequently silenced in the context of immigration law generally, the non-citizen is often viewed merely as a subject of a host state's laws and policies rather than a bearer of rights. Immigration law is inherently centered on the interests of the host community and its main objective is to differentiate between 'desirable' and 'undesirable' candidates for admission (Dauvergne 2004; Dauvergne 1997; Kyambi 2004). Thus, being in an already vulnerable position vis-à-vis the host state, what happens to non-citizens under multiplied and more permeating reach of the state in the context of immigration federalism? Is the discriminatory nature of immigration law likely to be amplified or alleviated by immigration federalism?

In the opening chapter, **Rob Vineberg** uses the lens of the literature on federalism to explain the reasons underlying the development of immigration federalism and to offer a reflection on an "ideal" model of immigration federalism (that is, a model that is the most effective and the most satisfactory to both state/provincial and federal governments in a given constitutional, economic and social context). Vineberg's "ideal" model of immigration federalism is as follows: (a) immigration control policies are left to the central government; (b) integration policies are left to states/provinces (with a federal coordinating role); (c) the overall immigration selection policy is led by the central government (i.e., federal leadership) but states/provinces are given some authority to select immigrants on the basis of regional needs and local priorities. Vineberg applies his ideal model to Australia, Canada and the US (although, as he points out, this model is equally relevant to the other two countries under consideration in this book (Germany and Switzerland)). He demonstrates that over time, the three jurisdictions have moved closer to the 'ideal' model: they conform to it in terms of immigration control and enforcement[2], but only Canada and Australia conform to this model in terms of immigrant selection and settlement and even then, not completely as immigrant selection and settlement is determined through both central and sub-national government policy. He views such a trajectory as generally desirable, if not inevitable. Vineberg's contribution allows us to understand that, from the perspective of the literature on federalism, there are strong reasons why federal states ought to be open to decentralized immigrant selection and settlement policies, either through a cooperative model where both the federal and state/provincial governments share the policy-making role or through a devolution model where these policies are ceded entirely to the state or province. As he notes, aiming at this "ideal" model of immigration federalism is important for both "the immigrant and the host society" because they "will clearly benefit from the greatest possible integration and co-ordination of federal and state/provincial immigration activities."

In Chapter 3, **Hélène Pellerin** discusses global migration governance thereby providing a broader context for understanding national and international trends in migration regulation. Despite the absence of formal institutions to administer a global migration regime, recent years have seen the emergence of many initiatives that resulted in converging political priorities and policy measures among states. This convergence reflects the power of governance to shape agendas and define the range of possible policy options. Being dominated by the neoliberal framework, current global migration governance facilitates the fluidity of migration, but does not translate into greater freedom of mobility or equal protection of all migrants. The "logic of efficiency" promotes the highly skilled migration and encourages the

[2] Vineberg's position on the United States (i.e., that US enforcement policies are mainly centralized) may seem at first sight radically different from the positions of other authors in this volume (i.e., Chacón and Aldana). However, Vineberg focuses only on the "formal" allocation of power and, namely that the US Constitution does not allow states to directly control the entry of non-citizens into their territory. He does not consider the situation on the ground (i.e., the devolution by the federal government of some of their traditional functions in immigration to states and localities).

shifting of some responsibilities for worker welfare to local and/or private actors. Pellerin observes that had human rights based initiatives "garnered the support of developed states and major international organizations, the global governance of migration would have been quite different." Similarly to what has been noted by Pellerin in relation to global migration governance, some cases studies in this book demonstrate both the dominance of the neoliberal pressures and the scarcity of human rights focus on immigration federalism in current discourses. For example, Soennecken (Chap. 8) situates her discussion of German immigration federalism in the broader context of the age of neoliberalism and views it as a way for the state to adapt and reconstitute itself to the changing circumstances. Baglay and Nakache (Chap. 5) demonstrate that in Canada, skilled and low-skilled workers are often treated differently under PTNPs and the underlying concern in evaluation of nominee programs is whether they benefit the host community rather than through the lens of non-citizens' rights (see for example, CIC 2011). In the US context, devolution, combined with border militarization and lax enforcement, allows the federal government to strike a compromise between the competing interests of economic liberalization and restrictive approach to membership (Varsanyi 2008).

It is precisely this missing/neglected dimension of non-citizens' rights that is discussed in the last theoretical chapter by **Raquel Aldana**. The author offers a comparative analysis of "asymmetrical immigration federalism" (a term used to refer to the diversity of laws and policies occasioned by the rise of immigration federalism) in Australia, Canada, the European Union, Belgium, the United Kingdom, Switzerland, and the United States. The key question asked by Aldana is whether asymmetrical immigration federalism has improved or worsened non-citizens' rights and protections in those respective jurisdictions. After having highlighted common arguments in the literature on advantages and disadvantages of immigration federalism (from an immigrants' rights' point of view), she demonstrates that immigration federalism is conducive to anti-immigrant policies as well as generous and innovative integration and welfare policies at the localities. For example, in Australia, Canada, and the United Kingdom, immigration federalism provides non-citizens with greater immigration and integration opportunities, a position shared by Baglay and Nakache in this book (see Chap. 5). In other countries, such as the United States, Switzerland and Belgium, immigration federalism seems to have both positive and negative impact on non-citizens' rights and welfare. Aldana examines the US in particular detail, providing a survey of state laws and ordinances related to immigration. While it is a common assumption in the media and scholarly literature that increased local involvement has negative implications for non-citizens, Aldana demonstrates that this assumption should be qualified as a sizeable number of state immigration-related measures also seek to expand the rights of non-citizens rather than to diminish them. Local factors (such as political divergence between national and local interests; the nature and degree of co-operative federalism that exists between the federal and regional governments, etc.) ultimately determine whether immigration federalism has negative or positive effects on non-citizens. Therefore, as Aldana puts it, the implications of immigration federalism for non-citizens are "highly contextualized and cannot be generalized". The case studies in Part Two of the book provide exactly such a contextualized examination.

1.2.2 Part 2: Case Studies

To ensure coherency of the volume, we asked each contributor of a case study chapter to address the following issues: (1) constitutional division of powers over immigration in their jurisdiction; (2) brief history of immigration regulation (with particular reference as to whether it tended to be more centralized in the past and is currently moving towards decentralization or vice versa; (3) factors impacting the roles of federal and provincial/state governments in immigration regulation; (4) nature of current federal/provincial/state interaction in each area of the immigration process—selection, settlement, enforcement; (5) implications of the changes for an immigration system of a given country and for non-citizens.

The case studies can be grouped into two trends: on the one hand, Australia, Canada and the US—where devolution has started to develop only in the past two decades; and, on the other, Germany and Switzerland, which have traditionally given sub-national units substantial autonomy in immigration-related matters. Australia, Canada and the US are examined first followed by Germany and Switzerland. The chapter on the European Union usefully concludes the collection by, first, explaining the supranational migration regimes, which directly and indirectly impact migration regulation in countries such as Germany and Switzerland and, second, exemplifying the particular challenges of supra-national immigration multilateralism, which echo those raised by immigration federalism in domestic contexts.

The first two chapters are dedicated to the study of Canada in order to account for the two different models of sub-national participation in immigration regulation: Quebec model and Provincial/Territorial Nominee Programs.

Sasha Baglay and Delphine Nakache examine Provincial/Territorial Nominee programs (PTNPs), which allow provinces/territories to nominate for immigration candidates with skills and qualifications in local demand. Developed in the past two decades, these programs can be seen as a response primarily to the ineffectiveness of federal programs in satisfying peculiar local social/demographic/economic needs and/or achieving more even distribution of newcomers across Canada. PTNPs exemplify a high degree of decentralization in immigrant selection: there are no national baseline requirements for provincial/territorial nominees (except for federal security, criminality and health checks[3]) and provinces/territories have wide latitude in determining design and scope of their programs. As a result, the selection criteria vary widely across provinces/territories with some of them exclusively focusing on highly educated and skilled, while others allowing for nomination of low-skilled workers as well as on the basis of family or community connections. This diversity of PTNPs has both advantages and disadvantages for applicants. On the positive side, it expands existing and/or provides new immigration opportunities. However, these opportunities are not always easily accessible, application processing lacks

[3] As of July 1, 2012, federal department of Citizenship and Immigration requires all nominees in semi- and low-skilled professions to undergo mandatory language testing, but no such mandatory testing is required for skilled workers nominated under PTNPs (CIC 2012).

transparency and there are limited remedies for applicants who want to contest a decision of a provincial authority.

In contrast to other provinces, Quebec has long occupied a unique place in Canada's immigration system. Its first interest in immigrant selection dates back to the 1960s[4] and its powers are more extensive than those envisioned for other provinces under PTNP agreements (e.g., Quebec has control over settlement and integration). Most importantly, Quebec's desire for its own immigration program has been traditionally explained by identity politics: immigration was necessary to maintain French language and culture and Quebec's uniqueness within Canada.[5] In her chapter, **France Houle** explores and questions this understanding of Quebec's immigration program. She explains that interculturalism—namely, promotion of "cultural pluralism, but with the ultimate goal of developing a common public culture" based on French as the official language—has dominated Quebec selection policy since the 1960s. This was reflected in, for example, the significant weight allocated to French language and adaptability factors under the Quebec points system as well as in the approach to immigrant integration. However, according to Houle, Quebec has recently moved away from selection governed by interculturalism towards a more economy-driven approach. Such a shift is significant as it seems to demonstrate certain convergence among all provincial and federal programs for selection of economic immigrants in their underlying prioritization of efficiency and economic benefits of selection. Thus, although Quebec remains unique in the history and scope of its immigration program, perhaps in other respects it no longer stands as far apart from other provincial programs as it has in the past.

Taken together, chapters by Baglay/Nakache and Houle demonstrate that in Canada, there are three main selection systems at play: federal programs, PTNPs and Quebec program. Despite notable variation in their approaches, the selection of economic immigrants under all of them is primarily driven by efficiency considerations. Such policy convergence likely happens not by design but more so as a coincidence of each government's own policy choices. The divergence occurs in how each government interprets who is a 'desirable' migrant and who is likely to make a valuable contribution to economy. It is these varying interpretations that produce a great diversity of selection streams and criteria at federal and provincial levels.

The immigration federalism in Australia has some parallels with Canada: as **Bob Birrell** describes, the federal government has long played a dominant role in immigration, but since the 1990s, states and territories have been allowed to administer their own sponsorship programs to select immigrants with skills in local demand. However, despite the existence of state/territorial programs, the federal government plays a stronger coordinating role in Australia's selection system than in Canada. Every year states must negotiate a migration plan with the federal Department of Immigration and Citizenship (DIAC), setting out occupations eligible for sponsor-

[4] In fact, Quebec has served as an example for other provinces who sought greater role in immigrant selection **(**Vineberg 2008**).**

[5] See, e.g., *Canada—Québec Accord Relating to Immigration and Temporary Admission of Aliens*, (February 5, 1991), s. 2, online: Citizenship and Immigration Canada http://www.cic.gc.ca/english/policy/fed-prov/can-que.html

ship and quota of admissions. Sponsored individuals also must meet a federally prescribed minimum language requirement and lodge an initial application through the DIAC administered Skill Select system. Importantly, as Birrell explains, recent developments in Australian immigration policy need to be understood in the context of the mining boom. For example, the increase in state sponsored immigrants was in large part motivated by the need to ensure a supply of labour during the mining boom and Western Australia, which is at the centre of the resource boom, is one of top destinations. However, the future of state sponsorship remains to be seen as the slowdown of the mining boom in 2012 is likely to have significant impact on overall migration policy in Australia.

In contrast to Australia and Canada where immigration federalism is exhibited most strongly in immigrant selection and with the objective of attracting migrants, in the US, sub-federal participation relates primarily to immigration enforcement and frequently with the objective of deterring undocumented migrants (often motivated by frustration about the perceived lack/failure of federal enforcement). While much of this local action is not sanctioned as such by federal immigration law, it seems that states and localities are "actually exercising the discretion that definitively shapes federal enforcement". **Jennifer Chacón** analyzes a series of recent court decisions on immigration and their implications for both the understanding of state/federal powers and for the treatment of non-citizens. In its most recent decision *Arizona v United States* (2012), the US Supreme Court upheld the pre-emption argument, namely that federal government controls immigration policy and that where a comprehensive federal regulatory scheme is in place, there is no room for additional state action. Chacón projects that notwithstanding the Court's formal endorsement of federal primacy in immigration, state and local activities will continue playing an important role in immigration enforcement in the United States in future years. One of the significant weaknesses of the Arizona decision is its failure to address the discriminatory effect of local enforcement, which as Chacón argues "will mean that, for migrants, more aggressive and racially-motivated policing will certainly follow from the decision." Clearly, federal immigration enforcement is not free from discriminatory practices, but Chacón believes that the dispersal of immigration enforcement powers is likely to amplify such problems, first because sub-federal agents are less likely than federal agents to be trained properly on immigration issues and second, because of the lack of a centralized mechanism to oversee and track constitutional rights violations occurring at the local level.

Finally, the case studies of Germany and Switzerland illustrate the workings of immigration federalism in societies that have until recently been dominated by the 'guest worker' approach to immigration, but where sub-national units traditionally enjoyed substantial role in various areas of the immigration process.

In Germany, immigrant selection has always been a federal government's responsibility but, in contrast to other federations, Länder (states) played a prominent role in the realm of immigration enforcement and integration from early on. Over the years, their role in these areas has even expanded, explains **Dagmar Soennecken**, "not because of a formal devolution of federal responsibilities to the subnational

level but largely because subnational actors made full use of their powers while the federal government dragged its feet". However, in contrast to the United States, it is not the "frustration" with the lack of federal action that has led Länder to take a more active role in immigration: the expansion of Länder role in this area happened with consensus instead of conflict—which is partially due to the model of German federalism characterized by high degree of coordination and joint decision-making between the two levels of government. Soennecken suggests that German immigration federalism can be understood as going through phases that oscillate between centralization and decentralization. Despite traditionally extensive role of the Länder in the immigration process, German federalism is currently in the centralization phase. For example, the federal level has begun reasserting its power in the area of naturalization (including through opening up citizenship to the *jus soli* principle), although the oversight of naturalization has always been a responsibility of the Länder. In enforcement and staying of deportation orders, federal reforms have mandated a more uniform approach, limiting the discretion of the Länder. Asylum laws and policies have been tightened at the federal level, although this has happened under the pressure of the Länder that sought to reduce the costs of the reception and settlement of refugees. As Soennecken demonstrates, these 'phases' of immigration federalism can lead to both restriction and expansion of non-citizens' rights—which one it is ultimately depends on the power of the underlying discourse and political, institutional, economic and other considerations.

Similarly to Germany, Swiss cantons have traditionally had significant role in the immigration field as main regulatory actors, as agents implementing national legislation as well as through political channels. Thus, here, too, one cannot speak of a recent trend towards greater devolution but rather one can observe some recent attempts towards building a national framework on immigrant integration. As **Anita Manatschal** shows, cantonal powers have resulted in "a heterogeneous puzzle of […] integration policies." She argues that, in the Swiss context, marked by considerable demographic, linguistic and cultural differences, devolution in integration policy is preferable to centralization for several reasons: it allows for better response to local needs, facilitates evolution and sharing of best practices and is less prone to symbolic party politics. However, she also acknowledges that these varying policies may be a source of structural discrimination against non-citizens. Cantonal integration policies represent a "limitrophe" along cultural-linguistic lines whereby French-speaking cantons are influenced by France's more inclusive notion of citizenship and German-speaking cantons—by Germany's more restrictive citizenship tradition. For example, French speaking cantons allowed for greater participation rights for non-citizens (e.g., voting in municipal elections) compared to German-speaking and Italian-speaking cantons. Similarly, naturalization requirements are less demanding in French-speaking rather than German-speaking cantons.

The last of the case studies by **Elspeth Guild** is on the European Union (EU). The EU is not a federal entity per se, nor does the EU call itself a federal state. However, the competences of the EU have been extended to the area of immigration prompting questions similar to those arising in federal states: how and which areas of migration to harmonize through EU regulation? At present, low-skilled labour

migration is not yet regulated by the EU, while skilled labour migration—which is the focus of Guild's chapter—is. That skilled labour migration is regulated mainly by EU law, not the law of the (currently) 28 Member States, is an indication that the EU is, according to Guild, moving towards federalism. However, what kind of EU labour market is in place today? This question is important, explains Guild, because "the more 'complete' the EU's internal market for people to move and reside the greater the convergence of the EU to a federal model may be" and the "greater the rights for the individuals concerned". Having had a close look at EU's legislation regarding labour migration, Guild concludes that accessibility of the EU labour market depends on who the person is. *For nationals of EU Member States* who move across intra-EU borders in search of a job, the legal regime is clear: nationals of any Member State accompanied by their third country national family members can move freely and seek employment anywhere (with the exception of temporary transitional arrangements for new member states). Thus, labour migration of EU nationals is treated as a single common EU labour market and "the system may be considered to have a federal element". *For third country nationals* (i.e., non-EU citizens), the legal regime tells however a very different story. Third country nationals who move to the EU for the purpose of labour migration are subject to a wide diversity of conditions, requirements and restrictions, depending on the job the person is likely to perform. What's more, first admission of third country nationals to EU territory is always limited to one Member State—even where that admission is regulated by EU law. Given the complexity and fragmentation of EU law relating to the admission of third country nationals, it can be said that the EU labour market for non-EU citizens consists of 28 different national markets. In addition, third country nationals are not allowed to move within the EU labour market before a certain period of time spent in the country of admission: 18 months for the Blue Card holders and 5 years for long-term resident third country nationals, beneficiaries of international protection and their family members. They also have to fulfill various conditions (related to work, accommodation, resources etc.) after admission to be authorized to move across intra- EU borders. And even after 18 months or 5 years spent in the country of admission, another Member State is entitled to re-examine whether the various conditions imposed on them are fulfilled. Thus, one common EU labour market for third country nationals is not really achieved, and Member States are still permitted to impose strong constraints when non-EU citizens seek to exercise their mobility right. This differential legal treatment between EU and non-EU citizens reveals, as Guild puts it, that "the EU is a place of struggles around federalism" because there is as of today no convergence in EU regulation over movement of persons.

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Chapter 2
Immigration and Federalism: Responsibility for Immigration in the Light of the Literature on Federalism

Robert Vineberg

> *The question then is, whether the different parts of the nation require to be governed in a way so essentially different that it is not probable the same Legislature, and the same ministry or administrative body, will give satisfaction to them all…*
> John Stuart Mill, 1861 (Mill 1972, p. 374)

Abstract The purpose of this chapter is to explore the peculiarities and challenges faced by states in immigration regulation through the lens of the literature on federalism. Following an examination of the fundamentals of the concepts of sovereignty and federalism, the chapter will summarize the development of the federal constitutions of three federal states that have had long histories of encouraging immigration (Canada, Australia and the USA). Then it will look at the similarities and differences of the three constitutions. In particular, the approach to concurrent jurisdiction will be examined. The drafters of the United States *Constitution* feared concentration of power in a national government and left, in theory, states free to legislate in most areas that had also been delegated to the federal government. In practice, however, particularly since the end of the American Civil War, the federal government has established almost exclusive pre-eminence in the area of immigration. The drafters of the Canadian *Constitution*, in 1866 took account of the relatively weak central government south of them that contributed, in their view, to the American Civil War. Therefore, they were determined to create a stronger central government and generally assigned specific powers to each level of government, only making an exception for agriculture and immigration for which there was provision for concurrent jurisdiction. The drafters of the Australian *Constitution*, working at the end of the nineteenth century had both the Canadian and American examples to take into consideration but opted for a concurrency model more like that adopted by the Americans. In the case of immigration, the Canadian provinces and Australian states were both quite active in immigration until the outbreak of the First World War. With war, followed by depression and another war, the provinces and states largely abandoned their role in immigration. In the post-Second World

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War period, therefore, the federal governments of all three countries had the field to themselves. However, towards the end of the twentieth century, general trends towards decentralized federalism and economic, demographic and cultural imperatives began to attract state and provincial governments back to active involvement in immigration. The chapter examines the differing approaches to the phenomenon in all three countries and concludes with a discussion of models that may be of benefit to both state/provincial and federal governments.

Keywords Cooperative model of immigration federalism • Decentralized model of immigration federalism • Immigration control and enforcement • Immigrant selection • Immigrant settlement • Immigration

2.1 Introduction

In his *Reflections on Representative Government*, John Stuart Mill sought to establish the conditions under which a state should adopt a federal constitutional structure. The purpose of this chapter is to explore the peculiarities and challenges faced by states in managing immigration policy through the lens of the literature on federalism. This chapter examines the constitutional authorities in respect of immigration for the three federal states that have had long histories of encouraging immigration (Canada, Australia and the USA).[1] In doing so it will: (1) examine whether, in the literature, there is a rationale for decentralization of major aspects of immigration regulation and, if so; (2) to develop a theoretical model reflecting what 'ideal' immigration federalism might look like; and then, (3) examine to what extent Canada, Australia and the United States conform to the model. Finally it will consider whether decentralization is desirable and, if so, is it inevitable.

In order to understand the theoretical and practical basis for the federal constitutions of these three countries, and the impact on approaches to immigration, let us first examine the underlying issues of sovereignty and federalism.

2.2 Theories of Sovereignty

Our starting point is to look at the concept of sovereignty and how it came about in order to establish a context for our subsequent examination of federalism in general and immigration federalism in particular. The classical concept of state sovereignty

[1] While this chapter is limited to examining the theoretical question of immigration and federalism in the context of three federations, the theories and models considered have general applicability to the other federations under consideration in this book (Germany and Switzerland).

has its origins in the Treaty of Westphalia (Westphalia 1648) that brought to an end the 30 Years War. The treaty resulted in the transfer of theoretically absolute power from the Holy Roman Emperor to many kings and lords who became sovereign in their own right rather than subordinate to the Emperor. In time this developed into the concept of the absolute right of the sovereign, known as 'Westphalian sovereignty' (Jackson 2003, p. 786). The challenge that would be posed by federalism was that Westphalian sovereignty was, by definition, absolute and any federal arrangement would require a division of powers.

Richard Haass (2003), former American Ambassador and Director, Policy Planning Staff, Department of State, provides a succinct working definition of state sovereignty:

> Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and a monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order.

The Treaty of Westphalia also began the process of creating states based largely on one language, one religion and one ethnicity. No longer were people primarily linked to their sovereign in the traditional feudal sense but, more and more, were linked by a concept of nationality and patriotism. Linklater (1996) notes that "it is important to recall that the territorial state triumphed in Europe in part because it was large enough to defend itself from external attack but sufficiently compact to facilitate administration from a central point" (83). Linklater also posited four factors "about the classical doctrine of sovereignty: first, no one can be subject of more than one sovereign; second only one sovereign power can prevail within a territory; third, all citizens possess the same status and rights, and fourth the bond between the citizen and sovereign excludes the alien" (95). All four factors are, potentially, inconsistent with the operation of a federal state and a state whose policy is to welcome immigrants, who by definition are "aliens". In a federal state, powers must be shared in some fashion and citizens are subject to both national and regional governments. Those regional governments may accord different benefits and responsibilities on their citizens. Finally, an immigrant receiving state creates a relationship with aliens within its territory. According to Linklater, it is time to develop a post-Westphalian concept of sovereignty as modern democracy, one that "involves the dispersal of sovereign powers rather than their aggregation in an unchallengeable central authority" (95).

Thus concepts of sovereignty have evolved, over time, from a unitary concept of immutable and undivided sovereignty to a much more nuanced approach. As concepts of sovereignty evolved, federalism became a means to share power, so to give voice to regional differences and to attempt to ensure that a central government would not be able to become an absolute power. Let us now look at the theory and practice of federalism.

2.3 Theories and Practice of Federalism

What is federalism and how is it defined in a federal nation's constitution? Riker (1964) provides this rule:

> A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere (11).

On the face of it, federalism appears to be inconsistent with the very concept of state sovereignty. If sovereignty is indivisible, as in the Westphalian model, how can sovereignty be shared? Indeed, the oldest surviving federations, Switzerland, officially still known as the "Swiss Confederation," and the United States of America, both began as confederacies, that is an agreement by sovereign powers to cooperate in certain areas but each member retaining the right to withdraw from the confederacy. Therefore no permanent cession of sovereign powers took place. The United States became a federation when the *Articles of Confederation* of 1777 were replaced by the *United States Constitution* in 1787 (USA 1787). The creation of a true Swiss federation, in which sovereign powers were shared between the federal and local jurisdictions, had to wait until 1848. By that time the Swiss had the example of the American Constitution and the benefit of the long debates in the United States as to the nature of their new federation (Coolidge 1911, p. XXVI, 243).

Elizar (1985) describes federalism as paradoxical in that it "is directed to the achievement and maintenance of both unity and diversity" (20). Federations can be categorized by the degree to which the powers within the federation are shared by the different levels of government. Riker (1964) posits a continuum of power accorded to the ruler of a federation from the 'minimum,' with only few categories of action that do not require the approval of the rulers of the constituent units, to the 'maximum,' where the ruler of the federation can make decisions unilaterally in most categories of action (6). Thus Riker considered federations to be either 'centralist' or 'decentralist.' Writing two decades later, King (1982) added a third category which he described as 'Federalist Balance' (21). In other words federal constitutions could establish a balance of power between the levels of government so that neither the national nor the regional level would dominate the other.

The division of sovereign powers is all good and well in theory but it can get quite messy in practice, so let us now look at how each of the three countries considered in this paper implemented a federal constitution.

2.3.1 The United States of America

The evolution of thought leading to the signing of the American Constitution in 1787 and the first ten amendments, collectively known as the *Bill of Rights,* ratified in 1791, is beyond the scope of this chapter. Suffice it to say that the Americans, in rejecting the confederation established in 1777, and opting for a true federation,

were able to arrive at the concept of division of powers that is at the basis of all federal states.

The American Constitution was absolutely ground-breaking. It took the republican theory of the Enlightenment and turned it into practice. For the first time a constitution vested sovereignty in the 'people.' The 'people,' in the constitutional sense were not just the sum of the individuals living in the United States; rather it was an intellectual concept—a legal fiction—that justified the exercise of power in a republic. The 'people,' therefore, were to a republic exactly what God was to monarchies—the source and justification of all power (Ducharme 2010, p. 36). In the United States, the 'people,' in turn, divided their sovereignty between the federal and state governments. Americans, with their new constitution were, indeed, trying to create a "more perfect Union," that is to say, one that would work better than that created by the original *Articles of Confederation* that left the national government virtually powerless.

The drafters of the Constitution assumed that, as the United States was a union of sovereign states, it would be clear that all powers *not* surrendered by the states to the new federal government would remain with the states. Furthermore, as Alexander Hamilton (1788) argued in the *Federalist Papers*,

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States (No. 32).

However, advocates of states' rights were not satisfied by this presumption and insisted that the *Bill of Rights* (USA 1787) include a provision specifically limiting the federal power. The *Tenth Amendment*, entitled, "Powers of the States and Peoples" specified that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, with the *Tenth Amendment*, the Americans had defined the concept of exclusive and concurrent jurisdictions within their basic law. The United States was a sovereign nation, but each of the states would be sovereign within their defined jurisdiction as well as having significant areas of concurrent jurisdiction in which to legislate. Managing immigration, in the new United States, remained important to each state while the federal government viewed immigration as also important to the nation as a whole. As a result the Constitution was somewhat ambiguous in dividing authority with respect to immigration.

Article 1, Section 8 of the American Constitution, enumerated the powers of Congress, including that of naturalization. In Article 1, Section 9, 'Limits of Congress', it was stipulated, *inter alia,* that the, "Migration or Importation[2] of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year 1808, but a tax or duty may be imposed

[2] The use of the word 'importation' refers to slaves. Slaves, as chattel, could not 'migrate' to the United States.

on such Importation, not exceeding **ten dollars** for each Person." Finally, Article 1, Section 10, enumerated the powers prohibited of states, including the conduct of foreign relations.

Tarr (2005) interprets Hamilton's statement, above, to suggest that the powers delegated to the federal government fall into three categories: (1) exclusive powers, that can be exercised only by the federal government; (2) concurrent powers, whose delegation to the federal government does not limit state power to legislate; and, (3) powers that are not entirely exclusive nor entirely concurrent, whose delegation to the federal government limits but does not completely preclude their exercise by the states (388, 389). In the case of immigration, as we shall see, the Federal Government and the United States Supreme Court successively reduced state freedom to act in the area, beginning in the latter part of the nineteenth Century.

2.3.2 Canada

In Canada, the *Constitution Act*—originally known as the *British North America Act* (Canada 1867), took a quite different approach from that of the Americans. The drafters of the Canadian Constitution, in 1866, took account of the relatively weak central government south of them that contributed, in their view, to the American Civil War. Therefore, they were determined to create a stronger central government (Riker 1964; p. 116). In particular, the "residual power" was to lie with the central government. The 'chapeau' of Section 91 of the *Constitution Act* specifies that the federal government has power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;" the precise opposite of the assumption in the American Constitution.

While federal powers, enumerated in s. 91, included naturalization and aliens (ss. 91(25)), and provincial powers were listed in s. 92, there was no mention of immigration in either of these sections. Canada in 1867 was a vast, under populated country whose major industry was agriculture. The former colonies had extensive experience in administration of both agriculture and immigration and felt strongly that they needed to remain involved, while acknowledging the paramount interest of the new federal government. Therefore, s. 95 of the *Constitution Act* accorded concurrent jurisdiction only in these two areas but stipulated that in the case of conflicting legislation that the federal legislation would prevail. Immigration did not include immigration enforcement (i.e., control of aliens). This was deemed to be in the exclusive federal jurisdiction (ss. 91(25)) but all other aspects dealing with bringing in immigrants, such as selection and settlement, were within the concurrent jurisdiction.

The Canadian *Constitution Act* was revolutionary in one particular way. The idea of sharing the power vested in the theoretical 'people,' as in the American Constitution was one thing. To divide the sovereign power vested personally in a monarch was quite another. Yet that was precisely what the Canadians were proposing at

the time of Confederation. The sovereignty of Queen Victoria was to be vested partially in the Queen and Parliament of Canada and partially in the Queen and the legislatures of every province. Thus Canada became the first federal state within the Westminster system of parliamentary government (Burgess 2006, p. 84) and, also, the first federal monarchy (Hodgins 1978, p. 13).

2.3.3 Australia

The drafters of the Australian constitution, working at the end of the nineteenth century, had both the Canadian and American examples to take into consideration but opted for a concurrency model more like that adopted by the Americans. Riker (1964) explains why:

> Its framers' image of the United States came from an era in which the Supreme Court was systematically endeavoring to undo the centralization occasioned by the Civil War. Whereas the Canadian framers looked at the horror of the Civil War and sought to minimize the danger of its replication by centralizing their system more than that of the United States, the Australian framers interpreted the degree of centralization in the United States as just about right and so copied our system as it was in 1900 (119).

In Australia the *Commonwealth of Australia Constitution Act* (Australia 1900), clearly gives the Commonwealth government the power to enact laws associated with immigration. Section 51 of the Constitution enumerates the federal powers: Immigration and Emigration (ss. 51(xxvii)) as well as Naturalisation and Aliens (ss. 51(xix)). However, unlike the Canadian Constitution and more like the American Constitution, most federal powers in Australia are concurrent but in case of "inconsistency", federal law prevails.[3] Therefore, in the realm of immigration, the Canadian and Australian constitutions are similar in providing for concurrent jurisdiction but with federal pre-eminence in the case of inconsistency. However, Saunders (2005) has noted that Australian jurisprudence has defined inconsistency to include "not only laws that are directly in conflict with each other but also circumstances in which a Commonwealth act purports to cover an entire legislative 'field,' leaving no room for state legislation" (25).

Galligan (2008) argues that "concurrency is the defining character of the Australian division of powers" and that "it allows flexibility and fluidity, rather than packaging up and boxing respective roles and responsibilities" (637). The result, according to Galligan, is a "competitive" rather than a "cooperative" federalism. Competition occurs both between states and the Commonwealth government but also among the states themselves. This competition is the main method of determining the respective roles and responsibilities between the Commonwealth and the states (639). However, Galligan notes that competition and cooperation are complementary dynamics in Australian intergovernmental politics and public policy (640)

[3] Section 52 enumerates a rather short list of powers given exclusively to the Commonwealth Government.

and the two levels of government will cooperate when it is in the best interests of both levels of government.

2.3.4 *Historical Context of Federalism in Australia, Canada and the United States*

In considering the adoption of federalism in the United States, Canada and Australia, one must also look beyond the theory of government to the reality of the environment at the creation of all three federations. In contrast to European nations, all three new federal states covered vast areas and were relatively under-populated. The British, in colonising these areas, saw fit to govern by sub-dividing them into colonial provinces. Populations were too isolated to be governed centrally. Therefore, in each country, there had been a tradition of local government but no central government, outside of London. It was reasonable, then, for the population of these colonial provinces to retain a structure with which they were familiar as they ventured into the unknowns of creating a new national government (In the case of Australia, see Burgess 2006, p. 87, 88). Therefore, a federal arrangement was tantamount to being an imperative. In Canada, one could add the further imperative of creating a form of government that could accommodate and protect the rights of both founding societies, British and French Canadian. Since the *Quebec Act* of 1774, French Canadians had been guaranteed the freedom to practice the Roman Catholic faith and the right to use the French civil code for personal matters and the French language for all matters before the courts. Canada's federal constitution had to accommodate this reality and a federal structure permitted the new province of Quebec to be different from the other provinces in order to retain its French language and institutions.

In creating, preserving and protecting the rights of French Canadians in its constitution, Canada also created an asymmetric federation. The United States had created a symmetric federation because every state was created equal under law in the American Constitution. In 1900, the Australians largely followed this model. We shall see that this acceptance of asymmetry in Canada created an openness to asymmetric approaches to immigration as well.

Both the United States and Australia were conceived as decentralized federations while Canada was conceived as a centralized federation. The United States became more centralized in the late nineteenth Century, in the wake of the Civil War, as many Americans blamed state power for creating the conditions that led to the war. Australia, also, became more centralized over the course of the twentieth Century both due to the ability of the Commonwealth government to 'occupy' areas of authority and because, until the 1970s, the Australian population (with the exception of Aboriginal peoples) was quite homogeneous and lacking in major regional differences. In contrast, Canada became more decentralized, due not only to the "profound vitality of the country's regional diversity" (Hodgins 1978, p. 7) but also

as a result of a series of constitutional decisions, in favour of the provinces, made by the Judicial Committee of the Imperial Privy Council.[4]

Centralization does not necessarily mean there is a greater concentration of power in the hands of the executive. By comparison with Australia, the executive in Canada, at both the federal and provincial level is more dominant. The major reasons for this are twofold. First, senators in Canada are appointed by the Governor-General on recommendation of the Prime Minister. Therefore, the upper house, the Senate, does not carry the political weight of the elected Senate in Australia to counter-balance the executive and the lower house. Second, all the provincial legislatures in Canada are unicameral whereas the state parliaments in Australia are bicameral and the state executives have to take account of the other house. A provincial premier in Canada, if he or she has a majority in the unicameral legislature, has great freedom to exercise authority. In the realm of federal-provincial relations, therefore, there is the potential for both cooperation and for conflict. "This development is characterized by strong governments pursuing their own priorities, and it should not be surprising, then, that the highly centralized nature of political power at both levels of government has lead to policy development activity quite dissimilar from what occurs in most other federal countries" (Radin and Boase 2000, p. 69, 70). The result is what Canadians call 'executive federalism,' as many decisions are taken at bilateral or multi-lateral meetings of federal and provincial Ministers or First Ministers. Hueglin and Fenna (2006) note that similar meetings, known as Premiers' Conferences take place in Australia as well (226). However, their view is that it is in Canada that intergovernmental relations have developed into a quasi-diplomatic activity with federal and provincial secretariats or ministries devoted to the subject so, "in Canada, the institutionalized practice of First Ministers' Conferences acknowledges that, at least in a number of crucial policy areas touching upon sensitive provincial interests, national decision-making without provincial government input is no longer acceptable" (235). The case of the United States, the U.S. Constitution so clearly delineates executive and legislative powers within the federal government that the executive is often constrained or even compelled to act by the Congress. An executive with the confidence of the assembly as in Canada and Australia will naturally concentrate more power compared to the American system which was designed to do just the opposite of the Parliamentary system.

The constitutional powers of the state and provincial governments, as we shall see, often come into play as provinces of Canada and states, in the United States and Australia, have moved to be more involved in immigration. Federalism has facilitated concurrent approaches to immigration in all three countries to a greater or lesser extent; yet the dividing point between the three basic models-exclusive federal jurisdiction, exclusive state/provincial jurisdiction or concurrent jurisdiction-is a moving target.

[4] The Judicial Committee of the Imperial Privy Council, the United Kingdom's court of final appeal also played this role for Canada in the late nineteenth Century and early twentieth Century until the Supreme Court of Canada was accorded this status in 1949.

In this section we have examined the evolving nature of federalism in the three countries under consideration. It is now time to turn to an examination of how each country has, in reality, regulated immigration.

2.4 Federalism and Immigration Regulation in Australia, Canada and the United States

In the previous section, we examined the federal structure of the three countries and the theoretical division of powers regarding immigration in the United States, Canada and Australia. It remains to examine how this legal, theoretical construct is applied in each country. A helpful theoretical construct for immigration federalism is offered by Spiro (2001) who identifies three models of federalism:

- Central Government hegemony
- Cooperative Federalism
- Devolutionary Federalism

For Spiro, central government hegemony exists when subnational units have only an indirect or peripheral role in decision making. By contrast, the cooperative federalism model retains primary control with the central government but enlists subnational authorities as junior partners with a certain amount of discretion to allow for specific subnational needs. Finally, the devolutionary model involves central government ceding primary control of all or part of immigration to the subnational unit (67).

As can be seen, Spiro's model for immigration federalism is quite consistent with King's model for federalism in general. This would suggest that immigration could be regarded in much the same light as any other area of government. Boushey and Luedtke (2006) examined Canadian and American immigration policy from the perspective of fiscal federalism and developed the following hypotheses:

1a: Given the high costs and inefficiencies associated with maintaining immigration control [i.e. visa vetting overseas, border control and inland enforcement] policy at the sub-central level, immigration control policies in federal systems will be centralized (210).

1b: As both security and citizenship are traditional nation-preserving functions of the central government, immigration control is likely to be part of central government policy (213).

2a: Because subcentral governments are better suited to determine local needs and preferences, immigrant integration [i.e. recruitment, selection, admission and settlement] policy in federations will be determined through sub-central government policy (211).

2b: Given local preferences for specific linguistic and cultural preservation, immigrant integration policy is likely to be controlled by sub-central governments (212).

Table 2.1 A theoretical model for immigration federalism

	Policy development	Program delivery
Selection/Admissions	Cooperative: Federal leadership but allowing states/provinces some authority to select immigrants on the basis of regional and local priorities	Cooperative: State/Provincial cases processed by Federal authorities to take advantage of economies of scale
Settlement	Devolved: to states/provinces but with Federal coordinating role	Devolved: State/Provincial authorities can ensure interface of services to immigrants with mainline social services, etc
Enforcement and control	Federal hegemony	Cooperative: Lead with Federal authorities but assisted by state/provincial/local authorities

2.4.1 A Theoretical Model for Immigration Federalism

If Boushey's and Luedtke's hypotheses are correct, one would expect that a practical federal state would centralize immigration control policies and decentralize recruitment, selection and settlement policies. This is what has taken place in Canada and Australia to some extent, but not in the United States to the same degree (Boushey and Luedtke 2006, p. 216, 217). Thompson (2011) has suggested a similar approach be adopted in the United States, based on economies and diseconomies of scale (250). Similarly, Su (2008) suggests that the determining factor is simply, "what is truly national and truly local" (182). One can also separate policy development from program delivery so that policy development might largely remain with the central government while program delivery is entrusted to sub-central governments. In order to illustrate this approach I have developed a theoretical model, derived from the literature. This model is illustrated in Table 2.1.

With this model in mind, let us now examine how close reality is to the theory in each country and where there is a variance to attempt to determine why that is so.

2.4.2 Immigration Federalism: The United States Experience

In 1889, the United States Supreme Court, articulated the "plenary power doctrine" on immigration. According to that doctrine, the regulation of immigration and immigrants falls under the exclusive and unreviewable purview of the federal government" (Filindra and Kovács 2011, p. 1, 2). Schuck (2007), in considering the almost complete federal control of immigration in the United States, wrote, "the fundamental question that the federalist default raises is this: why should immigration be different [from the way jurisdiction is treated for other areas of government]? My answer… is that in principle immigration should *not* be different, though the

precise mix of federal and state authority and responsibility is and must always be domain specific" (66). Nevertheless, in the United States, where the "plenary power of the federal government to regulate immigration" and the related "dormant power doctrine" are firmly established, "this federal power is indivisible and therefore the states may not exercise any part of it without an express or implied delegation from Washington" (57).

Schuck also offers the argument against delegation of powers over immigration to the states. He refers to Spiro's (2001) view that the principal reason is that, "immigration policy has generally been considered a part of national foreign relations and as such does not require to require ultimate central government control" (67). Schuck (2007) agrees that unitary control of foreign relations is the chief rationale for federal plenary power but he suggests that it is not the only one, citing other factors including tradition, economies of scale, costs of changing the *status quo*, the administrative experience and expertise at the federal level and, the fear that competing states will lower admission standards unacceptably (67).

In theory the federal plenary power over immigration policy has left room for the state and local authorities to control integration, thereby allowing for cooperative relationships between the different levels of government (Provine and Versanyi 2012, p. 105). Nonetheless, this has not taken place to any extent and the perceived lack of federal responsiveness to the concerns, particularly of the states bordering with Mexico, about the poor integration of immigrants and the number of illegal migrants has resulted in several states attempting to take matters into their own hands by challenging federal prerogatives relating to immigration enforcement (Rodriguez 2008, p. 575; Thompson 2011, p. 237). In April, 2010, Arizona enacted a law that *inter alia* would make it a state crime not to carry immigration papers (Archibold 2010a). However, just before the act was to be enforced, the federal government obtained an injunction to prevent most of the act from being implemented (Archibold 2010b). Arizona then sought and obtained agreement from the Supreme Court to review the lower court decision. The State claimed that the position of the federal government that states "are powerless to use their own resources to enforce federal immigration standards without the express blessing of the federal executive goes to the heart of our nation's system of dual sovereignty and cooperative federalism" (Associated Press 2011). The case was argued before the U.S. Supreme Court on April 25, 2012 and the Court rendered its decision on June 25, 2012. Most of the law's provisions were struck down as the Court determined that "the state may not pursue policies that undermine federal law" but the Court allowed the provision that state law enforcement officers could demand to see immigration papers if they suspected that a person was illegally in the United States. This provision, if abused, may still be subject of a further court challenge based on Civil Rights. For the moment both Arizona and the Federal Government can claim partial victory. (Liptak 2012)

The federal government is also challenging similar laws in other states including Alabama, Georgia, Indiana, South Carolina and Utah but the Arizona decision will likely establish a precedent for any other litigation.

Schuck (2007) finds it ironic that while some other countries accord substantial authority over aspects of immigration policy to state or provincial governments, the United States "remains a firm centralizer in immigration policy despite its robust tradition and structure—the federalist default—of state authority and administration…" (67). Nevertheless, while maintaining this position, the federal government, in recent years has sought state and local cooperation in the area of immigration enforcement. Wishnie (2002) provides a number of examples including the 1996 welfare law, in which Congress authorized states to discriminate against non-citizens in public benefits programs; the *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996 (*IIRIRA*) which authorizes cooperation agreements with state and local police; and, "perhaps most significantly, in 2002, the U.S. Department of Justice reversed a longstanding position and announced that, in its view, state and local law enforcement officials possess the 'inherent authority' to make arrests for civil immigration violations" (287–288).[5]

In the United States, the Federal government has long considered immigration to be its own area of authority but recent court decisions, federal legislation and interpretations by the Department of Justice have opened the door somewhat to state participation. Let us now turn to the Canadian experience.

2.4.3 Immigration Federalism: The Canadian Experience

In Canada, in the early years following federation, the provinces continued to be active in immigration (Vineberg 2011, pp. 18–21) but interest waned, during the First World War, recovered somewhat in the 1920s and then disappeared during the Great Depression. Following the Second World War, for many years, the Canadian provinces pretty well left immigration to be managed by the federal government. (Vineberg 2011, p. 23, 24)

Furthermore, while the Constitution accorded concurrent jurisdiction to immigration, this was not reflected in federal immigration legislation until 1976. In that year, a new *Immigration Act* (Canada 1977) was introduced in Parliament and ss. 108(2), provided specific authority to the Minister to "enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs." It also required, in ss. 108(1), that, "The Minister shall consult with the provinces respecting the measures to be undertaken to facilitate the adaptation of permanent residents to Canadian society and the pattern of immigrant settlement in Canada in relation to regional demographic requirements." These consultations started in 1977 and

[5] It should be noted that in Canada this is not an issue given that s. 92(14) of the *Constitution Act* (Canada 1867) assigns responsibility for the administration of justice to the provinces, regardless of whether the statute is federal or provincial. While the national police force, the Royal Canadian Mounted Police, and federal immigration enforcement officers of the Canada Border Services Agency take the lead in most cases, local police have full authority under the constitution to enforce the provisions of the *Immigration and Refugee Protection Act* (Canada 2001).

continue annually but on a bilateral basis. Similarly, all provinces and territories of Canada (except Nunavut) have entered into agreements on immigration with the federal government. The current Canadian immigration legislation, the *Immigration and Refugee Protection Act (IRPA)* has retained these provisions (Canada 2001, ss. 8(1) and 10(2)). However, unlike Australia, in the modern era, multilateral meetings of federal, provincial and territorial ministers of immigration only date from 2002 (CIC 2003).[6]

The Province of Quebec was the first province in the modern era to demand a say in immigration selection. Overwhelmingly French-speaking Quebec first established an immigration service in 1965. Wanting to maintain its demographic and linguistic weight in Canada and concerned that the federal immigration department was not selecting enough French-speaking immigrants, Quebec decided to try to encourage francophone immigration but without selection tools, it had little success. Therefore, it demanded, pursuant to its concurrent jurisdiction, a say in immigration. It first concluded a federal-provincial agreement in 1971 that permitted Quebec agents to counsel immigrants thinking of going to Quebec. It was followed by increasingly more complex agreements in 1975 and 1978, the latter of which gave Quebec the authority to select its own economic immigrants. This was clearly a response by the federal government to the threat of Quebec separatism. The federal government promoted the agreement as a demonstration that federalism could work for Quebecers. The current agreement with Quebec was signed in 1991 and also transferred control of settlement services to the province.

Sometimes, however, significant changes are wrought, not from theory and principle but from external pressures, such as the financial position of the federal government. One such case was the federal offer, in Canada, to devolve settlement services to the provinces. This offer was driven largely by the need to eliminate the federal budget deficit in the mid-1990s. Under 'Program Review' every federal department was ordered to review all its programs and identify programs that could either be terminated or transferred to provincial administration. The federal department responsible for immigration, Citizenship and Immigration Canada, decided to offer up settlement. Its reasoning was partially based on constitutional arguments, given that the provinces have responsibility for social services in general (Canada 1867, s. 92) but, mostly it was an effort to reduce the departmental budget. A number of provinces entered into negotiations with CIC but, in the end, either for reasons of provincial capacity or fear that the federal government would not transfer adequate resources, only the provinces of Manitoba and British Columbia ultimately concluded agreements to transfer settlement to provincial responsibility. As a result of the various agreements, in Canada, settlement services are delivered in a variety of ways across Canada: devolution to a province; co-management between CIC and a province; CIC delivery but based on a formal consultation mechanism; and, CIC delivery following informal consultations with a province (Vineberg 2012, pp. 43–46, 50). However, the federal government has just taken a major step back from devolution by giving notice that it will rescind the settlement agreements

[6] For a more detailed description of these developments, see Vineberg, 2011, pp. 30–38 *passim*.

with Manitoba (as of April 1, 2013) and British Columbia (as of April 1, 2014), making the argument that consistency requires central control of the program (CIC 2012). Thereafter, only Quebec will receive federal funding to deliver settlement programs. However, there is no impediment to provinces spending their own money on settlement services as well and several, including Alberta and Saskatchewan, do so but none approaches the scale of federal funding.

Also, in the 1990s, several Canadian provinces became dissatisfied with the lack of responsiveness of federal selection systems to meet their labour market needs, as the bulk of immigrants to Canada continued to congregate in Montreal, Toronto and Vancouver. Manitoba, in particular, argued that the national selection criteria were not selecting immigrants for Manitoba's needs, especially in the skilled and semi-skilled trades. At first, the federal government was reluctant to have more provinces involved in immigrant selection but it rather quickly recognized that it had to respond to provincial complaints. However, it did not want to have to deal with ten Canada-Quebec accords, as that would make selection of economic immigrants exclusively a provincial authority. Therefore, the federal government came up with a new device designed to preserve federal selection of economic immigrants but to open the door to provincial selection along different but parallel processes. In 1995, the Provincial/Territorial Nominee category was developed to allow provinces and territories to "meet specific local and regional economic immigration objectives … The category [would] allow each province or territory to identify a limited number of economic immigrants to meet specific regional needs and/or to receive priority attention for immigration processing each year" (CIC 1995, p. 9, 10). Saskatchewan, Manitoba and British Columbia signed the first Provincial Nominee Agreements in 1998 and 2013, by all provinces and two of the three territories had concluded similar agreements. Of course, Quebec, who already had greater authorities under its 1991 agreement, is the one province that had no need of a provincial nominee agreement. The provinces and territories have made extensive use of the program and the 'limited numbers' envisioned by the federal government have grown to over 38,000 in 2011, representing 24% of economic immigrants and 15% of all immigrants (CIC 2011, p. 17).

Canada, as we have seen, is far closer to the theoretical model of immigration federalism than is the United States. We shall now turn to the case of Australia.

2.4.4 Immigration Federalism: The Australian Experience

As was the case in Canada, in the early years following federation, the Australian states continued to be active in immigration (Atchison 1988, p. 7) but this declined with the Great Depression. The end of the Second World War marked the beginning of a significant degree of cooperation in Australia between the states and the Commonwealth government. "The basis of co-operation of Commonwealth and State departments and instrumentalities in immigration and settlement was secured at the 1946 Premiers Conference" (Atchison 1988, p. 10). Again, like Canada, the

central government establishes enforcement policy but enforcement activities are cooperative.

Williams and MacIntyre (2005) observe that in Australia, constitutional "lines of authority are rarely clear and, indeed, are often deliberately blurry." Thus, "the Australian federation is more 'cooperative' than are the American and Canadian federal systems…" (24). This seems to have been the case in the development of state involvement in the selection of immigrants. In May 1996 the annual meeting of Commonwealth, State and Territory Ministers for Immigration established a working party on regional migration leading to a number of initiatives to attract immigrants to areas which had historically received small numbers of immigrants (Hugo 2004, p. 47).

A similar conclusion was evident in the view of the Parliamentary Joint Standing Committee on Migration, in their *Review of State-specific Migration Mechanisms* (SsMM) (Australia 2001):

> SsMM emerged as a result of Federal/State/Territory consultations on regional and skilled migration. In the course of these consultations it was evident that there were concerns about skills shortages and the skewing of Australia's migration intake towards the larger metropolitan centres, (4, s.2.5).
> In response to these concerns, a range of State-specific migration initiatives was undertaken. These were partnerships between the State/Territories and the Commonwealth which allowed States, Territories, and regions to use provisions of the migration arrangements selectively (4, s.2.6).

The SsMM, by offering a range of programs that states can choose to use, have created a healthy competition demonstrating the competitive federalism model. Galligan (2008) observed that, "The most basic expression of horizontal competition would be through citizens migrating to preferred State regimes" (639). The same applies equally to non-citizens choosing between the various state specific migration schemes, as is the case in Canada, as well, where intending immigrants can choose among Provincial Nominee Programs.

So, Australia also conforms to the theoretical model more than does the United States. Now let us compare the current state of immigration federalism in the three countries.

2.4.5 Immigration Federalism Compared

We have examined the American, Australian and Canadian approaches to immigration in a federal setting in the forgoing sections. We will now compare what we have found in each of the three major areas of selection, settlement and enforcement.

In the area of selection, both Australia and Canada have concurrent selection schemes in which the states and provinces have the authority to select immigrants for their regional and local needs. By comparison, the United States has no

provision for selection at the level of state governments. Both Canada and Australia are proactive in their approach to immigrant settlement and offer a range of services designed to support the economic and social integration of immigrants. While Canada has specifically authorized some provincial governments to deliver settlement programs, the federal government has recently reversed this policy only the province of Quebec will soon deliver settlement services with funding provided by the federal government. By contrast Schmidt (2007) observes that, "the U.S. federal government has virtually no formal policies regarding immigrant settlement. Nearly all the attention given to immigrants in Washington, D.C., is focused on the "gatekeeping" questions of immigration policy, and not on facilitating immigrants' successful integration into U.S. society" (113). He goes on to assert that "from the perspective of the U.S. federal government, immigrants are expected to find their own way to successful integration into the U.S. society, economy, culture, and political community" (114). What little is done takes place at the state and municipal level or by NGOs (Newton 2012, p. 116). In contrast, settlement is the area of immigration in which Canadian provinces and Australian states have traditionally interacted with their federal governments due to local responsibilities for services needed by immigrants and the need to align these with the federal settlement programs. Spiro (2001) notes that while the U.S. federal government has supported devolution of responsibilities in many areas of governance, its views on immigration lag behind this trend (73). Wishnie (2002) agrees but feels that the enduring federal pre-eminence in American immigration jurisdiction remains an anomaly in the general trend towards greater state and local power (285–286). Su (2008) agrees that federal exclusivity is slowly giving way to immigration federalism (179). Both Huntington (2008, pp. 852–853) and Rodriguez (2008, p. 572) go one step further, asserting that there is no constitutional mandate for federal preemption and that the courts should treat immigration as they do any general issue of concurrent jurisdiction.

Thus, the thrust both of recent federal legislation in the United States (referred to above) and academic thought is moving the United States, slowly, in the direction of Canadian and Australian practice. While this still is occurring only in the area of immigration enforcement and social benefits for immigrants, these steps are opening the door to more cooperation.

In practice, much of the flexibility of federal states comes through the interplay of both the national and local governments. In all federal systems, there is an ongoing process of intergovernmental relations at all levels of government and administration from the working levels of the civil service up to heads of government. In Canada and Australia, federal and provincial/state Ministers responsible for immigration meet regularly. By contrast, in the United States, federal-state cooperation is usually restricted to the officials level—perhaps simply due to the difficulty of meeting with 50 as opposed to 8 or 13 ministers, as is the case in Australia and Canada.

If we return to our theoretical model, the United States, Canada and Australia all roughly conform to it in terms of immigration control and enforcement but only Canada and Australia conform, to a large degree, in terms of selection and settlement and even then, not completely. By contrast, the American federal government con-

trols immigration selection and for the most part, ignores settlement. States can enact integration policies respecting education and acculturation, but these programs are no substitute for the absence of the American federal government in settlement (Boushey and Luedtke 2006, p. 221). This assessment of the current situation in the three countries is portrayed in Table 2.2.

2.5 Conclusion

This chapter set out to examine: (1) whether, in the literature, there is a rationale for decentralization of major aspects of immigration regulation and, if so; (2) to develop a theoretical model reflecting what 'ideal' immigration federalism might look like; and then, (3) examine to what extent Canada, Australia and the United States conform to the model. Finally it would consider whether decentralization is desirable and, if so, is it inevitable.

The theoretical model of immigration federalism is reflected in Table 2.1. The model of actual immigration federalism behaviour described in Table 2.2 is somewhat at odds with the theoretical model suggested in Table 2.1. Canada and Australia conform, in practice, much more closely to the theoretical model than does the United States. However, American observers note movement, in their country, towards a more progressive vision of immigration federalism and several cite the Canadian example as a model to be followed.

Table 2.2 Current practice in immigration federalism in the United States, Canada and Australia

	United States	Canada	Australia
Selection/Admissions Policy	Federal hegemony	Cooperative	Cooperative
Selection/Admissions Program Delivery	Federal hegemony	Cooperative (with processing by Federal Government)	Cooperative (with processing by Federal Government)
Settlement Policy	Federal Government not involved. Left to State and Local Governments	A Mix of Cooperative and Devolutionary Federalism	Cooperative with Federal Lead
Settlement Program Delivery	Federal Government not involved. Left to State and Local Governments	A mix of Cooperative and Devolutionary Federalism	Cooperative
Enforcement and Control Policy	Federal Hegemony but challenged by several states	Federal hegemony	Federal hegemony
Enforcement and Control Program Delivery	Cooperative to a limited extent	Cooperative	Cooperative

Spiro (2001) argues that, "Although central governments are likely to retain substantial control over immigration, a model of cooperative federalism should allow for increased satisfaction of subnational needs and preferences while protecting national immigration-related interests" (73). Similarly, Filindra and Kovács (2011) observe that "Immigration policy is slowly taking its place alongside other domestic policy concerns at the state level and becoming more an issue of population incorporation than exclusion" (4). Boushey and Luedtke (2006) also feel that, in view of the costs to states of federal policies, "a Canadian-style system of concurrent powers might prove popular in the United States" (217). Varsanyi et al. (2012) note that most immigration devolution in the United States involves enforcement and, therefore, the resulting variation in local policy is a significant concern to the US federal government (152). Nevertheless, the consultative style of immigration management in Canada might still work for the United States. Tessier (1995), argued strongly that,

> The crisis in federalism in the United States created by the inordinate impact of illegal immigration on a small number of states presents a unique opportunity for the federal government to adopt an approach to immigration policy which replaces the current acrimonious relationship between the states and the federal government… The adoption of a Canadian-style system of consultation between the states and the federal government on immigration policy may not provide a total solution to the crisis in federalism, but it will go far in creating the framework for resolving this crisis in a manner which is beneficial to both federalism and the nation as a whole (244).

If his advice had been taken, the rash of state laws currently being challenged by the federal government might never have been considered necessary. This certainly seems to be the opinion of a number of recent observers, including Rodriguez, who also suggests that the Canadian example could be adopted by the United States (2008, p. 570, 572, 632, 633).

It seems clear, from this brief review of the literature on immigration and federalism, that there is a consensus among students of these subjects that while federal states ought to keep immigration control policies centralized, there are compelling constitutional, economic and social arguments to suggest that federal states ought to be open to decentralizing immigration recruitment, selection and settlement policies and program delivery. This might best take place through a cooperative model where both the federal and state/provincial governments share these policies or through a devolution model where these policies are ceded entirely to the state or province. In the case of settlement services, if both levels of government are involved in the delivery of services or funding of non-governmental organizations for that purpose, a co-management arrangement, in order to avoid duplication of services and wasteful spending by one level of government or the other, would seem to be most advisable.

The literature suggests strongly that the adoption of immigration federalism can improve immigration policy making and program delivery and both the immigrant and the host society will clearly benefit from the greatest possible integration and co-ordination of federal and state/provincial immigration activities. The literature also suggests that movement in this direction, though slow at times, particularly in

the United States, is not only inevitable but is also in keeping with the intentions of the drafters of the constitutions of Australia, Canada and the United States.

> [L]iberty provokes diversity, and diversity preserves liberty by supplying the means of organisation.
> Lord Acton, July 1862 (Acton 1907, p. 289)

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Chapter 3
On Governance of Migration Management at the World Level, Lessons and Challenges

Hélène Pellerin

Abstract This chapter focuses on the governance of migration management as a process of negotiating power and responsibilities between various actors, and as the production of a normative framework, around which various objectives and interests on immigration regulations and agency participation are organized, negotiated and re-defined. The analysis of the last two decades of multilateral migration management initiatives points two waves of efforts distinct in terms of goals and institutional settings. Despite these differences, the analysis reveals some consensus around the normalization of orderly migration flows and policies. Moreover, the analysis of the global governance of migration management also unveils the political process that is involved, whereby major stakeholders and principal orientations are promoted and others marginalized.

Kewords Global governance • Multilateral framework • Human rights • Migration management • State sovereignty

3.1 Introduction

The expression "global governance" generally highlights two features of public management at the international level: the transfer of authority beyond states and the partnering of public and private agencies for managing global common affairs. There is thus an emerging global governance for managing climate change or promoting human rights. In the field of migration policies however, caution is warranted because state sovereignty is still asserted quite well in this domain, which means that states are reluctant to delegate at the international or multilateral level their autority for border controls or for selecting immigrants. Some scholars, underlining the obstacles that prevent the creation of a multilateral framework for managing international migration, have called this the "missing regime" (Ghosh 2008; Hollifield 2000). Such absence would be an exception in our era of globalization where trade in goods, in services and the mobility of

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capital are all governed by some form of multilateral framework of rules and objectives. Contrary to flows of goods or of capital, migration would appear to be the least regulated form of flows, as far as international rules and institutions are concerned (Agunias 2009).

These views tend to downplay, however, the growing and sustained attention that migration flows and migration management receive at the international level, despite formal institutional frameworks. In recent years, and since the mid-1990s to be more precise, intensive efforts have been deployed to deal with one or many aspects of migration, whether security, trade or human rights. Migration is now part of a global policy agenda (Aleinikoff 2002). Does that make it a global governance issue? The answer to this question is complex and depends in fact on what is described as global governance, and on the way in which such governing form affects traditional management of migration flows. And there is no consensus on these definition and effects.

The only consensus there is at the moment refers to the acknowledgment of the many challenges posed by this new domain of international cooperation (Kunz et al. 2011; Geiger and Pécoud 2010; Betts 2011). For scholars, such complexity constitutes an opportunity to explore these developments both empirically and theoretically. Empirically, the growing number of initiatives for managing migration adopted in multilateral fora suggests the image of a complex architecture of policy-making instances covering broad domains regarding migration flows and migration policies. These instances go beyond state soveignty in many respects. The impact these initiatives have on states and on migration is ambiguous however. It does not necessarily affect the formal authority of states, which did not delegate their prerogative on migration management for most cases. At the same time though, policy objectives and policies are increasingly corresponding to views emanating from these global initiatives.

This chapter will interrogate the global efforts to manage migration in order to understand their nature and their impacts on migration management. This empirical examination will reveal that despite the absence of a formal global migration regime, many initiatives have emerged in the last two decades, resulting in converging policy measures and the formulation of some political priorities at the world level. Interrogating the meaning of these trends requires a theoretical discussion about what is involved in the governance of migration management. It requires to explore the mechanisms through which the management of migration functions, in the absence of formal institutions, and particularly the way migration is conceived and responses are proposed. The first section briefly introduces the concept of governance. The next section presents the most important global and regional instruments and initiatives adopted in recent years. The chapter then discusses the mixed impacts these initiatives have on migration management, as processes containing certain logics and approaches to problems of migration management. The fourth section seeks to understand why there is convergence in certain domains, and how the concept of governance can assist in explaining this.

3.2 The Meaning of Governance

Scholars have borrowed from management practices the concept of governance, in order to emphasize the processes whereby solutions are defined to address specific issues or problems. Accordingly, governance implies the common management and the reaching of basic agreements, through the coordinated work of several organizations, policies, rules and financial mechanisms acting on a specific problem or issue (Avant et al. 2010). Governance, unlike governing practices of governments, involves a fluid process of horizontal decision-making in which governments and other stakeholders work together to reach better solutions on a given issue. One key aspect of governance is said to be its open-ended framework, and its evolving nature according to circumstances and to the issues and problems to be governed. Through horizontal processes that sometimes are transnational in nature (Sassen 2008), governance takes a variety of evolving forms, and it is contingent upon the issue that is being 'governed' (Walters 2004). Accordingly, governance can involve a transfer of authority (Graz 2008), but need not be a formal and permanent transfer. Governments and their agencies can participate in governance processes without formally giving up their sovereign power. Governance, moreover, takes its authority from the expertise it contains. It hinges on the creation of networks of stakeholders and experts capable of providing solutions (Rischard 2003). Stakeholders can be public agents such as specific ministries, and they can be private agents such as employer associations, university administrations or individual experts. Stakeholders can also come from the civil society, more specifically from non-governmental organizations.

Governance is not just a way of doing things, a mere technical process. It is a political process. Like other forms of multilateral cooperation it brings together actors, states for example, to agree on issues for which they had different objectives and interests. But governance is political also in more implicit ways. Governance involves a selection of stakeholders which will be included, and also those that will be excluded. Moreover, the outcomes of governance tend to be normative, insofar as they contain political and ideological dimensions that shape the realm of possible ways to manage an issue. As one observer of migration management suggested (Bob 2010), governance should be assessed not just by what process of dialogue it produces, but also by what it excludes. In other words, instead of focusing only on institutional outcomes, one should also consider the policy 'might have been', if other actors and norms had been considered. This is particularly important for migration issues where discourses about migrants shape to a large extent the types of policies adopted.

The concept of governance is a useful analytical entry point to examine the implicit and explicit politics involved in multilateral management. In the case of migration management, governance suggests a certain way of approaching things built by stakeholders coming to some consensus about the formulation of best possible scenarios. Accordingly, the process of governance tends to selectively garner the support of stakeholders. Through attempts at reaching consensus on some issues, it

shapes to some extent, the realm of possible options (Walters 2004). Understanding the process itself allows one to understand how the content of governance is shaped. The concept of governance is thus a useful analytical tool for understanding the nature and impact of multilateral initiatives about migration management. Focusing on the institutional architecture might not be sufficient for understanding what is happening. Especially in this domain of public management where the sovereignty of states is still paramount (all states seek to maintain or to enhance their ability to control migration flows and their territorial borders, even European states members of the Schengen system), an approach that does not assume a given power sharing between states and other authorities is warranted.

3.3 Global Migration Management Initiatives

Up until the 1990s, the global institutions and agencies dealing with international migration were those created at the end of World War II, notably the International Refugee Regime, composed of the 1951 Refugee Convention and the United Nations High Commissionner for Refugees (Loescher 1993), and the International Organization for Migration (IOM), an inter-governmental agency not part of the UN system created in 1951. The 1990s witnessed the emergence of new institutions, and a more active role for existing ones, in a period of intense political and economic changes such as the collapse of the Soviet Union, the wars in Yugoslavia and in Iraq. These events brought concerned policy-makers to discuss migration pressures in situation of changes. The 1990s thus signaled the emergence of a sustained concern at the international level for migration problems. But these efforts were varied in scope and in shapes. A close look at these suggests a distinction between two periods: the first half of the 1990s, and the years 2000s.

3.3.1 The First Wave: Addressing Migration Pressures

The 1990s marked a significant change in the way migration was treated beyond national borders. New initiatives were created for the purpose of bringing states to discuss common migration issues. Hence in 1993, Austria and Switzerland spearheaded the creation of the International Centre for Migration Policy Development (ICMPD), an intergovernmental organization designed to provide expertise on migration management to member states. The 1990s also witnessed several discussions within the European Union about migration which led to the progressive incorporation of migration and asylum policies in the Treaty of Amsterdam. At the world level, long existing organisations also witnessed major changes. Hence, the mandate and mission of the UN High commissioner for Refugees was re-examined in face of changing challenges posed by post-Cold War conflicts and political violence. Its actions towards what it now calls ‘mix populations’ (refugees and other

categories) illustrates the enlargment of its mission. Part of this reform was also to enlarge participatory actors to some NGOs. The IOM also broadened its mandate. From a technical agency for facilitating the transportation of migrants, it became a major center for addressing lacunaes in member states migration policies. Its proactive strategy contributed to make the IOM one of the most central agencies of migration governance after the Cold War (Geiger 2009). With the regional processes launched in the mid-1990s, the IOM sought to bring together neighbouring states to discuss policies and migration patterns. The Puebla and the Manilla processes, and subsequent regional frameworks, have promoted dialogue and long standing relations among sending and host states, a premiere regarding international migration. These processes involved the participation of various state ministries, as well as the presence of some NGOs and some multilateral organizations.

The wave of initiatives of the 1990s remained somewhat limited however, insofar as it was mostly European governments that were raising migration concerns in a multilateral way among themselves and with neighbouring states. Such multilateral efforts sought first to identify the range of migration situations that could represent pressures on receiving countries. Secondly, they consisted in raising awareness among states that formal migration policies were required. Hence, many of the initiatives developed by the IOM or the ICMPD consisted of bringing states to develop strategies and policies to better document migration flows and better assess outmigration situations. Thirdly, through the facilitation of dialogues between sending, receiving and transit regions, these initiatives promoted the adoption of some coordination of control measures.

3.3.2 The Second Wave: Regulating Migration Policies

A new series of initiatives were developed in the post-2005 period. The UN appointed a special representative on migration; there was the creation of the Global Commission on Migration which tabled its report in 2005. In 2006, the Global Migration Group was set up, to bring more coherence in migration policies among different international agencies, and to promote the respect for existing laws about international migration. One of its initiatives was the attempt to bring more coordination between policies of sending and receiving countries, in order to meet development goals. Still in the context of the UN, a High-Level Dialogue on Migration and Development was launched in 2006, which served to bring to the attention of stakeholders the importance of ensuring if not more coherence, at least more efficiency in policies concerning labour recruitment, migrants' human rights and security concerns. Several discussion meetings followed. This led to the creation of a Global Migration and Development Forum in 2006, an annual forum where specific migration issues were discussed, in order to raise awareness about migration problems, such as abusive labour migration situations, lack of mechanisms for harnessing the human and financial capital of migrants, and so on. A second High-Level Dialogue on Migration and Development took place in 2013. These initiatives rested on the

participation of states and other international organizations such as the World Bank and the United Nations Development Programme.

In Europe, the existing ICMPD started to focus on capacity-building mechanisms in order to manage migration. Along with the Berne Initiative which started in 2001, they launched in 2004 the International Agenda for Migration Management (Kunz et al. 2011) for the purpose of assiting states to develop better capacities in terms of migration policies and legislations, and in terms of the administrative applications of these policies (Berne Initiative 2004). The European Commission of the European Union built on earlier discussions and Community proposals to develop a programme of cooperation with third countries. In 2004 the AENEAS program was launched, destined to assist third countries to deal with migration through capacity building projects.

Even the Organization for Economic Cooperation and Development (OECD) became mobilized about international migration management issues in that period. Since the 1970s, the OECD was publishing reports about international migration in member states. But the SOPEMI (Système d'observation permanente des Migrations internationales) reports were only this, reporting on migration situations in member states. In 2009, the OECD developed a new initiative which signaled the interest that migration management represented. The High-Level Policy Forum on Migration, produced a Road Map for member states. The Road Map contained 5 points which focused directly on policy capacities of states and the need for common approach. It aimed at: (1) Fighting against irregular migrant workers; (2) Long term immigration, and integration; (3) Regulating private stakeholders; (4) Encouraging measures to promote the development of countries of origins; and (5) a premium was set on elaborating and implementing successful labour migration integration strategies for migrants and their children (OECD 2011, p. 16). To summarize, the second wave of initiatives focused less on migration flows, but more on state policies and the search for coherence among states on this matter.

This brief examination shows the growing attention that international migration received at the multilateral level since the 1990s. It also gives some indications of the way in which multilateral efforts unfold at the world level. There are three possible ways of looking at these developments:

1. They could represent an incremental evolution of an international multilateral migration management framework, each initiative building up the expectations and preparing the terrain for the next ones. Such neofunctionalist analysis would consider each initiative as being constitutive of a global architecture of migration management at the world level. This vision tends to exaggerate however the similarities and complementaries among the initiatives.
2. A second approach consists of insisting on the differences, and on the distinct governance management efforts each wave produced. There is indeed a difference in the scope of multilateral efforts. In the first wave, migration initiatives involved a relatively small and localized number of states. Most of them were states and international organizations concerned with the negative impact of migration both on receiving and on developing countries. To put it bluntly, most

of the initiatives were concerned about reducing migration pressures. There was also little or no connection between the activities of various actors. Initiatives of the ICPDM and of IOM did not have dialogue with each other. In the second wave on the contrary, a shift to more global multilateral frameworks seems to have occurred, with the United Nations, the World Bank, and the IOM becoming central actors. The IOM worked on capacity building of states and the European Union in terms of management policies. The United Nations, together with the World Bank and the IOM, started promoting dialogues on migration at the international level. There are also differences in the type of actions pursued. The first wave focused more narrowly on capacity-building for controling migration flows. The years 2000 show broader multilateral efforts, with more interconnection between various initiatives. The priorities are also somewhat different. The first wave of initiatives approached migration as a problem to understand in order to better manage it. This led, among others, to a concern with the elaboration of a comprehensive approach towards migration management, in which the latter was conceived in their broader economic, social and political conditions of emergence in countries of origin, with a particular focus on the root causes. Whether one thinks about the brain drain, or curbing irregular migration, many efforts focused on the general conditions propitious for migration to occur. The second wave of migration management initiatives shifted the focus towards the coordination of state controls, like in combating migrant trafficking. It also contained an approach for promoting migration flows, but without making a direct policy link with development strategies. Efforts to address the root causes of migration took a second seat while the priorities were geared towards developing efficient mechanisms to curb irregular migration on the one hand, and developing strategies for leveraging migration for the benefits of migrants, states of destination and states of origin on the other. The focus on states policies and the need for better coordination mechanisms appears in declarations and activities of the UN High-level Dialogue on Migration and Development, and within the activities of the IOM towards the objective of orderly migration (Pellerin 2011; Geiger and Pécoud 2010).

3. A third way of looking at these initiatives consists in describing these initiatives in terms of their characteristics and outcomes. Their mixing of policy-making levels and of private actors makes them hybrid institutions (Graz 2008). Scholars do not agree in their assessment of the outcomes of these initiatives. Betts (2011) refers to a fragmented regulation of migration, because of major differences in types of activities and influences. He identifies three possible forms of governance: thin multilateralism involving intergovernmental processes, embedded governance in other issue areas such as trade and human rights, and trans-regional governance initiatives (Betts 2008). As Guild (this volume) argues about the European case, the regional level is not necessarily more successful in adopting and implementing coordinated migration management policies. Some scholars insist that multilateral governance of migration occurs, but in specific domains. For Koslowski (2008), there are two instances of mobility frameworks: a refugee regime, and a regime for travelers. He also indicated that a potential

regime for labour migration is appearing, but it is not yet formalized. Kunz et al. (2011) indicate that there at least four different policy fields where multilaterism exists: economic migration, immigration control, migrant rights, and cooperation for development.

Differences in assessments of what is actually happening are not just theoretical differences between more state-centered and more transnationally oriented scholars. They also reflect the ambiguities that exists when one defines governance forms simply based on describing their institutional makeup. It is also necessary to include more political analyses of the content of these initiatives. Many scholars admit for instance that migration management is a highly political process, bringing tensions between different models of population management, and between sending and receiving regions. As Geiger and Pécoud suggested (2010) it is crucial to be aware that governance is characterized by power struggles among actors with their own views about the nature of the issue and of the best solutions. More is at stake in this domain than finding technical means to reach solutions (Kunz et al. 2011).

The success of migration management therefore rests on the ability to garner the support of important actors, states, organizations and private agents, to a common approach. There are also challenges at the level of implementation of multilateral objectives, thus showing gaps and tensions in bureaucratic logics and between local and national or international levels of policy-making. As Guild (this volume) reports, it is difficult to conceive of a federal framework of governance on migration issues even at the European level partly because of contrasting forms of implementation in various settings. A closer look at the content of governance is necessary for understanding better the nature of these initiatives taking place at the world level. One way of doing this is to look at what governance does, and its impact on migration management. This is what I now turn to.

3.4 Analyzing the Impacts of Global Migration Management

As discussed earlier, governance is a process whereby stakeholders commonly seek to define problems and identify solutions. Institutional developments are not necessarily the most important characteristic of governance. The effects on policies and on the way problems are framed might be a better and more direct way of assessing the constitution of governance.

A brief empirical examination suggests that some convergence occurs in the policies deployed to manage economic migration, at least as far as developed countries of North America, Europe and Australia are concerned. Particularly since the early 2000s and the second wave of global initiative converging measures appear among developed countries in at least three areas of migration policies[1]. First, there is a rise

[1] The analysis is based on annual reports of the IOM and OECD since 2008.

in circular migration, also referred to as temporary migration. According to OECD figures (OECD 2011), there has been a 7% annual increase of circular migrants between 2000 and 2008. Economic migrants are also on the rise, the largest category of which is made up of unskilled, seasonal workers, and the second largest, being composed of working holiday makers (20%). These trends reflected changes in policies by OECD countries, notably the relaxation of immigration entry controls for selected categories of foreign workers; and the relaxation of work visa controls, especially in Australia, Canada, New Zealand, Ireland, and the United Kingdom, while Germany, Italy and Japan maintained labour immigration controls (Wight 2012). Thus, in Australia, new temporary work visa schemes were adopted between 1999 and 2008. In the UK, a relaxation of restrictions on employer-sponsored work permit schemes, and non-sponsored visas for innovators and highly-skilled professionals and students, as well as lower-skilled immigration schemes for specific industries were adopted between 2000 and 2004. In Canada, policy changes were adopted to enhance migration system's responsiveness to changes in labour markets (OECD 2011).

Another converging measure consists of managing the supply of migrants prior to their entry in the host countries. Among OECD countries, this trend is illustrated by the recruitment of skilled migrants, and particularly the shift towards very selective criteria. The point systems, spearheaded by Canada and Australia, are now adopted by many more countries, especially those smaller countries trying to compete with the United States to attract global talents (Shachar 2006). Even countries not known for long immigration history adopt point systems, such as Denmark and the Netherlands in 2008, and Austria in 2010, for the purpose of attracting top managers and PhD-level researchers (Freeman and Kessler 2008; OECD 2011). For immigration countries, the point system has been modified to be more selective. Hence the United Kingdom prioritised professionals on occupation shortage lists, while Australia promoted the selection of high-calibre applicants. In Canada new possibilities of selecting migrants were adopted, notably the provincial nominees programme (OECD 2011).

The orientation towards the management of migrant supply is accompanied by more restrictive measures towards non-economic categories of migrants such as family sponsored migration schemes. Pre-entry testing on language and more restrictive policies for sponsoring were adopted in many OECD countries. Stricter border controls for tackling irregular migration are also a common theme in OECD countries, with new mechanisms for information-sharing and actions against illegal immigration. The control of irregular migration has received sustained attention of policy makers and some multilateral agencies since the years 2000. At the regional level, approaches led to the progressive inclusion of sending and transit states in the management of irregular migration. At the European level and in North America, legislations and regulations either required or promoted harmonized border controls and integrated systems of surveillance of irregular migration (Lavenex 2002; Lavenex and Stucky 2011; Pellerin 1999). The protocols of the UN Convention Against Transnational Organized Crime, regarding the prevention of trafficking in

persons, and against the smuggling of migrants[2] created at the international level a legal framework that facilitated the adoption of converging measures.

The economic crisis of 2008 led to some refinements of strategies, as responses to economic downturn required more fine-tuning and adjustments. In general, this meant less policies to attract the highly-skilled (OECD 2011), and the adoption of regional provisions for labour migration management to ensure that immigrants go to areas where they are most needed in Australia, Canada, Switzerland, Italy and in France.

A third trend is the more liberal approach adopted by many countries to attract international students. Hence, Finland, Norway, Poland, Austria, the Czech Republic, Switzerland and Japan, have joined the group of industrialized states that opened their borders and their universities to this category of migrants[3].

A few words should be added here about the domain of integration measures to facilitate the integration of migrants in host societies. This domain, which is perhaps one of the areas where there is very little attention at the global multilateral level, is also an area where the OECD has noted some convergence, notably on minimum residence requirements for naturalisation and citizenship. According to a report from the Swedish Ministry of Justice (2010), this is a domain that should witness more coordinated or converging policies and actions in the next few years. As these observers have noted, differences in integration methods and models are increasingly scrutinized, insofar as they impact the economic contribution that migrants make to the host countries. In this very utilitarian vision, integration policies serve to promote cultural diversity and bridge building with emerging economies in order to promote trade and investments flows (Swedish Ministry of Justice 2010).

Converging trends appear also among sending countries, especially with regards to the liberal attitude towards migration. While no report offers a systematic and continuous analysis of sending countries' policies, general trends were observed by the United Nations Population Division. The most recent UN Report on international migration policies (UN 2006) thus indicates that 60% of sending countries tend to view emigration levels as satisfactory. Between 1995 and 2005, 7% more states consider that emigration levels are too low, thus indicating a growing interest in migration. As far as migration policies are concerned, the same report indicates that more sending countries have raised emigration level during that period, while those who have maintained these levels have decreased. It is also interesting to note that the majority of states do not intervene in curbing emigration, and the percentage of those that do has decreased from 54 to 51% between 1995 and 2005 (UN 2006). More detailed information about sending state policies is provided through

[2] The Protocol Against the Smuggling or Migrants by Land, Sea and Air, supplementing the UN Convention Against Transnational Organized Crime entered into force in January 2004; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children entered into force in December 2003.

[3] It should be noted by contrast that some countries have adopted tougher procedures of student recruitment programs, in order to curb fraudulous demands measures to Meanwhile, Canada, New Zealand, the United Kingdom and Australia, adopted tougher procedures to curb fraudulous demands (OECD 2011).

migration partnerships and other agreements signed with host countries. Through these various partnerships, observers noted, sending states have to adopt similar policies for documenting and monitoring the emigration of residents on their territories and tighten their border controls (Kunz et al. 2011).

The focus on policies should not overlook another aspect of migration management in multilateral governance. Something is also happening at the level of perceptions, conceptions and categorizations, or what can be called the normative framework of migration management. Normative frameworks are important to consider insofar as they constitute the background conceptual information from which descriptions of the problems are elaborated, and prescriptions of what constitute best practices are developed. To consider the normative frameworks of existing governance arrangements also provides the tools for asking the question of possible alternatives to existing governance arrangements, or, to use Bob's terms (2010), to reveal the 'might have been' of governance. In the case that concerns us here, it should be noted that the two waves of global initiatives have enabled an elaborated series of policies and categories of migration status (Piché 2012; Pellerin 2011). This had the effect of enlarging significantly the realm of possible policy options beyond the classical opposition between closing and opening borders, or between pro and anti-immigration. Two domains of migration management were particularly revealing of the development of a normative framework: the conception of migrants and the domain of migration priorities.

In the mid-1990s, migrants were seen simultaneously as a potential threat, or as an asset for different receiving countries. Sending countries considered migrants as a loss that they should seek to compensate by other means. The concept of orderly movement of people, pursued initially within the IOM in the early 2000s (see Ghosh 2000), sought the development of a new normative framing of migration. It contained at least two dimensions: the recognition that the mobility of people is not only inevitable, but also positive (Ghosh 2000; Geiger and Pécoud 2010), and second, the recognition that for the mobility of people to be positive, it had to benefit all three stakeholders: countries of origin, countries of destination, and migrants themselves. The orderly aspect of migration pursued addressed particularly the concerns of states wishing to make migration more predictable, and more controllable.

This normative discussion became particularly central for European states seeking to control irregular migration flows from the East and the South. More traditional immigration countries like Australia, Canada and the United States were less influenced by this new framework insofar as they had already been adopting a utilitarian approach towards migrants. In Europe on the contrary, this normative framework triggered some changes in the way migration was seen. More European states started to consider the advantages that immigration could bring, and the selective immigration policies adopted started being framed in terms of the utilitarian view of migrants as assets (Boswell 2003).

The normative framework emerging from global governance initiatives also contained a set of priorities that had to be addressed when dealing with migration management. Once again the concept of orderly migration is revealing. It contained concerns for security and for economic efficiency. Orderly migration was supposed

to integrate policies regarding the control of borders, combating human smuggling and trafficking, and facilitating the movement of selected migrants, thus making it harder for states to legitimately pursue say, the priority of facilitating migration, without at the same time embracing the objectives of migration controls. This bifocal approach became the norm and defined the range of policies that states were to adopt.

The priorities around risk management for managing orderly migration came to predominate, carried in part by police professionals (Bigo 1998) and by stakeholders of the biometric and surveillance industry. Accordingly, risk management, which used to be confined to the control of irregular migrants or to lax border controls, was now framed into a broader perspective. It included the identification of risky migrant identities and forms of integration, among migrant stocks, naturalized migrants, or second generation migrants. This norm is also very present in extreme right political forces in various parts of the industrialized world.

In the field of development too, the global governance of migration had some impact. It should be noted that this was about the time of the adoption of the Millennium Development Goals in 2000, and the agenda of partnering public and private sectors and civil society for attaining growth and sustainable human development. A normative shift occurred in migration-development management in the late 1990s, with the substitution of the root causes approach, which considered migration to be a problem resulting from lack of development, by a vision whereby migration is a strategy of development. As an illustration, the discourse surrounding the original UN Conference on population and development in 1994 contrasts with that of the Global Forum on Migration 22 years later. In 1994 concerns were about skill drain and long term economic development (UNCTAD & IOM 1996[4]). In recent times, rather than promoting the development of the sending country as a whole, the Global Forum on Migration seeks to address the development of migrants who, through remittances and diaspora transfers, improve their own conditions and should help sending countries to acquire knowledge and capital necessary for successfully competing in the world economy. This approach is now part of the High-Level Dialogue on Migration and Development. Even the UNDP recognized, in its 2009 annual report, that mobility constituted a necessary condition for human development. The discourse addressing the root causes of migration and ensuring the development of countries of origin, which until the 1980s characterized the policies and dialogue between developed and developing countries, led the way to a new set of values, more focused on the development potential of individual migrants (Bakewell 2008). As Bakewell suggested, the notion of development need not be territorialized; if migration enhances the well-being of people moving and their families, that is in itself an element of development. The support for circulatory and temporary migration schemes by the International Labour Organization, the World Bank and several

[4] As the report noted, "Large-scale and permanent outflows of skills may in any case not be desirable because they can seriously hamper economic growth in the developing world." (UNCTAD & IOM 1996, p. 29).

regional development banks is also indicative of this normative shift (Pellerin and Mullings 2012). Repercussions on state policies have been particularly important in sending countries where negotiations for compensation for migration have been replaced by negotiated accesses and rights for their workers instead (Phillips 2009; Pellerin and Mullings 2012).

3.5 Explaining the Impacts of the Global Governance on Migration Management

The examination of the variety of initiatives and their direct and mostly indirect impacts suggest that the global governance of migration management shapes the realm of policy developments and objectives. This begs the question of why this is happening. One possible explanation consists in conceiving this convergence as the adaptation of states to a neoliberal moment. Accordingly, states respond to global neoliberal forces with competitive deregulation, and to new strategies to harness human capital, including selecting highly-skilled labour (Dreher 2007; Sassen 2008). Take the priority towards circular migration for example, which requires states to adopt more spontaneous models, in order to remain attractive places for immigrants. Henceforth, states are said to be increasingly seeking to create enabling legislations and policies in order to facilitate mobility, such as the flexibilization of work permits, the recognition of dual citizenship, and the portability of social benefits (Swedish Ministry of Justice 2010).

Another possible explanation rests on the power asymmetry between regions and states at the global level. Weak and poor states, generally sending states, are forced into accepting new approaches and policies, through a variety of mechanisms wherein powerful states set the objectives. Whether it is through development cooperation or free-trade agreements, sending countries ought to adopt similar policies with regard to migration controls and new policy instruments. Powerful states like the United States or some European countries on the other hand, are less pressured to adopt changes. Their participation in cooperation schemes at the world level would be more motivated by their willingness to establish a more predictable regulatory environment that they can control than an indication of their subordinate position.

These analyses provide important information about the rationale for states to adopt specific migration policies, and about the pressures they feel. However, they assume that decisions are rational, based solely on a cost-analysis of best options. They neglect the influence that the process of governance itself involves in structuring the scope of options available. In fact, the power of governance lies in part in conditioning decision-making through different mechanisms. One of which is its ability to create a distinct policy field whereby some stakeholders and issues are included and others are not. Governance processes also shape the realm of possibilities through specific norms of efficiency. Let me review these two arguments more specifically.

3.5.1 The Politics of Governance Processes

The political dimension of governance appears in the definition of actors that will participate in decision-making, and stakeholders. One can describe the definition of actors as a process of selective inclusion. The actors or stakeholders to be included consist of agencies that can fit 'this system of self-management' (Walters 2004, p. 36). There is thus a process of inclusion and exclusion, but there is also the definition of the type of agency that partners should represent, once they are identified as such. As Walters explains, stakeholders become partners in networks of governance, and accordingly, their political agency gets circumscribed by this partnership (Walters 2004). The process of governance also establishes criteria of best practices, and therefore, it defines the realm of possible options that will be formulated. With regard to migration management, such processes involving the (self)selection of stakeholders, have led, in many countries, to the identification of specific agents deemed capable of contributing to migration management in an efficient way. A close look at the various activities of the International Organization for Migration in recent years is illustrative of this. The IOM is an organization that seeks to promote cooperation and the coordination of migration management policies (Article 1 of its constitution). The IOM was traditionally acting as a facilitator, providing states with logistical supports, and migrants with travel documents. More recently the IOM has been active in capacity building and recommendations. Through its numerous international and regional activities, the IOM convenes state ministries for dialogue on policy efficiency and cooperation. It is interesting to mention that in many cases some ministries are particularly targetted, notably those of international trade, foreign affairs and security, thus excluding from the discussion ministries of industries, or of employment, or health. The presence of the outward looking ministries also signal shifts in priorities. Rather than focusing on improving the situation of migrants in the countries, policies are articulated in order to enhance predictability of migration management and competitiveness of national economies.

Governance also implies a greater involvement of private agents, in the roles of experts (Boswell et al. 2011). On migration control, private companies providing logistical material are often invited to expose complex situations or to assess levels of risks. The presence of universities, employer associations, recruiting agencies, diaspora groups, and other intermediaries is also part of the new best practices in recruiting migrants. With the inclusion of these new agencies, the governance of migration management is presented as a model of self-regulated migration management (Pellerin and Mullings 2012; Bakewell 2008). These shifts in agencies, and in the importance of networks signal the emergence of a new 'policy fields' (Pastore 2002) with direct repercussions on the sets of solutions adopted.

3.5.2 The Efficiency Criteria of Governance

The normative power of governance also plays a role in shaping the agenda of migration management. Global governance rests on some norms inherent in the

practices of governance; it produces soft laws about migration management, based in part on the search for common grounds. The process of identifying common principles for generating dialogue and convergence fosters a particular vision of stakeholders. Governance's focus on networks and processes thus contains, implicitly, normative dimensions that play a structuring role in setting the agenda and in negotiations. Geiger and Pécoud insisted for example on the discourse of migration *management* (Geiger and Pécoud 2010) that is, the technocratic way in which migration is being treated, and policies developed, in order to generate smooth and predictable migration flows, and ready benefits for stakeholders. This technocratic bias tends to depoliticize migration management. This means that migration management is not only moved away from public debates at the national level (Boswell et al. 2011), and from state negotiations at the international level. It also means that stakeholders involved in the management of migration are promoting technical strategies rather than political ones. It also means that the goal of migration management is to reach efficiency rather than political compromise.

This technical outlook is not normative free however. It tends to promote a very specific view of migration as circulation or as mobility, and a very specific role for states as facilitators of this mobility. According to recent migration management initiatives, the priorities of management are fluidity but not necessarily greater freedom, let alone emancipation of migrants. This is illustrated by different initiatives thus far. Hence, in the migration and development nexus, the focus has been on enhancing the capacity for capital circulation (facilitating remittances) and the international circulation of highly skilled labour, and not on the movement of all categories of migrants. Despite the absence of a formal institutional regime for labour mobility (Koslowski 2008), many institutions such as the World Trade Organization, the IOM, and regional free trade agreements, set the standards for differentiated mobility rights depending on the skill level of migrants, or on their connections with employer associations. The growing number of bilateral, regional and private labour mobility schemes that emerged since the early 2000 suggests the existence of norms about facilitating some labour mobility and, moreover, greater legitimacy of private actors (employers and recruiters) in setting the objectives of agreements based on specifc issues (Pécoud and de Guchteneire 2007). As a consequences, the discourse of migration management is replete with references to economic dynamics, such as social and human capital, rates of remittances, risk analysis and diaspora bonds. To paraphrase Shachar (2006, p. 204) migration management becomes infected with market-based values.

The normativity of the global governance of migration management implies also changing conditions for migrants themselves. Contrary to the idea that global neoliberalism impacts negatively all migrants (Dreher 2007), the situations of migrants differ according to status, experience, and the context (Goldring and Landolt 2012). Scholars recognize differentiated rights according national migration regimes, national labour legislation, and the migration category migrants belong to (Piper 2008; Goldring and Landolt 2012). The global governance of migration does not erase these distinctions, but with its emphasis on economic migrants, and particularly of highly-skilled migrants, it is as if it promotes almost exclusively the right to mobility of the latter (Cornelius et al. 2001). Greater attention is being

paid to the development of regimes of rights for economic migrants that would facilitate their smooth circulation from one place to another. States sign trade agreements that contain clauses for the portability of migrants' pension and health coverage for instance (Holzmann et al. 2005). Competition between states to attract the best and brightest encourages greater harmonization of certain rights among OECD countries (Cornelius et al. 2001). As a result, the rights of other migrant categories are not so well protected, let alone promoted, by the global governance of migration management.

Migrant workers, even highly skilled ones, are not necessarily better off either in this global governance context (Smith and Favell 2006). The logic of efficiency that prevails in these initiatives encourages the shifting of some responsibilities to lower, local or private levels of implementation. Hence industries adopt self-regulated codes on workers rights, and local authorities are often left with the responsibily but not enough means, for ensuring that basic social rights are respected,

Contrast this neoliberal approach with efforts of some international organizations (UNESCO, ILO and the UN Special Rapporteur on Migrant Rights) to promote rights of migrants, and you get a better sense of the biased nature of policy choices currently made. The 'might have been' governance of migration (Bob 2010) could be inspired by a human rights approach. A human rights approach would have promoted as a founding bloc the fundamental right of people to move, irrespective of their migration category (Smith and Favell 2006). The promotion of the ratification of the UN Convention on the Rights of Migrant Workers and Members of their Families, which considers some basic rights for all migrants irrespective of their status exemplifies this alternative approach. Similarly, the campaign surrounding the ILO Convention on Decent Work for Domestic Workers, illustrates the type of regime rights that are excluded by the current global governance of migration management (Piper and Rother 2012). Had these activities garnered the support of developed states and major international organizations, the global governance of migration would have been quite different.

3.6 Conclusion

This chapter sought to offer some insights into the complexity of the global policy agenda of migration management. The variety of agencies and regional initiatives, and the absence of an overarching structure mislead observers into thinking that migration is absent from the global policy agenda. The notion of a missing regime no longer suffices to describe the global governance of migration management. The empirical examination illustrated that there is a sustained and even growing interest in migration questions in the last two decades. These led to the creation of a number of agencies, fora and dialogues about migration problems and migration policies. This emerging governance architecture is an unsual composite of various arrangements and weak institutionalisation.

It is unclear from this analysis however whether governance is getting stronger, with more powerful tools to force convergence or if it evolves according to specific challenges and issues. Differences between the first and second waves of global initiatives could be interpreted either as a consolidation of measures or a specialization of agencies and frameworks. Illustrative of the first interpretation is the greater legitimacy of the present global dialogues on migration in policy circles. Unlike the early 1990s when migration issues could hardly get the attention of the international community, the last 20 years saw a marked interest by states and international organizations in addressing migration issues and linking them with other global issues such as poverty, human rights, security and environmental degradation. The diversification of governance bodies points, on the contrary, to the existence of several approaches to the multilateral management of migration. There are regional approaches, with Europe and North America as possible types, and there are also different international approaches to the global governance of migration. On the one hand, there is the United Nations, which is particularly involved in promoting discussions on migration and development as highlighted by the High-Level Dialogue and the High-Level Forum on Migration and Development. On the other hand, the IOM focuses on the management of mobility, or the principle of orderly migration.

Independently of the question of one or several approaches to the global management of migration, what should be clear is the politicisation of migration management at the global level. By politicisation, one refers to the precise way in which key actors are involved as stakeholders, and problems and solutions are being identified. It is important to note that state policies are increasingly under the radar, and so are migrants themselves. In this politicisation, the process of governance is not value-neutral. It fosters a particular agenda. The discussion about migration development issues for instance clearly shows the shift in addressing migration. Governing migration is no longer about assessing root causes or migration pressures, it is shifting towards an approach where the circulation of skilled migrants is being promoted. In the area of migration controls too a shift has occurred. Approaches to migration management no longer refer to the simple dichotomy between opening or closing borders. The variety of migrant statuses, and the broad diversity of policy to control flows and insertions, highlight a qualitiative shift in migration policies. With the focus of migration management increasingly on selecting migrants and the conditions of their mobility, governance processes consist increasingly of establishing criteria for assessing various selection policies. These criteria, which were nationally adopted based on a plurality of concerns, are increasingly produced at the international level. This transnationalization of migration management (Sassen 1998) introduces different political conceptions of state responsibilities towards the global and towards the mobility of people. Accordingly, international migration is associated with the growing velocity of capital, human and financial, and the need for harnessing that which could bring advantages to a national economy.

One should be cautious however, of presenting global governance as a powerful force that bends state policies and migration dynamics. This would be an overestimation of what governance can actually do. Governance theory tends in fact to be

very ideological and can hardly account for the limits of its application. Scholars have noted for example that the definition of governance tends to be very normative, governance can only be a positive thing since it provides a public good (Avant et al. 2010). The theory of governance also lacks criteria for assessing the influence or successes of governance practices. One often finds governance to be assessed in terms of the longevity of networks and dialogues that it creates. The success of the governance of migration management is determined by the ability to keep relations and dialogues alive among stakeholders. The dialogue on migration and development offers an interesting example of this. Therein, successes of global governance initiatives are more often assessed in the duration of the dialogue among stakeholders, or in the size of the network of actors involved than in terms of their impact on curbing poverty and brain drain cycles in developing countries (Pellerin and Mullings 2012; Meyer 2008). This rather tautological approach tends to leave out any assessment of governance on actual policies and actions. It is therefore the continuing presence of a network of stakeholders that is crucial for success in the theory, and not the actual effect on state policies or on migrants themselves.

Ongoing dialogues among stakeholders are important in setting standards of best practices, which impact directly on policies. This should not underestimate however, obstacles to global governance of migration management. These obstacles can come from gaps between policy formulations or standards of best practices, and the actual implementation of migration management activities and systems. These gaps should not be seen as a temporary glitch that more technocratic knowledge would solve. They should be considered as an important reality of migration management, the local reality of policy practices, that governance theory had overlooked for too long. Actions, and objectives at the level of subnational entities, whether provinces, regional associations, or cities often do not follow or fit with national or global strategies of migration management.

Another limit of governance theory lies in its underestimation of the demographics of international migration, and the global political tensions this raises. I am not referring so much to domestic tensions and the rise of xenophobic reactions, than to the foreseen tensions between home and host states. All of the international global initiatives since the middle of the twentieth century rest on a scenario of relative population surplus in states of origin seeking to move to the developed world. This gave unprecedented power to host states in designing migration schemes that would favour their interests and objectives. The growing attractiveness of emerging economies and their singular way of considering the mobility of people risk provoking new tensions that the theory of governance might not be able to grasp fully.

Normativerly, one should also question the sustainability of a system of management that tends to project a very specific understanding of the migrants and their place in society. Behind the technocratic exercice of categorizing migrants (Martiniello and Simon 2005; Pellerin 2011), lays the power to define social and normative priorities for states. The major risk of such process is to consider migrants as mere tools, or tokens in networks of mobility; a risk that would become unsustainable when migrants will become a larger constituency in many host states.

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Chapter 4
Immigration Federalism and Rights

Raquel Aldana

Abstract This chapter undertakes a comparative analysis of the growing asymmetrical immigration federalism regimes that have surfaced in Australia, Canada, the European Union, Belgium, Germany, the United Kingdom, Switzerland, and the United States. The purpose of the study is to begin to trace whether the rise in immigration federalism—i.e., the diversity of laws and policies regulating immigration and immigrants—in these nations has improved or worsened the rights and treatment of immigrants in those respective nations. This chapter does not provide a conclusive answer to this question because federal structures help amplify both restrictive as well as inclusive possibilities and trends. There are, however, factors that appear to contribute to the outcomes of immigration federalism that are worth noting. Among these factors is the role of demographic and socio-economic factors, as well as political ones at the local level. The role of political divergence between national and local interests is another significant consideration of the implications of federalism for the rights of immigrants, although here whether the outcome is positive or negative depends very much on the relationship between local and national politics. The role of binding universal human rights law or domestic constitutional rights to protect the rights of immigrants also cannot be dismissed as a powerful argument, generally in favor of centralization. As the chapter documents, however, centralization does not necessarily translate to greater legal rights for immigrants in systems that apply exceptionalism to the national immigration power. Decentralization also need not mean the non-application of human rights law or even potentially greater local rights under sub-national constitutional provisions. Finally, the chapter takes up the extremely important consideration of what, if any lessons, can be gleaned from these comparative analysis on advocacy strategies on behalf of immigrants. Here too, the response is highly contextualized and cannot be generalized, as it will be dictated by the factors that influence the outcomes of immigration federalism.

Keywords Asymmetrical immigration federalism • Non-citizens' rights and protections • Restrictive vs. inclusive immigrant policies • Local factors • Human rights law

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4.1 Introduction

Particularly in the last two decades, with the advent of the global war on terror and the economic crisis, immigration federalism, as well as asymmetrical immigration federalism, have been growing trends among federal nations. Immigration federalism refers to the growing decentralization of the regulation of immigrations and immigrants, which increasingly includes not only the regulation over the living conditions of immigrants residing in the localities (e.g., electoral participation and access to public services), but also participation in immigration control (e.g., the policing of non-citizens or their punishment for immigration violations). Asymmetrical immigration federalism describes the divergence in laws and policies regulating immigration and immigrants as between the federal government and localities, but also as between localities under the same federal sovereign in comparison to one another (Brock 2008).

This chapter undertakes a comparative analysis of the growing asymmetrical immigration federalism regimes that have surfaced in Australia, Canada, the European Union, Belgium, the United Kingdom, Switzerland, and the United States. The purpose of the study is to begin to trace whether the rise in immigration federalism—i.e., the diversity of laws and policies regulating immigration and immigrants—in these nations has improved or worsened the rights and treatment of immigrants in those respective nations. Is the plight of immigrants better or worse off under universal regulatory regimes? Or conversely, have multiple sovereigns and regulatory regimes been more or less beneficial to immigrants in the conferral of rights and benefits to promote their integration? Additionally, to the extent that multiple sovereigns show such variations making it impossible to definitively conclude that decentralization is better than universality for immigrants, then the inquiry turns on what local factors may account for differential treatment of immigrants vís a vís the federal government and the localities within that single nation.

One challenge to this preliminary comparative undertaking is the fact that the federalism regimes being compared are not the same. While these nations share the commonality of being a federal regime, their political asymmetry (i.e., the impact of cultural, historical, economic, social, political conditions and ideology (Brock 2008; Radin 2007), and constitutional asymmetry (i.e., the lack of uniformity in powers, including fiscal distributions, assigned by the constitutions and laws of each federation (Brock 2008)), are likely to be significant factors in accounting for differences in the allocation or denial of rights to immigrants in the localities. A second challenge to the observations in this chapter is the lack of sufficient data over time in each of these nations that could lead to a sound comparative assessment on whether centralization or asymmetrical federalism is better or worse for immigrants. This chapter does not undertake a comprehensive study of each nation's laws to trace patterns of immigrant integration and rights over time or even in the last two decades. Instead, it offers a survey and a preliminary assessment of the literature and studies available to date that do provide glimpses of how localities and federal governments are interacting in these various jurisdictions to accord or take away rights

from immigrants. This Chapter does take a close look at patterns of immigration federalism in the last year and half in the United States and tries to explain some of the factors that appear to influence the overall negative effect on immigrants as compared to their treatment under the federal regime, despite some exceptions.

Part I of this Chapter explains the theories of the relationship between federalism and rights. Part II provides the comparative analysis of immigration federalism in Australia, Canada, the European Union, Belgium, Germany, the United Kingdom, Switzerland, and the United States, all of which were chosen because of their distinct federalism regimes and their standing as important immigration receiving nations. This part includes a study of immigration federalism in 2011–2012 in the United States to assess whether local norms have fared better or worse for immigrants. Finally Part III offers some concluding observations about some of the factors that appear to influence whether federalism is positive or negative for immigrants and offers some implications that these lessons offer on advocacy on behalf of immigrants.

4.2 Theories of Federalism and Rights

Federal unions inevitably raise questions as to the consequences of decentralized power on a shared understanding of universal human rights (Francis and Francis 2001). The discriminatory potential of decentralized decision making is an old topic in the literature on federalism, including with respect to immigration. Roger Karapin, for example, when studying postwar immigration in Britain (1958–1965) and Germany (1980–1993) concluded that anti-immigrant mobilization in these nations during these periods influenced national immigration policies and grew out of the leadership of subnational politicians and social movement organizations which were largely autonomous from socio-economic factors. That is, during these periods in Britain and Germany, when state and local politicians were in the vanguard of anti-immigration forces, economic factors could not explain the restrictive policies adopted in the area of immigration targeting ethnic minorities (Kaparin 1999).

Thomas Holzner et al., come to similar conclusion when looking at the unequal treatment of asylum seekers that persists in European Union nations, despite the shift within the EU to move toward a more uniform procedure to handle asylum seekers and establish an effective burden sharing mechanism. Holzner et al. observe that the discrimination in asylum procedures within Western Europe is a logical function of the control problems that power delegation to lower tier government creates; that is, the discriminatory potential in the area of asylum policies is increased the more decentralized decision-making is within any given nation. In the asylum context, local administrators possess an incentive to export local problems and also tend to profit from the benefits that other districts create. For example, a state official may exclude refugees from welfare programs to cut down cots while relying on the generosity of other states to receive undesirable asylum seekers. Left unregulated, a race to the bottom could emerge as a possible consequence of the negative

externalities (Holzner et al. 2000). The same argument is relevant to a more general immigration policy. The primary purpose of immigration control is to keep out unwanted immigrants and let in only desirable immigrants. Maintaining regional immigration control would lead to the problem commonly called the "spillover effect" where several regional units all maintain their own immigration control. Of course, when an immigrant is denied access to one region, that immigrant generally must seek to immigrate to another jurisdiction. Yet, in the absence of a cooperation and coordination between the regional units, the tendency will be toward a "race to the bottom" whereby regions will attempt to outdo each other by devising more costly and restrictive immigration control structures and dumping more of the undesirable immigrants onto their neighbors (Boushey and Luedtke 2006).

One argument in favor of decentralization that could result in the potential for increased rights for immigrants is for local governments to offer immigrants more possibilities for political participation. In local politics, diverse local groups are better able to control aspects of their lives without having to persuade a majority of citizens nationwide to adopt the same policies (Kelso 1999). The argument has also been made that the immigrants choose to settle more in cities rather than nations particularly because they wish to join an established community in the host state of co-ethnic or co-nationals (Vertovec 1998; DeVoretz 2004; Bauböck 2003). Political authorities of those states, regions, or cities will react differently to the political demands stemming from different levels of immigration. Across Europe, for example, Shaw has documented that decentralization has promoted suffrage rights for resident third party nationals in countries like Belgium, Denmark, Estonia, Finland, Hungary, Ireland, and Lithuania (Shaw 2009b), whereas centralization of electoral participation powers has prevented similar local initiatives in France, Italy, Germany, Austria, and Scotland (Shaw 2009a). There is also some evidence in the US that states have been more flexible to allow lawful residents who lack citizenship the right to participate in certain local elections (Su 2012; Kini 2005). Of course, there are multiple reasons for seeking subnational suffrage for non-nationals at the local level which may have little to do with seeking their integration or increasing their rights. Sometimes, the motivations are simply that political parties controlling the relevant territorial units differ sharply in ideology and approach to national government and those parties seek to use the issue of immigrant suffrage as a way of pushing local reform or emphasize difference. But it is also true that suffrage reform is motivated by localities seeking to implement a broader and more inclusive notion of the demos through the medium of local electoral rights. (Shaw 2009a) Regardless of the motivation for increased electoral participation by immigrants, such reforms are likely to lead to greater integration and greater rights.

On the other hand, not all localities would promote immigration suffrage; quite the opposite, some localities could harbor such anti-immigrant sentiments that the trend could easily move toward greater exclusion of immigrants than might otherwise be the case at a national level. A documented weakness of federalism is just how much easier it is for special interest groups to capture local or state legislatures, as opposed to national legislatures, and thereby effectuate bad public policy (Kelso 1999). Increased immigrant participation presupposes that the diversity of

politically salient identities and interests are distributed closely along geographic and territorial lines; yet, as a general matter, federalism is designed to accommodate the concentration of particular interests within specifically isolated geographic locales to permit the rise of anti-immigrant sentiments, which may not reflect the majority consensus in the nation (See Chen 1999). Certainly, there are several notable recent examples of this anti-immigrant trend that is inconsistent with national trends in several localities in the United States, such as in Arizona and Mississippi, which are discussed below.

As well, defenders of decentralized power have emphasized the opportunities it provides for quicker and potentially more enduring change on local levels, which may in the end promote greater rights for immigrants. These types of arguments emphasize that federalism may allow states to engage in public policy innovations, and, through competition, may either succeed or fail in attracting immigrants through the adoption of distinct or contrasting public policy regimes (Francis and Francis 2001). Immigration policy is not solely about immigration control, deciding who gets in and who stays out, but also about immigrant integration, which deals with the recruitment, selection, welcoming and settlement of desired immigrants. All of these components must entail public goods that are likely to be optimally provided at the regional level. Localities are best suited to tailor the output of local public goods in ways that respond to regional preferences, which are not solely economic but cultural and linguistic. In contrast, central governments may not be flexible enough to respond to regional differences and to maximize on the potential benefits of those differences for immigrants, sometimes even due to political concerns over "equality" in treatment between the regional units (Boushey and Luedtke 2006).

One significant impediment to the creation of rights through innovation and competition for immigrants is that regions will necessarily diverge in their treatment of immigrants based on their attitudes, whether real or perceived, on whether immigrants represent favorable interest for the state. Thus, federalism and experimentation will inevitably result in a range of policies, some of which will be good for immigrants and some of which will be bad for immigrants. Some have argued that immigrant mobility could help stabilize these divergent interests since immigrants will simply move into states that treat them more favorably. Of course, states will not only largely compete for the better-off-citizens or residents of other states while seeking to avoid attracting the least well-off, but they may also respond to the out migration phenomena caused by restrictive immigration policies in one state by shifting their policies away from the favorable treatment of immigrants (See Francis and Francis 2001).

Another consideration is the degree to which regimes are equipped to protect the rights of immigrants, whether in localities or at the national level. The tendency here is to view federalism as negative to the development of rights in general, at least when the lens is from the framework of universal human rights based on the patterns of resistance that local governments have toward top-down rights regimes beyond their jurisdiction (See Cameron 2002). At least in some countries, however, federalism as an obstacle to the application of universal human rights is overstated.

For example, Cameron has observed how the process of "co-operative federalism" has permitted Canada to creatively craft pragmatic solutions to allow for the ratification and implementation of a significant number of human rights treaties to meet the demands of Canadian federalism. To Cameron, the division of powers in Canada, while restrictive of the federal government's power to ratify human rights instruments, over time has been positive because human rights treaties signed by Canada carry the authority and commitment of the provinces as well (Cameron 2002). In the United States, Professor Rodríguez has made a parallel case for "co-operative federalism" in the area of immigration, suggesting that states and localities are better equipped to integrate immigrants into the body of politics and thus bring the country to terms with demographic change. In her view, a single sovereign cannot manage the process of successful integration of immigrants, and it often depends on states and localities adopting positions with federal policy before equilibrium can be reached (Rodríguez 2008).

Moreover, the conversation about constitutional rights and immigrants demands more nuanced comparisons of legal regimes, as it is sometimes the case that some localities could offer greater normative rights to immigrants than may otherwise be available either through statute or even through constitutional norms (Tarr et al. 2004; Chen 1999). Defenders of the constitutional structure of federalism remind us that one justification for a bifurcated system of power is the ability of states to monitor abuses of power by the national government. Federalism is supposed to provide a check on the tyranny of the federal government (Garry 2006). In some nations, such as the United States, the exceptionalist treatment of immigrants under federal constitutions has in fact resulted in the harsh treatment of immigrants at the federal level, particularly in times of crisis or war (Aldana 2009). Moreover, constitutionally, immigrants are better off challenging local discrimination and rights violations against states than they are at the federal level, at least in jurisdictions where the same principles of exceptionalism do not apply at the local level (Aldana 2007). This complicated relationship between federalism and rights-regimes in the context of U.S. federal immigration exceptionalism is explored more fully below.

4.3 Comparative Global Perspectives on Immigration Federalism

This paper will demonstrate that federalisms can be conducive to both anti-immigrant policies as well as to generous and innovative integration and welfare policies at the localities. In the same vein, centralization or harmonization has also yielded both positive and negative results for the rights of immigrants. With this in mind, this section provides illustrations of the most common scenarios that have been observed in recent state practices:

a. Decentralization having a largely positive impact on immigration opportunities, particularly for the highly-skilled, as well as immigrant integration such as in Australia, Canada, and some nations within the United Kingdom.
b. Decentralization having a mixed (both positive and negative impact) on migrants' rights and welfare such as in the United States, Switzerland, Belgium.
c. Centralization or harmonization having a largely negative impact on migrants' rights, with some exceptions, such as in some European Union and United Kingdom nations in the areas of asylum and citizenship and in the United States in the areas of welfare benefits.

Given that this short paper cannot comprehensively survey all areas of immigration regulation and migrants' rights, the brief case studies below have focused on three areas of immigration regulation: immigrant integration and welfare; access to citizenship; asylum policies.

4.3.1 Australia

In Australia, the constitution provides for a division of powers between the federal and state governments (Seidle and Joppke 2012). Historically, Australia's government has been highly centralized, although in the area of immigration the role of the state/territory governments has grown dramatically in recent years facilitated by generally amicable federal-subnational relations. The federal government still retains large control over the categories of immigration admission, except in the transformational role that sub-national governments are playing with respect to skilled migration (Hawthorne 2012). Here, the development of state/territorial immigration programs in addition to previously existing federal ones has created more choices of highly skilled immigration avenues for applicants, which may be seen as a positive development.

In Australia, state governments have vigorously lobbied for a greater selection role, backed by the capacity to offer regional incentives. By 2005–2006, five regional schemes existed that either facilitated permanent or temporary entry to skilled migrants, with the former offering more flexible sponsorship. Certain states, such as South Australia, Tasmania and Victoria, embraced a greater migration share of skilled migrants to promote growth. Regional sponsorship of medical migrants has also led to fierce competition for foreign doctors that has increased their benefits, and a comparable trend is under way for nursing, whether permanent or temporary. While these trends have benefitted the off-shore highly skilled, it has had adverse and unintended consequences for international students in Australia. As Hawthorne explains, the fact that state governments controlled the booming and highly lucrative technical-training sector meant that international students were rapidly channeled into vocational training courses at a time of sustained economic growth when trade fields were being added to Australia's Migration Occupations. In response, the Australian federal government introduced legislation in 2011 to regulate university and non-university higher education standards nationwide for international

students, while overriding traditional state regulatory powers. Another challenge to the integration of highly-skilled migrant workers has been the reluctance of state regulatory bodies to give control over credentialing of foreign professionals. Serious registration anomalies have evolved, with marked variations in the rigor of state assessment requirements for migrant doctors and nurses, for example, resulting in their displacement. Despite some federal attempts to push for national standards, effective governance of credentialing of foreign professionals remains a challenging issue (Hawthorne 2012).

Another area of robust immigration federalism in Australia has involved subnational programs aimed at improving immigrants' integration process. Australia has made sustained investment in settlement services, which were developed in the postwar years to facilitate the socio-economic integration of non-British immigrants. Integration services are largely managed by state governments, with significant financial assistance from the Commonwealth. In Australia, this is possible given the Commonwealth's substantial fiscal power, in a context where the federal government collects 60–75% of total revenue (compared to 45% in Canada and Switzerland and 54% in the United States). All state/territories are deeply engaged in integration efforts and have developed programs designed to address the linguistic, cultural and ethno-specific needs of immigrant Australians that have settled in the various states. Some programs focus not merely on new immigrants but also on second-generation youth grappling with identity and ethnic tensions. Multiple youth-focused programs have developed, for example, addressing outreach to Muslim Australians, inter-faith initiatives, school-based support, and ethnic community capacity-building (Hawthorne 2012).

4.3.2 Canada

In general, Canada is one of the most decentralized federations among contemporary democracies (Banting 2012). Influential factors that have propelled the province-building forces include the large diversity in Canadian society and the factor of Quebec, which has attempted to use its federalism might in order to weaken the federation, if not to obtain its outright independence from it Greg Craven, (1991–1992). Other influential factors have included divergent regional economic interests and the different patterns of immigrant settlements in different regions (Watts 1987). Institutional factors in how federalism functions in Canada have also influenced the distinctive adversarial character of intergovernmental relations (Watts 1987). Specifically, the executive-centered institutions and the concentration of power, particularly in the first ministers within each level of government, have had a significant impact on the operation of federalism; namely, the dominance of cabinets has made them the focus of relations between the provincial and national orders of government (Watts 1987). Moreover, in Canada, the existence within each level of government to the tight party discipline implicit in parliamentary government has reinforced the separation and distinctiveness of the federal and provincial branches of each political party (Watts 1987).

Another important factor in Canadian federalism, and specifically on the topic of immigration, is the form of the distribution of authority between the orders of government and the scope of powers allocated to each of the levels. Under the original British North American Act of 1867 [BNA], specific powers were listed as either exclusive federal or provincial government authority (including a general residual power), with the exception of agriculture and immigration which were placed under concurrent jurisdiction (Watts 1987). Essentially, while the Canadian central government has control over who immigrates and who can become a Canadian citizen, the Canadian provinces determine policies aimed at integrating immigrants into Canadian society and establishing services to support them. Thus, if a province disagreed with how many and which immigrants were admitted into their territory, the potential was great for those provinces to respond by refusing to facilitate their local integration. To avert some of these conflicts, the 1976 Immigration Act created a framework for cooperation between the provinces and the national government by granting authority to the provinces to consult with the national government on immigration policies (Tessier 1995). It is important to note that in Canada, the federal department of Citizenship and Immigration funds the immigrant settlement programs that are available only to permanent residents but administers their programs through the provincial governments or directly to community-based organizations through formal contribution agreements (Alboim 2009).

One area where Canada has had collaborated significantly with the provinces regarding immigration policy involves Quebec. The Chapter in this book on Canada provides the context and legal backdrop for Quebec's early (since 1978) and significant ongoing involvement in immigration, which arose from its desire for autonomy and preservation of its French culture. Essentially, Quebec has enhanced its control over immigration by being able to select immigrants based on cultural and linguistic considerations, determine the numbers of immigrants who would come to Quebec, and receive funding from the federal government for any additional immigration responsibilities (Tessier 1995; Hanna 1995). Not surprisingly, Quebec took steps to ensure that their newly arrived residents—and everyone else within the province for that matter—were completely immersed in French-Canadian culture, with measures that upset many immigrants. One of the most controversial measures was the passage of the Charter of the French Language, more commonly referred to as Bill 101, which reinforced Quebec's stance on maintaining French as the centerpiece of its culture and the official language of the province. Under the law, immigrant children were required to attend French-speaking schools, and with few exceptions, were denied the freedom of education choice. While still controversial with parents, immigrant children appear happy with their experience, as they are able to maintain proficiency in their mother tongue and also learn English under some modifications to the law. Bill 101, moreover, included commercial linguistic restrictions which kept many immigrants from being able to run their businesses in a language familiar to them. Quebec's immigrants, in fact, felt trapped in a culture of hostility to any other French-Canadian culture and have found themselves struggling to become productive members of the Quebec economy (Hanna 1995).

Another example of deep collaboration between Canadian national and provincial governments in the area of immigration has been the Provincial Nominee Programs (PNPs). The PNPs were designed, based on shared jurisdiction between the two levels of government, to allow provinces to recruit and nominate potential immigrants using selection criteria that meet locally defined needs. Currently, all federal-provincial governments in Canada, except Quebec, have signed PNPs. The programs vary across regions, since they respond to particular regional interests. Since their inception, the provinces have created more than 50 different immigration categories and selection criteria. PNPs have allowed historically low recipients of immigration provinces to embark on ambitious agendas to increase immigration to their regions (e.g., Manitoba, Saskatchewan, and the Atlantic provinces). The selection criteria used by the PNPs differ significantly from those used in the national program. Special programs within the PNPs allow provinces to recruit immigrants in semi-skilled occupations who would not have been eligible for immigration on the national Federal Skilled Worker program. As well, many PNPs require a legitimate job offer with a recognized employer in Canada to qualify (Pandey and Townsend 2010).

In summary, in Canada, the admission of economic migrants has undergone major decentralization with the provinces becoming significant and autonomous players in the selection, although the federal government has retained ultimate control over the levels of and the final decision on admission. The story is similar with regard to socio-economic integration, both in terms of settlement programs for newcomers as well as longer-term integration. With settlement programs, focused on pre-naturalization integration, there is considerable asymmetry in terms of the level of devolution and funding from the federal government, ranging from Quebec, with comprehensive provincial control, to Alberta, with a co-management model with joint selection of projects and joint delivery of services, to Ontario, which has a joint federal-provincial steering committee with a formal role in the City of Toronto but with the federal government retaining final decision-making, to a simple consultation model in other provinces where localities provide information but the federal government retains exclusive control. This pattern reflects the accumulation of bilateral political agreements rather than a multilateral approach to intergovernmental relations. In contrast, political integration remains exclusively federal, which has occurred through the adoption of national multiculturalism policies (with federal funds), the Charter of Rights and Freedoms, and through naturalization. The Charter, for instance, extends rights protections to immigrants throughout the regions, including the principle of non-discrimination, making it an instrument for "Canadianizing" newcomers. Canada's exclusive control over naturalization, requiring three years of lawful residence and a citizenship test, has led to significant rates of naturalization in the country that is much higher (nearly double or higher) than in most European countries and in the United States. The national approach to political integration has not gone uncontested by the regions, particularly in Quebec, which as explained above has insisted on the adoption of a French-Canadian identity by its immigrant settlers (Banting 2012).

Has decentralization in Canada mattered to immigrants? One positive aspect of decentralization has been to allow the regions to tailor their policies to local conditions, which has, in turn, contributed to the survival of the country as a single state, especially with Quebec. Decentralization of economic migrant policies has also contributed to increasing the diversity of occupational mix among the new arrivals, as well as expanded their geographic distribution in the country, but it has also made the process more complex and industry dependent. Still, fragmentation of admissions has also provided immigrants the opportunity to forum-shop, and yet, it is also true that the more flexible the regional rules (i.e., non-existent language requirements), the harder it may be for immigrants to assimilate. In general, with some exceptions, federally admitted economic migrants have higher earnings than those admitted under provincial programs. One study conducted by Pandey and Townsend in 2010 used administrative data to compare the real earnings and retention rates of PNPs (Nominees) with those of equivalent federal economic class immigrants (ECIs) for the first two full years after arrival. When controlled for observable differences between the ECIs and Nominees, Pandey and Townsend found that the real earnings of Nominees were substantially higher than those of equivalent ECIs (Pandey and Townsend 2010). Also, as part of its 2010 Canada-BC Immigration Agreement, British Columbia conducted an assessment in 2011 of its PNCs performance. The studyfound that 94% of the nominees were working full time including self-employed and were earning much higher incomes than FSW workers based on 2009 Figs. (Ministry of Jobs, Tourism and Innovation 2011). Yet, others question this data because the comparative focus is too short-term. Other research indicates that principal applicants on all permanent categories in Canada do best economically in the long term; yet it is precisely these federal categories that are declining and being replaced with provincial, not national, priorities (Alboim 2009).

The effect of decentralization on integration policies is not as well studied. Certainly, the federal administration of settlement programs has been criticized for its failure to adapt to diverse localities and diverse immigrant groups; however, better results in the localities have not been across the board. For example, a 2000 study of British Columbia found that federal funds for immigrant integration were simply diverted into other programs and that community organizations felt shut out of the policy process. It is not yet clear whether the divergent variations to civics and language programs benefit immigrants over greater standardization. In addition, regional variation can lead to more onerous language and civic integration requirements, such has been the case in Quebec. Another problem is the inequitity in funding allocation for settlement programs to the provinces that is not tied to their share of immigrants. A related issue is a lack of clarity on matters of accountability when policies fail or are implemented poorly and multi-layered government involvement is at play. Finally, decentralization has also led to the political fragmentation of immigrants who feel less attached to the national government when it is the localities who select them and integrate them according to local preferences. As a result, immigrants are less engaged with the economic and social national realities that could affect them collectively as a group of immigrants, while at the same time improving their political integration in the local communities (Banting 2012).

Another problem that has been noted about the PNPs is the lack of common standards and a national framework that has resulted in a very confusing immigration system where applicants are increasingly needing to rely on immigration lawyers to help them sort through the maze. The application cost may increase as well because some provinces charge fees for the nominee programs on top of the fees charged by the federal government, while other provinces do not (See Chapter 5 in this book See http://www.cic.gc.ca/english/information/applications/prov-apply-application.asp). More importantly, from a rights perspective, permanent residents under national standards have guaranteed mobility rights under the Charter of Rights and Freedoms and retain no obligation to remain in the province that selected them once they have obtained permanent resident status (Alboim 2009). The right to mobility has been critical to safeguard rights in the context of federalism insofar as the advantages of federalism, such as innovation and competition, presuppose that residents of any region can exercise the right to move in order to enjoy the benefits offered by one region or to escape the constraints imposed by another (Francis and Francis 2001).

4.3.3 The European Union

The European Union is not a federation in the classical sense but it does possess a number of federal-like attributes and dynamics; as well, its formation is founded in federal ideas that recent changes such as the adoption of a common citizenship is more definitively moving the European Union into a more decidedly federal direction (Burgess 1996). One area in which the European Union, and specifically the nations within the European Union that are also members of the Organization of Economic Cooperation (OECD), has experienced a universalistic impetus has been in the area of asylum. The Treaty of Amsterdam transferred legislative competence in the field of asylum to the European Union. The Tampere Conclusions of 1999 also firmly stated that the objective for the adaptation of the European asylum regime was to create "a common European asylum system" (CEAS) including a common asylum procedure (CEAP) and a uniform status for recognized refugees and persons benefitting from subsidiary protection in Europe (Staffans 2008). These multilateral legal measures tried to prevent a race toward more and more restrictive asylum standards that had developed across Western European Union states, although some view the trend toward harmonization as representing, instead, the lowest common denominator. For example, there remains a vastly unequal treatment of asylum applications within EU nations even after substantial harmonization (Staffans 2008). Some of these asylum trends are discussed in more in detail below in the sections on Germany and Switzerland, both of which are nations with strong national traditions of federalism in the context of immigration.

Another area where the EU has influenced member laws on immigration is in the area of citizenship. EU nations retain exclusive competence to decide who their citizens are; however, their conferral of nationality also results in the conferral of EU citizenship. The connection between EU and national citizenship was not lost on member states and provoked strong objection and controversy when the subject

was introduced. EU member states recognized that their national decisions on citizenship would affect their neighbors and vice versa, since the new citizens acquire not solely domestic membership but also the rights of free movement and non-discrimination throughout the EU, as well as a long list of entitlements linked to EU citizenship, such as political rights (Rostek and Davies 2006). EU citizenship would also expand the right of certain third-party nationals to accompany or join their EU citizen family members in any of the EU territories, although this right appears to be limited to one or both parents of a minor child (Cambien 2012a). Some nations feared this interdependence of national policies between EU members would ultimately threaten their nation's independence. Nations also expressed concern that EU citizenship would ultimately adversely affect the position of third country nationals residing in the EU who would face more restrictive policies as a result of this interrelationship of nation and community citizenship (Rostek and Davies 2006). In a 2012 essay, Nathan Cambien challenged the assumption that EU member states remain autonomous as a matter of law to regulate nationality by stressing the European Court of Justice's dictum language in its *Micheletti* judgment that it is for each Member State to lay down conditions for the acquisition and loss of nationality *while having due regard to Union law* (Case C-369/90 Micheletti [1992] ECR I-4239, para. 10 (emphasis added).] Cambiem considers the 2010 Rottman Judgment of the ECJ, [Case C-135/08 Rottman [2010] ECR I-1449], which clarified, to some extent, for the first time the meaning of the italicized phrase, to argue that under certain circumstances, EU citizenship law could constrain EU member state's exclusive competence regarding both acquisition and loss of nationality to the extent that it has an impact on the status of EU citizenship. While Rottman's unique facts—a denationalization case that would result in statelessness of an Austrian who have given up citizenship to acquire German nationality and who would later be denaturalized in Germany based on immigration fraud—Cambien extrapolates whether the Court's reasoning would be confined to loss of nationality cases that result in statelessness or could equally apply to the acquisition of nationality, for instance, of long term third-party state nationals who lack a nationality elsewhere by virtue of their residence outside of their country nationality (Cambiem 2012b).

There has been, in fact, influence from the EU immigration institutions and EU legislation on the laws adopted by nation states regarding the requirements for citizens. Ryan, for example, documented in 2004 that, despite EU member states concerns about losing their autonomy over who became a member, a need for harmonization on nationality laws did emerge in light of the interdependence between national and EU citizenship policies. Ryan showed that the EU trend toward harmonization resulted in moving to the center, with states with strict nationality laws relaxing their rules to facilitate the inclusion of non-national residents, while states with more open nationality laws moving to make them more restrictive (Ryan 2004). Rostek and Davies have also documented how individual EU nations have responded to EU citizenship by implementing stricter restrictions concerning conditions of entry, allowing nations to be more willing to expand nationality internally, which the EU has encouraged nations to do through soft law (Rostek and Davies 2006). In 1991 and 1992, for example, Spain moved to restrict entry by citizens

from Maghreb and most Latin American countries without a visa under pressure from the European Community,. For years Spain had granted many Latin American nations dual-nationality based on bilateral agreements with those nations, which increased pressure on Spain to restrict entry. Spain's amnesty provisions in 2005 toward undocumented workers, combined with their flexible policies of granting nationality to legal residents after only two years of residence prompted very negative reactions from France, Germany and Italy out of fear that ultimately these same nationals would gain EU citizenship and be able to move freely to those nations (Rostek and Davies 2006).

Rostek and Davies and Cambien also describe a similar phenomenum in Ireland, which moved to more restrictive citizenship national policies as a result of pressure from EU membership (Rostek and Davies 2006; Cambien 2012a). Until 2003, when the Irish Supreme Court ruled that parents of babies born in Ireland did not enjoy automatic right to residence, Ireland had remained relatively liberal regarding birthright citizenship. This led other EU nations to accuse Ireland of promoting a "foreign baby boom," whereby third-party nationals, particularly from sub-Sahara Africa, would travel to Dublin to give birth in order to obtain Irish citizenship. These worries were reinforced by the European Court of Justice [ECJ] ruling in the *Chen* case in 2004 which granted the Chinese mother of an Irish-born child the right to reside in Britain based on EC Directive 90/364/EEC of 28 June 1990, which conferred on the minor child, who was a birthright Irish national, the right to reside and receive health care benefits in Britain, and by extension, conferred the right to reside to her mother as the primary caretaker (Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen [2004] ECR I-09925). All of this culminated in Ireland amending its constitution in 2004 through a referendum, approved by the overwhelming majority of voters, that stripped the right to automatic Irish nationality from children born on or after 1 January 2005 of non-national parents, requiring instead that parents first prove their genuine link to Ireland (Rostek and Davies 2006; Cambiem 2012).

Cambien argues that it was EU citizenship and the rights to family unification conferred on third-country nationals of EU citizens that propelled Belgium as well to adopt more restrictive citizenship laws. Until 2006, the criteria for acquiring Belgian nationality were fairly liberal and gave children born in Belgium the right to acquire nationality if they would otherwise be stateless. The 2006 law restricted this by requiring the child's legal representative or parent to take affirmative steps to obtain a different nationality for the child. Cambien notes that the 2006 amendment was a direct reaction to concerns over the ability of third-country nationals, specifically parents of children who acquired citizenship in Belgium by birth, to gain residency in Belgium despite their ineligibility for an employment visa, especially in light of ECJ decisions like Chen. Interestingly, in 2011, subsequent to the Belgium amendments, the ECJ did indeed grant an undocumented Colombian father of two Belgium nationals who had been granted citizenship by birth prior to the amendments a right to reside lawfully in Belgium based on his minor children's rights to family unification (Case C-34/09, Gerardo Ruiz Zambrano v. Office National de L'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011). Cambien believes that while the Ruiz Zambrano case has been limited

by subsequent holdings to apply solely to the parents or primary legal guardians of minor children (and perhaps only one) [see, e.g., ECJ Case C-256/11, Judgment of 15 November 2011 Murat Dereci et al. v. Bundesministerium Fur Inneus], it will continue to push nations within the EU, like Belgium, to adopt more restrictive laws on nationality (Cambien 2012a). Cambien draws a similar conclusion in a subsequent article that EU law will continue to push EU Member states toward more restrictive nationality legislation in light of two 2010 ECJ cases, Ibrahim and Teixera [Case C-310/08 Ibrahim [2010] ECR I-1065; Case C-480/08, Teixeira [2010] ECR I-1107], which similarly granted a right to residence to the primary care takers of school-age children who were EU citizens in the UK even when the parents, the wives of migrant workers who had been separated from their spouses, were not self-sufficient and had applied for housing assistance for themselves and their children. Cambien criticizes the ECJ for recognizing a right of residence to non-self-sufficient third party nationals when such a right does not even exist for EU members and anticipates a move by EU Member States to restrict nationality rights to children of third-party nationals, particularly those who are poor and likely to become economic burdens to nations (Cambiem 2012b).

In contrast to Spain, Ireland and Belgium, however, the introduction of EU citizenship had the effect of pressuring Germany to relax its restrictive nationality laws, particularly as applied to long-term residents from third countries. Until the 2000 citizenship reforms to the 1913 Citizenship Act, millions of Turks who had lived in Germany for two or three generations were denied the right to acquire German citizenship. The new law on citizenship made significant changes by departing from the exclusivity of the *ius sanguinis* principles and also softening conditions for naturalization. It does not wholly abandon *jus sanguinis*, but it adopts a new *jus solis* provision that allows a child born in Germany to non-German parents to become a German citizen, provided the parents meet certain criteria, including legal residence in Germany for a period of eight years. Citizenship is also available through naturalization if the applicant has lawfully resided in Germany during the eight years preceding the application and satisfies all other statutory criteria (Hartnell 2006). As Rostek and Davies explained, the impetus for Germany to institute these reforms came as a result of harmonization pressures from the EU for members to recognize the significant contributions of third party nationals to the community (Rostek and Davies 2006). Yet, despite the best intentions in the recent legal reforms in Germany, some scholars predict that the legal reforms will exacerbate rather than alleviate social tensions in Germany and potentially yield other forms of more restrictive sub-national and intra-national laws. For example, Hartnell notes that the price for the liberalization of citizenship in Germany has been felt in heightened concerns with integration and security, and specifically an emphasis on the early detection and deportation of persons who are perceived politically violent as well as tough laws for naturalization such as requiring high levels of German proficiency (Hartnell 2006).

A third area of interaction and tension between EU laws and the immigration laws of its members relates to EU citizen's right to free movement. Shaw documented this interaction specifically as to the United Kingdom and concluded that even

forty years after the UK's accession to the EU, there continue to be difficulties in the UK regarding the application of the EU free movement rules in general and the Citizens' Rights Directive [CRD] (Directive 2004/38/EC of the European Parliament and the Council on the right to citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77) in particular. EU freedom of movement is both intrinsic to EU citizenship rights but also independent insofar as these attach only to those EU citizens who are not static and choose to exercise these rights.

The EU has gradually and progressively developed free movement rules that have increased the rights of EU citizens and family members, with precise details depending upon economic status and their activity in the host state. Despite the treaty-based nature of freedom of movement rights, EU law is still heavily dependent upon implementation of the rights that attach to free movement at the national level, especially when the central instrument of implementation is the CRD directive and nations continue to enjoy a certain degree of discretion with respect to the methods it chooses for the purposes of achieving those objectives (Skordas 2006). It is clear today that EU citizens and their families, regardless of nationality, have treaty-based rights to enter, to remain and to work, study, take leisure, conduct whatever business they like or just live in other Member States, under the same conditions as nationals, albeit subject to certain conditions permitted by the Treaty and the secondary legislation. Even so, certain aspects of immigration control have been retained by EU nations, such as in the UK where the United Kingdom Border Agency (UKBA), the body charged with administrative immigration decisions, plays a role in the decision to admit, subject to appeal to the ordinary national courts. The lack of specialized agencies to handle EU exercise of freedom of movement in the UK has simply made it more difficult to overcome the restrictive tendencies despite the growing expansion of free movement rights within the EU. For example, EU free movement rights still encounter resistance when nations express concern over threats from the outside, particularly as to terrorism and political violence, as well as concerns over scarce welfare resources and jobs in an age of harsh economic recession. This has led to the greater use of power to deny entry or deport persons deemed undesirable or to simply limit the possibility for permanent settlement for EU citizens and their families. In the UK, for example, in 2011, only 62% of the EU citizenship EEA applications were granted. Thirty-eight percent is a high refusal rate in circumstances where national authorities have little discretion in deciding whether to admit an application. This is not a problem isolated to the UK, and similar problems exist throughout the EU. In fact, even in states which are part of the Schengen zone and/or are subject to all of the provisions of the TFEU on immigration and asylum the framework of free movement does not wholly replace, but rather operates in conjunction with, domestic implementation (Shaw and Miller 2012).

4.3.4 Belgium

Belgium has always been a divided country in which national unity has remained problematic. The three regions (the Walloons, the Flemish, and the Brussels-Capital)

are socio-economic units. The three communities (the French-speaking, the Flemish, and the German-speaking) are linguistic and cultural entities. The chief competence of the federal government is to deal with matters concerning all Belgian citizens independent of linguistic, cultural, or territorial considerations, such as EU and external relations, whereas the regions deal with so-called "territorial matters," such as land use, environment, and employment policy, and the communities are concerned with matters related to persons, such as education, culture, language, etc. In terms of immigration and integration, four levels of power share most competences: the EU level (for parts of immigration, asylum, and anti-discrimination policies); the federal, community, and regional levels; the provinces; and the communities (Martiniello 2012).

Interestingly, Belgium's process of federalization coincided more or less with its decision to stop the recruitment of migrant workers in the early 1970s, which was reflective of a consensus in Belgium toward a zero-immigration doctrine. The different regions of Belgium have experienced different patterns of migration, both historically and in the present day, which has also led to different philosophies on integration. In general, immigration has become an important dimension of the domestic conflict between Flemish-speaking and French-speaking Belgiums. Two major attitudes toward multiculturalism have emerged. On the one hand, Flanders has defended cultural homogeneity and either sought the repatriation of immigrants or their total assimilation into Flemish society. On the other hand, the more liberal side, such as in Wallonia, has sought to promote some sort of multicultural society based in part as a response to its own history of forced assimilation (Martiniello 2012).

Following the 2010 elections, which left the country even more politically fragmented, Belgium faces the disappearance of a federal government; in fact, as of 2011, it is not clear whether Belgium still has the framework of a federal government. For immigration, this has meant that regional governments, particularly Flanders, are claiming more and more exclusive powers. In theory, the admission of immigrants has been an exclusive federal competence; however, in practice, the lack of cooperation between a deteriorating federal government and the regions weakens implementation. For example, there are no coherent national labor immigration policies in Belgium due to a lack of cooperation between the Belgian regions in delivering work permits, which are provided at the regional level. Different economic needs and administrative practices in the regions have led to different priorities and practices in the absence of coordinated dialogue, even when most work permits delivered in the regions are also valid in other regions of the country. Unfortunately, there is also little, if any, federal leadership on the issue. Regarding immigrant integration, which is more clearly a power devolved to the regions (socio-economic) and communities (cultural and education), a similar pattern of a lack of coordination between the regions and the communities emerges, at least in Walloon and Brussels, although not so much in the Flemish region where the region and community overlap significantly. As a result, even the mere exchange of information on integration and the development of best practices is highly problematic. Here, too, concerted efforts by the federal government to influence national integration policies have failed. Thus, while in Flanders integration policies include

mandatory socio-economic and cultural and civic dimensions (e.g., learning Dutch and norms and values), at least for immigrant newcomers, in Wallonia no integration initiative has been undertaken and immigrants have no obligation to attend any program. Finally, it is interesting to note that access to nationality, which has been nationally defined in Belgium to include three main ways of becoming citizen—through naturalization, by virtue of marriage, and through *jus solis*—is being resisted in the regions, especially in Flanders, because the absence of any civics or language requirements conflicts with that region's integration policies and practices (Martiniello 2012).

4.3.5 The United Kingdom

The United Kingdom, not unlike the European Union itself, is a multi-level polity where the exercise of power is increasingly contested among its members: England, Wales, Scotland, and Northern Ireland. Scotland offers an interesting contrast in their treatment of immigration issues, which has resulted in conflicts within the Union. In general, Scotland has historically been a nation of emigration and has also considered itself to be much more flexible and welcoming of immigration. In contrast to the overall population of the United Kingdom, and especially as compared to England, Scotland's population has declined severely as a result of declining fertility and insufficient immigration that has been unable to match the continuing emigration. As a result of Scotland's regional variations, particularly in 2007, the issue of seeking the devolution of citizenship and immigration has inevitably received some attention. Scotland has sought to have greater autonomy to welcome immigrants in ways that are responsive to its regional economic and population needs (Shaw 2009a). So far, devolution has not happened, but it is clear that were it to happen, at least under current Scottish conditions, it would result in more favorable policies toward immigration.

One of the battlegrounds between Scotland and the UK where the issue of decentralization has arisen is in the area of asylum. The UK is one of many states that has used a policy of dispersing asylum applicants in the name of burden sharing within the union. In practice, this has promoted the emergence of differences within states over the politization of the asylum questions. In Scotland, for example, the policy of forced removal of those who have been refused asylum has been more hotly contested, particularly as it applies to children, than in other parts of the UK. Scotland has also been opposed to mass detention policies of asylum seekers, including children, with the Scottish Minister actively seeking the closure of the only asylum seeker detention facility in Scotland. Further, the Scottish government has actively sought the integration of asylum-seekers in the host country from the day they arrive to Scotland, including given them the right to work. All of these favorable initiatives toward asylum seekers have been emphatically rejected under current UK policy (Shaw 2009a).

Another contested space relates to the framework of electoral entitlements that attach to citizens within the UK, which are both geographically differentiated and

particularly inclusionary insofar as certain groups of people are automatically treated as privileged non-nationals by virtue of both UK and EU citizenship. Within the UK, both EU and UK citizens are privileged non-nationals in the UK electoral context—i.e., they can vote and stand for election in all elections in the UK, including elections to the UK parliament in Westminster as well as in elections of the devolved bodies of the UK. As a result, not unlike the EU, the individual member decisions as to who qualifies as a national have implications for all of the UK nations collectively. Here, too, England has proposed to adopt much more restrictive conceptions of national British nationality. In contrast, Northern Ireland, Scotland and Wales have more complex sub-national identities as to who is considered a national. For example, Shaw discusses a 2008 government commissioned report called The Path to Citizenship: Next Steps in Reforming the Immigration System [Lord Goldsmith QC, Citizenship: Our Common Bond, Citizenship Review, March 2008, available from www.justice.gov/uk/reviews/citizenship), which explicitly links the process of accessing national citizenship to the proposition that a person must display certain features (e.g., no criminal convictions, English language skills, and the pursuit of active citizenship) to deserve British citizenship. This would privilege national British citizenship in terms of electoral participation over all other sites of political and legal authority over the issue, including the EU (Shaw 2009b).

4.3.6 Switzerland

Switzerland has one of the highest immigration rates in Europe during the twentieth century, yet Switzerland has lacked an immigration policy at the federal level reflecting its lack of identity as a nation of immigrants. During the period preceding WWI, immigration was largely the responsibility of the cantons. It was not until 1925 that the federal constitution gave the federal government the power to address immigration issues at the national level (D'Mato 2012). As a federal state, Switzerland is confronted with the challenges of multilevel governance, including as regards to immigration. One example of the challenges of multilevel government in Switzerland is that the main subterritorial units possess substantial discretionary power in asylum procedures. This is because central authorities typically delegate the implementation of certain rules to the subterritorial units. That is, even if bound by some national law, the 26 Swiss cantons can, in principle, treat asylum requests from similar individuals differently, which opens the door for both positive and negative discrimination (Holzer et al. 2000). In a study looking at the period of 1988–1996 conducted by Thomas Holzer and colleagues in Switzerland, after controlling for the most important individual attributes of asylum seekers, there was wide variation in the likelihood of positive decisions (more than twice) in some states of Switzerland compared to others. The study found that while the individual background of a claimant has the strongest influence on the chance of recognition, decentralized implementation is clearly linked to the unequal treatment of individual asylum seekers. Namely, the way in which the asylum seeker administration is organized at the level of cantons influences the chance of admission, as does the

share of foreign population residing in any given state and the attitudes of the Swiss citizens in that state toward asylum seekers (Holzer et al. 2000).

Another example of divergent cantonal practices pertains to naturalization. Whereas all persons who have resided in Switzerland for at least twelve years are eligible to naturalize under federal legislation, the cantons continue to play an important role. The federal government grants the green light for the acquisition of Swiss nationality first after certain preconditions are met, but the cantons may have their own additional residency or additional requirements that must also be met before the applicant can acquire Swiss citizenship. The cantons' criteria and processes vary widely and generally have lowered the federal government's desired rate of naturalization. There is great variety in naturalization practices between the German-and French-speaking cantons, for example. While the French cantons tend to have more formalized procedures, many German-speaking cantons endorse the principle of local adherence and political participation, where the question of who deserves citizenships easily turns into a question of preferential treatment and prejudice. Additionally, in at least three referendums in the last 20 years (1983, 1994, 2004), Swiss voters have rejected laws that would make it easier for the children of immigrants to naturalize (D'Amato 2012).

4.4 The United States

The 1787 U.S. Constitution devised a very limited concentration of powers in the nation's federal government. As to immigration, the U.S. Constitution is largely silent on federal immigration powers with the exception of the Naturalization Clause and the protection of birthright citizenship. Before 1819, there was little significant federal legislation. The centralization of federal immigration control began in 1864 and was solidified in a series of nineteenth century Supreme Court decisions that invalidated certain state immigration restrictions and ultimately declared in the 1889 Chinese Exclusion case [Chae Chan Ping v. U.S., 130 U.S. 581 (1889)] that immigration control is an exclusive federal power (Aldana 2009). Since then, Congress has largely legislated over the control of immigration and specified the guidelines for naturalization. State governments share some of the costs of immigrant integration programs and have also moved to regulate immigrant access to these programs; however, they retain little formal authority to determine the flow of immigration into their jurisdictions (Boushey and Luedtke 2006). The trend toward centralization in the US in the area of immigration is intriguing because historically the system was just the opposite. The first era of immigration regulation in the U.S. from the country's founding until the late 1800s evolved informally from concurrent policies enacted by the federal and state governments alike. The second period emerged in the late 1800s when, through judicial review and congressional legislation, the national government asserted its constitutional authority to harmonize disparate immigration law. Throughout this second period, some states also asserted limited powers over immigration control and took steps to mediate against the high

cost of both documented and undocumented immigration (Neuman 1993). Aldana 2009). Especially after September 11, 2001, a third period of asymmetrical immigration enforcement emerged in the U.S. with localities exerting their authority over a number of areas. Because states cannot directly control the entry of immigrants into their territory, they have instead largely regulated the living conditions of immigrants in terms of their access to public services, jobs, and housing. In addition, the federal government has devolved some of their traditional functions in immigration to states and has expanded the role of localities in the policing of immigrants. In some cases, such as Arizona, states have even expanded their policing function beyond what the federal government allows and have even legislated to criminalize immigrants or to create new immigration crimes (Aldana 2009).

Much of the discussion around U.S. immigration federalism in the media and by scholars has focused on the negative implications of increased local involvement for the lives of immigrants. However, with few exceptions, not much empirical work has been done to document more systematically whether the new local rise of U.S. immigration federalism has been more or less positive for immigrants. The Migration Policy Institute (MPI) conducted an early study of this trend in 2007 that yielded surprising results. The MPI study found that state legislatures in all 50 U.S. states introduced more than 1,000 immigration-related measures in 2007. Texas, New York, Tennessee, and Virginia introduced the most state measures. These laws covered a wide range of topics, especially dealing with education, employment, identification and driver's licenses, law enforcement, public benefits, trafficking, and voting procedures. In all, 306 measures sought to expand the rights of immigrants, while 256 contracted the rights of immigrants (Rodríguez et al. 2007).

A Study of U.S. Immigration Federalism

This section of the chapter updates the MPI 2007 Study findings by examining the trends in local immigration laws and ordinances adopted in 2011 and 2012. The data is based on the compilation of laws and ordinances compiled by the National Conference of State Legislatures (NCSL), which has been systematically assembling this information since 2005. NCSL produces reports three times a year on state laws that address legal immigrants, migrant and seasonal workers, and refugees or unauthorized immigrants (see http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx). This study analyzes this data to assess the degree to which these local laws and ordinances have improved or worsened the conditions of immigrants.

In general, localities have shown an upward trajectory in the adoption of state legislation related to immigrants as follows (Table 4.1):

This study considered all of the state legislation related to immigration for 2011 and 2012. Only enacted legislation was addressed, and resolutions that did not have the effect of law were excluded from consideration. Laws were classified two ways: by subject area and impact on immigration populations. Each bill was placed into one of the following categories: Law Enforcement, Education, Employment, Bud-

Table 4.1 State legislation related to immigrants, 2005–2011

Year	Introduced	Passed legislatures	Vetoed	Enacted	Resolutions	Total laws and resolutions
2005	300	45	6	39	0	39
2006	570	90	6	84	12	96
2007	1,562	252	12	240	50	290
2008	1,305	209	3	206	64	270
2009	1,500	373	20	222	131	353
2010	1,400	356	10	208	138	346
2011	1,607	318	15	197	109	306

gets, Public Benefits, Health, Human Trafficking, Drivers License/ID, Voting, and Miscellaneous. Each law was then categorized as either having a "positive" or "negative" impact on immigrant populations. This approach was used, rather than the more narrow approach of "expanding" or "restricting" rights, because many laws, such as those that require immigration status to be made available on sex offender registrations, don't necessarily contract rights but could have a negative impact on perceptions of the immigration population as a whole. Thus, the "positive/negative" determination encompassed a broader range of immigration-related state legislative activity, including activity that may contract or expand immigrants' rights.

As one might expect, there was some degree of difficulty in classifying legislation as "positive" or "negative," as a single piece of legislation may impact populations differently. For example, Georgia's H 742 (2012) provides a substantial amount of money for access to services for refugees, but also appropriates money for the enforcement of E-verify. This legislation can be considered positive for refugees yet negative for undocumented workers. There are also various laws across the states, particularly with public benefits, that provide access to health or other assistance for legal permanent residents but not for the undocumented, creating a split in the positive/negative impacts for each population; for example Vermont's H 781 (2012) and Virginia's S 568 (2012), which extended medical assistance for legal permanent residents only. In these circumstances, the positive/negative determination was made in consideration of impact on the immigration population specifically named in the legislation as well as those that are impliedly related to the legislation. For example, a law that provides access to a benefit for citizens and lawful permanent residents may still be considered negative because of the exclusion for nonimmigrants and undocumented immigrant populations if the law seemed to be drafted specifically to enunciate that exclusion. However, a similar law would be considered positive if it were an extension of some previously unavailable right or benefit to an immigration population even though other groups were not positively impacted.

Some laws were too attenuated to determine whether they would have a positive or negative impact on immigrants without much more extensive analysis and research; those laws were placed in the "Other" category. Procedural or clarifying legislation that did not have a clear impact on an immigrant population was also

placed in this category. Budget appropriations were often categorized as "other," unless there was a clear specification that it would expand access to benefits or other positive rights for immigrant populations.

In 2011, 197 new immigration-related laws were enacted at the state level. During this year, state legislators introduced far more bills and resolutions than were introduced in 2010, yet 11 % fewer were enacted. This may be explained by many factors, including frustrations with lack of action on a federal level, partisan gridlock on the state level, or anticipation over the impact of litigation related to Arizona's SB 1070 (see Chacón chapter in this book), passed the year before. The states with the most enacted immigration legislation in 2011 were Virginia (18), California (16), Arizona (14), Utah (13), and Texas (10). The states with the least amount of immigration-related legislation in 2011 were: Hawaii, Iowa, Pennsylvania, and New Jersey (1); Florida, Louisiana, North Carolina, New Mexico, New York, South Carolina, Tennessee, West Virginia (2); Alabama, Connecticut, Idaho, Illinois, Kansas, Massachusetts, Maine, Nevada (3). Additionally, Alaska, Delaware, Kentucky, Minnesota, New Hampshire, Ohio, Rhode Island, South Dakota, Wisconsin, and Wyoming did not pass any immigration-related laws in (National Conference of State Legislatures, Immigration Policy Project 2011).

Five states—Alabama, Georgia, Indiana, South Carolina, and Utah—passed omnibus laws in the likeness of Arizona's SB 1070 (see Chacón chapter in this book). These laws included provisions requiring E-Verify, prohibiting the harboring or transporting of unauthorized aliens, requiring law enforcement to attempt to determine the immigration status of a person involved in a lawful stop, allowing state residents to sue for state and local agencies' non-compliance with immigration enforcement, and making the failure to carry an alien registration document a criminal violation. All five of these state omnibus laws received court challenges based on preemption and civil rights in 2011, before the Supreme Court handed down the ruling in *Arizona v. United States*. As of June 2012, the lower courts have either partially or wholly enjoined these statutes. However, as of the time of this writing, there is still a class action lawsuit pending in Arizona to test additional constitutional questions not considered in *Arizona v. United States,* including the Fifth Amendment right to due process, First Amendment right to free speech, and the Fourteenth Amendment right to equal protection. There are pending complaints filed by the federal government against immigration enforcement laws enacted in Alabama, South Carolina, and Utah (National Conference of State Legislatures, Immigration Policy Project 2012).

In 2011, the top categories of immigration legislation were law enforcement, identification/drivers' licenses, and employment. Alabama, Idaho, Kansas, Michigan, South Dakota and Utah enacted legislation requiring proof of citizenship or immigration documents to be included in sex offender registries. Montana enacted legislation requiring the Department of Motor Vehicles to use the SAVE program to verify a driver's license or an ID applicant's lawful presence. Eleven states—Alabama, California, Georgia, Indiana, Louisiana, North Carolina, North Dakota, South Carolina, Tennessee, Utah and Virginia—enacted legislation on E-Verify. Another popular topic of legislation on the state level in 2011 was education, with

many states legislating on undocumented immigrant student eligibility for in-state tuition. Both Connecticut and Maryland issued legislation permitting undocumented students to claim in-state tuition in 2011.

Overall, the legislation passed in 2011 predominantly had a negative impact on immigrant populations. Arizona, Texas, Utah, and Virginia passed the highest number of laws with negative impacts on immigrant populations. For example, Arizona's H 2016 (2011) requires a person applying for health benefits to prove status and requires administrators to report verified individuals, the types and numbers of fraudulent documents, and the number of individuals referred for prosecution. Texas' H 2734 (2011) requires that a parole panel compel a condition of parole or mandatory supervision so that an illegal criminal alien will be released to the custody of United States Immigration and Customs Enforcement. Utah's S 138 (2011) requires fingerprinting for driving privilege card applicants and allows for sharing of that information with Immigration and Customs Enforcement.

The state with the most positive legislation was clearly California, with 7 positive laws enacted in 2011, including a provision offering financial aid to undocumented immigrants. Virginia is unique because, in addition to enacting the highest number of "negative" legislation, it also managed to enact one of the highest numbers of "positive" legislation. Like many states, one area that Virginia legislated in was with relation to undocumented access to higher education, following California's "DREAM Act." Virginia's H 1848 provided guidelines for granting in-state tuition, including residence in the state of Virginia for one year. However, Virginia's S 1279 (2011) stipulates that a person holding a student or temporary visa is ineligible for in-state tuition and penalizes individuals who falsify information in order to avoid paying out-of-state tuition. These two states were the stand-alone "positive" immigration-related legislation leaders at the state level, as much of the legislation enacted in 2011 was either negative or in the "other" category.

For 2012, the study only addressed legislation from January 1-June 30, 2012, as no data was available beyond that date at the time of compilation. During the first half of 2012, the enactment of immigration-related legislation dropped 20%, with more legislators focusing on state budget gaps and redistricting maps. Additionally, lawmakers cited pending litigation on states' authority to enforce immigration laws as another motivating reason to refrain from action (Source: National Conference of State Legislatures, Immigration Policy Project 2012). The 2012 ruling on *Arizona v. United States* upheld only one of the four state provisions challenged in the case; the provision allowing law enforcement officers to inquire about a person's lawful stop (See Chacón chapter in this book for a detailed discussion of the Arizona ruling and its likely effect on US immigration federalism).

The states with the most immigration-related legislation during the first half of 2012 were Florida and Utah (8); Georgia and Virginia (7); and Alabama, California, Colorado, and Michigan (5). The states with the least amount of immigration-related legislation were Alaska, Arkansas, Washington D.C., Hawaii, Iowa, Kentucky, Maryland, Mississippi, New Jersey, Ohio, Oregon, Pennsylvania, Washington, West Virginia (1); Illinois, Minnesota, New York, South Carolina, Tennessee (2); and Indiana, Kansas, Maine, New Hampshire, Oklahoma (3). Connecticut, Delaware,

Idaho, Massachusetts, Montana, Nevada, New Mexico, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, Wisconsin, and Wyoming all did not enact any immigration-related legislation.

As compared to 2011, similar states remained in the "top legislators," such as California, Virginia, and Utah. However, there was a marked increase in the number of states who enacted only 1, 2, or 3 laws related to immigration. Many of the states that were in the "mid" range in 2011 with respect amount of laws enacted dropped to the "low" range in 2012, and many of those in the "mid" to "high" range were focused more on budgets than on substantive rights. Both the drop in number of immigration legislation and the refocus towards budget issues can be explained by a number of possible factors, including the economic situation among the states as well as the federal government, uncertainty regarding state authority to enforce immigration laws in the wake of the Supreme Court's decision in *Arizona v. United States*, or even the fact that it was an election year, among many other possible factors.

Law enforcement and identification/drivers' licenses were, as in 2011, two of the top issues addressed by state legislatures. Sex offender registration remained a popular topic, but 2012 also saw the introduction of more laws barring restraints on pregnant inmates, including those in immigration detention. Additionally, budget and appropriations laws funding naturalization assistance, refugee aid, and English as a Second Language, among other programs, made up one fourth of the laws enacted in the first half of 2012. Employment issues, specifically E-Verify, remained hot topics, with six states—Alabama, Georgia, Louisiana, Michigan, New Hampshire, and West Virginia—enacting legislation related to employers' use of E-Verify. This brings the total number of states with an E-Verify requirement to 19. (National Conference of State Legislatures, Immigration Policy Project 2012).

The states with the most "positive" immigration-related legislation during the first half of 2012 were Missouri, Virginia, and California. For example, Missouri's S 576 (2012) requires that sponsors of charter schools grant at least 1/3 of its charters to schools that actively recruit high-risk students, a category that includes refugees. Virginia's H 1200 (2012) addresses human trafficking concerns by requiring the adult entertainment business to post notice of the National Human Trafficking Resource Center Hotline to alert potential trafficking victims of the availability of assistance. California's A 1467 (2012) establishes an office of health equity within the state department of public health to reduce health and mental health disparities in vulnerable communities, including immigrants and refugees. However, California's A 1470 (2012), enacted the same day as A 1467, establishes a State Department of State Hospitals which would be required to cooperate with the US Bureau of Immigration in arranging for the deportation of aliens who are confined in, admitted, or committed to any state hospital. California illustrates a common principal that must be considered when determining which states are the most "positive," which is that state legislatures sometimes give with one hand and take with the other.

The states with the highest numbers of "negative" legislation during the first half of 2012 were Alabama, Arizona, Georgia, and Louisiana. For example, Alabama's H 121 (2012) allows a spouse of an active duty military to qualify for unemploy-

ment if s/he has voluntarily left a job in order to relocate based on military orders, but specifically disqualifies unlawfully present aliens from receiving these benefits. Arizona's S 1149 (2012) makes it illegal for undocumented aliens to be in possession of a firearm. Georgia's H 868 (2012), in turn, pertains to tax credits for job creation and specifies that eligible full-time employees must either possess a valid Georgia driver's license or state issued identification or submit a notarized affidavit swearing to be a US citizen or lawful permanent resident authorized to work in the United States.

Overall, 2012 saw much fewer numbers of "positive" and "negative" legislation, with most enacted laws falling in the "other" category. The leaders in both the positive and negative immigration-related legislation in 2012 only enacted 4 laws respective to each category, whereas the leaders in those categories in 2011 were closer to 8 or 10 positive or negative laws. As noted before, this is part of a trend in 2012 that saw an increased silence on immigration-related legislation at the state level that can be explained by a multitude of factors, including the economic situation among the states as well as the federal government, uncertainty regarding state authority to enforce immigration laws in the wake of the Supreme Court's decision in *Arizona v. United States*, or even the fact that it was an election year, among others.

4.5 Concluding Observations

This chapter has attempted to explore through various case studies on federalism whether decentralization is good or bad for immigrants. This chapter does not provide a conclusive answer to this question because federal structures help amplify both restrictive as well as inclusive possibilities and trends. There are, however, factors that appear to contribute to the outcomes of immigration federalism that are worth noting. Among these factors is the role of demographic and socio-economic factors, as well as political ones at the local level. A few very interesting studies have documented the genesis of the recent state and local immigration regulation in the United States, for example. The popular and even academic explanation has resorted to demography-based explanations, such as economic stress, wage depression and overcrowding, and the seeming frustration by the localities over federal inaction in the area of immigration enforcement (Rodríguez 2008; Huntington 2008). More recent explanations, based on empirical studies of over 25,000 municipalities and all fifty states, suggest instead that political conditions or party polarization and ethnic nationalism present after 9/11 in the United States presented opportunities for political parties and key policy actors (issue entrepreneurs) to push for certain types of legislation (predominantly anti-immigrant) in the localities that were ripe for this type of legislation. According to these studies, partisanship in the localities-whether heavily Democrat or Republican, provides a statistically stronger relationship in the U.S. for the immigration federalism patters, over demographic factors; namely, Republican heavy localities were more likely to adopt anti-immigrant measures than

democratic-heavy localities (Ramakrishnan 2012; Gulasekaram and Ramakrishan 2012). Much like in the United States, local political realities have also surfaced in Canada, as is the example of Quebec's French nationalism, with immigrants being caught in the middle. Even in these examples, however, not all has been bad for immigrants. While Quebec insists on French-centric immigrants, it has adopted multi-faceted integration policies that have benefitted those who settle in Quebec, while in the United States, plenty of the local politics has also been pro-immigrant.

In other nations, scholars have offered the relevance of demographic and socio-economic factors as extremely important to explain the outcomes of immigration federalism. For example, in contrast to the United States, in Canada, unauthorized immigration is not a problem and low migration to certain areas has been more a problem than too much migration into other areas. As a result, local involvement has prompted increased competition of greater migration at the local levels, albeit with a preference for the highly skilled. The same has been true in Spain, Ireland, and Scotland, nations which have traditionally been more flexible to immigration than their other European counterparts. In fact, in these nations harmonization trends either from the European Union or from the United Kingdom have had the effect of restricting rather than expanding rights for immigrants in great part because local preference for more immigration diverges from the experiences of the majority of other member nations.

The role of political divergence between national and local interests is another significant consideration of the implications of federalism for the rights of immigrants, although here whether the outcome is positive or negative depends very much on the relationship between local and national politics. When the divergence is large, pressures toward harmonization which do not sufficiently account for issues of sovereignty territoriality and regional exclusivity can actually result in some cases in more restrictive immigration policies in the localities or even in the national sphere. Within the EU, for example, pressures toward harmonization, whether with regard of asylum, freedom of movement, or EU citizenship law, have had the dual effect of pushing some nations toward greater restriction (e.g., Ireland, Spain) while opening others to greater flexibilization (Germany). Staffans has identified that the challenges posed by harmonization of asylum law within the EU have been too great because the EU has not sufficiently taken into the account the impact of concepts such as sovereignty, territoriality and regional exclusivity into account (Staffans 2008). Staffans has suggested that a better model for moving forward in areas of deep division between national and central governments is to adopt models of mutual recognition as an inherent process of harmonization approaches. Mutual recognition implies an obligation on the part of Member States of the union to accept, recognize and implement certain decisions made by the sub-national units. In the area of asylum, for example, a good illustration of the use of mutual recognition within the EU is the Dublin regulation, which requires nations not to interfere in an asylum process already begun by another Member State, and the mechanisms for "burden-sharing" implemented by the union within the framework. Staffans agrees that a certain amount of harmonization is necessary for mutual recognition to even be possible at all; however, full-scale harmonization in the absence of a system

of mutual recognition will never be possible if it does not recognize the divergent political forces and interests that would seek to undermine a top-down approach (Staffans 2008).

In the United States, Peter Spiro coined the phrase "the Steam Valve effect" to describe the phenomena that can also result when divergent local pressures explode to yield either more or fewer rights for immigrants at the national level depending on the structural power arrangements that dictate centralized policies: Whether, for example, as in Canada and the EU, with national governments being less a reflection of national policies as much as a contested space of various local interests with a strong preference for devolution and decentralization except in areas of consensus; or as in the U.S., with structures that permit bottom-up pressures brewing at the localities to influence policy making. Of course, in either case, dominant local preferences in the area of immigration law, which can be either more restrictive or more flexible toward immigration, will be the pressures that will explode or be allowed to surface to influence national policies. Within the EU, for example, resistance toward harmonization of more flexible immigration law reflects the fact that this is an arena of policy development that remains a relatively protected space within the EU which is dictated by chosen ministries of the interior and justice. This narrowly-structured inter-governmental lobby has dominated policy-making on immigration at the EU level since the 1980s, which means that the EU simply reflects the emphasis of the localities on exclusion and restriction and the preference of decentralization. Thus, for example, while national ministries of the interior like to push for centralized EU immigration policies within the EU that will lead to greater securitization, these same political actors will insist on sovereignty on issues involving the rights of third party nationals, for example (Schain 2009). In the United States, steam valve pressures least in a few documented instances, has led to the nationalization of the very policies that advocates have challenged as discriminatory at the local level, and then to the devolution of that discriminatory power to states (e.g., federal immigration public benefits restrictions or denial of driver's licenses) (Spiro 1997; Wishnie 2001).

Thus, another important consideration in the outcome of immigration federalism for immigrants is the nature and degree of co-operative federalism that exists between the federal and regional governments. Prof. Rodríguez's argument in favor of a multi-sovereign regime for the successful integration of immigrants (Rodríguez 2008) finds great support in models such as Australia and Canada where co-operative regimes have functioned relatively well to the benefit of immigrants. Both in Australia and Canada, local government's role with regard to the selection of highly-skilled immigration and the implementation of integration programs, largely managed by the localities but with significant federal funds, have produced positive results for immigrants. These coordinate programs are not without flaw (e.g., adverse effects of decentralized economic migrant management in Australia for international students), although the choice for improvement may argue for greater coordination to manage the drawbacks at the federal level rather than abandon altogether a multi-level approach to migration. Belgium and Switzerland serve as examples of how failed leadership and coordination on the part of central government in the

area of immigration has been negative, with divergent outcomes resulting from decentralization in areas where they should be greater standardization, such as asylum and naturalization.

Finally, the role of biding universal human rights law or national constitutional rights cannot be dismissed as a powerful argument in favor of centralization. For example, within the EU, anti-discrimination initiatives have had a positive impact on improving the treatment and lives of immigrants already in residence. Anti-discrimination legislation were given a major push by the Treaty of Amsterdam in two directives of the European Council in 2000, which also obliged all EU countries to constitute commissions that would monitor and act against patters of racial discrimination. Because immigrant communities have been racialized in Europe, the emerging institutions have begun to offer them a measure of recognition and protection. In essence, the EU standards have promoted similar policies for dealing with integration in ways that have expanded the rights of immigrants (Schain 2009). Centralization, however, does not necessarily translate to greater legal rights for immigrants. In the US, federal immigration exceptionalism, as well as the subservient treatment of universal human rights norms, makes this complicated at least until federal immigration exceptionalism as a dominant doctrine is changed (Aldana 2007). Decentralization also need not mean the non-application of human rights law or even potentially greater local rights under sub-national constitutional provisions.

A remaining and extremely important consideration is what, if any lessons, can be gleaned from these comparative analysis on advocacy strategies on behalf of immigrants. A response to this question is highly contextualized and cannot be generalized, as it will be dictated by the factors that influence the outcomes of immigration federalism. By way of example, Professors Ramakrishnan and Gulasekaram, who have concluded that in the United States, political factors more than demographic factors influence immigration federalism, suggest that advocates should pursue, and that courts should follow, equality-based judicial protection on behalf of immigrants, as opposed to structural framework to evaluate the constitutionality of state and local immigration laws (Gulasekara and Ramakrishnan 2012). Interestingly, litigation in the United States to challenge anti-immigrant local legislation has focused principally on preemption arguments; that is, the argument is that only Congress, and not the states, has the power to adopt laws that affect the living conditions of immigrants (Aldana 2009). And yet, at least in the United States, federal constitutional exceptionalism applies to immigration laws, although not to states. This means that an argument for preemption to challenge a local anti-immigration law carries a risk that that very law could be nationalized through the political process and that an argument for preemption could weaken the equality guarantee that is at least available against local laws (Aldana 2007). In the end, given the explosion of local regulation in the US, advocates have preferred to risk the political outcomes at the federal level over a decentralized and robust immigration federalism with mixed and in some cases, terrible results for immigrants. This strategy has had some costs, including the use of similar structural pre-emption challenges employed by anti-immigrant groups to challenge positive legislation (e.g., in-state tuition at the local level).

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Part II
Comparative Perspectives

Chapter 5
Immigration Federalism in Canada: Provincial and Territorial Nominee Programs (PTNPs)

Sasha Baglay and Delphine Nakache

Abstract This chapter focuses on the devolution of selection of economic immigrants in Canada as occurred through the establishment of Provincial and Territorial Nominee programs (PTNPs). While for most of the twentieth century there was one set of federally prescribed and administered selection criteria, since the 1990s, provinces/territories were given an opportunity to develop their own selection requirements and nominate for immigration candidates that were considered of the most benefit for their local needs. This has resulted in great diversity of PTNPs with reportedly more than 50 different provincial/territorial streams and categories that vary not only among themselves, but also compared to federal selection programs. Although this diversity is generally welcomed and PTNPs are considered largely effective in attracting and retaining immigrants, questions arise with respect to both policy coherence and implications for migrants. The latter issue is the primary focus of this chapter. We evaluate the advantages/disadvantages of PTNPs for immigrants by concentrating on three questions: (a) do PTNPs expand immigration opportunities and what applicants (skilled or low-skilled workers) are they likely to benefit the most? (b) is the application process accessible and transparent? (c) is there a clear avenue of redress for applicants rejected by provincial authorities? As we show, PTNPs increase opportunities for skilled applicants—who are also primarily targeted through federal streams—to settle permanently in Canada, and they provide some lower-skilled applicants with a unique access to permanent residency. In that sense, it can be said that PTNPs are working to the benefit of applicants of all skill levels. However, PTNPs come with serious limitations (difficulty navigating these programs, an increased dependence on employers, limited appeal options). Thus, the likely impact of PTNPs on non-citizens is mixed. However, given the increasing importance of PTNPs within the Canadian immigration landscape, more research on the *concrete* costs and benefits of PTNPs for non-citizens is needed.

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5.1 Introduction

Like Australia and the United States, Canada is a "country of immigrants", and it has long maintained a fairly centralized immigration system to pursue immigration as part of its ongoing project of nation-building (Reitz 2005; Spiro 2002). However, Canada has recently experienced the devolution of some powers to sub-national levels in immigrant selection.[1] This trend is most evident through the development of Provincial and Territorial Nominee Programs (PTNPs), which allow sub-national units to select and nominate for immigration candidates that are considered of the most benefit for their local needs. Devolution under PTNPs is occurring in relation to only one area of the immigration process—selection—and with respect to one immigration stream—economic immigrants. This development is consistent with the current orientation of Canadian immigration policy towards efficiency, better response to labour market needs and competitiveness in the international 'race for talent.'

In the past decade, provinces/territories have been given progressively more leeway in how to design their selection programs, how to administer and evaluate these programs and how many nominees to admit. This has resulted in great diversity of PTNP streams, criteria and sizes. Although this diversity is generally welcomed and PTNPs are considered largely effective in attracting and retaining immigrants, there are signs of an emerging federal government's concern over too much devolution and an attempt to establish some federal baseline criteria for all nominees. Thus, the federal government has expressed its willingness to take a closer look at the balance to be struck between the pursuit of efficiency and maintenance of a coherent, long-term-oriented immigration policy. What's more, until recently, there was relatively little policy and academic debate on the costs/benefits and implications of PTNPs. However, a critical scholarship on PTNPs has started to emerge (see Baglay and Nakache 2013). This scholarship, which raises concerns about the impact of PTNPs on immigrants and on the Canadian society as a whole, is an important indication that immigration federalism is no longer viewed as a largely uncontroversial and positive development in Canada.

[1] In the mid 1990s, some Canadian provinces took advantage of the federal government's offer to develop devolved immigration settlement and integration services and agreements. Thus, according to the existing federal/provincial agreements, Manitoba and British Columbia could manage their own language training and jobs programs for newcomers using federal funds. However, in April 2012, the federal government announced that it will resume management of settlement services in British Columbia (effective April 2014) and Manitoba (effective April 2013), noting that "integration of newcomers is a nation-building responsibility". Manitoba Premier delivered a stinging public rebuke in response, claiming the federal government was attempting to destroy a successful program that has brought thousands immigrants immigrants to Manitoba since its inception in the 1990s. Manitoba Immigration Minister also deplored the fact that this "unilateral decision" had been made "without consultation" with the province (Owen 2012).

In this chapter, we provide background on the history of immigration regulation in Canada, factors that have motivated the development of PTNPs, and an overview of these programs' main characteristics. We then evaluate the advantages/disadvantages of PTNPs for immigrants by concentrating on three questions: (a) do PTNPs expand immigration opportunities and what applicants (skilled or low-skilled workers[2]) are they likely to benefit the most? (b) is the application process accessible and transparent? (c) is there a clear avenue of redress for applicants rejected by provincial authorities? As we show, PTNPs increase opportunities for skilled applicants—who are also primarily targeted through federal streams—to settle permanently in Canada, and they provide some lower-skilled applicants with a unique access to permanent residency. In that sense, it can be said that PTNPs are working to the benefit of applicants of all skill levels. However, PTNPs come with serious limitations (difficulty navigating these programs, an increased dependence on employers, limited appeal options). Thus, the likely impact of PTNPs on non-citizens is mixed. However, given the increasing importance of PTNPs within the Canadian immigration landscape, more research on the *concrete* costs and benefits of PTNPs for non-citizens is needed.

5.2 Constitutional Division of Powers Over Immigration

In Canada, immigration is a matter of shared federal-provincial jurisdiction: federal government may regulate immigration "into all or any of the Provinces" and provinces may regulate immigration "in and for the Province" (Constitution Act 1867, s. 95). However, in case of a conflict between a federal and a provincial law, the former prevails.

Provincial role in immigration matters can be observed throughout Canadian history, but its extent has fluctuated over the years. Although pre-Confederation period was characterized by relatively uncontrolled immigration (Mcdonald 1960, p. 90), Nova Scotia, New Brunswick and Lower Canada have implemented certain immigration-related measures such as a head tax, health and quarantine screening (Vineberg 1987, p. 300; Kelley and Trebilcock 1998, pp. 40–50; Kalbach 1970, p. 11). Following Confederation, the first Canadian *Immigration Act* was passed in 1869 (Kelley and Trebilcock 1998, p. 84). The 1874 federal–provincial immigration conference concluded that independent action by provinces was inefficient and decided to vest the federal minister of agriculture with the sole responsibility for immigrant recruitment overseas (Knowles 1992, p. 49). In 1879, the first national policy has identified immigration as one of three prongs for centralized economic and social planning (Gagnon and Iacovino 2007, p. 84).

[2] In Canada, National Occupational Classification (NOC) is a standard that classifies and describes all occupations in the Canadian labour market according to skill types and skill levels: "0" type are senior and middle-management occupations; "A" level are professional occupations; "B" level are technical and skilled trade occupations; and "C" and "D" levels are occupations requiring lower levels of formal training. Low-skill occupations are those defined as requiring skills classified at the NOC C and D levels.

Between World War I and up until mid-1960s provinces remained largely inactive and disinterested in immigration matters (Vineberg 1987, p. 304). At the same time, the role of the federal government was increasing, particularly after World War II when immigration policy became not only a tool of economic development, but also one of nation-building (Hawkins 1988, p. 180). A federal department of Citizenship and Immigration was established in 1950 and new 1952 *Immigration Act* was passed virtually without consultation with the provinces (Hawkins 1988, p. 177–179).

However, since the 1960s Quebec started looking at immigration as a tool to maintain its demographic and cultural distinctiveness within Canada (see Chap. 6 in this book). A series of accords with the federal government gradually gave the province the powers of immigrant selection, reception and integration.[3] Quebec experience not only had a major impact on Canadian federalism in the area of immigration (by creating an asymmetrical system), but also gave incentives to other provinces to follow suit (Kostov 2008).

The 1976 *Immigration Act* created further preconditions for greater provincial involvement in immigration management. The Act gave the Minister of Citizenship and Immigration power to enter into agreements with provinces and envisioned federal–provincial consultations on various immigration issues.[4] Since the 1990s, provinces other than Quebec started to seek roles in immigrant selection when they faced demographic and economic challenges that could not be addressed by the federal immigration program—an issue that will be discussed below. They have entered into agreements with the federal government that allowed for the creation of PTNPs. As a result, there are currently three immigrant selection systems at play in Canada: federal, Quebec and PTNPs.

5.3 Factors Motivating the Development of Immigration Federalism in Canada

Canada's immigration system is comprised of three streams, each corresponding to major program objectives: family ("reuniting families"), economic ("contributing to economic development") and refugee ("protecting refugees"). The devolution of

[3] The first Canada-Québec immigration agreement signed in 1971 allowed Québec to have representatives in Canadian embassies abroad. The 1975 agreement provided that Québec officials could conduct interviews with applicants and make recommendations to visa officers. The 1978 Cullen-Couture agreement gave Québec—where immigration became a particularly hot issue under the separatist government of René Levesque—a right to select immigrants subject only to federal medical, criminality and security checks. At that point, Quebec adopted its own points system, which differed from the federal points system in a number of respects. The most recent 1991 *Canada-Quebec Accord* maintained Quebec's powers of immigrant selection and expanded its authority in the area of reception and integration services (Young 1991).

[4] *Immigration Act*, s. 7, 109(1). The 2002 Immigration and Refugee Protection Act (IRPA) maintained this power in section 8(1).

selection is happening *only* with respect to the economic stream, which accounts for approximately 60 % of the about 250,000 immigrants admitted to Canada each year (CIC 2012a). Economic immigrants include 4 main categories:

- **Skilled workers.** The skilled worker component includes immigrants who meet federal selection criteria that assess the candidate's overall capacity to adapt to Canada's labour market. These criteria take into consideration factors such as education, English or French language abilities, and work experience. The skilled worker component is comprised of the Federal Skilled Worker Program (FSWP), the Canadian Experience Class (CEC) and the Skilled Trades Program (STP). The FSWP stream is assessed under the points system and is open to 3 groups of applicants: (a) persons with work experience in 24 eligible skilled occupations; (b) persons with a job offer from a Canadian employer; (c) international students enrolled or recently graduated from a PhD program in Canada. CEC allows individuals who are already in Canada to transition to permanent residence from within the country. An applicant must have 12 months of full-time work experience in a skilled occupation in Canada within the last 36 months and the required level of language proficiency. STP allows for immigration of skilled tradespeople who have a job offer from a Canadian employer, 2 years of work experience in their occupation and a required level of language proficiency.[5]
- **Business immigrants**. The business immigrant component includes those who invest their money in an approved venture, those who intend to run their own business, or those who intend to be self-employed.
- **Provincial and territorial nominees**. The provincial and territorial nominees are permanent residents designated by a province or territory that have entered into agreements with the Government of Canada to select immigrants who will meet their local economic needs. While these nominees must meet federal health and security admissibility criteria, they are not subject to the skilled worker selection grid.
- **Live-in caregivers**. Live-in caregivers are temporary foreign workers who are granted permanent residence after their participation in the Live-in Caregiver Program. Initially, live-in caregivers must be qualified to provide care for children, sick or elderly people, or persons with a disability. Successful candidates are granted temporary resident status and a work permit and, after 2 years, are eligible to apply for permanent residence.

The patterns of admission under the economic class are changing. The FSWP had traditionally been the major source of admissions in the economic stream, but in the past decade FSWP has decreased from over 70–80 % of the economic stream to 56 % in 2012. Admissions under PTNPs, in contrast, have shown a steady growth from approximately 500 (or 0.9 % of the economic stream) in 1999 to some 40,000 (or 25 % of the economic stream) in 2012 (CIC 2012). CIC plan for 2013–2014 is projecting approximately 35 % of economic admissions under the FSWP and 27 % under PTNPs, further closing the gap between the two programs (CIC 2013). The

[5] This program was launched in 2013 and is limited to 3,000 admissions in the first year.

increase in provincial/territorial nominees, which illustrates a net trend towards devolution of immigrant selection in Canada, is driven by three major factors: (1) pursuit of efficiency of immigration management; (2) the need to respond to diverse regional needs/concerns; and (3) changes to the federal FSWP.

First, the considerations of 'race for talent' and international competitiveness (see Shachar 2006) have created space for allowing states/provinces to set out their own immigrant selection programs, with the underlying idea that they are better equipped to respond to particular local needs and help quicker labour market integration of newcomers (Alboim 2009, p. 5).

Second, settlement patterns in Canada are characterized by uneven distribution of newcomers across the country. Between 1995 and 2008, over 80 % of new arrivals settled in British Columbia, Ontario, and Quebec; 70–75 % of all newcomers settled in Toronto, Montreal and Vancouver (CIC 2009).[6] On the one hand, gravitation of immigrants to major cities is deemed to give advantage to those metropolises, while leaving other regions in shortage of new arrivals. On the other hand, concentration of immigrants puts greater strain on resources and services in major destination areas. In fact, immigrants who live in large cities earn less and face greater challenges in finding work and housing than those living outside the three major urban centres (Frideres 2006; Goyette 2004). Further, research has shown that megacities tend to develop "one size fits all" policies, which are not always flexible enough to accommodate specific needs of minority communities (Collett 2006).

Third, the FSWP has undergone major changes lately. In the past, it allowed for admission of workers in all skilled occupations based on their prospective employability assessed under the points system. However, this approach was criticized as insufficiently linked to the labour market needs (Hawthorne 2006; Reitz 2005). This problem was addressed by: (a) introducing eligibility rules, which limited the pool of those who could apply under FSWP; (b) changes to the points system. Currently, only three groups are eligible to apply under FSWP: persons with experience in listed occupations in demand; skilled workers with a job offer; and international students enrolled in PhD programs in Canada. Under the revised points system, language has become the most important selection factor; points for Canadian work experience have been increased while points for foreign work experience have been reduced; and the emphasis on younger immigrants has become stronger. The overall result of these changes is that fewer skilled workers are eligible to apply under the FSWP and/or qualify under the new points system. Consequently, more individuals may have an incentive to use PTNPs as an alternative pathway to permanent residence.

[6] Although the three provinces continue being major newcomer destinations, more recent settlement patterns started to exhibit some changes. For example, the share of Manitoba, Saskatchewan and Alberta has increased from 9 % of the total annual intake in 2000 to 22 % in 2011. At the same time, the number of newcomers destined for Ontario, Quebec and British Columbia has declined from 89 % in 2000 to 74 % in 2011 (CIC 2012). In the past 5 years, Toronto's share in new admissions has been dropping, while settlement in western cities such as Calgary, Edmonton, Regina and Saskatoon was increasing (Jedwab 2008; CIC 2012).

In addition to the above factors, other current policy trends—increasingly employer-driven admission and growth of two-step immigration—support further expansion of PTNPs. FSWP, CEC and temporary foreign worker programs are mainly employer-driven, requiring either a job offer or Canadian experience in order to apply (Nakache and Kinoshita 2010). Further, unlike in the past, when most candidates applied for permanent residence from abroad, there is an increasing preference for "two-step migration" whereby a person is first admitted on a temporary basis as a student or foreign worker and later on allowed to transition to permanent residence. For example, in 2011, close to 70,000 former temporary residents transitioned to a permanent resident status, a considerable increase from the 42,000 that made the transition in 2002 (CIC 2012). As will be shown below, PTNPs fit both of these trends as they usually make a job offer a precondition for nomination and/or require previous work experience with a local employer. In fact, from 2005 to 2009, between 31 and 54% of the total PTNP principal applicants who received permanent residency were individuals who had been in Canada on a work permit for 4 years. Throughout this period, Ontario (91% in 2009), British Columbia (88% in 2009) and Alberta (83% in 2009) had consistently the highest proportions of these principal applicants (CIC 2011, p. 24, 32). Thus, PTNPs are becoming an integral and long lasting feature of Canadian immigration program—a development that requires close scrutiny of its implications.

5.4 PTNPs: Application Process and Key Features

Provincial and Territorial Nominee Programs (PTNPs) allow provinces and territories to nominate for immigration applicants who would be of economic benefit to them. PTNPs currently exist in nine provinces (except for Quebec, which has a distinct system) and two territories.[7]

Depending on the stream and category, nominee applicants may apply from abroad or within Canada. The application process involves two steps: (1) potential immigrants submit applications to a given province/territory; those who meet the provincial/territorial selection criteria are nominated for immigration by provincial/territorial authorities; (2) the federal department—Citizenship and Immigration Canada (CIC)—conducts security, criminality and health checks and makes a final decision on whether to issue a visa. Once a successful applicant has been issued a

[7] Agreement for Canada-British Columbia Co-Operation on Immigration (April 5, 2004), Annex C: Provincial Nominees, s. 3.1–3.15, Canada-Manitoba Immigration Agreement (June 2003), Annex B Provincial Nominees, ss. 5.1–5.15; The Canada-Ontario Immigration Agreement (November 21, 2005), Annex C Pilot Provincial Nominee Program, ss. 4.1–4.15; Canada-New Brunswick Agreement on Provincial Nominees (January 2005), ss. 5.1–5.15, 6.1–6.2; Canada-Nova Scotia Agreement on Provincial Nominees (27 August 2002). Ss. 4.1–4.12; Agreement for Canada-Prince Edward Island Co-operation on Immigration, Annex A—Provincial Nominees, ss. 2.1–2.8; Annex A—PNP, SK, ss. 4.1–4.14; Agreement for Canada-Alberta Cooperation on Immigration (May 11, 2007), Annex A: provincial nominees, ss. 5.1–5.15.

visa and has presented the visa at a Canadian port of entry (or at a CIC office in Canada if the applicant is already in Canada and has a valid temporary resident status), the individual is granted his/her permanent residence status (IRPR 2002, s. 71, 87).

In the absence of a national framework for PTNPs or common baseline requirements (except for those regarding inadmissibility at the federal level[8]), Canada is characterized by a high level of decentralization of immigrant selection. Most federal—provincial agreements on immigration are of indefinite duration and do not contain annual caps on nominee admissions. In addition, PTNP agreements do not require provinces or territories to obtain CIC's approval when they create new PTNP streams; they are required only to inform CIC. The language of PTNPs also indicates that these programs are designed for the province/territory to occupy maximum jurisdictional space. The Canada-Ontario Agreement, for example, recognizes that "Ontario is best positioned to determine the specific needs of the province vis-à-vis immigration" (2005, s. 1.1.). As a result, there are currently more than 50 different streams and categories under various PTNPs (CIC 2011, p. 15), each with its own selection criteria developed according to the specific interests of the province or territory—often not only to address specific labor needs, but also to achieve broader objectives of population growth and socio-economic development (see Table 5.1). These varying scopes of PTNPs create different dynamics among PTNPs themselves and between PTNPs and federal economic streams, at times projecting a similar approach to selection, while at other times, competing or conflicting with each other (for more see Baglay 2012).

Manitoba, New Brunswick and Ontario are illustrative examples of this diversity, as each nominee program was established for different reasons and has different design and size.[9] PNPs in Manitoba and New Brunswick reflect the original reasons why PTNPs were developed, namely due to demographic and labour shortages that could not be addressed through federal immigration programs. In both provinces PNPs have become major sources of immigrants, although their approaches to selection are somewhat different. In contrast, Ontario as a major destination for newcomers under the federal programs has not experienced similar challenges and hence keeps its PNP small and narrowly focused on skilled workers (Tables 5.2 and 5.3).

As the first province to implement a nominee program (in 1998), **Manitoba's** interest in a PNP can be explained by at least two major factors: (1) particular labour market needs that could not be addressed through the federal immigration programs (Leo and August 2009, p. 496); (2) socio-demographic challenges: slow population growth, low newcomer arrivals, outmigration, and high concentration of new arrivals in Winnipeg (Carter et al. 2008, p. 167). Manitoba has successfully

[8] Inadmissibility refers to circumstances that preclude a person's admission to Canada on a temporary or permanent basis. Among the grounds of inadmissibility are: criminality, serious criminality, organized criminality, security, international and human rights violations, health, financial, misrepresentation, non-compliance with the IRPA and inadmissible family member. IRPA, ss. 34–42.

[9] In this section, we discuss only worker nomination streams, although most PTNPs also seek to attract businesspersons who can either invest in local economy or establish their own new businesses.

Table 5.1 Nomination streams under PTNPs. (Source: Based on information from PTNP websites (current as of May 2013))

	Skilled worker	Business	Family connection	International graduate	Worker in some NOC skill level C and D
Newfoundland	✓	✓		✓	
Nova Scotia	✓[a]	✓[b]	✓[c]		
New Brunswick	✓[d]	✓	✓[e]		
PEI	✓	✓			✓[f]
Ontario	✓	✓		✓	
Manitoba[g]	✓	✓	✓	✓	✓[h]
Saskatchewan	✓	✓	✓	✓	✓
Alberta	✓	✓	✓	✓	✓
British Columbia	✓	✓		✓	✓[i]
Yukon	✓	✓			✓[j]
Northwest Territories	✓	✓			✓

[a]Despite its title 'skilled worker', this stream seems to allow nomination of skilled, semi- and low-skilled workers
[b]In agri-food sector
[c]The Family Business Worker stream assists employers in hiring workers who are close relatives and have the work experience and required skills for positions employers may have been unable to fill with a permanent resident or Canadian citizen. Both skilled and semi-skilled occupation (level C, but not D) are eligible
[d]It also allows nomination in Skill level C, Category 1, 3, 7, 8, 9 ; Skill level D, Category 1, 3, 7, 8, 9 under the skilled worker category with employer support
[e]Skilled worker with family support stream
[f]Truck driver, customer service representative, labourer, food & beverage server and housekeeping attendant
[g]Manitoba allows for nomination of workers of all skill levels
[h]In hospitality sector and long-haul truck drivers only
[i]Select occupations in tourism/hospitality, food processing, and long-haul trucking
[j]It appears nomination in C and D skill levels is possible under the critical impact worker category

used PNP to attract and retain immigrants (Carter 2009). It has the largest PTNP with the broadest selection criteria: 12,342 nominees admitted in 2011, which accounted for approximately 32% of Canada's PTNP intake that year (Manitoba Facts 2011, p. 6). PNP is the main source of immigrants to Manitoba accounting for 77% of all newcomers in 2011 (Manitoba Facts 2011) (see also Tables 5.4 and 5.5). Although applicants to the MPNP may qualify under several specific categories (workers, students, farmers, businessmen), as of June 2013, there were three main paths of nomination for immigration to Manitoba:

1. Currently working in Manitoba: Applications are accepted from temporary migrant workers of all skill levels and international graduates of Manitoba public post-secondary institutions who have been working full-time for at least 6 months and whose employer has offered a full-time, long-term job;

Table 5.2 Canada: FSWP vs PTNP admissions, 2000–2012. (Source: Based on the data from CIC, Facts and Figures)

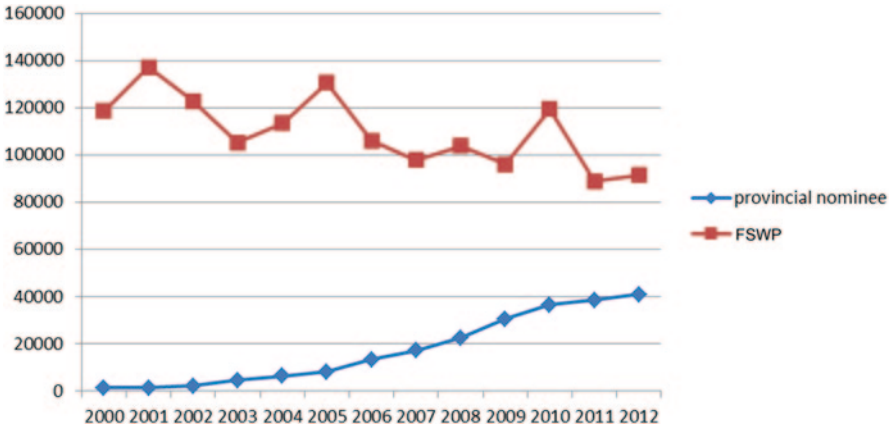

Table 5.3 Ontario PNP statistics. (Source: Statistics provided by Ontario PNP (on file with authors))

	2007	2008	2009	2010	2011	2012	Total
Nomina-tions	50	361	410	839	1,012	1,103	3,775

2. Skilled workers overseas: for applicants who have either studied in Manitoba or worked in Manitoba for at least 6 months in the past. Unlike applicants in the first stream, they also must score sufficient points under provincial points system based on five factors: age, English proficiency, work experience, education and connection to Manitoba.
3. Manitoba support: for persons who can be supported by a friend, distant or close relative.[10] In addition to demonstrating support from a friend or a relative, applicants must meet the provincial points test, have sufficient settlement funds and a settlement plan.

Similarly to Manitoba, **New Brunswick** has experienced declining birth rate, aging population, a significant out-migration to other provinces and decreasing immigration intake (Government of New Brunswick 2007). A provincial task force estimated that in order for the province to be self-sufficient, it needs to increase its population by 100,000 people by 2026 (Government of New Brunswick n.d.). Immigration is one of the important tools in this process with a target of attracting at least 5,000 immigrants annually by 2015, especially under the PNP (Government of New Brunswick n.d.). New Brunswick PNP was launched in 2000 and its nomi-

[10] The following are considered close relatives for the purpose of PNP: sister or brother; aunt or uncle; niece or nephew; mother or father; grandmother or grandfather; first cousin.

Table 5.4 Manitoba PNP statistics. (Source: Based on statistics from CIC, Facts and Figures and Manitoba Facts)

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
Total nominees admitted	418	1,088	972	1,527	3,106	4,048	4,619	6,661	7,687	7,968	10,152	12,177	12,342	n/a	72,765

Table 5.5 New Brunswick PNP statistics. (Source: Statistics provided by New Brunswick PNP (on file with authors))

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total
Total nominees admitted[a]	22	70	105	146	161	438	967	921	1,035	1,167	1,352	1,229	1,310	8,923

[a]Principal applicants and their dependants

nation criteria are substantially similar to Manitoba's PNP. As of June 2013, there were two worker nomination streams:

1. Skilled Worker Applicant with employer support. Although the stream is titled 'skilled worker', it in fact also allows for nomination of some low-skilled workers.[11] Applicants must: be between 22 and 55; have a job offer from a local employer; and score at least 50 on provincial points system.
2. Skilled Worker Applicant with family support also allows for nomination of skilled as well as some low-skilled workers.[12] The applicant must: have close family in the province[13]; be between 22 and 50; have settlement funds; have education for and at least 2 years of work experience within the last 5 years, in the intended occupation; have sufficient knowledge of English or French.

Compared to Manitoba, New Brunswick PNP is small: 1,828 nominees admitted in 2011 (Government of New Brunswick 2011–2012, p. 53). However, it accounted for 93 % of all newcomers to the province in 2011 and, thus, is the principal avenue of immigration.

Ontario was the last province to launch a PNP. Since its beginning in 2007, the program was intended to be small and complementary to admissions under federal programs. In fact, unlike other provinces, Ontario was not actively seeking to create a PNP, but has agreed to do so with incentives from the federal government (Seidle 2010, p. 9).

The annual nomination target is 1,000, which is equal to approximately 1 % of all newcomers to Ontario. Only in the last 2 years, the nomination targets have actually been filled and even slightly exceeded (see Table 5.3). OPNP focuses on skilled and highly educated only:

1. General nomination stream is for skilled workers who have at least 2 years of work experience in their occupation and a permanent full-time job offer from a local employer. Prior to extending job offers to foreign nationals for the purposes of nomination, employers must apply for approval of those positions by Opportunities Ontario.
2. The *international student* category consists of:

    a. international PhD stream—for graduates from publicly funded Ontario universities; applicants do not even need to have a job offer from a local employer;
    b. international Master's graduates must meet the following requirements: graduated from a Master's program at a publicly funded university in Ontario; have resided in Ontario for at least 1 year in the past 2 years; are currently

[11] Skill level C, Skill type 1, 3, 7, 8, 9; Skill level D, Skill type 1, 3, 7, 8, 9.

[12] Skill level C, Skill type 1, 3, 7, 8, 9; Skill level D, Skill type 1, 3, 7, 8, 9.

[13] A close family member is a non-dependent child, brother, sister, niece, nephew or grandchild of the Family Supporter. The family supporter needs to meet some requirements such as being employed or running a business for at least 12 consecutive months as of the date the Applicant's immigration application was received by NB PNP.

residing in Ontario; do not have further studies as the main activity in the province; demonstrate high official language proficiency and settlement funds. Applicants do not need to have a job offer from a local employer.

c. international students with job offers stream—for those how have completed at least half of their studies in Canada and have graduated or will be graduating from a publicly funded college or university and have a job offer in a skilled occupation from a local employer.

As can be seen from above, each program reflects a different philosophy of admission and creates varying opportunities for applicants. If we were to arrange the three provincial programs on a continuum from most restrictive to most open, Ontario would represent the most selective model, followed by New Brunswick and ultimately Manitoba. Ontario is exclusively focused on highly educated and skilled and in many respects overlaps with FSWP and CEC. However, in case of Master's and PhD graduates, it seems to depart from the approach prevalent in federal and other provincial programs: applicants do not need to demonstrate actual employability. Thus, while Ontario PNP is highly restrictive due to emphasis on skilled workers, it is very (perhaps even too) flexible in nomination criteria for Master's and PhD students. New Brunswick allows for admission of not only skilled, but also low-skilled workers. It looks for actual employability of nominees as well as recognizes the importance of family connections in settlement and retention. Manitoba has the most open program (relative to other PNPs, CEC and FSWP) allowing for nomination of workers of all skill levels. The nomination streams are designed to recognize various factors that condition successful settlement: actual employability; a combination of applicant's prospective employability and past experience in Manitoba as well as family support.

In January 2012, CIC has made public its first evaluation of PTNPs, concluding that they are effective, but also recommending a number of changes with respect to program design, delivery and accountability (CIC 2011). For example, the report recommended establishing minimum language requirements for all nominees as well as ensuring a stronger link of selection criteria to local labour market needs. In fact, as of July 1, 2012, CIC requires all nominees in low-skilled professions to undergo mandatory language testing. The Minister of Citizenship and Immigration has also raised a concern that in some provinces, PNPs have been used as indirect routes to family reunification—an undesirable duplication of federal family stream.[14] This seems to suggest that, at least from federal perspective, PTNPs should be confined to satisfying mostly local economic and labour needs rather than pursuing broader demographic objectives.

[14] "We have a federal family sponsorship program that reunites families," added Minister Kenney. "This is not the goal of the PNP and we want to work with provinces and territories to ensure that the program is solely focused on supporting economic growth rather than duplicating non-economic federal immigration streams."

News Release—Minister Kenney strengthens economic value of provincial immigration programs. http://www.cic.gc.ca/english/department/media/releases/2012/2012-04-11.asp.

5.5 Impact of PTNPs on non-citizens

In this section, we weight into the costs and benefits of PTNPs for applicants. Three questions inform our discussion:

a. Do PTNPs expand immigration opportunities and what applicants (skilled or low-skilled workers) are they likely to benefit the most?
b. Is the application process accessible and transparent?
c. Is there a clear avenue of redress for rejected applicants?

5.5.1 Do PTNPs Expand Immigration Opportunities and What Applicants (Skilled or Low-Skilled Workers) are They Likely to Benefit the Most?

Canada has traditionally emphasized the immigration of "skilled" workers, providing low-skilled workers with no opportunity to independently immigrate to Canada (Alboim 2009; Shah and Burke 2005). With the recent expansion of two-step immigration processes, this trend has been maintained at the federal level. In other words, federal avenues available for temporary migrant workers for transitioning from temporary to permanent status are again the exclusive preserve of skilled workers (Nakache and D'Aoust 2012). In contrast, PTNPs, while primarily targeting skilled workers,[15] also allow some low-skilled workers who are already working in Canada to transition to permanent residence. Yet, these transition opportunities remain very limited. First, not all PTNPs even contemplate admission of low-skilled workers (e.g., Ontario). Second, where nomination of low-skilled workers is possible, the eligibility is limited to a narrow list of specific industries or occupations and is subject to change, depending on local needs[16] (Nakache and D'Aoust 2012). Third, nominations are usually employer-driven, leading to increased dependence of migrant workers on their employers. To start with, migrant workers of all skill levels who apply under a PTNP have to demonstrate that they have a job offer from a local employer. If there is a change in the employment status of the migrant worker prior to attaining permanent residency (e.g., they lose their job or their temporary work permit expires), the application for permanent residency may be can-

[15] PTNPs have increased opportunities for skilled workers to settle permanently in Canada in the following ways. First, all PTNPs have a nomination stream for skilled workers and in this respect may substantially overlap with federal programs such as FSWP and CEC. Thus, some applicants have an option of choosing between nine PTNPs, an FSWP and/or CEC. Second, PTNPs provide an immigration opportunity for skilled workers who are no longer eligible under FSWP due to eligibility requirements and/or new points system. PTNP streams for skilled workers are usually open to applicants in any skilled occupation.

[16] For example, Alberta seeks to attract workers in trucking, hotel and lodging, food processing and food services industries, while Saskatchewan has a stream for long haul truck driving and hospitality industries.

celled (Nakache and D'Aoust 2012). Low-skilled workers are also often required to have worked for their employer for a certain period of time prior to nomination. Further, employers are sometimes required to undertake specific responsibilities towards nominees in low-skilled occupation. These include facilitating the search for housing at a reasonable cost (see, e.g., Alberta), or providing for English or French training where nominees are not proficient in one of these languages (Nakache and D'Aoust 2012). Thus, an employer holds significant power over the worker in the nomination process, and in the case of low-skilled migrant workers, employers have even greater involvement in many significant aspects of workers' lives. There is a danger that this power may be abused, as temporary migrant workers may feel compelled to put up with abusive practices in order not to jeopardize their chances of nomination. This may be even more so in the case of low-skilled workers who have virtually no opportunity to independently immigrate to Canada, except under PTNPs (Nakache and D'Aoust 2012).

5.5.2 Is the Application Process Accessible and Transparent?

The applicant's ability to benefit from expanded opportunities under PTNPs may be significantly dependent on the accessibility of these programs. At least three considerations inform this issue: (1) is there clear and up-to-date, easily accessible information on PTNPs; (2) are processing procedures transparent; (3) are there additional fees or other costs associated with PTNPs.

Each PTNP has its own website with outline of all streams, selection criteria and application forms. However, the information posted is often confusing and sites are difficult to navigate. There is no single source that links up or compares various PTNPs. Further, given that provinces/territories do not need to consult with the federal government on any PTNP changes and that there is no provincial legislation on PTNPs, selection streams and criteria can change frequently and without notice. As a quick search on various PTNP websites reveals, the level of detail provided on these websites also varies greatly: some sites contain the bare minimum such as the list of application streams, criteria and application forms, while others also provide processing time and relevant immigration statistics.

To add to the confusion and complexity, not all PTNP websites explicitly state that they allow for nomination of low-skilled workers, although in reality such nominations are possible. For example, the Newfoundland and Labrador Nominee Program does not have a selection stream specifically dedicated to low-skilled workers, but, as appears from our previous study of PTNPs, which is based on the results of questionnaires completed by key governmental actors in the administration of PTNPs,[17] the Program does give low-skilled workers opportunities to access permanent residency. If an employer can demonstrate a "critical need" for a worker in

[17] Research questionnaires were completed between May 2010 and September 2010 by nine provinces (Nova Scotia, Prince Edward Island, New Brunswick, Newfoundland and Labrador, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia) as well as the Northwest Territories.

a low-skilled position, such worker can be nominated under the "skilled worker" category. In fact, between April 2007 and May 2010, 9% of principal applicants under Newfoundland PNP were in NOC C occupations, and 9% were in NOC D occupations.[18] How are low-skilled migrant workers made aware that they are eligible to apply through the program if this is not stated anywhere on the PNP website?

Further, there is very little insight into how processing of PTNP application is conducted at provincial level. So far, only Manitoba and Saskatchewan published Policy and Procedural Guidelines on their PNP websites (Government of Manitoba 2008; Government of Saskatchewan 2011). However, even those guidelines are rather brief and do not provide detailed account of how applicant information (e.g., education credentials, employment experience) is to be evaluated and how much discretion decision-makers have in such evaluations. This is in contrast to federal processing where CIC Operational Manuals are available online and can help applicants better understand how specific selection criteria are applied.

The institutional complexity and lack of transparency can increase the overall cost of PTNPs for applicants by necessitating hiring legal representation to assist with the process or due to the time-consuming process of researching and understanding various PTNPs.

Furthermore, the cost increases where a province charges a processing fee. Alberta, Manitoba, Saskatchewan and Nova Scotia do not charge provincial processing fees, but other provinces do: $ 1,500 and $ 2,000 in Ontario (depending on nomination category) (Government of Ontario 2009); $ 550 in British Columbia (Government of British Columbia 2012); $ 250 in New Brunswick and PEI (Government of New Brunswick 2012; Government of PEI 2013), $ 150 in Newfoundland (the fees is for skilled worker category, but there is no fee for international graduates) (Government of Newfoundland and Labrador 2012). These provincial fees are in addition to the processing fees that have to be paid to CIC. This can make PTNPs less accessible, particularly for applicants with lower socio-economic standing.

Finally, provincial/territorial application-processing times vary considerably, including by the nomination stream. For example, as of June 2013 in Alberta, processing of nomination applications was "at least" 1 month for skilled and international graduate streams and "at least" 4 months in semi-skilled category (Government of Alberta, AINP Processing times). In Saskatchewan, nominees in skilled categories can wait up to 6.9 months and those in family referral stream—up to 16.4 months (Government of Saskatchewan, SINP processing time). At the same time, processing for international graduates and semi-skilled workers is done within 3–4 months.

Although the Yukon has a nominee program, the territory declined our invitation to participate in this research project. For more, see: Nakache and D'Aoust 2012.

[18] Newfoundland and Labrador government official, questionnaire response; and follow-up e-mail communication, 26 July 2010 (in Nakache and D'Aoust 2012).

5.5.3 Is There a Clear Avenue of Redress for Rejected Applicants?

PTNP agreements provide that the province/territory is responsible for assessing and nominating the candidates, and that CIC retains the sole authority to grant permanent resident status to the nominee.[19] Thus, two levels of decision-making—provincial and federal—are involved in the PTNP application process. While federal decision-making through CIC has a well-established structure, including clear avenues for review of rejected applications, provincial immigration processing is a relatively new development that represents a steep learning curve for provincial authorities. Newly established PTNPs in particular have been noted to suffer from irregularities, and lack of oversight (Auditor General, Prince Edward Island 2009; Auditor General, Newfoundland and Labrador 2009; Auditor General, Nova Scotia 2008). The first federal evaluation of PTNPs also suggests that provinces/territories apply differing levels of rigour when applying selection criteria (CIC 2011, p. 60). Given these concerns, it is important that there is a clear avenue of redress for those who consider that their applications have been wrongly rejected by a provincial authority.

Although provinces/territories are responsible for the nomination of PTNP applicants, the power of the provinces/territories to make these decisions flows *exclusively* from federal legislation—the *Immigration and Refugee Protection Act* (IRPA). There is no equivalent provincial/territorial legislation for PTNPs. While federal-provincial/territorial agreements are today the *only* source of legislative authority for PTNPs, decisions of PTNP officers are not subject to judicial review by the Federal Court because s. 72 (1) of IRPA and s. 18.1 (3)(a) of the *Federal Courts Act* only deal with decisions of federal decision makers (not decisions of provincial/

[19] For example, the *Canada-Manitoba Immigration Agreement* stipulates, at s. 0.17, "The Parties Hereto agree on the following: (…) b. That Canada will determine national policy objectives and annual plans for the immigration program; it will be responsible for the selection, admission and control of immigrants and temporary residents and refugee claimants (…) c. That Manitoba will advise Canada regarding its annual immigration levels plans; and d. That Manitoba will exercise its responsibilities in the development and implementation of programs; policies and legislation; facilitating promotion and recruitment of immigrants; determination of provincial nominees; and the provision of settlement and integration services as set out in this Agreement." Canada, Citizenship and Immigration Canada, "Canada-Manitoba Immigration Agreement" (June 2003) online: <http://www.cic.gc.ca/english/department/laws-policy/agreements/manitoba/can-man-2003.asp> [CIC, "Canada-Manitoba Agreement"]. Similarly, the *Canada-Ontario Immigration Agreement*, Annex C: Pilot Provincial Nominee program, s. 4.1 provides that "Ontario has the sole and non-transferable responsibility to assess and nominate candidates", while s. 4.7 stipulates that " […] Canada will: (a) exercise the final selection; (b) determine the admissibility of the nominee and his or her dependants with respect to legislative requirements including health, criminality and security; and (c) issue immigrant visas to provincial nominees and accompanying dependants who meet all the admissibility requirements of the IRPA and IRPR." Canada, Citizenship and Immigration Canada, "Canada-Ontario Immigration Agreement" (November 2005) online: <http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/ont-2005-agree.asp>. See also Citizenship and Immigration, "Federal-Provincial/Territorial Agreements", online: CIC <http://www.cic.gc.ca/english/department/laws-policy/agreements/index.asp>.

territorial decision makers).[20] Thus, if an applicant obtains a PTNP nomination at the provincial/territorial level and is subsequently denied permanent residency status by a federal decision maker, the available mechanism is clear: the applicant may apply to the Federal Court for leave to judicially review this refusal.[21] What remains unclear in law, however, is the mechanism by which an applicant dissatisfied by a decision made by provincial/territorial authorities may seek remedial relief (Bellissimo 2011; Diner 2012).

Most provinces provide some form of internal review process for nomination refusals, but these reviews are not statutorily based and should be more properly seen as "reconsideration requests". If an applicant is not satisfied with a nomination decision, he/she may ask for a secondary review. The applicant facing refusal is first asked to write a letter to the responsible authority (a PTNP director or a provincial Minister), explaining the grounds of the request and how the application has been assessed wrongly. Some programs will also allow applicants to provide more information regarding their file (Ontario, Nova Scotia)[22], but others may not (see e.g., Government of Manitoba 2008; Government of Saskatchewan 2011). A reconsideration request must be presented within short periods of time upon refusal, varying from 15 days (Ontario) to 60 days (Manitoba) (Diner 2012). If a candidate remains dissatisfied with the outcome of this reconsideration, a judicial review to the applicable provincial court is the most viable option for the PTNP applicant. However, since the PTNP process is not set out in any provincial/territorial legislation, and given that the power of the provinces/territories to make these decisions flows exclusively from federal legislation, key questions remain unanswered. For example, on which basis could an applicant contest the exercise of discretion by a PTNP decision maker if no legal authority determines its scope? Is it correct to assert that failure from the provincial/territorial decision maker to follow the process and criteria for nomination established by the province/territory would *automatically* trigger review? At the time of writing this book chapter, this very particular legislative structure had not been the subject of examination by case law. It is also

[20] Section 72 (1) of IRPA states: "Judicial review by the Federal Court with respect to any matter—a decision, determination or order made, a measure taken or a question raised—under this Act is commenced by making an application for leave to the Court". This position was further clarified by the Federal Court in *Aulakh v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 212, at para. 4: "I am satisfied that Manitoba's Provincial nominee program is not a "Federal Board commission, or other tribunal" as defined by section 2 (1) of the Federal Court Act. The decision being the subject of the application for leave and judicial review therefore falls outside the jurisdiction of this Honourable Court to judicially review, as established by the Federal Court Act, s.18.1 (3)(a)".

[21] The vast majority of the available jurisprudence with respect to provincial nominees focuses on applicants at this stage in the process (i.e., post nomination), who are seeking redress for permanent residence refusals based on failures to fulfill or comply with legislative requirements, principally of the *Immigration and Refugee Protection Act* (IRPA). For example, an application for permanent residency as a member of the PTNP class may be rejected due to inadmissibility, on grounds such as security (IRPA, s. 34(1)), criminality (IRPA, s. 36(1), health (IRPA, s. 38(1)), or misrepresentations (IRPA, s. 40(1)(a)).For more on this topic, see Bellissimo 2011.

[22] For Nova Scotia, see Nova Scotia Government (2013) at 13. For Ontario, see Diner (2012) at 6.

unclear why there is currently no provincial/territorial legislation dealing with the powers and responsibilities of provinces/territories in the PTNP process, given that, as stated previously, provinces/territories are allowed to legislate in immigration matters. It may be the case that provinces/territories "have opted (…) to manage their PTNPs by means of policy directives in order to maintain flexibility in adjusting [PTNP] programs to changing economic conditions" (CIC 2011, pp. 1–2). Whatever the specific reason, hopefully future litigation will further clarify this issue. It is also to be hoped that future provincial/territorial legislation will be introduced to set out in law the powers and responsibilities of provinces/territories in the PTNP process. This is crucial as the PTNP category continues to expand in scope and numbers year after year.

5.6 Conclusion

The growth of PTNPs in the last decade is a clear example of a more active involvement of provincial/territorial governments in immigrant selection. To put it simply, Canadian provinces and territories have maximized the space in immigrant selection provided to them by federalism. While PTNPs can serve an important purpose in a country as large and diverse as Canada, the rapid expansion of PTNPs without the benefit of common standards and a national framework is both an advantage and a limitation for applicants. On the one hand, PTNPs may offer multiple options for immigration for skilled workers: they have not replaced the federal immigration program but are instead alternative routes for them to obtain permanent resident status. PTNPs may also provide some low-skilled workers with immigration opportunities that do not exist under federal programs (although these opportunities remain very limited). On the other hand, the variety, complexity and changing nature of PTNPs (i.e., each nominee program has its own targets, sub-components, selection criteria, fees, application processes, and timelines, with sometimes no rationale provided for these differences) can make them less accessible for some applicants and can be associated with additional costs, since applicants may need to rely on immigration lawyers and consultants to help them navigate through the maze of immigration programs. Other concerns are associated with issues of transparency, fairness and access to remedies. Thus, the same applicant may have a very different experience and a different outcome, depending under which PNTP he/she applies. A key question that should be addressed in future research on PTNPs is whether it would be in the interest of immigrants to have national standards for PTNPs. The question of what these standards should be and what aspects of selection/processing should be standardized is by no means an easy one. First of all, from the jurisdictional point of view, provinces do have the power to regulate immigration into their territories. Thus, establishment of national standards for PTNPs cannot be done by federal government alone and may be possible only as a result of federal/provincial/territorial negotiations. Second, the leeway that provinces/territories enjoy in PTNP development is of great advantage not only for regions themselves,

but also for migrants who may benefit from more flexible admission requirements. This is particularly evident in case of low-skilled workers who have traditionally been excluded from eligibility for permanent residence under federal programs.

In light of the above, some of the steps that could be taken in a short-term with a view of protecting interests of migrants should be directed at making PTNPs more accessible, transparent and accountable. First, it would be useful to develop a website that provided up-to-date information on all PTNPs and allowed for their easy comparison. Second, development of provincial legislation on PTNPs as well as detailed processing guidelines should be encouraged. Third, provinces/territories need to ensure that appeal mechanisms are available and that periodic auditing of PTNPs is conducted.

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Chapter 6
Implementing Québec Intercultural Policy Through the Selection of Immigrants

France Houle

Abstract One of the most powerful arguments the Province of Quebec has historically put forward to the Federal Government to invest its normative space in the immigration sector was that of a society distinct culturally (language) and institutionally (religion and Civil Code). These two characteristics have been the engine for Constitutional Distribution of Legislative Powers reforms between the two levels of government. Today, one must ask the question whether this argument about the Quebec cultural exception is still the central constitutional issue or if it has been replaced by an economic imperative that has become the driving force behind Quebec's change to its immigration selection grid. The objective of this paper is to show, through a historical description, that the main goal of the Quebec Program to select immigrants is no longer to protect its cultural distinctiveness, but rather to position itself in the development of the knowledge economy.

Keywords Immigrant selection • Integration • Multiculturalism • Interculturalism • Quebec identity

6.1 Introduction

With the Quiet Revolution in Québec, awareness grew among Quebeckers about the strategic importance of immigrants to maintain and develop the unique character of the Province within Canada. A political discourse has emerged concerning how immigration and integration policies can be formulated to serve as instruments to reach this goal. This discourse can be encapsulated as Québec's intercultural policy.

Since the early 1960's, the Province of Québec developed and refined its intercultural policy. Although the concept of interculturalism has not yet formally entered the domain of positive law in Québec (Bouchard 2012)—contrary to the federal concept of multiculturalism which was first developed in the *Canadian Multiculturalism Policy*, 1971, then entrenched in s. 27 of the *Canadian Charter of*

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Rigths and Freedoms and further incorporated into the *Canadian Multiculturalism Act*—I will nonetheless use this concept in this paper. The main reason I justify this choice is that there is a growing consensus among Québec scholars to the effect that *interculturalism* is a neologism which best describes Québec's efforts to use immigration as one of the tools to maintain and promote its status as a distinct society within Canada (Rocher et al. 2007). In this paper intercultural policy, or interculturalism, refers to an ensemble of policy and legal measures undertaken by the Québec government since the 1960's to implement its vision as to how new and native Quebeckers can work together to meet this objective.

This paper is exploratory in nature. In the first part, my aim is to show the links between the developments of Québec's intercultural policy with the immigration selection criteria used by Québec immigration officers since the 1960's. However, the political will of the Québec Government to implement the intercultural policy has waned over time, moving further and further away from the explicit goal of matching immigration inflow with the aims of the policy. Indeed, as I will expose in the second part, the Québec Government moved slowly away from developing an immigration policy chiefly used to protect Québec's distinct society to, rather, developing a policy more clearly aimed at advancing the economy and, in particular, the knowledge economy. In a nutshell, what this paper seeks to achieve is to demonstrate this policy shift through changes in Québec immigration selection grids.

6.2 Protecting Québec Distinctiveness Through Immigration

After the Second World War, the Federal Government increased its level of immigration and was not particularly attentive in selecting French-speaking immigrants for Québec. As a result of this *laissez-faire* policy, the number of immigrants establishing their residency in Québec and choosing English as their principal language to work and live notably increased. This factor, combined with others, in particular socio-economic inequalities between the Francophones and the Anglophones, added to the growing preoccupation amongst French-speaking Quebeckers of being assimilated into the English-speaking Canadian majority (Piché 2011) and contributed, *inter alia*, to the rise of the independence movement in Québec in the 1960's (Piché 2003).

During the three decades that followed, the Federal Government's actions were aimed at countering the separatist movement, either by maintaining a hard line (mostly the Liberal Party) or by employing a flexible approach (mostly the Conservative Party). In Québec, successive governments constructed basic legal structures to provide greater autonomy for the province within Canada (Liberal governments) or to prepare for independence (Parti Québécois). These events shaped Québec's intercultural policy for almost three decades, fueled during most of that time by the rejection of the *Canadian Multicultural Policy*, which was at the heart of Québec's fight to share jurisdiction over immigration with the Federal Government.

In order to guide the reader through the political debate surrounding the multicultural and intercultural policies, it is useful to briefly summarize the main ideas underlying both. Multiculturalism defends two main ideas: (1) The promotion of Canadian citizenship based on the recognition of a cultural pluralism; (2) French and English as the two official languages of Canada. In contrast, interculturalism promotes: (1) Cultural pluralism but with the ultimate goal of developing a common public culture; (2) French as the official language of the Province.

6.3 Québec's Rejection of the Federal Multicultural Policy

To address the fear of separatism, a Royal Commission on Bilingualism and Biculturalism was created in 1963 by the Federal Government. Completed in 1969, the final report recognized that there existed two founding nations in Canada, but recommended that the Federal government integrate all ethnic groups into the Canadian social fabric through a formal recognition that the same rights be guaranteed to all Canadians. In the Royal Commission's aftermath, the Trudeau Government refused to acknowledge the existence of two official cultures. In the eye of this Government, the essence of Canadian identity was cultural pluralism and to ensure its implementation in the Canadian discourse, the *Canadian Multiculturalism Policy* was adopted by the House of Commons in 1971. The adoption of this policy rejected the idea, defended by the French-speaking majority in Québec at the time, that as a founding nation, the cultural distinctiveness of Québec should be protected in the same fashion as its linguistic distinctiveness. The Canadian multicultural policy was deeply criticized in Québec for it was perceived as an instrument of domination in the hands of Anglo-Canadians. For Quebeckers, the long-term effect of this policy would be to reduce the distinct character of Québec to the level of a minority ethnic culture (Leman 1999).

In order to contain ethnocentrism and prevent an identity withdrawal (*repli identitaire*), Québec developed its own policy, the intercultural policy, which consisted of two central ideas: the culture of the majority and the French language, both of which must be protected. These ideas would remain central to Québec's intercultural policy through the years, and they would be considerably enriched with the passage of time.

6.3.1 Protecting the Culture of the Majority

The distinction that there exists a majority culture (us) and minority cultures (them) in Québec had always prevailed in the Province and was defended by successive Québec governments throughout its history. Based on the premise that the Québec Francophone culture constitutes a minority within Canada (and the Americas), but a majority within the Provincial boundaries, the Québec Government believed that its special status could and should be recognized. It is for this very reason that the 1971

Multiculturalism Policy of Canada was held in contempt in Québec, for its core objective was to recognize the equal status of all cultural groups in Canada. This objective gained constitutional status with the adoption of s. 27 of the *Canadian Charter* stating that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage".

As a result of the *Canadian Charter*, the multicultural heritage of Canadians (including the Francophone heritage) could only be preserved and promoted if it did not violate individual rights (Helly 2005). From that point on, Québec governments' ability to foster cultural rights of its majority was going to be severely limited. Save for three collective rights entrenched in the Canadian Constitution (ss. 23, 35 and 93), attempts to guard the culture of a majority within a province would likely be interpreted as an offense against the foundational principle of individual rights protected by the *Canadian Charter*. Québec's legal margin of manoeuvre became more and more constrained. Not only could Québec's attempts to protect its culture be attacked in the courts for violating individual rights but, further, it could be found to be in contradiction with the multicultural interpretive clause. In addition to protecting French language (through the *Charte de la langue française*), the Government of Québec recently tabled Bill 60 known as the *Charte des valeurs québécoises* (http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-60-40-1.html) It provides a thought-provoking example of an attempt to protect the majority's culture in Québec. This proposal, which was made by the actual minority Québec Government formed by the Parti Québécois, is currently being hotly debated not only in the Province of Québec, but elsewhere in Canada. Not long after the proposal was made public, the Federal Government as well as the Federal Liberal and Neo-Democratic parties announced their intention to contest this *Charte des valeurs* in court, arguing *inter alia* that it was against multiculturalism and against the *Canadian Charter of Rights and Freedoms*. On October 17th, 2013, the Québec Human Rights Commission published a commentary on *la Charte des valeurs québécoises* stating that, in its opinion, this *Charte* also violates the *Québec Charter of Rights and Freedoms* [http://www.cdpdj.qc.ca/Publications/Commentaires_orientations_valeurs.pdf].

The individual rights ethic had a profound impact on the way Canadians and Quebeckers started to view their relationship toward one another. One of its manifestations can be seen in the evolution of the Québec's intercultural policy. As noted by D. Juteau (2002), it went from an ethnocentrist policy (1970's), to become a pluralist policy (1980's) and a republican policy (since 1990). If *la Charte des valeurs québécoises* becomes law, it will undoubtedly have an impact on the scope and limits of the intercultural policy. The Québec Government announced that it would table a bill at the end of 2013 or at the beginning of 2014.

The development of Québec's pluralist policy started in 1981 with the release of *Autant de façons d'être Québécois, Plan d'action à l'intention des communautés culturelles*. In this document, the Québec government officially established the principle that a cultural *rapprochement* was at the heart of its policy of diversity (Rocher et al. 2007). The concept of *convergence* was then created to explain the government's view on this matter: it would preserve the distinct character of Québec as a francophone society with a set of coherent laws and policies.

Although Québec urged all its citizens to acknowledge that the Francophone majority is the "principal engine of the Québécois culture", an invitation was given to all the Québec's cultural communities to associate themselves freely to a collective project (Department of Immigration and Cultural Communities 1981). This collective project would aim at building a common public culture distinct from "us" (*nous*) and "them" (*eux*) and based on "otherness" (*l'Autre*) (Winter 2011). It was understood, however, that not all ideas, values and cultural traditions could participate to the building of this new common public culture. The realization of this project would have to be informed by civic values and principles. However, as recent events show, giving life to this ideal is replete with difficulties. Indeed, defining and gaining broad consensus on the content of what could or should constitute a Québec common public culture is a project engendering political divides amongst Québec society. Here again, the project of adopting a *Charte des valeurs québécoises* is a good case in point: What are we talking about when we speak of a common public culture? Do we speak of the culture shared by the majority of Quebeckers? This position is defended by a good number of interculturalists, including Bouchard. However, even among interculturalists there are divisions, shown in particular by the debate between Bouchard and Minister Drainville regarding the scope of the ban on ostentatious religious signs. There are also other interculturalists who are of the view that an intercultural policy should be about defining a common public culture infused by values blending identity and otherness (see the collective who signed the *Manifeste pour un Québec inclusif*, http://quebecinclusif.org/).

In 1990, Québec enriched its intercultural policy with republican values. In *Au Québec pour bâtir ensemble. Énoncé de politique en matière d'immigration et d'intégration*, the government stated that Québec society is founded on common civic values: "Québec is a French-speaking society, a democratic society based on the rule of law and made rich by its diversity. The Québec state and its institutions are secular" (Department of Immigration and Cultural Communities 1990). All Quebeckers (be they part of the majority or of a minority culture) must abide by these republican values. With respect to newcomers, the Department of Immigration working alongside various organizations now offers an information session entitled "Living together in Québec" which regroups workshops on different themes, such as the rule of law, secularism and equality rights (see website http://www.immigration-quebec.gouv.qc.ca/en/settle/information-sessions/objectif-integration.html). Of course, one of the important workshops is on the necessity for newcomers to learn French in order to be able, as citizens, to fully participate in the social, political and economic life of the Province.

6.3.2 Protecting the Language of the Majority

During the 1960's, the Lesage government created a Royal Commission of Inquiry on Education (Parent Commission), which found, *inter alia*, that a vast majority

of new immigrants chose English, rather than French, schools for their children (1963–1964). Thereafter, other initiatives were undertaken to discuss Québec's status with respect to language and culture; among them, a Commission of Inquiry on the Situation of the French Language and Linguistic Rights in Québec, which filed its report in 1973. One year later, the Québec National Assembly adopted the *Official Language Act* (known as Bill 22) which provided, *inter alia*, that English-language public schools would be restricted to children who had sufficient knowledge of English. In 1977, Bill 22 was replaced by the *Charter of the French Language*. Section 73 states the basic rule with respect to the language of education: children may receive instruction in English if one of the parents is a Canadian citizen and received elementary instruction in English in Canada. Thus, the vast majority of children of immigrants are required to be instructed in French.

With respect to adult immigrants, the Québec government offers French language courses on a voluntary basis. But the question whether all immigrants should be compelled to learn French in order to integrate into the French linguistic political community is an issue which is still discussed today. For some scholars and politicians, compelling immigrants to learn French is necessary to perpetuate Québec's distinct society. For others, this goal is neither legitimate, nor legal given the culture of individual rights in which we now live. However, both sides would agree with the proposition that knowledge of French is necessary to integrate into the cultural, social and economic fabric of the Province. As the Department of Immigration and Cultural Communities declared in 1981, the goal of creating a common public culture within Québec cannot be reached, unless it is recognized that sharing a "common language" is a necessary condition to attain this objective. In 2012, the key issue in realizing this necessary condition is one of financial resources. Ensuring French instruction to all immigrants who do not have sufficient knowledge of the language is a costly proposal which is likely beyond Québec's means. This is why Piché insists on the notion of public language (used in commerce, schools and work) which should be the object of an official policy regarding the use of the French language in the public sphere rather than a notion of private language (used at home) and which (private language) be protected as a fundamental right (Piché 2011).

To summarize, multiculturalism supports cultural pluralism. Through this concept, the Federal Government holds the view that all cultures should be treated on an equal footing, and seeks to protect the two official languages of Canada. However, one must recognize that nowadays multiculturalism is evolving and, as Bouchard suggests, it resembles more and more an intercultural policy (Bouchard 2012). By contrast, in its most recent version, the Québec intercultural policy also promotes cultural pluralism, but with the ultimate goal of developing a common public culture (which would, however, be defined through a majoritarian view as the current proposal of a *Charte des valeurs québécoises* clearly suggests). It also seeks to protect French as the official language of the Province. It is in the space between these political ideas that Québec fought with the Federal Government to share jurisdiction over the selection of immigrants.

6.4 Québec's Fight to Share Jurisdiction Over Immigration

Although immigration is a concurrent jurisdiction between Federal and Provincial governments, with paramount Federal powers according to s. 95 of the *Constitution Act* of 1867, it took almost a century before provinces started to exercise some power in this field. And the first province to do so was Québec.

To understand the slow development of shared jurisdiction between the Québec and Federal Governments over the selection of immigrants, one has to come back to the interpretation theory of s. 95 of the Constitution Act which prevailed between 1960 and 1990. Indeed, the interpretation theory was based on the concept of *occupation of the field* which came from the *Nakane* decision (1908):

> It is not possible that there can be two legislative bodies having equal jurisdiction in this matter, and where the Dominion Parliament has entered the field of legislation, they occupy it to the exclusion of Provincial legislation.

Because of this case law, it became virtually impossible to share legal jurisdiction over the selection of immigrants since the Federal level was occupying the whole field and was assumed to be unwilling to retreat. Therefore, the only way for a Province to achieve the goal of sharing jurisdiction in this field was to find leverage to negotiate an agreement with the Federal government. Québec had this leverage. The rise of a strong nationalist movement in Québec starting with the Quiet Revolution (during the 60's), the October crisis and the election of the Parti Québécois (during the 70's) are some of the events which triggered a sentiment that the Federal government ought to show some flexibility to agree to Québec's demands. Amongst other important events, one should note the demographic context. Indeed, the decline in the fertility of French-speaking Quebeckers which threatens the secular demolinguistic equilibrium within Canada (Piché 2003), was also one of the important arguments that Québec made in support of a shared-jurisdiction over immigration.

6.4.1 Negotiating Intergovernmental Agreements

Near the end of 1960, Québec initiated negotiations with the Government of Canada in order to extend Québec's powers to the selection of economic immigrants. In 1971, these negotiations concluded with the Lang-Cloutier Agreement. For Québec, the chief accomplishment was that the Federal Government authorized the presence of orientation officers from the Department of Immigration of Québec in Federal immigration offices outside Canada. These provincial representatives did not operate as recruiting officers. Rather, their functions were limited to the counseling of immigrants that were willing to settle within the Province and to provide information regarding employment openings to those immigrants that were declared

eligible by the federal officers (1971, p. 10). The gains made by Québec with this agreement were minimal. Nevertheless, this growing cooperation between the two levels of government contributed to the Andras-Bienvenue Agreement of 1975.

As specified in the preamble, the Andras-Bienvenue Agreement granted Québec some power in the selection process in order to encourage immigration of French-speaking or potentially French-speaking immigrants who have the ability to integrate rapidly and successfully into Québec society. Specifically, the agreement allowed Québec officers to participate in periodic joint Canada-Québec recruitment trips. Federal Immigration officers were required to take into consideration the opinion of the Province before accepting or rejecting any applicant for immigration to Québec. Still, the real gains were to be achieved after the election of the Parti Québécois in 1976 which pursued two explicit policies regarding the protection of language and culture in Québec. With respect to language, the new government adopted the *Charter of the French language* in 1977 which declared, in its preamble, that French was the language of Government and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business. With respect to culture, the Minister for Cultural Development, Camille Laurin, published a *Cultural Development Policy for Québec* in 1978. The policy included a chapter dedicated to ethnocultural minorities and their connection to Québec's culture. It suggested that the adaptation of minorities depended on their adherence to a set of values shared by the French-speaking majority such as language.

Partly because of the threat that the election of a separatist party represented to the maintenance of the Federation, the Federal Government wanted to prove to Quebeckers that the Federal system was flexible (Kelley and Trebilcock 1998). It decided to explicitly allow provinces to have input into immigration policies in its newly adopted *Immigration Act*. It also enabled the Federal Immigration Minister to "enter into an agreement with any province […] for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs" (s. 109). These new legal measures were quickly followed by the conclusion of a decisive agreement between Québec and the Federal Government.

The Cullen-Couture Agreement (1978) allowed Québec to define its own selection criteria by taking into account the demographic and socio-cultural variables and the employment opportunities of the applicant. Under this agreement, the selection of foreign nationals was the result of a joint decision-making process. In fact, the Provincial Government could elaborate its own selection criteria based on the applicant's capacities to become successfully established in Québec. The applicant was assessed under both Federal and Provincial criteria. However, if an immigrant wanted to settle in Québec, he or she needed prior approval of the Province. The Cullen-Couture Agreement was significant because it allowed the establishment of "a point system for independent immigrants that would work concurrently with the federal system, and that would allow Québec to recruit more Francophone immigrants […]" (Kelley and Trebilcock 1998).

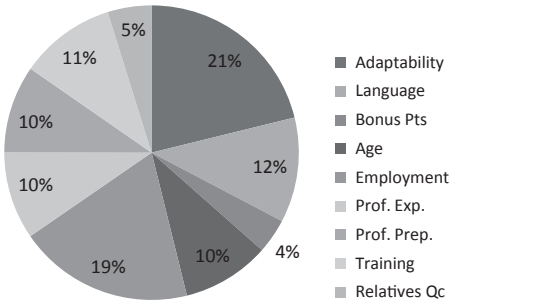
Following the Cullen-Couture Agreement, Québec introduced its own immigration regulations which included a selection grid accompanied by a point system. This regulation enabled the Province to orient its selection of immigrants based on their knowledge of French and their 'cultural ability' to integrate into the culture of

the majority. But it was not enough for the Government of the Parti Québécois for it wanted to have exclusive jurisdiction over the selection of immigrants. Indeed, while the Parti Québécois was putting in place its policies, it was also preparing the first referendum on Quebec's separation from Canada.

In 1980, Quebeckers rejected the separation option on the promise of Prime Minister Trudeau to renew federalism. However, the idea of a renewed Federalism that both parties (Trudeau and Lévesque) had in mind was different. In any event, Prime Minister Trudeau and the Canadian Provinces, to the exclusion of Québec, agreed to, *inter alia*, the adoption of the *Canadian Charter of Rights and Freedoms*, including s. 27 on multiculturalism. It is this event, with the repatriation of the 1867 Constitution, that would be baptized "*La nuit des longs couteaux*" by the Parti Québécois. Federal elections were called in 1984 bringing the Conservative Party to power. Its leader, Brian Mulroney, promised to Quebeckers that there would be a new round of constitutional negotiations should he win. Indeed, he won with a majority of seats in Québec which gave him leverage to negotiate new constitutional terms. In 1987, the Premiers of Canada agreed to the Meech Lake Accord, which included a provision regarding the recognition of Québec as a distinct society and which also constitutionalized the principles of the Cullen-Couture Agreement. Unfortunately, in 1990, two provinces refused to ratify this Accord and, as a consequence, the *Constitution Act, 1982*, could not be amended.

The rejection of the Meech Lake Accord stimulated a significant increase in support for Québec sovereignty and some MP's of Federal Parliament expressed great concerns. Liberal MP André Ouellet urged Prime Minister Mulroney to conclude an agreement to transfer additional immigration power to Québec (Hansard 1990, p. 16091). Prime Minister Mulroney admitted that such an agreement was essential to preserve the national unity (Hansard 1990, p. 16091). In December 1990, Québec and the Federal governments concluded the *Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens* which came into force in April 1991. Under s. 12 of the Accord, Québec had the sole responsibility for the selection of independent immigrants.

The defeat of the Meech Lake Accord was probably not the only reason why the Mulroney Government consented to transfer full jurisdiction to select immigrants to Québec, although it was a significant one. Indeed, one must assume that the Federal Government (the Conservatives at that time) would need support from the Federal opposition party (the Liberals at that time) to make such a profound change in federal-provincial constitutional powers. Therefore, one possible hypothesis as to why this change was agreed by both the Federal Government and the Opposition Party could be that Québec consented to change its intercultural policy to align it with the principles of cultural pluralism and the protection of republican values. In any event, this hypothesis is supported by the timely publication in 1990 of a document by the government of Québec entitled *Let's Build Québec Together: A Policy Statement on Immigration and Integration*. This global policy rejected the idea that immigration was a threat to the durability of the French language and culture and stated explicitly that foreign nationals were contributing to the economic and cultural development of the province. It was the first time that Québec indicated explicitly its adoption of cultural pluralism. Recall that in 1981, Québec merely expressed its openness to this principle.



The percentages are calculated based on the total points which could be accumulated by an applicant with or without a spouse (104 pts).

Fig. 6.1 Point system as established in 1978 by the Province of Québec.

It is also in this 1990 publication that Québec stated that civic republican values were at the center of its project of building a common public culture.

6.4.2 Implementing Interculturalism in the Immigration System

Québec was empowered to establish its own point system by the Cullen-Couture Agreement in 1978. The selection grid which was then developed was comprised of nine basic criteria to evaluate the capacity of an applicant to integrate into the social and economic fabric of Québec society: adaptability, language, age, employment, professional experience, professional preparation, training, relatives in Québec. The last criterion was related to the presence of spouse and children and was assessed as bonus points. Of these criteria, two will be more closely examined in this section of the paper, in order to form a clearer view as to how the intercultural policy was implemented in the immigration system. These two criteria are language and adaptability.

Indeed, the criterion pertaining to language is important to examine for an obvious reason. The selection of French-speaking immigrants is the starting point to ensure that immigrants will be able to more rapidly integrate into the Québec cultural majority. With respect to adaptability, Québec immigration officers are asked to examine three core factors since 1978: if an applicant possesses personal attributes, motivation and knowledge of Québec which are deemed adequate and sufficient to successfully immigrate into the Province. In evaluating applicants for their knowledge of French and ability to successfully integrate into the Québec cultural majority, immigration officers were entitled to exercise broad discretionary powers. These powers were notably used to ensure that applicants coming from countries sharing a common Francophone heritage with Québec's cultural majority could be selected despite an otherwise weak application.

In 1978, the Québec Government was empowered to enact its first *Regulation Respecting the Selection of Foreign Nationals* and with it, its first selection grid (Fig. 6.1).

Under this grid, adaptability and language were core elements being assessed during the selection process (see Table 6.1). Immigration officers had, in this regard,

Table 6.1 Selection criteria 1978*

Criteria	Details	Method of calculation	Max. pts
1. *Training*	Primary and secondary education successfully completed	Each year of education (1 pts)	**11**
2. *Specific Vocationnal Preparation*	Duration of the training according to Canadian Classification and Dictionary of Occupations	• Under 6 months (2 pts) • 6-12 (4 pts) • to 2 years (6 pts) 1 2 to 4 years (8 pts) 2 4 or more years (10 pts)	**10**
3. *Adaptability (suitability)*	• Personal attributes	Flexibility, sociability, dynamism, initiative, perseverance, self-confidence, perception of reality and maturity (15 pts max.)	**23**
	• Motivation	Motives for emigrating and the reasons he puts forward for his proposed coming to Québec (5 pts max.)	
	• Knowledge of Québec	***3 points maximum for this criteria*** Member of a non-profit association (1 pt) Stayed in Qc 2 weeks within 5 years preceding filing of application (1 pt) Worked or studied in Québec 2 weeks within 5 years prior to application (2 pts)	
4. *Employment*	*Foreign nationals who have assured employment*	***20 pts***	**20**
	Foreign nationals who do not have assured employment	***0-15 pts*** Depending on the employment opportunities in Québec for persons engaged in the occupation for which the foreign national is qualified and prepared to follow in Québec, such opportunities being determined by taking into account Québec labour market demand	
5. *Professional and vocational experience*	Time spent engaged in the full-time occupation on which the foreign national is assessed under factor 4	½ year (1 pt) 1 year (2 pts) 1½ year (3 pts) 2 years (4 pts) 2½ years (5 pts) 3 years (6 pts) 3½ years (7 pts) 4 years (8 pts) 4½ years (9 pts) 5 or over (10 pts)	**10**
	If applicant does not produce a diploma attesting that he has completed his apprenticeship, the following points are subtracted.	Specific voc. Prep. / Points subtracted 2 / -1 4 / -2 6 / -3 8 / -4 10 / -5	
6. *Age*	The age of the applicant is assessed as follows:	Up to 35 years (10 pts) 36 years (9 pts) 37 years (6 pts) 38 years (4 pts) 39 years (2 pts) 40 years (1 pt)	**10**
7. *Languages*	Knowledge of French – up to 10 pts	French • Comprehension (4 pts) • Verbal skills (3 pts) • Reading skills (2 pts) • Writing skills (1 pt)	**12**
	Knowledge of English – up to 2 pts	English • Comprehension (1 pt) • Verbal skills (1 pt)	
8. *Relative or friend residing in Québec*	Relative or friend lives in the region or locality of settlement	5 points	**5**
	Relative or friend lives elsewhere than the region or locality of settlement	2 points	
9. *Bonus points*	Spouse fluent in French	2 points	**4**
	Spouse capable to engage in an occupation or employment in Québec in which the occupational demand is a least equal to the average.	4 points	
	Children – 12 years or under	• 1 child (1 pt) • 2 children (2 pts) • 3 children (3 pts)	
Total points			**104**

*This table is a reproduction of Annex A of the *Regulation respecting the selection of foreign nationals*, G.O.Q., July 30, 1979, vol. 2, No. 21, at pp. 4155-4159.

powers to exercise broad discretion to determine how well a candidate met these criteria. But most importantly, the cutoff line to be granted a Québec selection certificate was 50 points. Therefore, an immigrant coming from France, Algeria, Morocco or Haiti could accumulate 33 points. The remaining 17 points needed to pass the selection test and be authorized to establish in Québec could easily be accumulated under other criteria such as age (up to 10 points), presence of a relative or friend in Québec

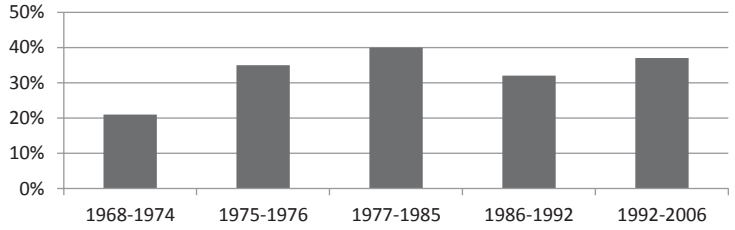


Fig. 6.2 Selection of French speaking immigrants in Québec 1968–2006. (Based on the data gathered by N. Franco from statistics Canada data 2011, pp. 27–28)

(up to 5 points) and some basic education (up to 11 points). Thus, the 1978 Québec grid was beneficial to increase the total number of immigrants who shared cultural and language abilities with the majority as Fig. 6.2.

However, it is equally important to state that an applicant could accumulate 0 points under 'language' and 'adaptability' and still be able to immigrate to Québec. It is crucial to understand that Québec never applied its selection grid so as to exclude people with no Francophone heritage to immigrate in Québec. Indeed, Québec has never been able (nor wanted) to select only immigrants with such a Francophone heritage to reside on its territory. This being said, Fig. 6.2 confirms the positive impact of intergovernmental agreements on the growing number of French-speaking immigrants. Indeed, what this figure shows is that right after the Andras-Bienvenue Agreement of 1975, the recruitment of French-speaking immigrants increased and stabilized around 35–38 % from a lower level of 20 %. In statistics collected by the government of Québec for the years 2007–2011, it is reported that 30.2 % of immigrants come from countries sharing a common Francophone heritage: France, Haiti, Morocco and Algeria (*Portraits statistiques* 2012).

Between 1978 and 1995, this selection grid did not change, but right after the referendum in 1980, the point system did. The Parti Québécois government increased the number of points allocated for the knowledge of French to 15 points and 0 points for the knowledge of English. In addition, the criterion "bonus points" was increased to 8 where 4 points were allocated to a spouse who was fluent in French. In addition to the 22 points allocated to the criterion adaptability, a candidate could accumulate up to 45 points (41 %) for cultural and language abilities and the cutoff line remained at 50 points. This may explain the peak in the selection of French-speaking immigrants to be observed in Fig. 6.2 for the period (1977–1985). It may also explain the sharp decrease for the period 1986–1992. Indeed, the source of French-speaking immigrants was probably not inexhaustible. To form a sharper understanding of these numbers, further research would need to be conducted.

Until 1995, the criteria for selection remained unchanged. Therefore, the coming into force of the Canada-Québec Accord in 1991 did not have a significant and immediate impact on the selection of immigrants. It is only in 1995 that the Québec Government adopted a new selection grid and point system which was far more sophisticated that the 1978 selection grid (see Table 6.2). With the adop-

Table 6.2 Selection criteria 1995* and 2001″

Criteria	Details	Method of calculation		Max pts / criterion	Cut off score	Max. pts
Training	Schooling	a) 11 years (3 pts) b) 12 years (4 pts) c) 13 years (5 pts) d) 14 years (6 pts) e) 15 years (7 pts)	f) 16 years (8 pts) g) 17 years (9 pts) h) 18 years (10 pts) i) 19 years (11 pts)	**11**		**11/ 17 /**
		In 2001 a) Secondary dip. b) 1-year postsecond c) 2-year postsecond d) 3-year postsecond e) 1-year undergrad.U f) 2-year undergrad.U g) 3-year undergrad U. h) 4-year or more Undergrad. U. i) Master's degree j) Doctorate	In 2001 3 4 5 7 7 7 8 9 11 11			**11**
	Second specialty	a) 1 year (1 pt / 2 pts) b) 2 years (2 pts / 4 pts)		**2/ 4**		**4**
	Preferred training	a) University (4 pts / 4 pts) b) Other (2 pts / 4 pts)			**4/4 4**	
Employment						
	2A. Assured employment Permanent full-time employment A or B NOC Worker undertakes to hold employment No labour dispute Hiring not detrimental to Labour Code Exemption of proof of workforce scarcity or reasonable effort to hire by employer	**15 pts / 15 pts**		**15**	**15 / 8**	**15**
	2B. Profession in demand in Québec Meet the conditions of access to the occupation, within the meaning of NOC, to hold employment mentioned in the List of occupations in demand in Québec.	12 pts/ 12 pts		**12**		**12**
	2C. Employability and professional mobility - EPM				**30*****/ Sch. II 8	**7 / 0 or 8**
	(In 2001, this criterion became Schedule II. Therefore, a separate grid was created to evaluate EPR. 6 factors were assessed: 1.Training – 19 points 2.Experience – 5 points 3.Age – 10 points 4.Languages – 13 points 5.Stay in Québec – 6 points 6. Spouse's characteristics – 11 points	2.C.1 Training		**17**	**N/A**	
		2.C.1.1 Schooling	11 years (3 pts) 12 years (4 pts) 13 years (5 pts) 14 years (6 pts) 15 years (7 pts) 16 years (8 pts) 17 years (9 pts) 18 years (10 pts) 19 years (11 pts)	**11 / 11**		
	Applicant without a spouse; factors 1 to 5 applicable; cutoff scores 30 points; max. 56)	2.C.1.2 Second specialty	1 year (1 pt) 2 years (2 pts)	**2**		
	Applicant with a spouse; factors 1 to 6 applicable; cutoff scores 35 points; max. 67)	2.C.1.3 Preferred Training	University (4 pts) Other (2 pts)	**4**		
		2.C.2 Prof. Experience		**5**	**1**	
	A candidate who obtains a total of points equal to or greater than the passing score concerning him shall receive 8 points in factor 2 of Schedule 1; if not, he shall	2.C.2.1 2.C.2.2 2.C.2.3 2.C.2.4 2.C.2.5	6 months (1 pt) 1 year (2 pts) years ½ (3pts) 2years (4 pts) 2years ½ (5pts)			
	receive 0 points.	2.C.2.6 2.C.2.7 2.C.2.8 2.C.2.9 2.C.2.10	3years (5 pts) 3years ½ (5pts) 4years (5pts) 4years ½ (5pts) 5years or more (5pts)			
		2.C.3 Age Up to 23-30 years (10 pts) 31 years (9 pts) 32 years (9 pts) 33 years (9 pts) 34 years (9 pts)	35 years (9 pts) 36 years (4 pts) 37 years (3 pts) 38 years (2 pts) 39 years (1 pts)	**10**	**N/A**	

Table 6.2 (continued)

		2.C.4 Knowledge of languages 2.C.4.1 Comprehension of French (6 pts max) 2.C.4.2 Studies in French (2 pts max.) a)secondary (0) b) postsecondary (2) 2.C.4.3 Comprehension of English (3 pts max.)		**11**	**N/A**	
		2.C.5 Stay in Québec and relationship with Québec 2.C.5.1 Stay in Québec (5 pts max.) a) studies or work (5) b. other stay (2) 2.C.5.2 Relationship with Québec (4 pts max.) a) relative (4) b) friend (2)		**9**	**N/A**	
Experience (Professional and management)	3.1 Professional experience in full-time employment	½ year (1 pt) 1 year (2 pts) 1½ year (3 pts) 2 years (4 pts) 2½ years (5 pts)	3 years (6 pts) 3½ years (7 pts) 4 years (8 pts) 4½ years (9 pts) 5 years or over (10 pts) (same in 2001)	**10**	**1**	**/10**
	3.2 Management experience (abrogated in 2001)	½ year 1 year 1½ year 2 years 2½ years 3 years	3½ years 4 years 4½ years 5 years 5½ years	6 years 6½ years 7 years 7½ years or more	**N/A**	**N/A**
Adaptability (suitability)					**15****** In 2001, no cutoff	**/31**
	Personal qualities	Flexibility, sociability, dynamism, initiative, perseverance, self-confidence, perception of reality and maturity		**15 / 0-6**		In 2001 6
	Motivation	Motives for emigrating and the reasons he puts forward for his proposed coming to Québec		**5 / 0-2**		2
	Knowledge of Québec	Assessment of his knowledge of Québec, particularly of the labour market, of the conditions prevailing in the occupation he wants to practice, of the living conditions and of the climatic conditions		**2/ 0-2**		2
	Stay in Québec	a)Studies of work (5 pts) b) Other stay (2 pts) In 2001: a.full-time studies/1 semester (4pts) b.full-time studies/2 sem.or more (6pts) c. employment – 3 months min. (4 pts) d. employment – 6 months min. (6 pts) e. training – 3 months min. under bilateral agreement (5 pts) f. . training – 6 months min. under bilateral agreement (6 pts)		**5 /6**		6
	Relationship with Québec	a)Relative (4pts) (spouse, son, daughter, father, mother, brother, sister – 3 pts); grandfather or grandmother – 2) b)Friend (2 pts) (relative or friend – 1 pt)		**3**		**3**
Age	The age of the applicant is assessed as follows:	23-30 years / 20 to 35 (10 pts)	36 years (4 pts /8pts) 37 years (3 pts / 6 pts)			**10**
		31 years (9 pts) 32 years (9 pts) 33 years (9 pts) 34 years (9 pts) 35 years (9 pts)	38 years (2 pts) /4 pts) 39 years (1 pts) / 2 pts) 40 to 45 (1 pt)			
Languages	Knowledge of French	French • Comprehension (6 /8 pts) • Verbal skills (5 / 8 pts) • Reading skills (3 / 0 pts) • Writing skills (1 pt) (Abrogated in 2001) • Studies in French (2 pts max.) (same in 2001) -secondary 0 / 2 -postsecondary 2 (same in 2001)		**17 / 16**	**N/A**	**/23**
	Knowledge of English	English • Comprehension (3 / 0-3 pts) • Verbal skills (3 / 0-3 pts)		**6 / 6**		
Spouse's Characteristics	Training	11 years (2 pts) (secondary/ 2 pts) 13 years (1 pt) (at least 1 year postsecond. Dip./3pts) 16 years (1 pt) (3-year uni. Degree/4 pts) Second specialty		**5**	**N/A**	**17**

Table 6.2 (continued)

		or preferred training (1 pt) (same in 2001)			
	Professional Experience	6 months to 1 year (1 pt) More than 1 year (2 pts)	**2**		
	Age	30 or less (2 pts) (20 à 39/ 2 pts) 31-39 (1 pt) (40 à 45 / 1 pt)	**2**		
	Knowledge of French	Comprehension (3 pts) (0-4 pts) Verbal skills (3 pts) (0-4 pts) Reading skills (1 pt) (0 pt) Writing skills (1 pt) (abrogated)	**8**		
Children	12 years or less 13-17ears	2pts/child (same in 2001) 1 pt/child (same in 2001)		**N/A**	**8**
Financial autonomy capability	Financial resources to fulfill his needs and those of the dependent persons accompanying him.	1month (0 pt) (same in 2001) 2months and more (1 pt) (same in 2001)	**1**	**1**	**1**
Total points	Without Spouse			60/60	**115/106**
	With Spouse			**70/68**	**132/123**

*This table is a reproduction of Schedule A of the *Regulation respecting the weighting applicable to the selection of foreign nationals*, G.O.Q., December, 27, 1995, No. 52, at pp. 3622-3627.

" Schedule 1 of the *Regulation respecting the weighting applicable to the selection of foreign nationals*, G.O.Q., July 4,2001, Vol. 33, No. 27, at pp. 3455-3458.

***If less than 30 points are allocated for those criteria, no point shall be credited for factor 2C; if 30 points or more are allocated, 7 points shall be credited for that factor.

**** If less than 15 points are allocated for those criteria, no point shall be credited for this factor

Legend :

* Items in dark grey are the criteria and points in the selection grid 2001.

tion of this new point system, the government went back to its pre-1981 policy. Indeed, the total percentage of points allocated to language and adaptability was brought back to around 35 % (calculated on 22 points maximum for adaptability, 17 points maximum for fluency in French and 8 points for a Francophone spouse). Since it was still the Parti Québécois which was in power at that time (and given that this government lost its second referendum on separation, but with a very small margin), some other explanation than political would need to be offered to understand this change in Québec's immigration policy. In fact, looking beyond 1995, it appears that a gradual shift occurred in the sense that the implementation of the intercultural policy was no longer a priority. One of the reasons which explain this shift, without necessarily offering a valid justification for it, is the development of the knowledge economy.

6.5 Developing the Knowledge Economy Through Immigration

With the 1990's, globalization would start to have a profound impact on the foundation of economic growth. Knowledge, technology and innovation became the buzz words of the new economy. During that time, nations around the world began to realize how important 'human capital' would become and countries began to compete to attract talent coming from abroad.

In order to supply this new economy with the workers it needed, language and culture would have to partly give way to other factors such as training and work experience. This explains to some extent why Québec completely revamped its se-

lection grid and point system in 1995. As Godin noted, Québec adopted a pragmatic attitude in order to adapt its immigration policy to economic realities. As a result, the list of occupations in demand was made more flexible and the selection grid regulated and systematized the selection of immigrants with a promising profile (Godin 2004). Later, this major policy shift would be implemented by the Federal Government with the coming into force of the new *Immigration and Refugee Protection Act* 2001. But in Québec the race for talent began before 2002.

6.5.1 The Race for Talent

In 1995, the Québec Government approved two separate sets of regulations. The primary regulation is the *Regulation respecting the selection of foreign nationals* (RRSFN) by which the criteria for selection are established, and a secondary regulation, the *Regulation Respecting the Weighting Applicable to the Selection of Foreign Nationals* (RRWASFN) setting the points allocated to each criterion. By separating the two regulations, the goal was to empower future Québec governments to respond more quickly to labour market needs by authorizing them to change solely the points allocated to one or several factors in the secondary regulation. The other major change to this regulatory system was to distinguish the grid applicable to workers and to economic immigrants of the business class: entrepreneurs, investors and self-employed. In this text, it will not be possible to describe the system applicable to the business class due to limited space. Suffice to say that criteria pertaining to culture and language became nearly irrelevant for the candidate of the business class, although some changes were made in the recent years to again enhance linguistic abilities.

With respect to workers, the former selection system was based on occupational demand. Therefore, whether the workers were "skilled" or "unskilled" was not the main evaluation criterion. With the 1995 selection grid, however, the "occupational demand" model was set aside, for it was based on the demand economic model (keynesian economics) rather than supply economic model (neoclassical economics). From a neoclassical perspective, the government's role is to ensure a supply of workers with flexible skills to meet the demand of this new economy in which market has to be as free as possible to determine its orientation and investments decisions and, as a consequence, the workers it needs to develop accordingly. As Minister Boisclair specified in 1997, the new regulation intended to promote versatile skilled workers who could adapt themselves promptly and successfully to labour market changes (Commission permanente de la culture 1997). This policy orientation was implemented particularly through the introduction in 1995 of the new "employability and professional mobility criterion (EPM)".

This new policy orientation based on the "occupational supply" model would characterize immigration policies until around 2006 in Québec and Canada. Thereafter, the pendulum swung back, as a mixed model approach was adopted by Québec through the years whereby equilibrium was sought between "occupational

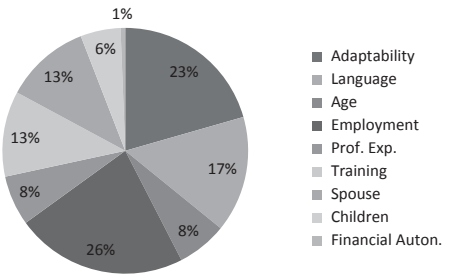


Fig. 6.3 Selection Grid Established in 1995.

The percentages are calculated based on the total points which could be accumulated by an applicant with a spouse (132 pts). The cutoff score is 70pts.

demand" and "occupational supply". Nowadays, one can observe another trend developing through temporary workers programs by which the Federal and Provincial governments partner with national and international corporations to authorize workers to enter Canada on a temporary basis. This new trend resulted in a *de facto* semi-privatization of the selection of workers, a trend that has gradually increased in recent years. The latest indicator of this trend is a Federal initiative announced on December 12, 2012. Indeed, the New Federal Skilled Trades Stream targeting permanent immigration has begun accepting applications on January 2, 2013. This initiative will likely be followed by Québec soon after, but its first development began in 1995. On January 1st, 2013, the Immigration Minister announced further changes in the form of the creation of a new Web-based "Expression of Interest" system to be in place by 2014.

Under the Québec 1995 Selection grid used to select workers, one immediate observation can be formed. That particular year marked a turning point in the selection a particular type of workers: skilled workers, that is to say, workers with a college or university degree (see Table 6.2). Although the concern for the protection of language and culture of the majority of Quebeckers remained, as it represented more or less 35 % of total points which could be accumulated, it also became next to impossible to immigrate to Québec if the applicant was an unskilled worker (Fig. 6.3).

With the 2001 Selection grid, this policy orientation became even clearer (see Table 6.2 highlighted in grey), likely because the Federal government adopted the same policy with the new IRPA and IRPR.

Several changes would be made to the selection grid and points allocated after 2001, but it would be too fastidious to report these in this text. Suffice to say that regulations were progressively designed to identify immigrants who would provide a significant economic benefit to the province. It is through changes in the point system that the needs and constraints of the occupational supply and demand were addressed. Two criteria were considered more carefully. The first is education and training. Points awarded to these were raised from 19 (RRWASFN 2001, schedule I, s. 1) to 29 (RRWASFN 2006, schedule I, s. 1). More importantly, the regulation adds a cutoff score of 2 points for this factor. The second is employability and pro-

fessional mobility. In 2001, this criterion was assessed alone through a specific and separate selection grid and point system (RRWASFN 2001, Schedule II). For an applicant with a spouse, a passing score was 35 points (see Table 6.2). If the passing score was met, the applicant would earn 8 points for this criterion and 0 points if the passing score was not met. With respect to language proficiency, the total of points allocated for the knowledge of French was reduced to 16 in 2006 (RRWASFN 2006, subclass I, s.4). With respect to adaptability, points were also reduced from 10 to 8 points and important factors, such as personal qualities, motivation and knowledge of Québec were removed from the grid entirely.

In sum, from 1978 to 2006, changes brought to the weighting applicable to the selection of foreign nationals illustrate the tensions between cultural and linguistic issues and economic imperatives. Starting 1995, economic imperatives started to prevail over the objectives of protecting the distinct culture and language of the majority of Quebeckers. However, the future will show that although immigrants were very educated, skilled, and experienced, finding employment adapted to their qualifications in Québec (or elsewhere in Canada) proved to be a tremendously difficult hurdle to surmount especially if a skilled worker had none or insufficient knowledge of French (or English). This observation brought governments (Federal and Québec) to re-evaluate their selection policies in this regard.

6.5.2 The Detrimental Effects on Immigrants

By 2011, several studies had already showed that skilled workers selected to reside in Canada including Québec had great difficulty finding a first job. More often than not, these workers accepted positions below their level of qualifications. As a consequence, they were poorer than Canadians with an equivalent amount of expertise (Boudarbat et al. 2010; Alboim et al. 2005).

In Québec, the Auditor General decided in 2010–2011 to conduct a thorough analysis of the efficiency of the Québec skilled workers program. He made numerous findings and exposed a number of problems with this immigration program, in particular, the manner in which the selection grid and point system were applied. He also found that no linguistic tests were dispensed to applicants in order to assess their knowledge of French or English. Indeed, the Immigration Officer had the task to assess the linguistic capabilities of a candidate during the selection interview. As reported by the Auditor General, this discretion was not always appropriately exercised by Immigration Officers. The information contained in their file and pertaining to applicants under the skilled workers program did not always justify the number of points allocated to linguistic proficiency (Auditor General of Québec 2010–2011). As a result, applicants with an insufficient knowledge of either French or English were selected to establish in the province. Outside Québec, other scholars came to similar conclusions. As asserted by Chiswick and Miller, the ability to speak one of Canada's official languages "explains significant differences in the earnings" of immigrants (1999). They found that those who speak neither English

nor French made less than half the earnings of unilingual English speakers. Derwing and Waugh also concluded that official-language skills have an impact on the economic and social integration of foreign nationals (2012).

The Québec Government responded quickly to the Auditor General's report. By December 6, 2011, all new applicants wishing to immigrate in Québec under the skilled worker category must include with their immigration application a document providing their language test results from an organization recognized by the Department of Immigration and Cultural Communities. At the Federal level, ss. 79(1)(2) and 87.1(2)(b) were amended on March 16, 2011 to ensure that skilled workers were also under an obligation to certify their language proficiency (IRPR, SOR/2011-54).

6.6 Conclusion

Testing the French-language proficiency of applicants for immigration is good news. First, it will have positive results on the capacity of newcomers to integrate into the cultural and social fabric of this province, and therefore, enhance the effectiveness of Québec's intercultural policy at least with respect to the promotion of the French language. It will also enhance the capability of immigrants to build networks and, hopefully, also increase their chances to integrate into the labor force more quickly upon their arrival (Derwing and Waugh 2012). However, this factor alone will not solve all the problems faced by immigrants who chose Québec as their residence (or any other province for that matter). Here, the importance of ensuring that a cultural bond is woven between natives and newcomers should not be dismissed under the pretense that it is a private matter. This idea appeared to be implicitly supported by the Multicultural policy in the past. However, as Bouchard showed in his book, this view would not be accurate anymore since this policy has also greatly evolved since its inception (Bouchard 2012). In any event, what this text shows is that there is a need to clarify the scope and the limits of both intercultural and multicultural policies.

I believe that Québec is on the right track when furthering the idea of nurturing the development of a common public culture with the inhabitants of its territory (which should include aboriginal people). However, the question is to which extent this idea can be implemented with respect to newcomers in an immigration policy (and, if yes, how?). Indeed, the idea of a common public culture is to develop and maintain a dialogue between diverse cultural groups sharing different "values, norms, worldviews, interests and ideas" (*Intercultural policies in European cities: Good practice guide* 2010). Therefore, it seems that a common public culture can only be developed and implemented through an integration policy and not an immigration policy. In Europe, actions related to the implementation of intercultural policies occur at the city level. The work of the CLIP network (Cities for Local Integration Policy) is an example. In Québec, the current government chose to develop a provincial policy through a proposed *Charte des valeurs québécoises* which seeks

to define a public common culture for all Quebeckers. This proposal shows however that one of the biggest challenges is precisely to determine the content of this public common culture. If it were to be defined as only containing the protection of language and fundamental values found in the Québec and Canadian Charters of rights and freedoms, very few people would disagree with such a policy (at least in Québec). However, if one wants to go beyond these protections, and the *Charte des valeurs québécoises* represents such an attempt by the banning of all ostentatious religious signs for the public sphere, it then becomes quite problematic to find broad support, especially if one attempts to distinguish between religion and historical patrimony. For example, in the current version of *Charte des valeurs québécoises*, the government proposes to ban ostentatious religious signs, but to keep the crucifix in the Salon Bleu of the National Assembly arguing that it is part of Québec's history and patrimony.

In any case, there is a need to think further about this issue for it is likely that it holds the key to resolving some of the more pressing contemporary problems confronting immigrants. Indeed, much of the contemporary discussions are about systemic discrimination faced by different cultural groups. In order to address these and other important integration issues, a new approach to the intercultural policy could be envisaged in Québec. On this topic, innovative ideas were put forward during a workshop on interculturalism which was held in 2011. As suggested in the synthesis document produced after the workshop, a new iteration of the Québec intercultural policy could include principles regarding the social and economic integration of immigrants. It could further include ideas of best practices for the benefit of Québec industry with respect to, for example, the development of a more inclusive organizational culture or of a corporate image, which would value the needs and the interests of industry to hire immigrants (Nootens and St-Pierre 2011). These types of initiatives would certainly improve awareness among the population that beyond the ethic of fundamental rights and freedoms, there is also a simple humanitarian objective which still needs to penetrate our conscience: that human beings, whether immigrants or not, shall be treated as an end and not as a means to protect the culture of the majority or enhance the economic development of a country.

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Chapter 7
Migration: The Australian Experience

Bob Birrell

Abstract Australia has experienced a massive increase in net overseas migration since the beginning of the mining investment boom in 2003. The Australian Commonwealth Government has dominated the policy changes facilitating this increase. Its focus has been on satisfying employer demands for more workers. It has done this by increasingly outsourcing the selection of skilled migrants to employers. It has opened up both the main permanent entry visa and temporary entry visa subclasses to employer sponsorship. The Australian States have been given a minor role as sponsors of skilled migrants for permanent entry, but only under the strict supervision of the Commonwealth.

Keywords Immigrant selection • Skilled migration • Mining boom • Employer-driven • Politics of immigration

7.1 Introduction

In the Australia Constitution, immigration is designated as a Commonwealth or federal power. Disputes about the jurisdiction of the Commonwealth and the States are never ending, with both jealously guarding their authority. The Commonwealth is not about to concede anything to the States; indeed the trend is towards the Commonwealth increasing its role in areas where the Constitution does not allocate it specific powers. This accretion mainly stems from the Commonwealth's domination of tax revenue, thereby enabling it to trade revenue grants to the states in return for policy influence, such as in areas like education and health.

As would be expected, given this context, the Commonwealth has been reluctant to allow the Australian States and regional authorities a take on a significant role in the management of immigration movements.

Nonetheless, the States and regional authorities do administer some designated state and regional migration programs. However this role is limited in scope by comparison with the role employers now play in determining the scale and characteristics of migration movements. The reasons for this outcome, can only be

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understood in the historical context within which Australia's immigration policy has evolved. After sketching this context the chapter then identifies the major factors shaping the policy since the 1980s. On this basis, developments in the main permanent and temporary entry visa programs are explored.

As we will see, there have been some fundamental reforms to Australian migration policy since the 1980s. These have been largely determined by the Commonwealth Government's commitment during the 1980s to open Australia's economy to the international market place. Subsequent to this decision, the Australian economy has experienced an extraordinary economic boom driven by mining investment. This boom accelerated during the 2000s. It has been accompanied by reforms to the immigration program. These have facilitated a massive increase in the number of temporary and permanent migrants, and as noted, a greater role on the part of employers in selecting these migrants.

The story ends, however, with immigration policy in a state of flux as a consequence of what appears to be the peaking of the mineral investment boom in 2012.

7.2 The Historical Context

Australia is a settler society and as with Canada and the USA there is a predisposition towards an active migration program. This is partly a consequence of a cultural heritage in which successive waves of migrants have been celebrated as nation builders. There is also a build-up of vested interests with a stake in continued migration. Since World War 2 this is most obvious with industries dependent on growth in the domestic market. These include the housing and construction industries and manufacturing, but also a wide array of other influential industries, including the banks and retailers.

However immigration policy is far more politically volatile and contested in Australia than in Canada or the USA. Since the 1970s, public support has been grudging at best, with majorities almost invariably opposed to increases in the intake (Betts 2010).

Asylum seeker policy illustrates the point, a prime example being the Liberal/National party Coalition Government's retention of power at the November 2001 national election. At the time there had been a surge in the number of asylum seekers landing on the Australian coast without authorisation. Their arrival engaged Australia's obligations as a signatory to the International Refugee Convention to assess their claims to be refugees.

In August 2001 alone, some 1,212 arrived. The issue came to a head during August when the Norwegian flagged bulk carrier, the Tampa, picked up 433 asylum seekers from their stricken boat and sought to land them on the Australian territory, Christmas Island. In response, the Coalition Government implemented what came to be known as the 'Pacific solution'. This involved interdicting asylum seeker boats before they reached the Australian coast and transferring them, mainly to Nauru. At this point their asylum cases were heard but without access to Australian

courts should they wish to appeal a negative decision. Those who were recognised as refugees, were (initially) denied the right to locate in Australia. This policy, as well as in a few instances the towing of boats back to international waters, had the effect of virtually stopping further boat arrivals.

The Coalition justified its action by claiming that its measures reflected public concern that asylum seekers were deciding who should become Australians. They were allegedly choosing to join the Australian community without reference to the views of the host community. This stance plugged into one of the strongest threads of Australian nationalism: the notion that Australians constitute a unique community sharing a common identity, and thus have the right to determine who should become a member.

Since the current Labor Government came to office in late 2007 it has been reminded of these public attitudes. In 2008 the new Government abolished the Pacific Solution. It allowed those who made it to an Australian territory (notably Christmas Island) to remain there to have their claims for refugee status processed by the Immigration Department. If these claims were rejected it allowed them to pursue the matter under the protections of Australian law and to take up residence in Australia if their claims were affirmed. As a consequence, the numbers making the boat trip surged again, with some 17,202 arriving in 2012. As in 2001, this surge was accompanied by a public backlash which forced the Labor Government to reinstate the Pacific Solution.

This background also explains why multiculturalism has also been far more controversial in Australia than in Canada. The emergence of a strong ethnic movement in the 1980s was accompanied by the propagation of a form of multiculturalism which advocated that Australia should become an amalgam of separate ethnic communities. There was a strong reaction against such advocacy. (FitzGerald 1988, pp. 11, 31, 59) Partly as a result, ethnic community leaders have lost much of the influence they had in the 1980s in shaping immigration policy—especially on family reunion issues.

One implication of these controversies for immigration policy is that those responsible for managing it have been anxious to convey the impression that the selection process is ‘under control’. This means reassuring the public that those chosen as permanent residents reflect Australian priorities, including that they are prepared to join the Australian community on its own terms.

The task of managing immigration movements has been in the hands of the Commonwealth Immigration Department for almost the entire post-WW2 period. This is an unusual situation which contrasts sharply, for example, with the USA. There, immigration policy is diffused through various committees in the House of Representatives and the Senate as well as within diverse branches of the executive government.

One consequence of this administrative arrangement is that the Australian Immigration Department (currently entitled the Department of Immigration and Citizenship—DIAC) has been relatively free to craft the detailed rules governing migration entry. For example, the oft-changing rules governing Australia’s skilled visa points system (explored below) are normally announced without any preliminary assessment by the Australian Parliament.

Though DIAC is currently a large department, it has to take into account the views of other departments, particularly those that shape economic policy. These are the Department of Prime Minister and Cabinet, the Treasury and the Department of Finance. DIAC's proposals to Cabinet are all mediated by these departments as well as by the bigger strategic issues which shape Cabinet decisions. Cabinet's attitudes on these issues are in turn a product of the larger political setting. All changes to the regulations shaping the various permanent and temporary visa categories, as well as target numbers for the permanent program, have to be approved by Cabinet. DIAC's proposals have to be framed to accommodate the diverse interests represented around the Cabinet table, as well as any big picture political issues—like appeasing the public on asylum seeker policy.

Since immigration issues are frequently in the headlines, the task of managing the immigration intake has proved to be problematic. Australia is a highly attractive destination for those living in low wage countries who wish to migrate temporarily or permanently. As DIAC often complains, one of its dilemmas is that 'there have been many more applications for skilled migration than there are places available in the program' (DIAC 2012, 47).

7.3 The Public Policy Setting Since the 1980s

The 1980s can be read as the last phase of the post-WW2 population building era in Australia. The ends that policy makers had in mind included strengthening Australia's defence capacity and enlarging the domestic market. This was in order to create the scale economies needed for Australian protected manufacturing industries to flourish. The first priority was settlers from the UK who would make Australia their home. If they were skilled so much the better, but this was not the key concern. When interest in moving to Australia from the UK declined the Australian Government recruited people from Southern Europe, most of whom were unskilled.

During the 1980s when interest from Southern Europe also waned, the Australian government turned to Asian sources. By this time the focus was on skilled migrants. However generous family reunion provisions were also extended to siblings, parents and spouses. This stance reflected the growing political influence of Australia's ethnic communities. A welcome mat was laid out. All those granted permanent residence during the 1980s (including family members) could access, on arrival, the full range of labour market and pension benefits available to existing residents.

These arrangements were transformed during the 1990s and 2000s. Beginning in the early 1980s under the Hawke Labor Government, successive commonwealth governments have opened up the Australian economy to the international market place. Amongst the major changes, the Australian dollar was floated in 1983, and tariffs were reduced in the late 1980s and early 1990s to very low levels. In addition, successive governments have instituted a program of micro economic reform designed to maximise market competition within Australia. These measures included the dismantlement of the longstanding centralised wage fixing system in favour of

enterprise bargaining. Australia's welfare system has also been put under the microscope in order to encourage greater participation in the labour market. The objective was to create a leaner, more competitive environment in which (it was hoped) globally competitive enterprises would flourish.

In this context, the arrangements shaping migration policy in the population building era came under critical review. Some economists even argued that, with the mineral boom of the late 1970s (notably coal to Japan), Australia's comparative advantage lay with its commodity industries. Since these were not large employers of labour, it followed that there was no longer any justification for sustained high migration. However such advocacy was trumped by business interests. One prominent argument used by these interests was that, in the new competitive environment, Australia needed a large population base, including of skilled Asians, if it was to sell knowledge intensive goods and services into the growing Asian market place (Garnaut 1989).

From the 1990s, successive governments put more emphasis on the selection of migrants who would best serve Australian interests in the new economic setting. The story falls into three phases: one from the 1980s up to the beginning of the latest mining boom in 2004, the second since the boom got underway until 2011 and the third since mining investment levels appear to have peaked in 2012.

7.4 The Long Reform: Pre Mining Boom

a. Family reunion

The Labor Governments of the late 1980s and early 1990s took some tentative steps to rein in the family reunion program, a move that was intensified by the depth of the economic recession that occurred in the early 1990s. However after the Liberal/National Party Coalition won government in 1996 it took a scythe to the family reunion program. Prior to 1996 the visa subclasses which allowed Australian residents to sponsor their relatives (other than spouses and parents) were separated from those for independent skilled migrants. The Coalition Government incorporated these visa subclasses into one set of skilled, points-tested visas, with siblings and other relatives being given points concessions. But as DIAC tightened the requirements of the points test through the late 1990s and into the 2000s, these concessions were gradually removed.

The rights of residents to sponsor parents and spouses were also curtailed, despite opposition from the ethnic communities. The Hawke Labor Government had introduced a Balance of Family rule in 1989 which prohibited the sponsorship of a parent unless more than half of the children were resident in Australia. In 1997 the Coalition legislated to give the government the power to cap the number of parent visas. Thereafter, the number of parent visas was cut sharply to around 1000 a year. Since 2007 the Labor Government has increased the number of parent visas to 8,000–10,000 a year.

In the case of spouses, attempts to put a cap on the number of visas issued each year failed in the Parliament. However legislation was passed, with Labor support, whereby most spouses (whether in married or de facto relationships) were initially granted 2-year temporary visas. These were converted to permanent entry visas if the partners could subsequently prove that their relationship was 'genuine and continuing'.

In another striking piece of legislation, given the contrast to the welcome mat laid out in the 1980s, the Coalition Government (again with support from the Labor opposition) put a 2-year moratorium on access to unemployment benefits for all new migrants, except those entering under the Humanitarian program. (This subprogram includes migrants granted refugee status.)

b. Skilled permanent migration

By the 1980s there was a greater focus on attracting skilled migrants. They were valued not just because they might fill skilled vacancies but also because, even if there was no immediate vacancy, they would add to Australia's stock of human capital. In the ensuing decades the criteria for selection were toughened, with a much sharper focus on migrants who could actually fill skilled vacancies.

A crucial first step was taken in 1989 when the points test used to filter applicants for skilled visas was restructured. The previous system, which emphasised educational credentials (and other elements of human capital) resembled the current Canadian arrangements. After 1989, an applicant for a permanent entry skilled visa had to possess the credentials necessary for an occupation in Australia at trade level or above. Applicants had to first satisfy the relevant occupational authority that their credentials met this standard and were recognized in Australia. The occupational authorities were generally national in reach, such as the Australian Computer Society in the case of the information technology professions and Engineers Australia in the case of engineers. The Australian states have had no role in this accreditation process.

If an applicant did not possess credentials acceptable to the relevant accrediting authority, the application could not proceed. One consequence was that applicants with generalist degrees as in arts or science, but without any accompanying vocational credential (such as in teaching or accounting), were no longer eligible for selection. It was not enough to be well educated: the education had to be related to job requirements in Australia (Birrell 2003).

Beginning in 1992 the Australian Government gradually increased its English-language requirements for skilled visas. Previously, proficiency in the English language was one of the criteria taken into account, but it relied on self-assessment. Since 1992, all Independent skilled applicants have had to have their English-language skills assessed via a formal English test.

In 1999 the Coalition Government specified that all those seeking a points-tested skilled visa had to attain a minimum standard on the four modules tested for speaking, reading, writing and listening under the International English Language Testing System (IELTS). This minimum was 'vocational' English, or band 5 on the IELTS scale. According to IELTS, those reaching this level have a 'partial command of the

language, coping with overall meaning in most situations, though likely to make many mistakes' (IELTS 2006). The next level up, band 6, is labelled as 'competent' English. Persons at this level are considered capable of managing normal commercial and social relationships. This level is well short of the English standard required by university students in class room situations or by professionals in dialogue with each other or with clients. For this standard, level 7, or 'proficient' English is required. Nevertheless the 1999 ruling was a tentative start on a pathway to much tougher standards (described below). The English language requirements for other visas, including those sponsored by employers or by the States (discussed below) are generally lower than those required for the main points tested visa subclasses.

By the late 1990s the Australian economy had recovered from the recession of the early 1990s. The mineral investment boom, which was to get underway from around 2004 was still to come, but signs of skill shortages were emerging and business interests were agitating for a larger skilled immigration program. At the time, the priority was skills relevant to the so-called 'new economy', particularly in information technology (at least up until the dot.com bust in May 2000). Australia was alleged to be lagging behind other advanced economies in training for such fields.

This advocacy prompted a crucial innovation in Australia's immigration selection system, which was to ramify until the present day. In the early 2000s the Australian government decided to privilege skilled applicants who had come to Australia on student visas and had completed certain degree or diploma courses at Australian universities or vocational colleges. They were given points concessions for the attainment of such qualifications and, unlike all other applicants, the requirement of several years relevant job experience applicable to other applicants was waived. These students were encouraged to apply for permanent resident visas immediately after completing their studies. If they did so within six months of graduation they did not have to leave Australia and apply from offshore locations (as had previously been the case for applicants with Australian credentials).

c. Skilled temporary migration

Beginning in 1996 the rules governing employer sponsorship of migrants under the 457 visa for temporary periods of work of up to 4 years in Australia were transformed. These initiatives reflected the Australian Government's objective to enhance the international competitiveness of Australian based enterprises. Prior to 1996, organisations sponsoring temporary workers had to test the labour market. They had to demonstrate (as through job advertisements) that the job or jobs to be filled had been first offered to Australian residents and that no such suitable residents were available (Kinnaird 1996).

The new rules for 457 visas largely dispensed with labour-market testing (all remaining vestiges of this were removed in 2001). Employers were allowed to sponsor as many migrants on 457 visas as they required, as long as they could establish that the jobs existed and that they were skilled jobs (at trade level or above). In contrast with the credentials assessment required for points-tested migrants described above, it was left to the employer to decide whether the skills of the sponsored

migrant were adequate. The government's rationale was that, if enterprises based in Australia (including multinational enterprises), were to flourish in the global market place, employers had to be free to employ the staff they needed.

7.5 Reform in the Mining Investment Boom Era

From around 2004 Australia's economic revival became supercharged as a mining investment boom, driven by China's surging demand for minerals, got under way. This situation has had a profound impact on immigration policy in Australia.

The mining investment boom sharply increased the level of investment in Australia. It also fed both business and consumer confidence which has been reflected in strong housing and office construction and in related investment in the major metropolises. Australia's economic experience during the 2000s stands apart from that of other developed countries. Real GDP increased throughout the 2000s without the severe downturn that occurred elsewhere at the time of the Global Financial Crisis (GFC). Unemployment fell to near 4% in 2008 and peaked at just short of 6% in 2009. Investment in new mineral projects surged again after 2009 as a consequence of the Chinese Government's decision to initiate a massive economic stimulus package in 2009. This flowed on to renewed growth in demand for and the price of commodities, particularly iron ore. Partly as a result, unemployment in all the states has, since the GFC, fallen to around 5% (Stevens 2012).

Employers involved in the construction phase of the mining boom were begging for workers. They needed to attract construction workers at a time when the demand for such workers was also strong in the major metropolises. It was not until late 2011 and 2012 that Australian workers have had cause for concern about migrant competition for jobs. This removed a major potential restraint on the development of immigration policy.

From the Commonwealth government's point of view, the fear was that the boom could burst if labour shortages undermined the economic viability of the pipeline of resource projects. In this context, DIAC was expected to contribute by augmenting the supply of the required labour. The focus had to be skills targeted to meet employer needs. The result, since 2004, has been a shift in emphasis towards outsourcing the choice of migrants to employers themselves. This has occurred primarily via the 457 visa system, but also through an expanded permanent entry employer sponsorship program. As is explained below, it is in this context that the Australian states and regional authorities have also been given an expanded role in selecting migrants. The rationale was that employers and the states and regional authorities were the best judges of the skills that were needed within their respective jurisdictions.

Various initiatives to this end were put in place after 2004. By 2008 the Australian government was ready to pronounce that employer sponsorship was now at the centre of its immigration policy priorities. According to DIAC:

> The decision to move to a (sponsored) demand driven program in early 2008 was predicated on the philosophy that skilled migrants settle more easily and make the greatest contribution if they are able to come to a job. The decision highlighted a significant and growing mismatch between the skills on offer and those demanded by the Australian labour market (DIAC 2011, p. 28).

This statement incorporates a stark criticism of the flow of skilled migrants 'on offer' from the points-tested permanent visa subclasses. The basis for this harsh judgment will become evident as our account of developments in these subclasses unfolds.

7.6 The Points-tested Permanent Visa Subclasses

As noted, by the early 2000s the selection criteria for the points-tested visa subclasses favoured former overseas students who had completed Australian university or vocational qualifications. These arrangements generated a series of unanticipated consequences.

The number of overseas students enrolled in Australian educational institutions escalated during the 2000s. This escalation turned out to be driven not by the value of the qualifications gained for employment outside Australia, but rather by the opportunities that studying in Australia opened up for participating in the Australian labour market. Most students came from Asia, particularly China and India. For these students employment in Australia promised to deliver vastly greater financial returns than could be obtained at home. As the rules on the points tested visas were tightened the students who were no longer eligible proved to be both tenacious and resourceful in exploring all the visa pathways open to them stay in Australia and work (Baas 2010). These included the permanent and temporary visa subclasses which involved employer or state sponsorship

By 2005, students who completed courses which satisfied the requirements of the relevant occupational assessment authorities were virtually assured of a permanent entry visa under the points tested visa subclasses. By this time the Australian government had made an attempt to target the occupations it wanted to attract migrants for. It established a list of skilled occupations which were judged to be in short supply by the Department Education and Workplace Relations (DEWR). This was entitled the Migration Occupations in Demand List (MODL). A student with a qualification acceptable in one of these occupations could normally expect to be granted a points-tested permanent visa.

DIAC did not anticipate the speed with which universities and Vocational Education and Training (VET) colleges would open up courses which the relevant accrediting authorities would deem to meet the required credentials in the occupation in question. Nor did DIAC anticipate the escalation in the number of overseas students who would enrol in these courses. Almost all Australian universities and VET colleges sought to enter this market. This was because overseas students could be charged high fees and the universities in particular were all struggling to finance

their operations. Australia's regional universities were especially enterprising in this regard. Some set up customised campuses in central Melbourne and Sydney which catered exclusively to overseas students. The focus was on Masters courses in accounting and IT, both of which occupations were listed on the MODL. Students could complete the curriculum required by the accrediting authorities in these two fields within 2 years. Those enrolled in these Masters courses had to have an undergraduate degree qualification (from any country), but it could be in any field. Thus an educational investment covering just 2 years could be converted into a very valuable permanent resident visa.

In the case of VET courses, the focus was on cooking and hairdressing. The accrediting authority (which in this case was a branch of DEWR) deemed that 1 year's full-time training in either of these two fields (with no on-the-job experience) was equivalent to the skills attained by a 3 year apprenticeship in these occupations (which in the past had been the accepted pathway to trade level positions in these occupations). No competency test in cooking or hairdressing was required. DEWR simply accepted the certification of the college conducting the training that these standards had been achieved. Few other trades were open to overseas students because most of the traditional trades in Australia, as with carpentry or metal working, required several years of on-the- job training as an apprentice. The other significant feature of the VET sector was that successive Australian governments had encouraged the entry of private colleges into trade training. The response from entrepreneurs catering for the new overseas student market was extraordinary. Private VET colleges specialising in cooking and hairdressing proliferated.

Commencements in universities by overseas students grew strongly from 65,089 in 2004 to 77,961 in 2008, but they exploded in the VET sector from 32,056 in 2004 to 105,752 in 2008. Most of the latter growth in enrolments was students from India and Nepal, followed by China (Birrell and Perry 2009).

By 2008 around half of all visas granted under the permanent-entry points-tested visa subclasses were granted to former overseas students, with accountancy being by far the largest single occupation. Meanwhile an enormous wave of accounting students within the universities and cooks and hairdressers within the VET colleges were still to complete their courses. DIAC was by this time well aware that these students, too, would be anxious to stay in Australia. If they succeeded this would make a mockery of the government's desire to attract migrants with skills needed by employers. At the same there was a flood of media stories about recently created VET colleges catering to the demand for cooking courses where the motive appeared to be maximising fees from enrolment regardless of the quality of the instruction provided.

There were also concerns about the English-language capacity of the students graduating from the universities. As noted, at the time, the minimum level of English required for the points-tested visa sub classes was 5, or 'functional' English. DIAC did not initially require overseas student applicants to take an English test. Overseas students had to satisfy minimum English standards before being enrolled. In any case, DIAC assumed that, if they had completed a university course, their English should have improved. By living and studying in Australia, so it was expected,

overseas students would acquire the English skills needed for professional roles. When it came to allocating the points for language skills overseas student applicants were deemed to have achieved 'competent' English—or level 6.

Suspicion that some overseas students were not achieving this level prompted DIAC, in mid-2004, to require all overseas students to document their English competence by providing the results of a recent IELTS test. It turned out that a sizeable minority of those being granted permanent-entry visas were poor English speakers with no better than 'vocational' level 5 English (Birrell 2006). This finding prompted much soul searching. How could graduates with such a low level of English competence pass their university exams? How would they fare in accounting and other professional job markets, where capacity to communicate with clients was essential? No satisfactory answers were provided. This prompted radical changes to the selection system. It also contributed to decisions to increase the role of employers and the states in selecting skilled migrants.

7.7 Reforms to the Immigration System Since 2008

Beginning in 2009, the new Labor Government (following DIAC's lead) initiated a series of radical reforms to the points-tested visas subclasses. They were instigated because of the issues just discussed and because the Labor Government had began to worry that the influx of students was contributing to record high levels of Net Overseas Migration (NOM). These numbers were raising concerns about the capacity of Australia's metropolises to cope with their surging populations.

The reforms had to run the gauntlet of some powerful interest groups. By 2009 the export of educational services (generated by the expenditure in Australia of overseas students) was said to have reached some $ 17 billion (for an analysis of doubts about these claims, see Birrell and Smith 2010). This amount was only exceeded by revenue from the export of iron ore and of coal.

Yet DIAC was able to get its reform proposals through Cabinet. This outcome was driven by the damage being done to the integrity of the migration program, the widespread impression that the government was 'losing control' of the program, and the tenuous link between the skills being recruited via the points-tested visas and employer needs. The reforms implemented were momentous.

A new Skilled Occupation List (SOL) was announced in mid-2010 which did not include cooking or hairdressing. Thereafter overseas students with these credentials were no longer eligible for a points-tested visa. In one stroke, the government destroyed the business model of the VET colleges catering to overseas students. The number of student visas issued for VET courses since 2010 has plummeted.

As of mid-2011 a new points-tested visa regime was introduced which diminished the prospects of overseas students graduating from Australian universities being granted a permanent visa. Former students applying from within Australia now normally need at least 1 year's work experience in Australia in their professional or trade field. Though most overseas students can obtain a graduate skill visa which

Table 7.1 Skilled visa outcomes from 2007–2008 to 2010–2011 and planning levels for 2011–2012 to 2012–2013. (Source: DIAC, Includes principal applicants & accompanying family)

	2007–2008	2008–2009	2009–2010	2010–2011	2011–2012	2012–2013
Employer sponsored	23,762	38,026	40,987	44,345	46,000	47,250
Points tested visa subclasses						
Skilled independent	55,891	44,594	37,315	36,167	44,350	45,550
Skilled Australian sponsored	14,579	10,504	3,688	9,117	4,100	4,200
State/Territory sponsored	7,530	14,055	18,889	16,175	24,000	25,650
Total points tested	78,000	69,153	59,892	61,459	72,450	75,400
Business skills	6,565	7,397	6,789	7,796	7,200	7,400

allows them to stay on in Australia for up to 18 months with full work rights after completing their course, most have difficulty finding professional work. This is because employers are reluctant to invest in training a graduate who does not have permanent residence and thus may not stay within their firm.

The minimum English standard under the new system is 6 on the IELTs. But in reality it is higher for most of those with professional occupations. This is because DIAC has encouraged the professional occupation accrediting authorities to increase their English standards. Almost all (though not the Australian Computer Society responsible for accrediting IT graduates) have increased the minimal level of English required to level 7 on the IELTS test. This is a major hurdle for applicants from a non-English-Speaking-Background, especially those from China.

The new system also abolished most of what remained of the concessions granted to residents wishing to sponsor their relatives under the points-tested visa subclasses. The sharp decline in the numbers visaed under the Skilled Australian Sponsored category in 2011–2012 and planned for 2012–2013 shown in Table 7.1 reflects this reform. The only remaining concessions for those sponsored by relatives are for a provisional visa category which requires those sponsored to live in a designated regional area for 2 years after which they can apply for a permanent residence visa (Birrell et al. 2011, p. 22).

Starting from July 2012, a new *Skill Select* system has been introduced, the main innovation being that prospective applicants (including those hoping to be sponsored by a State or Territory) must first lodge with DIAC an *Expression of Interest* detailing their occupation and other qualifications relevant to the points test. The prospective migrant can only proceed to a formal visa application if invited to do so by DIAC, or by a State/Territory Government in the case of State-sponsored visas. The invitation depends on the applicant achieving a minimum number of 60 points on the selection system—with DIAC reserving the right to select those who score the highest points if the number of applicants exceeds the planning target for particular visa subclasses. This innovation also gives DIAC the opportunity to make

its selection in the light of 'the changing needs of the labour market' (DIAC 2012, p. 45).

The Skill Select system was also motivated by DIAC's concern to remove the opportunity for overseas student graduates to obtain a bridging visa to stay and work in Australia while their onshore skilled visa application was finalised. As noted below, the numbers doing so were large. *Skill Select* removes this option. Prospective former student applicants must now leave Australia while they wait for an invitation to apply for a skilled visa.

The net effect of these innovations has been to attenuate the nexus between completing a VET or university course in Australia and access to a points-tested permanent visa. As noted, the consequence for the VET colleges has been catastrophic because of their reliance on students enrolled in cooking and hairdressing courses. The impact on university enrolments has also been severe, because of the sharp contraction in the number of overseas student graduates who can meet the new qualifying standards. By 2011 and 2012 the number of new student visas issued overseas had halved relative to the levels in 2008 and 2009.

Finally, the Government has reduced the share of skilled migrants visaed under the points-tested sub-classes in favour of skilled migrants sponsored by employers and the States. These priorities are reflected in the outcomes for the different skilled components of the immigration program shown in Table 7.1. The number of visas issued for the Employer Sponsored visa subclasses have doubled since 2007–2008. The number of visas issued for the State/Territory Sponsored visa subclasses have tripled, though from a lower base.

But not all has gone to plan. The number of visas issued in the Skilled Independent and the Skilled Australian Sponsored visa subclasses did decline in 2009–2010 and 2010–2011 but, in the case of the former, have increased again in 2011–2012 and 2012–2013.

This outcome is a consequence of the decisions covering transition to the new arrangements for former overseas students. Those who had already applied for a points tested visa but whose applications had not been processed by 2010 were given the right to be evaluated on the rules in place when they applied. Those who were holding a graduate student visa or who had applied for such a visa before 2010 were given a similar concession. There were tens of thousands of such persons. The extra visas issued in 2011–2012 and 2012–2013 reflect the start of the processing of this backlog (Birrell et al. 2011, pp. 23–24). Meanwhile all the students and former students in question have been issued with bridging visas as described above.

The education industry story is not over. The industry has pressed successfully for new concessions. These have been granted in the form of an easing of the requirements for overseas students to establish their bone fides and the amount of money required before a visa will be issued. In addition, from March 2013, all overseas students who graduate with an Australian university degree can stay on for at least 2 years with full work rights. This is more generous than the previous skilled graduate visa which was for 18 months and which required the student to possess the credentials required for an occupation listed on the SOL. However, there have

been no changes to the reforms described above which lessened the connection between an Australian credential and access to a points-tested visa.

7.8 State/Territory Sponsored Visa Subclasses

The Commonwealth began offering the states a role in selecting immigrants in the late 1990s. This was partly in response to vigorous lobbying from states like Victoria, which was anxious to stimulate the local economy through population growth.

However, as Table 7.1 shows, after 2007–2008 the number of permanent entry skilled visas sponsored by the States and Territories expanded rapidly. This reflected the Commonwealth Government's anxiety about providing scarce skills to the industries at the front line of the mineral investment boom. Skilled migrants sponsored by the States and Territory Governments now rank in the DIAC processing priority below employer sponsorships, but above the other points-tested visas discussed above. As noted, the rationale for this priority is that the states were expected to have a good understanding of the skill needs within their jurisdictions.

The selection of these State/Territory sponsored migrants occurs within the *Skill Select* framework described above. Prospective migrants must achieve a minimum of 60 points on the points test. When applying they are required to indicate a preference for State sponsorship and the State they wish to be considered by. The main reason why a prospective migrant would chose the State sponsorship route is that it is a concessionary category. They receive a five or ten point bonus (depending on the visa subclass within the State/Territory suite of visa subclasses). This can be very important for applicants on the margin of selection. The range of occupations eligible is also much wider than is the case for the SOL which determines eligibility for the other points tested visa subclasses.

The incorporation of the State/Territory sponsored program within the *Skill Select* system has led to some tightening of the rules on this visa subclass. They must now meet a minimum English language requirement of 6 on the IELTS test. There has also been a tightening of the numbers and occupations eligible for state sponsorship. States used to be able to sponsor as many migrants as they pleased and in whatever occupations they chose (as long as the occupation was at trade level or above and was listed on the SOL). Beginning in 2010–2011, each State/Territory must negotiate a state migration plan with DIAC, the result of which is that each State or Territory is allocated an annual quota of sponsorships. State/Territory governments are also required to indicate the occupations eligible for sponsorship and to provide target numbers for each of these occupations. The latter are guidelines rather than strict quotas.

There is a degree of politicking in the setting of these quotas, though the Commonwealth is the final arbiter of their size. The South Australia Government continues to receive a relatively high quota (considering its small population and the slow pace of economic growth within the state). By 2012–2013, however, the major sponsoring government was Western Australia (WA). This reflects the extraordinarily

rapid growth in employment in that state (because it is the epicentre of the mineral investment boom) and the keenness of the Commonwealth Government to facilitate the WA Government's desire for a high migrant intake.

Most of those visaed under the State/Territory visa subclasses have been professionals (as has been the case with the other points tested visa subclasses). However there is a wider spread of occupations. This is partly because of the capacity of the States and Territories to decide which prospective migrant to invite and partly because most of those invited have applied from offshore. As a consequence there has been no parallel to the concentration of accountants described earlier in the case of the other points tested visa subclasses.

7.9 Employer Sponsorship

Since 2008 skilled migrants sponsored by employers have been DIAC's number one processing priority. As Table 7.1 shows there has been a strong response from employers with the number of visas issued to sponsored migrants and accompanying family doubling since 2007–2008. Most of those being sponsored are professionals, particularly nurses and engineers. A significant minority have been tradespersons, particularly metalworkers.

The criteria employed in determining eligibility for sponsorship incorporate major concessions relative to the points-tested visa subclasses. The occupations of those sponsored do not have to be listed on the SOL. Almost all trade level and above occupations, including cooks, are eligible for sponsorship. In addition, the minimum English standard is very low—just 'functional' or level 5.

There is no requirement for the sponsoring employer to test the labour market. Employers are regarded as the best judges of whether the migrants possess the skills required. This outsourcing of migrant selection is consistent with the prevailing official ethos that, not only must Australia be open to flows of talent, but also that employers should be free from government constraints in making choices about whom they employ.

The majority of those sponsored for an employer-sponsored permanent visa are already living in Australia, most of whom are already working on a 457 temporary visa. Where this is the case, as long as the migrant has worked for 2 years with the sponsoring employer there is no requirement that the applicant must first achieve a successful assessment of his or her occupational credentials (as is the case for the points- tested visa sub classes). The exception is for registered professions, like medicine and nursing, where accreditation is a condition of employment.

This circumstance means that the characteristics of most of the migrants sponsored for the permanent-entry employer sponsored subclass reflect those of persons sponsored under the 457 visa subclass (see below).

The permanent residence employer nomination program also incorporates a significant regional component which allows employers to sponsor migrants to particular jobs on concessional terms relative to those just described. These concessions

include lower English language standards and more opportunities for the sponsoring of semi-skilled workers. This outcome partly reflects the lobbying from regional interests worried that the mining boom will attract migrants away from regional areas not benefiting from the boom.

The Labor Government's willingness to promote regional migration also reflected debate about the urban quality of life implications of metropolitan population growth. This debated peaked during 2010 when the Government produced a report indicating that Australia's population was likely to grow from 22 million in 2010 to reach 36 million by 2050 with the immigration policy settings then in place (the various perspectives on this debate are explored in Australian Government 2010). The Labor Government has framed its recent promotion of regional migration in the context of public concerns about rapid metropolitan population growth.

The State Governments are not involved in administering this regionally based component of the employer sponsorship program. The only element of devolution of authority to the regions has come in the form of the appointment of local Certifying bodies which advise the Commonwealth Government about the extent of skill shortages in semi-skilled occupations in each (usually sub-state) regional labour market.

7.10 Changes to the 457 Visa Since 2004

The 457 visa subclass has been the most contentious of the Australian government's visa subclasses. The Australian government has sought to promote the visa as part of its policy of outsourcing migrant recruitment of employers.

As noted earlier, migrants can be sponsored for employment on a 457 visa without any requirement for labour market testing. Any employer can sponsor a 457 visa holder regardless of the location of the employer or the occupation, as long as it is classified at trade level or above. The minimum English standard required since 2009 is 5 on the IELTS test.

Employers have responded to the opportunities. The number of 457 visas issued to primary applicants (not including accompanying family) increased from 46,680 in 2006–2007 to 58,050 in 2007–2008. After a downturn during the GFC the number of 457 visas issued surged from 48,080 in 2010–2011 to 68,310 in 2011–2012.

A crucial advantage of the 457 visa regime from the employer's point of view is that the sponsored migrant must stay in the employ of the sponsor or risk losing the visa (unless another employer can be found to provide an alternative sponsorship). Because a high proportion of those holding 457 visas hope to be sponsored by their employer for a permanent-entry employer-sponsored visa, most 457 visa holders have a powerful motive to remain with their initial sponsor.

This aspiration is especially evident among those 457s attracted from Asia. Their share of the program has been increasing, as has the proportion of those sponsored who are already in Australia (around 40%) (DIAC 2013). Their number includes

Table 7.2 Stock of temporary entrants as at 31 December 2009, 2010 and 2011 *by major visa group*. (Source: DIAC, Immigration update; various issues excludes New Zealanders, includes primary and secondary visa holders)

Visa group	2009	2010	2011
Students	324,555	291,199	254,681
Working Holiday Makers	116,805	114,158	130,612
Visitors	365,534	372,147	367,971
457s	119,018	116,012	128,602
Others	112,803	146,171	163,973
Total	1,038,715	1,039,687	1,045,839

thousands of the overseas students marooned in Australia following the reforms to the points-tested visas detailed above.

People on 457 visas who are keen to gain employer sponsorship for a permanent-entry visa are vulnerable to exploitation on the part of employers who may require them to accept pay and conditions below those acceptable to resident workers. DIAC has only limited resources to investigate whether such exploitation is occurring. However there has been widespread publicity of disturbing stories about such conditions. The trade unions have also complained that some employers are using 457 visa holders in preference to resident workers because they give the employer a competitive advantage relative to those employing resident workers.

The Labor Government responded by introducing new rules for the visa in 2009, the most important of which was a requirement that employers must pay the market rate of pay in the industry and occupation in which the 457 visa holder is employed. There is also a minimum rate (currently $ 51,400) which the employer must pay if the market rate is below this level.

7.11 Other Temporary Entrants in Australia

As Table 7.2 shows, by December 2011 there were 130,612 principal applicants holding 457 visas in Australia. This was just a small fraction of the total of 1 million temporary entrants in Australia at this time. As would be expected the number of those on student visas has declined since 2009. However the number holding Working Holiday Makers' visas, visitors' visas and other visas (including former students holding graduate skilled visas or bridging visas pending decisions on their applications for a points tested visa) have increased. Apart from those on visitor's visas almost all these temporary resident visa holders were permitted to work in Australia.

There is not space to provide more detail on the implication of this huge stock of temporary residents on the Australian labour market. Suffice to say that successive Australian Governments have put in place liberal arrangements for these various temporary entry visas. This has been a deliberate policy, consistent with the

priorities which shaped the focus on employer sponsorship, that is, of providing an ample supply of labour during the mining boom era (Birrell and Healy 2012).

7.12 Immigration Policy Since 2011

The economic environment in Australia changed in late 2011. The price of iron ore fell from around US$ 180 a tonne to $ 80 a tonne. It has since risen (to around $ 130 a tonne in 2013). Both thermal and coking coal prices also subsided during this time. The shock in Australia was profound. The pipeline of new mineral projects that had seemed bottomless suddenly truncated because many were no longer viable at the new price levels. As a consequence the expectation of ever increasing demand for construction and mining workers also evaporated.

These events coincided with the fruition of Labor Government plans to allow big mining projects special concessions on the sponsorship of 457 visa holders on what were called Enterprise Migration Agreements (EMAs). These allowed big mining projects to sponsor semi-skilled workers as well as skilled workers.

By 2011 and 2012, the rate of job creation in Australia had slowed sharply relative to the years prior to 2011. Employment in the construction industry across Australia also contracted during this time, making access to the highly paid work available on mining and liquid petroleum projects very appealing. The trade unions representing construction workers seized on this development. They asserted that the welfare of resident workers should be paramount. There followed a tumultuous debate about the merits of allowing employers the freedom to import labour at a time when locals appeared to be available for the work in question. This debate drew in major players, including the peak union body, the Australian Council of Trade Unions (ACTU). The ACTU asserted in a parliamentary submission that:

> The starting point for unions with EMAs is that Australian workers (citizens and permanent residents) must have enforceable first rights to all jobs on major resource projects.

The submission further declared that:

> If major project owners and employers covered by EMAs wish to make use of 457 visa labour and other forms of temporary migration they should first have to demonstrate they have made every possible effort to employ locally to fill vacancies (ACTU 2012, p. 5).

In the face of this advocacy, the newly appointed Minister for Immigration in the Labor Government, Michael O'Connor, announced on 23 February 2013 that the government would reform the 457 visa system. DIAC's compliance and enforcement powers would be beefed up to ensure employers were not abusing the system (as by paying below market rates of pay). As well, employers would henceforth have to 'demonstrate that they are not nominating positions where a genuine shortage does not exist' (O'Connor 2013).

This message was taken up by Julia Gillard, the Labor Prime Minister, in March 2013. She declared in reference to the 457 controversy that Australians should be 'at the front of the queue for available jobs, not at the back'.

7.13 Current Politics of Immigration

As noted at the outset, the public narrative about immigration in Australia supports the expectation of continued high migration. This situation is consistent with Freeman's theory that high immigration is the default position in settler societies where there are powerful vested interests lobbing for it (Freeman 1995). Support within the wider community may be lukewarm (at best) but, especially in an economic boom, few residents are likely to feel directly threatened by migrant competition.

The peaking of the mineral investment boom may change this situation. As noted, there has been a softening of the Australian labour market since 2011, not just in regard to the mineral industry but also across a spectrum of industries vulnerable to international competition (including manufacturing and tourism). Since 2011 the net growth in jobs in Australian has fallen to just over 100,000 a year compared with double that number prior to 2011.

Opinions differ as to whether this is a temporary phenomenon. If it is not, Australia's migration program is vulnerable in part because it has been justified by claims that it is directed towards filling skilled vacancies which cannot be met from resident sources. If residents with the skills being targeted are without work, yet employers continue to sponsor migrants in large numbers, the system may lose legitimacy. This is the moral foundation of the trade union campaign against the 457 visa regime. It appears to have aroused widespread community feeling that the Australian government's first obligation should be to ensure that residents have priority in filling job vacancies.

It is this response that has fuelled the tumultuous public debate that followed the Prime Minister's rhetorical intervention that Australians should be put at the head of the queue rather than migrants sponsored on a 457 visa. Legislation requiring a limited form of labour market testing for 457 visas was passed in the Commonwealth parliament in August 2013 (by which time Labor was being led by Kevin Rudd).

As Julia Gillard was surely aware, once such issues are publicised they may bring into play concerns about the impact of migration on urban quality of life and on the changing ethnic make-up of Australia's population. These are concerns that normally do not have much traction but, if tacked on to the job issue, could mobilise a sizeable constituency.

The response of those anxious to maintain migration at a high level has been to highlight other advantages, including offsetting the ageing of Australia's population, the role of immigrants in promoting demand and thus high aggregate economic growth, and the value of Asian migrants in the enhancement of business linkages with our Asian neighbours (among others). Critics have also been at pains to undermine the legitimacy of the PM's intervention on the grounds that it amounts to dog whistling, that is, communicating in a clandestine way with this wider constituency. She, and her supporters, have, on this account, been accused of xenophobia and racism, including by the media baron Rupert Murdoch (Hannan, and Kelly 2013).

The depth and volatility of this debate suggests that Australia might be entering a new and contested era as regards immigration policy. The historical record (detailed

above in the case of the asylum seeker issue) shows that large numbers of voters can be mobilised on immigration issues. Time will tell.

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Chapter 8
Germany and the Janus Face of Immigration Federalism: Devolution vs. Centralization

Dagmar Soennecken

Abstract What challenges and opportunities has federalism held for countries like Germany, one of Europe's most 'reluctant' states of immigration? Although the formal, constitutional division of powers between the German central government (Bund) and the federal states (Länder) has certainly shaped Germany's response to immigration and integration, federalism is only one aspect of a broader, 'semisovereign' model of governance that has dominated German state-society relations for decades (Katzenstein 1987). This model sees a range of decentralized state actors, among them constantly negotiating with a set of highly centralized societal (or "parapublic") organizations, such as churches, labour and employer associations, leading to at best incremental policy change over the years. While some observers argue that this model will endure and likely also impair Germany's ability to successfully navigate future immigration and integration challenges (Green and Paterson 2005), others argue that German political actors have been quite successful all along in shifting "venues" to suit their policy preferences, be that "up" (to the intergovernmental/EU level), "down" (to the local level) or "out" (to non-state actors) (Guiraudon and Lahav 2000). The chapter will argue that Germany's particular version of immigration federalism has facilitated both incrementalism and venue shifting.

Keywords Immigration federalism • Decentralization vs. centralization • Immigration enforcement • Naturalization • Asylum policies • Venue shifting • Germany

8.1 Introduction

The rapid expansion of the provincial nominee programs (PNPs) in Canada and attempts by an increasing number of American states to participate in determining immigrant rights and enforcing immigration regulations are examples of an emerging

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trend in settler societies like the United States and Canada, where immigration matters have traditionally been the exclusive domain of the federal government. This trend has been referred to as "immigration federalism." It denotes the increasing role of subnational actors in the governance of immigration (Spiro 2001). A number of scholars consider this development to be reflective of a broader shift towards a neoliberal, "marketized" governance of immigration that promotes subnational and even private actors as being better suited to ensure the economic competitiveness of would-be immigrants in the global "battle for brains" (Shachar 2006). This realignment and "rescaling" of admission policies has been accompanied by another trend, namely the devolution of membership, which has seen the empowerment of subnational actors in the enforcement and definition of status and rights, along with the benefits to which noncitizens are entitled, with the goal of excluding those who do not fit the neoliberal logic (Varsanyi 2008).

How well does the "immigration federalism" concept travel to European societies such as Germany that have not traditionally defined themselves as countries of immigration? Is the marketization of immigration policy happening (and becoming problematic) there as well? And does it express itself there in the same way, namely through the rescaling and devolution of admission and membership? As this chapter will show, at first glance, Germany, one of Europe's largest immigrant societies, appears to be an outlier or a "very different" case. Three differences in particular stand out. First, subnational actors have played a prominent role in the governance of German immigration matters early on, ranging from enforcement to integration. Second, no formal devolution in the role of subnational actors seems to have taken place. Still, a number of shifts can be observed. Overall, we can observe a centralization trend.

This chapter argues that it is precisely the deliberate shifting of policy-making levels that is indicative of the efforts of nation-states to continuously adapt and reconstitute themselves in the age of neoliberalism. In short, both devolution and centralization are but two sides of the same phenomenon. As Guiraudon explains, since the beginning of the 1980s, European governments have deliberately used a wide array of actors to overcome growing domestic judicial obstacles and international human rights norms to remain in control of who enters, remains and belongs (Guiraudon 2000) by shifting "venues"—either "up" to intergovernmental fora, "down" to local authorities or "out" to private actors such as air carriers. As Varsanyi concludes, "the neoliberal…state is not less powerful as much as it…organizes and rationalizes its interventions in different ways" (Varsanyi 2008, pp. 881–882).

The remainder of this chapter is divided into three parts. The first begins by discussing the general workings of German federalism. It highlights four factors that illustrate a general tendency towards coordination, joint decision making and power sharing that go much deeper than is common in (for instance) the US model (Scharpf 1988, p. 243): the significance of the *Bundesrat*, the implementation power of the *Länder*, the fiscal set-up and the limited options for acting alone. The subsequent section shows that all of these factors also shape the "multi-level" governance of immigration matters and that, in fact, the substantial involvement of subnational actors in the governance of immigration matters is a reflection of (and at times, a struggle with) this larger federal logic.

The section opens with a brief review of Germany's population make-up, outlines its three migratory "waves" and then continues with a historical (albeit select) examination of labour migration and family reunification, asylum, enforcement and integration. In the areas of asylum and enforcement, deliberate shifts of responsibility between different levels of government took place in the mid 1970s and 1990s respectively with the goal of deterring and excluding noncitizens. In the area of labour migration, Germany was a pioneer of the marketization of immigrants through the employment of a guest worker scheme from the 1950s to 1973. Here, the constant federal-state level struggle over the setting of limits on residency permits and family reunification illustrates the deep involvement and discretion of subnational actors in defining questions of belonging and right to stay early on.

In contrast, integration policy was largely left to the subnational level until the late 1990s. First local experiments took place in the absence of any acceptance of permanent immigration at the federal level. However, more recently, labour migration and integration have been strongly centralized beginning with the reform of Germany's citizenship law (*Staatsangehörigkeitsgesetz*) in 1999 and the passing of the Migration Act (*Zuwanderungsgesetz*) in 2005. Residency categories and naturalization procedures have been simplified and subnational discretion reduced. At the same time, the federal level has asserted itself in the area of integration by passing new regulations and by similarly reducing discretion at the subnational level. Although many of these measures were passed in consultation with the subnational level, they—together with the steady stream of EU regulations concerning migration—all add up to a recent, centralization trend. In the conclusion, I briefly sum up the findings regarding the compatibility of the German case with the general trend outlined above.

The chapter uses historic analysis throughout to isolate and contrast different phases and important turning points (Pierson 2004). This approach is also helpful for comparative purposes as it underlines the constructed and fluctuating nature of federal power over immigration across federations. As Neuman's work has shown, the solidification of the US federal government's power over immigration and naturalization only took place after a decade during which the American states controlled significant aspects of immigration policy (Neuman 1996). The analysis of the German cases presented here spans the 1950s to the present. Important historical markers include the 1973 oil crisis (which ended Germany's guest worker programs), reunification in 1989 and Germany's first migration act in 2005.

8.2 Federalism, Semi-Sovereignty and Multi-level Governance in Germany

While Germany's postwar immigration history has been frequently analyzed, the role of subnational actors—the German states (*Länder*) and the over 2,000 cities and 11,000 municipalities (*Gemeinden*) (Thränhardt 2001, p. 26)—has been less frequently studied. Formally, immigration matters are federal jurisdiction (Art. 73, para 1, no. 3 GG), while all residency matters of "aliens" or foreigners and issues concerning refugees are areas of "concurrent" jurisdiction (Art. 74, para 1 no. 4 and 6 GG)

that are shared between the federal and state levels. The local level is not mentioned, although its independence is constitutionally protected (Art. 28 no. 2 GG).

At first glance, this division of labour makes it seem as if Germany fits the traditional US view that "*immigration law*" is exclusively federal jurisdiction because it is concerned with the admission and expulsion of aliens, which are matters at the heart of national sovereignty and foreign affairs, in contrast to "alienage" or foreigner laws (i.e. "other matters relating to their legal status"), including access to welfare and education—which are traditionally thought of as state-level jurisdiction (Motomura 1994, p. 202).[1] However, the actual governance of immigration policy is far less clear cut and fairly consistent with the larger "unitary" German federalism, which grants subnational actors an important role in federal decision-making. It is this model we need to examine next before we can turn to the governance of immigration in more detail.

Although most observers would note that Germany has a long history of federalism, the contemporary model of German federalism laid out in the 1949 Basic Law was selected as a way to curb the power of the then highly centralized post-Nazi state (Erk 2008, p. 58). Thus, the initial post-war constitution envisioned a fairly decentralized federation with clear jurisdictional demarcations for federal versus *Länder* governments. However, over time, Germany—largely with the help of the Constitutional Court, a set of national policies for officially state-level competences, and a financial system that fosters dependence on the *Bund* (the federal level)—has developed strong centralizing tendencies and gradually evolved into a prime model of what some call "unitary" federalism (Gunlicks 2003, pp. 68–69)—so much so that a recent OECD report called on the federal government to more actively foster greater competition among states (Bendel and Sturm 2010, p. 175).[2] A more fitting term perhaps is "interlocking" federalism. It highlights the fact that the institutional set-up of the system fosters such complex and multiple linkages between political actors at all levels of government, that one cannot effectively function without the participation of the others, to the extent that actors are frequently in a "joint decision making trap," which leads them to avoid confrontation, wait for agreement and accept sub-optimal outcomes for the sake of preserving unanimity (Scharpf 1988).

German federalism is characterized by such a high degree of unanimity, coordination and joint decision making that it is indeed difficult to find policy areas that are untouched by federal-state "harmonization" efforts, even those that are exclusive *Land* jurisdiction, such as education and culture. Despite recent federalism reforms in 2006 and 2009 that were aimed at clarifying jurisdictional and financial responsibilities, this fundamental pattern of decision-making has not changed.

What are the reasons for the high degree of cooperation in the German federation?

[1] As Motomura rightly notes, this legal division is in fact an artificial one that blurs the strong functional overlap between the two categories and their real, interlocking public policy consequences (Motomura 1994).

[2] The Länder have certainly taken the OECD up on the recommendation and now maintain separate representations in Brussels.

First, Germany—a parliamentary republic with a President as the largely ceremonial head of state—allows for a substantial degree of state-level involvement in federal policy making. While the *Bundestag* is Germany's primary legislative venue, as well as the seat of the roughly 598 nationally elected members of parliament (who also elect the Chancellor, or head of government), the *Bundesrat*, Germany's second constitutional chamber, is an assembly of the states. It is primarily responsible for reviewing federal bills and regulations, although it can also introduce bills of its own. The *Länder* are represented in the *Bundesrat* by their Premier (*Minister Präsident*), and a number of ministers. However, all representatives from a given state have to vote unanimously. Voting power is assigned according to the size of a state's population, ranging from 3 to 6 votes (Art. 51 GG). States have a formal say over federal legislation if the bill in question is a matter of shared jurisdiction ("consent bills"; which represent circa 50 percent of all bills) or if it would impose significant costs on an individual state. States can also veto other laws not directly affecting them, although a majority of the *Bundestag* may subsequently overturn their veto. Until reunification, voting blocks in the *Bundesrat* used to mirror the typical federal government-opposition pattern and frequently lead to deadlocks, requiring resolution through a joint mediation committee (Art. 53 a GG) (Oeter 2006, p. 145). However since reunification, the pattern has been much less clear-cut. Knowing how to navigate within this environment is important, since the federal government's ability to pass legislation and pursue its policy agenda is significantly influenced by the number of "veto players" in a given institutional setting (Tsebelis 1995). As we will see in the next section, the *Bundesrat* certainly became an important venue for a number of immigration initiatives.

The *second* reason for the high degree of cooperation is that the implementation (i.e. execution and administration) of *any* federal law is formally handled by the *Länder* (Art. 30 and 83 GG). Naturally, the *Länder* also administer state-exclusive laws. Although there are many avenues of federal involvement and control, this division of labour has traditionally left the German states with a wide scope of discretion and power beyond mere procedural interpretation. Furthermore, formal and informal cooperation between states at the intergovernmental level is the norm. A frequently cited reason for this extensive coordination is a commitment to uphold "similar living conditions" in all states (Benz 2000, p. 24). Depending on the issue, states may ratify formal agreements or contracts with one another. They may also meet ad hoc or at regular intervals at conferences or in commissions. For instance, all state prime ministers get together regularly. Similar events may involve certain types of ministries only. Frequently, though not always, federal counterparts are included. An important example of the latter that has been very influential regarding migration is the standing conference of the Ministers of the Interior (*Innenministerkonferenz*, *IMK*),[3] which has been meeting at least twice a year since 1954. The rise of the IMK to perhaps one of the most important decision making bodies in immigration is particularly noteworthy, as it underlines the upwards shifting of responsibility to the intergovernmental level.

[3] See: http://www.bundesrat.de/cln_051/nn_8758/DE/gremienkonf/fachministerkonf/imk/imk-node.html.

Third, Länder powers are tempered by the fiscal reality of German federalism. With most taxation power residing exclusively with the "federation" (*Bund*), what little such power the *Länder* possess is largely exercised at the local level (Art. 105 GG). The constitution further lays out a complex equalization system. For one, it designates revenues from certain taxes exclusively to the states. It also provides for equalization payments among the *Länder* and provides for further transfers from the federation and within each *Land* if necessary (Art. 106 para. 7 GG). Still, the overall set-up privileges the federation because states cannot have a say in financial policy-making without forging alliances at the *Bundesrat*. Although they can experiment and innovate when implementing policy to a certain degree, they cannot experiment with new revenue sources, which naturally constrains their options (Gunlicks 2003, p. 191). These financial realities also impacted immigration negotiations in the area of asylum, as we will see shortly.

The *fourth* reason for the high degree of cooperation in the German system is that the federal government can expand its scope of influence substantially and with little consent of the *Länder* by creating federal agencies or advisory bodies in areas of *Länder* jurisdiction. Although one such agency, the Federal Office for Migration and Refugees (*Bundesanstalt für Migration und Flüchtlinge, BAMF*), certainly exudes a substantial degree of influence and saw its authority expanded with the 2005 Migration Act (*Zuwanderungsgesetz*), it was technically created in an area of concurrent jurisdiction. The *Länder* have fewer options for acting alone. Although the 2006 and 2009 federalism reforms somewhat strengthened their position, their overall ability to act alone is fairly limited, even for those *Länder* in which the issue of migration is more pressing, be that for partisan political reasons or because of settlement patterns (Blumenthal 2012). While local governments only generate some of their own revenues and are ultimately financially dependent on revenue transfers from their respective *Land*, they have made full use of their policy manoeuvring room, leading the way when it comes to immigrant integration, although not always to the benefit of migrants.

So, how can changes within this type of federal system occur? In other words what are possible mechanisms towards devolution or centralization? As Blumenthal notes (Blumenthal 2012), the first involves a formal change to the division of powers as laid out in the Basic Law. This requires a constitutional amendment, which is only possible with the consent of 2/3 of the *Länder*. The most recent examples are the 2006 and 2009 federalism reforms; however they only affected migration tangentially. The second entails the tightening (or expansion) of the scope of discretion built into one of the federal laws, which the *Länder* are tasked to implement. While a tightening would have to be mandated in federal legislation, an expansion can occur quite simply through *Länder*-specific interpretation or the increased use of intergovernmental fora. As we will see in the next section, this has been the most frequent mode of change in German immigration federalism. However, whether this constitutes "devolution" is another question. This would imply a more permanent shift of responsibility from the central to the subnational level. Here, it is merely the *Länder* making use of what they were already granted. Moreover, as already mentioned, we can observe an increasing tendency towards centralizing lately. Upon closer inspection, we will see that this in fact an oscillating develop-

ment, which shows that we need to analyze these changes over time, i.e. by identifying distinct phases.

The interaction and coordination of federal and subnational actors in Germany takes place within a larger model of governance at the national and EU level. Briefly, in the national, "semi-sovereign" model, a range of decentralized yet powerful state actors, ranging from the *Länder* to the Chancellor and the Constitutional Court, constantly negotiate with a set of highly centralized societal (or "parapublic") organizations, such as churches, labour and employer associations, leading to, at best, incremental policy change over the years (Katzenstein 1987). This national model, as Green has shown, explains the overall incremental nature of migration policy making in Germany very well (Green 2004).

While this general model emphasizes the internal constraints affecting policy making within Germany, immigration regulation in Germany also needs to be understood with external constraints in mind, in particular, with respect to the ever-growing significance of the European Union (EU). EU integration has created a complex system of "multi-level governance," with additional rules, layers and networks that political actors must navigate to achieve their policy preferences (Marks et al. 1996). The term "multi-level governance" underlines that no single actor has the power to dominate the agenda. Conflicts are resolved through coordination and negotiation. Unlike the traditional German system, however, the EU system is less likely to result in stalemates (Benz 2000, p. 21). In the area of migration, EU regulations are slowly beginning to affect everything from the minimum standards of reception conditions for asylum seekers to the entry and residence of highly qualified workers.[4]

All in all, while federalism partly explains Germany's regulatory response to migration, it is embedded in a broader, 'semi-sovereign,' multi-level model of governance that has dominated German politics for decades (Katzenstein 1987). It is this model, increasingly together with EU policy, that more fully explains the regulation of migration in Germany. Although I am unable to fully explore these general models in more detail here, recognizing their impact on Germany's immigration federalism is critical for developing theories that could apply across federations. The next section begins by briefly describing Germany's population make-up and its three migratory "waves" and is followed by the analysis of the four central aspects of immigration policy mentioned earlier: labour migration, asylum, enforcement and integration.

8.3 Germany: A Reluctant Immigration Nation

Germany, with 81.8 million inhabitants, is the most populous state in the European Union. Despite its past policy of not considering itself a country of immigration, it now possesses one of Europe's largest migrant communities. Its territory is di-

[4] The two examples are: Council Directive 2009/9/EC, January 27, 2003 ("Minimum Standards Directive"), Council Directive 2009/50/EC, May 25, 2009 ("EU Blue Card Directive").

vided into 16 *Länder*, 5 of which joined with reunification in 1989. For historic reasons, 3 out of the 16 are "city states"—Berlin, Hamburg and Bremen. Roughly 15.7 million, or 19.3% of the population, have a "migration background." This includes all those who have either migrated to Germany themselves or who are second and third generation descendants, regardless of citizenship status. The largest (non-EU) group is of Turkish background, followed by Russian, Polish and Italian (Bundesamt 2012).

Only a small percentage of migrants (under 5%) live in the former East—most live in the more populous Western states, North Rhine-Westphalia, Bavaria and Baden-Württemberg (ranging from 10 to over 25%). Germany's migrants are further predominantly urban, with 80% living in cities larger than 100,000 inhabitants. The largest German cities (Berlin, Hamburg, Munich, Cologne and Frankfurt; all over 600,000) have attracted significantly more migrants than the mid-size and smaller municipalities, ranging from almost 30% in Frankfurt to 10% in Essen (Schmitter Heisler 2008, p. 238). As we will see, cities and local governments have increasingly taken the lead when it comes to integration.

Migration to Germany occurred in three "waves" (Hansen 1999, p. 417). The first spanned the 1950s and 1960s, Germany's postwar economic boom decades, which created such a demand for workers that Germany concluded a number of "guest worker" agreements with Mediterranean countries, ranging from Italy (1955) and Turkey (1961) to Yugoslavia (1968). The 1973 oil crisis slowed down the dramatic economic growth and lead to a formal stop in such recruitment—not just in Germany but in other EU countries that had similar labour agreements, such as France, Switzerland and the Netherlands (Messina 2007). The next wave occurred during the 1970s and 80s and consisted largely of family reunification despite the German government's attempts to discourage the practice and instead encourage repatriation (or "rotation"). The third wave, peaking during the 1980s and 1990s, consisted of asylum seekers, who—fuelled by numerous civil wars—entered Germany relying on a unique, asylum provision in the German constitution (Art. 16 GG)—which was not amended until 1993, making Germany (one of) the top EU refugee-receiving countries at the time.[5] Moreover, based on Art. 116 GG, individuals (largely from Eastern Europe and the former Soviet Union) able to demonstrate German "ethnic" origin either as "expellees" (*Vertriebene*) or as "re-settlers" (*Aussiedler*), have entered Germany in large numbers throughout the postwar era, peaking at an unprecedented 400,000 in 1990. Since 2000, their intake has been limited to 100,000 annually and since 2005, resettlement further requires evidence of basic German language proficiency. More recently, Germany has seen a moderate influx of migrants, largely through changes in EU regulations.

[5] See http://www.unhcr.org/pages/49c3646c4d6.html for historical data.

8.4. Labour Migration

Although it was the federal government, albeit in consultation with major industry, that formally concluded the well-known "guest worker" treaties in the 1950s and 1960s, this power to admit—which is often considered the most important in immigration matters—diminished in significance once the federal government decided to formally end guest worker recruitment with the 1973 oil crisis. At the same time, *Länder* prominence rose because the (federal) 1965 Foreigner Act (*Ausländergesetz*, *AuslG*)—which was fundamentally revised in 1990 and replaced by the 2005 Residency Act (*AufenthaltsG*)—contained only broad guidelines and assigned almost complete discretion to the states when it came to the issuing (and denying) of residency permits to foreign nationals. This was not unusual but rather in keeping with the constitutional principle that regulating the status of foreigners is a "shared responsibility." However, it underlines that in Germany, experiments with the marketization of immigrants took place early on and that in this early, post-war period, subnational actors were already substantially involved in defining (and limiting) membership. As we will see later, this principle of shared responsibility has granted states an equally wide scope of discretion in enforcement matters, such as deportation and detention.

As Green points out, prior to 1965, the discretion of state officials was fairly limited in that a residency permit *had* to be granted to a foreigner once their "worthiness" to reside in Germany had been established. The 1965 AuslG shifted the power to grant such permits to local officials by decreeing that residency permits *could* be issued if the presence of the foreigner did not contravene the "interests of the state." The latter was left completely undefined in federal law—even in secondary regulations. Moreover, initially federal legislation did not impose any time limitations on residency permits and most importantly, made no mention of a process for family reunification. What early regulations *did* make clear was that permits were to be granted only for a limited period of time (e.g. initially 1 year) and that they should be denied if there were any doubts regarding alignment of the would-be immigrant with the state's interests. These guidelines were in keeping with Germany's restrictive, federal naturalization laws and its initial "not a country of immigration" position (Green 2004). However, they were not followed and subsequently engendered a federal-subnational "conversation" about the limits of membership and in particular, the right to stay.

The local level grew in importance because the actual issuing (and denying) of residency permits occurs in "foreigner" offices (*Ausländer Amt* or *Ausländer Behörde*) located at the municipal level. Although they follow *Länder*-wide regulations, the individual officers are the ones tasked with interpreting these regulations. Not surprisingly, studies found a wide variety of permit granting practices across the country. Although some have argued that past practice largely followed partisan lines (i.e. more restrictionist in the more conservative states in the South) (Joppke 1999), others have shown that there is a considerable degree of variation between larger cities and smaller municipalities even in conservative states, like Bavaria, casting some doubt on the generalizability of this finding (Ireland 2004).

While the role of the subnational level in the issuing of residency permits—however discretionary and restrictive—is part of their traditional constitutional mandate of policy implementation, what is perhaps more surprising is that states have also been prominently involved in policy *making* at the federal level. Recall that their participation may occur through the larger "interlocking" framework of German federalism, which grants a significant role (though not necessarily power and success) to states in federal policymaking, both formally through the *Bundesrat* and informally through intergovernmentalism. For states to successfully influence federal policymaking, they need to either form coalitions with one another or cooperate with an influential federal actor, such as the Ministry of the Interior. As the following, well-known examples show, while the federal government's past policy making style with respect to foreigners has usually been characterized as reactive and incremental, the *Länder* have been much more willing to go out on a limb by pushing forward with their own policy initiatives. These initiatives have often been restrictive in nature.

A rotation of workers was critical to Germany's guest worker programs prior to the 1973 recruitment stop but, as was widely documented, this was never realized. For one, the federal government was reluctant to enforce rotations. As already mentioned, it was initially equally unwilling to legislate time limits for residency permits. Therefore, workers—with the backing of employers and home countries—often stayed longer than initially envisaged and also brought their families. For instance, a 1964 revision to the recruitment agreement with Turkey lacked both a maximum stay and a prohibition to family reunification (Triadafilopoulos and Schönwälder 2006, p. 8). Thus, de facto settlement was occurring and the commitment to marketization was slipping.

It was ultimately the states that repeatedly pushed for instituting and enforcing limits on residency permits and family reunification, which (so was the thinking at the time) would encourage rotation and affirm Germany's policy of not being a country of immigration. Their first effort occurred in 1965, at the same time as the new Foreigner Act was finally passed. The standing conference of the Ministers of the Interior (*Innenministerkonferenz*, *IMK*),[6] which includes the federal Minister, released a draft set of "foreigner policy principles" consisting, among other things, of a strict, 3-year limit on residency permits (Schönwälder 2003, p. 130). As part of a grand political compromise, this particular limitation was eventually dropped. However, a subsequent, Bavarian-lead initiative in 1969 successfully instituted a policy that would limit residency permits to 5 years (Triadafilopoulos and Schönwälder 2006, pp. 10–11). Still, when Bavaria and Schleswig-Holstein began issuing deportation letters in late 1972, they faced such significant opposition that the federal government publicly proclaimed that "no legal instruments" would be used to enforce the limits imposed, effectively forgoing rotation from then on (Schönwälder 2003, pp. 136–137).

[6] See http://www.bundesrat.de/cln_051/nn_8758/DE/gremienkonf/fachministerkonf/imk/imk-node.html.

Imposing restrictions on family reunification had also been part of these state-level proposals but little progress had been made. In the fall of 1981, almost a decade after the official 1973 recruitment stop, the CDU-ruled states unilaterally announced tough family reunification restrictions, which (among others) excluded children above the age of 16 from joining their parents in Germany and required that both parents reside there. They also introduced restrictions on circumstances under which spouses could emigrate. These restrictions came on the heels of a lot of "noise," i.e. policy announcements at the federal level without subsequent legislation (Green 2004, pp. 44–45). However, once the (then SPD-led) federal government was confronted with the (CDU-lead) state-level restrictions, it unilaterally drafted a set of "guidelines" that mirrored the relatively tough restrictions of the state of Berlin, leaving other states, including Bavaria, little choice but to fall in line. Nevertheless, these guidelines were not binding and some variation persisted since some states refused to budge on certain points. That was not the end of the story. In 1982, a federal CDU/CSU-FDP coalition was elected. Although it took up the cause of reforming family reunification with a vengeance, it too did not successfully pass any legislation until almost 10 years later, in 1990. Most analysts note that even then it merely codified what had already been the policy on the books, due, *inter alia* to a number of important constitutional court cases on the topic (Joppke 1999).

Finally, the 2005 migration act and subsequent 2009 regulations simplified the granting of residency permits by reducing the number of categories and the degree of discretion available to subnational actors. These regulations reflect a broader, renewed willingness at the federal level to take the lead on immigration questions, albeit in consultation with other political actors. They also denote a strong centralizing tendency in this area for the first time in decades.

8.5 Asylum

At first glance, it seems that asylum policy in Germany is primarily a federal responsibility. Broad, federal legislation, beginning with the 1953 asylum regulations (*Asylverordnung, AsylVO*)—together with Germany's constitutional asylum provision (which was restricted in 1993)—governs refugee determinations. Moreover, the Federal Office for Refugees, since 2005 known as the BAMF, was put in charge of all decisions regarding refugee status as early as 1953 and is overseen by federal courts. However, federal laws and regulations were only updated infrequently over the decades and primarily focused on establishing procedural "how to" guidelines instead of addressing substantive questions, effectively leaving policy development to the Federal Office together with the *Bundesbeauftragter*, the representative of the Federal Ministry of the Interior until 2004 as well as the federal courts (Korbmacher 1987). More recently, federal legislation and guidelines have increased and among other things, brought Germany's refugee determinations in line with that of other countries, for instance by accepting non-state and gender-based persecutions.

So what is role of the states in refugee policy? And more importantly, when and how has this role changed? Although one might assume that the states would be primarily responsible for the reception and settlement of refugees (e.g. housing and feeding) and exercise their discretion there, it is precisely this settlement role that has also led to a "feedback loop," i.e. an assertion of their influence in policy-making at the federal level. More specifically, the financial and social pressures of housing refugees in local communities have served as an incentive for states to exert pressure on federal policy through the *Bundesrat*. Overall, the *Länder* have been a restrictive force in asylum policy making, although there certainly is substantial variation in their positions (Thränhardt 2001, pp. 20–21).

A central motivation for their involvement in federal policy making is Germany's asylum dispersion policy. Incoming refugees were initially housed and processed in a reception facility in Bavaria. The drastic increase in refugee numbers in the mid 1970s eventually made the continuance of this arrangement unworkable. Since 1974, asylum seekers have been dispersed to reception facilities across all German states shortly after their arrival (Boswell 2003, pp. 318–319). The number of refugees per state is kept proportionate to the population in each state. Each state's tax revenues are also considered when calculating the number of refugees per state. Within each state, refugees are then further distributed among the various cities and municipalities.

Under the current scheme, which was finally codified in 1982, however, states carry the reception costs exclusively and do not receive any further reimbursement from the central government. Although this kind of cost sharing is typical for Germany's federalism, it increases the financial pressure on the states, which are also responsible for providing social assistance. This pressure was particularly intense between 1978 and 1989 when the number of asylum seekers entering Germany rose dramatically. As a consequence, individual states, in particular Bavaria, Baden-Württemberg and Berlin, who were receiving particularly large numbers of refugees from the East (Fullerton 1988), started to public campaign for a tightening of asylum laws citing the intense pressure of accommodating "merely economic" refugees on the public purse as a reason (Schuster 2003, pp. 199–204) To deal with the spiking numbers, successive federal governments passed a number of laws between 1978 and 1988 intended to curb the number of asylum seekers by "accelerating" the refugee determination process. Concurrent legislation in the 1980s also reduced social assistance benefits to refugees and introduced a residency requirement for asylum seekers (in the municipality of their reception centre). Clearly, federalizing the reception of asylum seekers was also intended as a deterrent to refugees and as a mechanism to limit their membership rights (Boswell 2003, p. 319).

While all states had pressured the federal government for changes to the refugee determination procedures, the last bill during this period in 1987 is worth mentioning separately here. It was introduced in the *Bundesrat* by the same state "troika" that had publicly campaigned for tighter asylum rules a few years earlier (Schuster 2003, p. 202). Among other things, it proposed "in kind" rather than cash payments for refugees, increasing the waiting period for work permits from 2 to 5 years,[7]

[7] Applicants from Eastern Europe had to wait only 1 year (Kanstroom 1993, p. 197).

and expanding the category of "manifestly unfounded" claims, which came with (and still does) tightened appeal options and increased the likelihood of deportation (Fullerton 1988, pp. 67–70). Although some measures were left out in the course of negotiations, the core of the bill ultimately became law, underlining the influence of the *Länder* in limiting noncitizen rights.

The dispersal policy brought with it financial tensions that percolated up the federalism chain in the form of pressure for policy change. After reunification, it also raised social conflicts at the local level to new heights, in particular in the new German states. Violent attacks on asylum seeker reception centres in Hoyerswerda and Rostock but also on foreign nationals in Mölln and Solingen between 1991 and 1993, put pressure on politicians to change policies more drastically, culminating in the tightening of the constitutional asylum provision in 1993. At the same time, a range of provisions aimed at increasing "burden" sharing with other EU countries were introduced. The constitutional amendment necessary for these changes required a 2/3 majority in both houses. Hence, this "asylum compromise," as it is often called, could only be reached in true German fashion, namely after wide reaching negotiations and compromising with other political and societal actors. Among the successfully bargained items were the introduction of an annual limit on the number of ethnic Germans allowed to relocate to Germany (200,000 in 1990 and 100,000 in 2000), a promise to open up the definition of refugee to include those fleeing civil wars and a commitment to reform German citizenship and naturalization laws (Schuster 2003). Despite recent protests, the dispersion policy remains in place to date. However, with the passing of the EU's "minimal reception standards" directive, the EU is also making its influence known in this area.

8.6 Enforcement and "Toleration"

Immigration enforcement, which usually encompasses a range of practices from detention to deportation and expulsion that are aimed at an individual's removal from the country, is intimately connected with the regulation of the residency status of foreign nationals, which is an area of shared jurisdiction. Germany's practice of "tolerating" individuals whose removal orders have been temporarily stayed—often for years—without granting them a residency permit will also be discussed briefly, because it is another example that illustrates the rise of the IMK to one of Germany's central immigration policy making venues. These enforcement practices further highlight both the influence of Germany's interlocking federalism on the governance of immigration and the ease with which a deliberate shift in policy venues can occur.

Enforcement practices are "constitutive of citizenship" in that they not only "reaffirm the legal boundaries of membership" but also showcase the state's "raw" sovereign, disciplinary power (Anderson et al. 2011). Paradoxically, for a long time this power was of secondary importance because it came with too many, costly and time consuming constraints (Gibney 2008). This was reflected in decades of relatively low deportation figures. However, in the mid 1990s, Germa-

ny's removal numbers spiked dramatically, as did those of other liberal democracies (Ellermann 2009, p. 19). Although deportation can affect any foreign national without status, this particular "deportation turn" was caused by a drastic increase in the removal of rejected asylum seekers, who were targeted as a result of the growing securitization and politicization of "illegal" migration (Gibney 2008, p. 146). Over the same time, the number of asylum seekers coming to Germany started decreasing. However, since 2000, unlike in the UK and the US, deportation numbers in Germany have started dropping back to 1990 levels again (Anderson et al. 2011, p. 551).

Responsibility for deportations and detentions has always been shared between the federal and the subnational level, illustrating yet again that control over the definition of membership in Germany was never an exclusively federal affair. Both, the Federal and the *Länder* Ministry of the Interior issue key regulations and (since 2005) can directly issue a limited number of deportation orders.[8] Deportation orders for rejected asylum seekers are generally issued by the BAMF but carried out by local foreigner offices, discussed earlier, in conjunction with the police. If a deportation is carried out by air, federal police agents are in charge (since 2004, increasingly in collaboration with Frontex, the EU's border agency), while regional and local police officers are responsible for local arrests. Foreigner offices are further responsible for issuing deportation orders in other cases (e.g. for illegal or resident aliens convicted of a criminal offense), and if necessary, requesting detention orders from a local court.

Yet this discretion and local grounding has also made the foreigner offices open to anti-deportation campaigns by local churches, refugee councils and human rights activists. For instance, between 1983 and 2000, church sanctuary campaigns (*Kirchenasyl*) resulted in roughly 70 percent of 2,500 cases being granted at least a more favourable legal status, if not a residency permit (Castaneda 2010, p. 252). At the same time as such local activism grew, state governments shifted the responsibility for carrying out deportations "up" from the local to the regional level (Ellermann 2009). Baden-Württemberg led the way. In 1989, it established four regional immigration authorities that took over responsibility from 120 local offices. It also reorganized accountability, so that the regional offices are no longer overseen by elected officials (i.e. mayors) but by appointed bureaucrats, which significantly reduces their exposure to political influence by anti-deportation advocates. However, not all German states have followed Baden-Württemberg's lead. Some, like Brandenburg, even explicitly rejected such reorganization after testing it (Ellermann 2009, p. 127). While Ellermann's study underlines the nimbleness of political and bureaucratic arrangements at the subnational level, it further shows that these reorganizations did not consistently follow partisan lines, suggesting that these upward and downward shifts are not exclusively driven by ideology but inadvertently perhaps by the success of mobilization efforts on the ground.

In Germany, the practice of staying deportation orders, frequently for long periods of time and often for entire groups of non-citizens, together with the granting of a special "tolerated" permits ("*Duldung*"), needs to be discussed here as well. Since

[8] In cases of "particular federal interest" or in case of a danger to national security or of terrorism (Par. 58 a AufenthG).

a toleration permit is intended to be temporary, it does not come with some core membership rights, such as a certain welfare provisions or a work permit, although the latter may be granted in some circumstances. Typically, individual reasons why local officials may stay someone's deportation order are illness, pregnancy or other evidence of "deservingness" (Castaneda 2010). Since 2009, some individuals on such a permit, for example young adults, who are judged "well integrated," may be granted a residency permit (Par. 25a AufenthG).

The practice of merely tolerating someone, without granting them some kind of firm status to remain, has attracted significant political debate. More importantly for our purposes, with time, its function as a discretionary enforcement tool at the local level has almost become completely overshadowed by its significance as a policymaking instrument at the *Länder, intergovernmental,* and more recently, federal level. Specifically the IMK, along with some *Länder,* have repeatedly granted large-scale amnesties from deportation, or at least long-term exemptions, to rejected refugees and others without status. For instance, the IMK stayed the deportation orders of rejected refugees from Eastern Europe in a wholesale fashion in 1966 (Höfling-Semnar 1995, p. 114) and has done so regularly for various groups since, most recently for rejected refugees from Afghanistan and the former Yugoslavia. Interestingly, both the IMK and some *Länder* governments have been open to lobbying by employers (Schönwälder 2003), illustrating that these actors are not only charged with defining membership but also with adjudicating demands for labour.

While reforms in 2005 further institutionalized the policymaking aspect of the *Duldung,* by mandating that all *Länder* create a hardship commission for assessing whether someone's deportation order should be stayed, they also removed discretion from the *Länder* by mandating the agreement of the Federal Minister of the Interior to any large scale stays, leaving the *Länder* with significantly less political manoeuvring room than previously. Interestingly, this change passed only after extensive consultation and ultimately, with consent of the *Länder*, in anticipation of a new EU regulation adopted in 2008 on the return of third country nationals (Blumenthal 2012).[9] Still, *Duldung* stands out as yet another important example of the expanded significance of subnational control over the regulation of migration, rights and membership in Germany.

8.7 Cities, Local Governments and Integration

In the introduction to their 2012 annual report, the expert council on migration (*Sachverständigenrat deutscher Stiftungen für Integration und Migration*)[10] repeated a core message of an earlier report: "Germany has arrived in the integration society age. Integration in Germany is better than its reputation" (Migration 2012, p. 7). Yet the fact that Germany has arrived there at all is primarily due to leadership at the subnational level and has occurred largely in the absence of any acceptance of the permanence

[9] This is EU Directive 2008/115, the so-called "Returns Directive."

[10] http://www.svr-migration.de/content/.

of immigration at the federal level. As Penninx et. al. note: "As a consequence of non-acceptant European attitudes, immigrant integration polices at the national level have generally been late to develop, if they have been developed at all (Penninx et al. 2004, p. 3)."

Given Germany's long-standing reluctance to consider itself a country of immigration, how then did the presence of migrants become a political issue at the subnational level and when did dealing with this "presence" turn into a commitment to integration (Mahnig 2004)? And what does this development tell us about shifts in immigration federalism? And what role do local actors exactly play in integration? Consulting Germany's formal division of powers for an answer offers little help. Although the subnational level is exclusively responsible for culture and education—two important areas that facilitate immigrant participation, inclusion and social mobility—even these two policy areas are subject to a complex web of federal co-regulation and participation. For instance, while the hotly debated topic of religious instruction in schools (which is mandated in the German constitution (Art. 7(3) GG)) is overseen by state-level ministries in coordination with religious communities, Germany's extensive apprenticeship programs are governed by both federal and state-level regulations. Other components of integration, ranging from social housing and welfare provisions to language courses and even naturalizations are equally governed by both federal and state-level regulations and implementation. The local level thus has precious little policy-making power of its own, but plays a central role in deciding how and where something gets implemented and whether the growing diversity of German cities is taken into account when doing so, ranging from early childhood initiatives for non-native speakers to support for ethnic festivals and the creation of anti-discrimination guidelines. Noteworthy, yet still understudied, is the involvement of other local actors in the integration process, including local churches, businesses, voluntary organizations and increasingly, immigrant organizations (Mushaben 2008). Ultimately, the local level is the critical juncture between noncitizens and their rights.

Although the "reality" of immigration hit home sooner in the cities, there is currently no agreement on how cities and municipalities became the lead actors in German integration politics. Scholars point to both "top-down initiatives by political elites, aimed at preserving their own control," and to local crisis, such as "urban unrest" not to mention "closed door commitments of civil servants and judges," as motivating policymakers, albeit less so "bottom up" pressures (Mahnig 2004, pp. 17–18). All in all, local policies have not necessarily always been migrant friendly. Nevertheless, faced with inaction, silence and incrementalism at the national level, local actors have not been afraid to experiment and shown a great deal of leadership.

The cases of Berlin and Frankfurt show that partisanship at the local level played an important role in the basic openness of local policy makers. Under successive conservative governments, Berlin, one of the most frequently studied German cities when it comes to integration, initially pursued a very restrictive migrant policy during the 1970s and early 1980s, that included barring migrants from living in certain districts and confining them to others while advocating for returns and restrictive admissions at the federal level (even under SPD). Although it committed itself more firmly to integration in the mid 1980s, it still continued to talk tough to its electorate while expanding integration initiatives on the ground. Only under the red-green

coalition did it finally shift to framing its integration discourse in a language of equality and anti-discrimination (Mahnig 2004, pp. 24–25).

In Frankfurt, the city known as Germany's financial capital, a prominent Green party city counselor, Daniel Cohn-Bendit, led the city to open Germany's first ever "Office of multicultural affairs" (*AMKA)* as one of its many administrative units (Aybek 2010, p. 95) in 1989. This occurred without the backing of "bigger" political players and was highly controversial at the time (Amt für Multikuturelle Angelegenheiten 2009, pp. 10–16). What made the office unique was that it gradually expanded its sphere of influence and also, its budget, while acting as a central coordination unit for a range of integration projects. Most importantly, it was intended to facilitate a paradigm shift towards integration, a step that other actors in the federation were only reluctant to accept (Amt für Multikuturelle Angelegenheiten 2009, p. 10). Today, the AMKA is involved in a wide variety of projects from support for early childhood education to vocational training and neighbourhood conflict monitoring.[11]

Finally, although the granting of citizenship falls under federal jurisdiction, the actual overseeing of naturalizations, another core measure of integration, has always been a responsibility of the *Länder*. Naturalization used to be a rare act administered by the local foreigner offices, because the requirements were high (minimum 15 year residence, no dual citizenship allowed, proof of a firm "orientation towards Germany," administrative fees etc.) and because the officers retained a substantial degree of discretion in the interpretation of the (federal) regulations (Green 2004, p. 40). Reforms in 2000 resulted in a flurry of state-level initiatives, and a set of questions that were meant to guide the decision of local foreigner offices morphed into a "citizenship test" requirement, that was subsequently standardized and enshrined in federal legislation in 2008.

While the many initiatives and experiments at the local level certainly underline the local level's ability, given sufficient resources and policy freedom, to serve as "laboratories of innovation," they could equally prove the "steam-valve" theory, which views localities as relief points for bad ideas in a federal system (Provine and Varsanyi 2012, p. 107). Further research is needed to uncover the mechanisms and transferability of effective integration policy. What is clear is that national policies, images and institutional arrangements matter a great deal because they channel opportunities and provide important symbolic and actual endorsement for approaches to integration (Penninx et al. 2004). The German federal level has certainly begun to reassert and reorient itself when it comes to immigration and integration. Beginning with the cautious opening of its citizenship laws in 1999 towards the *ius soli* principle (i.e. citizenship based on place of birth instead of descent), followed by the passing of a new Migration Act in 2005 (which included, for instance, the publication of an annual national integration plan and the mandating of integration and naturalization courses), it has firmly shifted the national debate towards integration as well. While some observers view the current German debates on integration as in line with a larger EU shift towards hard line "civic integrationism," this shift comes after decades of denial and neglect at the federal level.

[11] http://www.frankfurt.de/sixcms/detail.php?id=7017&_ffmpar[_id_inhalt]=7846492.

8.8 Conclusion: The Janus Face of Germany's Immigration Federalism

This brief survey of Germany's immigration federalism has shown that the particular federalism model in place there ultimately facilitated both the restriction and expansion of non-citizen rights. Unlike in other federations, subnational actors played important roles early on in the regulation of all aspects of German migration, ranging from labour migration and asylum to enforcement and integration. However, their role in these areas expanded not because of a formal devolution of federal responsibilities to the subnational level but largely because subnational actors made full use of their powers while the federal government dragged its feet. Still, this had the effect of shifting the control over membership to the subnational and the intergovernmental level (i.e. to the IMK) for decades. Moreover, the high degree of policy initiatives and policymaking at the subnational level frequently created a "feedback loop" at the federal level, in that subnational activities became the basis for federal legislation later on, often together with "input" from the courts. Here, the governance of immigration follows the larger German logic of federalism, which is based on a complex web of coordination, inter-connections and joint decision-making.

The survey further suggests that we should consider conceptualizing any shifts in a country's immigration federalism as "phases" rather than permanent trends. Germany, after all, was one of the earliest users of a classic marketization scheme for immigration, the guest worker programs. Although past choices can significantly influence future decision-making, the most recent flurry of activities at the federal level certainly makes it clear that Germany has entered a new centralization phase. However, this centralization phase, as this chapter has argued, is only another side of a neoliberal nation-state reconstituting itself. This phase is further propelled by the steady increase in EU Directives, regulations, jurisprudence, working groups and other policy-related "output." Although this growth in EU activities has also had the effect of restricting the sovereign policy choices of national governments, the associated regulations seems to have largely "trickled down" to the German subnational level in the form of policy centralization, as the implementation of the recent EU "Returns Directive" illustrates.

Given the nature of Germany's "interlocking" federal system, which is further embedded in a larger system of multi-level "semi-sovereign" governance, this centralization phase will not mean the end of subnational activism and policy leadership. In fact, it serves as a reminder of the range of "venues" available to nation states in this age of global migration.

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Chapter 9
Swiss Immigration Federalism

Anita Manatschal

Abstract In Switzerland, sub-national regulation in the field of immigration has developed mainly in relation to immigrant integration, whereas the areas of immigrant selection and immigration enforcement remain predominantly regulated by the central government. The current regulatory situation can be read as the result of three interacting factors: Switzerland's pronounced federal system, the country's former guest-worker approach to immigration and the bottom up nature of local processes of immigrant integration.

Two principles characterize Switzerland's federalism; subsidiarity and executive federalism. Accordingly, cantons are not only the main responsible units for all areas which are not or only partially regulated at the national level, such as integration policy, but they can also decide how to implement existing national law, for instance in the field of immigration policy. As challenges related to immigrant integration arose primarily at the local city level where most immigrants live, cities and urban cantons were the first to formulate formal regulations and informal guidelines in this policy field. By contrast, the national government, long time neglected the topic of immigrant integration; a typical reaction for former guest-worker countries which were assuming that, eventually, the guest-workers would return to their countries of origin. To this day, national regulations on integration remain minimal and are worded in a very open way, which leaves the cantons considerable liberty in formulating their own integration policies.

Considering ongoing political debates within Switzerland, opinions vary on whether the cantonal variety of integration policies is rather beneficial or detrimental. On the one hand, opponents contend that subnational policy variations constitute a potential source of structural discrimination for immigrants, and that the heterogeneous puzzle of cantonal integration policies challenges the formulation of a coherent national strategy in the field. Proponents of cantonal autonomy, on the other hand, argue that adapted, context specific solutions for the local issue of immigrant integration are better than a "one size fits all" national framework and that Switzerland's federalist laboratory facilitates the evolution of cantonal best practices. This policy-learning potential could be used more systematically, for instance by fostering inter-cantonal exchange.

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9.1 Introduction

Over the last years, an increasing number of studies witnessed decentralizing processes of immigration regulation in federal states such as Canada, the United States or Australia (cf. Tessier 1995; Schmidtke 2001; Spiro 2002). In the Swiss federation, by contrast, we cannot speak of a *trend* towards a greater devolution of policy making competences to the subnational level in the realm of immigration, as the subnational units of Swiss cantons are already traditionally endowed with a large autonomy in this policy field.

Considering recent developments, one would rather be tempted, if at all, to speak of a trend towards centralization or even supra-nationalization of migration policy making in specific areas such as immigration policy, which deals with questions of immigrant selection, immigration enforcement and settlement. Conflicts between national and supranational interests are particularly salient in the area of immigrant selection, where the agreement on free movement of persons with the European Union clearly restricts Swiss state sovereignty (Mahnig and Piguet 2004; Koch and Lavenex 2006; Sassen 2005). At the same time, sovereign decision making is fiercely defended through popular initiatives of right wing anti-immigrant parties who try to limit free movement for EU citizens across Swiss borders.

Apart from immigrant selection, however, it appears more adequate to state that cantons remain important actors in Swiss migration policy, to use an umbrella term for immigration and integration policy (Giugni and Passy 2006). Firstly, cantons are the principal responsible authorities for the implementation of national immigration policy with a large room for interpreting federal immigration law (Spescha 1999). Secondly, cantons are the main regulatory units in the field of immigrant integration policy. In line with international concepts (cf. Koopmans et al. 2005; Koopmans et al. 2012; Huddleston et al. 2011; Waldrauch and Hofinger 1997), the definition of integration policy used in this chapter comprises a broad range of immigrant rights and obligations such as civic rights (i.e. naturalization policy), political rights (e.g. voting-rights for non-nationals), but also rights regarding cultural difference (e.g. religious minority rights) or cultural obligations (i.e. demands for assimilation to the host culture) respectively.[1] Cantonal regulations and practices vary strongly in all of

[1] While I base my understanding of integration policy on established international concepts, I am aware that there is no unanimous and generally accepted definition of this multidimensional and contested term (cf. Castles et al. 2002; Robinson 1998). In line with the empirical-analytical approach taken in this chapter, the definition of integration policy used here is not normative, but descriptive, as the aim is to illustrate cantonal diversity in integration policy making. For a more comprehensive overview and discussion including additional aspects of integration policy such as access to socio-structural rights, family reunification and anti-discrimination, see Manatschal (2011).

the aforementioned areas, leading to a heterogeneous puzzle of cantonal integration policies (cf. Cattacin and Kaya 2005; Ireland 1994; Soysal 1994; Manatschal 2011). This cantonal policy variety takes the shape of a "limitrophe" coinage of integration policies along Switzerland's cultural-linguistic regions: while French-speaking cantons are influenced by France's more inclusive and liberal jus soli citizenship conception, integration policies of German-speaking cantons correspond more closely to Germany's exclusive and restrictive jus sanguinis citizenship tradition (Cattacin and Kaya 2005; D'Amato 2010; Manatschal 2012).

In this chapter, I argue that the current regulatory situation in the fields of Swiss immigration and integration policy can be read as a result of three interacting factors: Switzerland's pronounced federal system, the country's former guest-worker approach to immigration, and the bottom up nature of local processes of immigrant integration. The first part of this contribution on Swiss immigration federalism contains a more thorough elaboration of these three aspects, offering thereby insights into how the distribution of competences between central state and cantons evolved in a non-settler state whose self-conception was for a long time shaped by the neglect of being a country of immigration. In the second part of the chapter, I turn to the specific topic of cantonal autonomy in integration policy making by discussing its implications for Switzerland's immigrant population. More specifically, part two of the chapter addresses the question whether varying cantonal integration policies, which I exemplify using selected areas of immigrant rights and obligations, harm or benefit non-citizens. As for benefits, I will show that cantonal autonomy facilitates efficient and problem oriented policy making, whereas negative effects of subnational policy making are mainly related to immigrants' unequal access to political and civic participation rights. Overall, the evolution of (cantonal and national) integration policy in Switzerland illustrates the high potential of the country's "federal laboratory" for policy learning processes. This potential could be used more systematically, for instance by fostering inter-cantonal exchange.

9.2 Peculiarities, Historical Evolution and Contemporary Nature of Swiss Immigration Federalism

9.2.1 Constitutional Division of Powers

In his book on immigration and integration policy in federal states, Tränhardt (2001) identifies four channels for subnational influence on migration policy making. First, subnational units may act autonomously, for instance when they are designated as the main regulatory actors in a given policy area. Second, subnational units often enjoy considerable flexibility and scope of interpretation when acting as the main responsible authorities for the implementation of national legislation. Third, subnational units may influence national legislation in the field of migration policy through a second parliamentary chamber, or, fourth, through symbolic politics.

All four channels are used extensively by Swiss cantons to shape migration policy at the national or cantonal levels. As suggested by Tränhardt, cantons may influence national legislation in migration policy directly through the second parliamentary chamber ("Ständerat"). Unlike the first chamber ("Nationalrat"), which is based on proportional representation of cantonal populations (200 members of parliament or MP's in total), each canton is accorded the same number of two seats in the Ständerat[2], amounting to a total of 46 MP's for the second chamber. The Ständerat guarantees that the interests of all cantons are equally represented in the legislative process. Yet, it also implies an overrepresentation of rural and conservative interests and thus, a rather restrictive stance in the field of migration policy, as the vote of a Ständerat (MP of the second chamber) from the small rural canton of Uri, for instance, outweighs the vote of a Ständerat from the urban canton of Zürich by 39 times in terms of electoral representativeness (cf. Linder 2005; Vatter 2006)

Besides this, Switzerland's manifold instruments of direct democracy on all three federal levels (local, cantonal, national) offer additional channels for the cantons to control or influence national and cantonal migration policy making. More specifically, cantons may impact national policies through the cantonal legislative initiative ("Standesinitiative"), which allows cantons to introduce a legislative proposal into parliament, or through the cantonal referendum, which can be invoked by at least eight cantons (Linder 2005; Vatter 2002, 2006). Direct democracy offers also a very fertile ground for symbolic party politics, the fourth channel identified by Tränhardt (2001). Ever since the post World War II era, right populist parties have been using the instruments of direct democracy in order to restrict national legislation in the fields of immigration, asylum and immigrant rights (Niederberger 2004; Skenderovic 2009). The most recent successes of initiatives from the right populist Swiss People's Party ("Schweizerische Volkspartei", SVP) at national polls, such as the minaret ban in 2009 and the approval of the deportation initiative in 2010, demonstrated that direct democracy provides powerful instruments for (right) populist mobilization against immigration and its consequences (cf. Giugni and Passy 2006).

When it comes to cantonal policy making, the room to maneuver is, as proposed by Tränhardt (2001), basically determined by the degree of cantonal autonomy as well as by the cantons' freedom to implement national law. Both aspects, subsidiarity and executive federalism, are pronounced in the Swiss context. The principle of subsidiarity, as it is defined in article 3 of the Swiss constitution, states that Swiss cantons are responsible for all policy areas which are not regulated by a higher (i.e. the national) level. In the field of integration policy, the minimal and open-worded national standards in this matter imply that cantons enjoy considerable autonomy in policy making (Eggert and Murigande 2004; Cattacin and Kaya 2005; Manatschal 2011). Voting rights for non-nationals, for instance, as one aspect of integration

[2] With the exception of the "half-cantons" Obwald, Nidwald, Basel-City, Basel-Country, Appenzell Inner Rhodes, and Appenzell Outer Rhodes, who are accorded only one seat each. See: http://www.parlament.ch/D/ORGANE-MITGLIEDER/STAENDERAT/Seiten/default.aspx (last accessed: 7 November 2012).

policy (cf. Koopmans et al. 2012; Huddleston et al. 2011), are attributed at the cantonal level. In general, cantons hold a referendum on the topic and let the cantonal population decide whether immigrants should have voting-rights at the cantonal or local level or not (see examples in Sect. 9.3.2).

The principle of executive federalism, in turn, which is defined in article 1 of the constitution, stipulates that the cantons are responsible for the implementation of national law (Linder 2005; Vatter and Wälti 2003). The fact that certain national legal propositions are formulated in a facultative way implies that in these instances, cantons have de facto liberty in policy making. One example is the restrictive policy instrument "integration agreement", which is an indicator for cultural obligations as one aspect of integration policy. According to article 54 of the new aliens' law ("neues Ausländergesetz, AuG"), the attribution of (temporary) residence permits can (but does not have to) be tied to the condition that the applicant attends an integration or language course. This means that cantons have the option to prescribe course attendance as a requirement for residence permits in form of a written integration agreement.[3] As a result of the facultative nature of integration agreements, certain cantons use them systematically when attributing residence permits, whereas other cantons prefer to issue unconditional residence permits, foregoing thus this restrictive policy instrument (cf. BFM 2008; Kübler and Piñeiro 2010) (see examples in Sect. 9.3.1).

As the overview on the constitutional division of powers in Switzerland revealed, the principles of subsidiarity and executive federalism leave to the cantons considerable autonomy in policy making. The following elaboration on the historical evolution and contemporary nature of immigration federalism in Switzerland illustrates the implications of this constitutional division of powers for the fields of immigration and integration policy.

9.2.2 Immigrants in Switzerland: From "guest workers" to Fellow Citizens

Today, one third of Switzerland's population has a migrant background while one fourth was born in a country other than Switzerland (BFS 2010; Lavenex 2006). From a quantitative perspective, Switzerland is comparable to typical settler states such as Canada, the United States or Australia (Piguet 2004). Yet unlike the settler states, this immigration reality did not reflect in Switzerland's national identity which was long time shaped by the perception that Switzerland is no country of immigration. From a political perspective, Switzerland was formerly a prime example of a continental-European guest-worker country, meaning that on the one hand, it pursued an active strategy of foreign worker recruitment while on the other hand maintaining a restrictive position regarding naturalization and immigrant integra-

[3] See also art. 5 in the decree on immigrant integration ("Verordnung über die Integration von Ausländerinnen und Ausländern", VIntA).

tion. This former segregationist integration strategy (cf. Koopmans et al. 2005) is largely responsible for the late and tentative development of a national integration policy in Switzerland.

9.2.2.1 Immigration Policy

The end of World War II marked the beginning of Switzerland's "guest-worker" era (Cattacin 1996; Lavenex 2006; Wicker 2004). In order to reestablish national postwar economy, Switzerland pursued an active strategy of foreign worker recruitment, mainly from Italy and Spain. The concept of the guest-worker, which was also prominent in Germany, based on the assumption that foreign workers are only temporary residents who would eventually leave and return to their home country. Former guest-worker countries invested a considerable effort in so called guest-worker-programs, which encouraged foreign workers to maintain cultural ties to their home land in order to facilitate their return (Koopmans et al. 2005). Over the years, legal entitlements for foreign workers were steadily extended,[4] and increasing family reunifications soon invalidated the hope that immigrants would eventually return to their home countries, with the result that the guest worker concept was gradually watered down.

The agreement on the free movement of persons within the European Union, which Switzerland as a non-EU member state concluded with the European Union in 2002, definitely terminated the guest-worker era. Since that time, Switzerland has a dual or "two-circles" immigration system. While citizens from the European Union as well as countries from the European Free Trade Area (EFTA) enjoy de jure free mobility (first circle), the admission for citizens from the rest of the world (second circle, generally referred to as "third-country nationals") is restricted to highly skilled immigrants.[5] Yet, during a transitional period which should originally not last later than 2014 (cf. Lavenex 2006), Switzerland continued to apply a quota system which allows for limited admission of EU citizens. Ten years after agreeing with the EU on the free movement of persons, the country has not established free mobility yet. On the contrary, in May 2012, Switzerland activated the so called "valve clause", limiting the admission of immigrants from eight Eastern EU countries. This act was sharply criticized by the EU commission which considers the valve clause a contravention of the agreement on free movement from 2002.[6]

[4] The legal situation was first improved for Italian immigrants in a "recruitment agreement" with Italy in 1964. This agreement facilitated family reunifications as well as a conversion of guest worker-permits into temporary residence permits. In the 1980's, residence conditions were further improved for Italian, Spanish and Portuguese foreign workers, meaning that they were faster eligible for unlimited residence permits and family reunification (Lavenex 2006).

[5] Yet, there are special arrangements for permanent residence permits for immigrants from the United States and Canada (see: http://www.bfm.admin.ch/bfm/de/home/themen/aufenthalt/nicht_eu_efta/ausweis_c__niederlassungsbewilligung.html, last accessed: 2 November 2012).

[6] See *Neue Zürcher Zeitung*, April 18 2012. Online: http://www.nzz.ch/nachrichten/politik/schweiz/schweiz-droht-konflikt-mit-eu-wegen-ventilklausel-1.16509769 (last accessed: July 23 2012).

As the preceding discussion shows, the topic of immigrant selection is a very relevant national matter in Switzerland. Although immigration regulation increasingly intersects with the international arena (cf. Sassen 2005), more specifically the European Union, the most recent developments highlight that Switzerland still adheres to sovereign state control in immigration policy. The expression of this protectionist stance which is quite widespread among Switzerland's population is facilitated by the instruments of direct democracy. Most recent example thereof is a new immigration bill which plans the reintroduction of fix quotas, on which the Swiss population will presumably vote in 2014, and which subverts de facto the agreement on free movement with the EU. Not surprisingly, this protectionist popular initiative was launched by the right populist SVP.[7]

At the same time, and in line with Switzerland's tradition of executive federalism (see Sect. 9.2.1), cantons remain responsible for policy implementation and they enjoy a large room for interpreting national immigration law (Spescha 1999). This holds true for immigrant selection, as cantons can for instance unilaterally extend immigration quota, as well as for immigrant settlement, since cantons can deny the issuance of residence permits unless there is a legal entitlement for such a permit (Lavenex 2006).

In Switzerland, immigrants are eligible for a temporary working permit if they possess a valid Swiss working contract. After 5 years, this temporary permit can be converted into a permanent residence permit. All permits are issued by cantonal migration offices, whereby the Federal Office for Migration ("Bundesamt für Migration", BFM) determines the exact date for the issuance of permanent residence permits.[8] While permits for EU/EFTA nationals have a nationwide scope, granting geographical and occupational mobility all over Switzerland (see art.8, 14 and 24, par.7, appendix I in the agreement on free movement of persons with the European Union), the permits for third-country nationals are insofar restricted as working in another canton is possible, whereas a change of domicile to another canton requires that a new permit is issued by this canton (see art. 37 and 38 AuG).

9.2.2.2 Integration Policy

Against the background of Switzerland's history as a guest worker country, it is not surprising that the topic of immigrant integration was long time neglected at the federal level. The traditionally strong position of Swiss cantons in the area of immigrant inclusion can be best illustrated with one of the central tenets of integration policy, naturalization policy. Until the foundation of the Swiss federation in 1848, naturalization was regulated solely by the cantons (Auer et al. 2000; Lavenex 2006; Eggert and Murigande 2004). This historical legacy reflects in Switzerland's current and unique three-stage regulation of citizenship acquisition, where any naturaliza-

[7] See *Neue Zürcher Zeitung*, July 5 2012, p. 9.

[8] See http://www.bfm.admin.ch/content/bfm/de/home/themen/aufenthalt.html (last accessed: November 1 2012).

tion process has to pass through local and cantonal authorities, before it is approved at the national level (Helbling 2008; Kleger and D'Amato 1995). The national citizenship law and the 26 cantonal citizenship laws respectively define formal eligibility criteria for naturalization, such as residence requirements, costs, or conditions for facilitated naturalization (Manatschal 2011). Yet contrary to practices in most other countries, the responsibility for naturalizing foreigners is largely delegated to municipalities which enact the naturalization procedures and ultimately decide on the applications (Hainmüller and Hangartner 2012; Helbling 2008).

Most recent developments in the field of integration policy are attributed to the fact that political, social and economic rights are decreasingly linked to civic rights (Soysal 1994), leading to a change in awareness: today, immigrants in Switzerland are no longer perceived as foreign workers but as fellow citizens facing however high hurdles for citizenship acquisition (Lavenex 2006). Questions regarding the broader integration of immigrants into Swiss society, which surpass the narrow civic inclusion in terms of citizenship acquisition, such as political (e.g. voting rights), economic (school, labour market) and cultural integration (cf. Ager and Strang 2008), arose primarily at the local city level where most immigrants live. Accordingly, cities and urban cantons were the first to formulate formal regulations and informal guidelines in this policy field (Lavenex 2006). One of the pioneer cantons in this respect was Basel-City, where a guiding principle on integration was enacted in 1999 (Ehret 2002). This local and cantonal activity in the regulation of immigrant integration is a prime example of how the principle of subsidiarity which characterizes Swiss federalism (see Sect. 9.2.1) works in practice.

In 2008, five out of overall 26 cantons possessed own integration laws, 11 cantons provided constitutional articles on integration and in several cantons and cities specific guiding principles on integration were in force (Manatschal 2011). Although these formal cantonal integration provisions were generally worded in an open and target-oriented way,[9] the regulatory activity of cities and cantons sensitized the national level for the issue of immigrant integration. As the following overview on the legal development of Swiss integration policy shows, the Confederation still represents a minimal and very open-worded understanding of the term integration with rather general objectives (cf. Niederberger 2004). This situation leaves the cantons considerable autonomy in integration policy making, and in the definition of immigrants' rights and obligations. Over the last years, cantonal competences in this policy field have even been consolidated by national law.

In 2000, the Federal Council enacted for the first time a decree on immigrant integration (SR 142.205 "Verordnung über die Integration von Ausländerinnen und Ausländern", VIntA) which defines the objectives of immigrant integration. According to art.2 par.1 of the VIntA, the aim of integration consists of the equal par-

[9] According to article 15 of the constitution of Basel-City, for instance, the canton "supports cultural diversity, immigrant integration and equal opportunities in the population". Similarly, the integration law of the canton of Fribourg aims at fostering the process of immigrant integration by facilitating equal societal participation of immigrants and Swiss citizens.

ticipation of immigrants and Swiss citizens in the economic, social and societal life. Yet, it is hardly specified how this aim of equal opportunities should be reached. Two factors might explain this lack of specificity: firstly, article 2 of the VIntA defines integration primarily as a task of the existing societal structures such as schools and the labor market, whereas governmental support for immigrant integration should only be supplementary. Secondly, integration is defined as a comprehensive cross-sectional task, which involves the federal, cantonal and local authorities as well as non-governmental authorities including social partners and immigrant organizations (art. 2 par. 2 VIntA). Thus, the Confederation is only one, and not the most important actor among many who are responsible for the task of integration, which precludes more specific national prescriptions on integration.

The aforementioned legal integration provisions (art. 2 VIntA) can also be found in article 4 of the new alien's law (SR 142.20 "Bundesgesetz über Ausländerinnen und Ausländer", AuG), which came into force in 2008 and replaced the former federal law on residence and settlement (ANAG). What is more, the AuG specifies the role of Swiss cantons in integration policy: they are now officially considered principal actors and contacts for the Confederation when it comes to immigrant integration (art. 57 AuG), whereas the Confederation confines itself to the financial and strategic support of cantonal integration programs.[10] Cantonal law is furthermore decisive when it comes to define the competences of municipalities and cities regarding integration tasks (TAK 2005).

In 2009, the Federal Council initiated a process on the future development of Swiss integration policy to find out whether Switzerland needs a national law on integration (TAK 2009). In his final report on this process, the Federal Council adheres to the status quo, concluding that the topic of integration should first and foremost be regulated more consistently through existing legislation instead of creating a new law (Bundesrat 2010). While traces of such a national unification of integration standards are looming in the current partial revision of the new aliens' law (AuG), which eventually will be renamed to "aliens' and integration law", these modifications do not imply a restriction of cantonal autonomy in integration policy making [11].

As the discussion in the first part of this chapter showed, Swiss immigration federalism did not undergo significant changes recently, but the division of competences between the Confederation and cantons which emerged over the last decades rather manifested itself. Thus, immigration, particularly immigrant selection, remains a contested national topic, even more so in the light of increasing supranational regulations of migration streams, whereas the implementation of immigration policy (selection and settlement) as well as the regulation of immigrant integration

[10] See Federal Office of Migration (2010) "Entwicklung kantonaler Integrationsprogramme und begleitende Massnahmen (EKIM)" from May 20 2010. Online: http://www.bfm.admin.ch/bfm/de/home/themen/integration/politik/weiterentwicklung.html (last accessed: July 23 2012).

[11] See *Neue Zürcher Zeitung*, March 23 2012. Online: http://www.nzz.ch/nachrichten/politik/schweiz/vereinheitlichung_der_standards_bei_der_auslaenderintegration_wird_begruesst-1.16041622 (last accessed: July 23 2012).

fall largely into the domain of Swiss cantons. From an immigrant perspective, this raises the question on the implications of the subnational heterogeneity in integration policy making for non-citizens, which will be addressed in part two of this chapter.

9.3 Consequences of Swiss Immigration Federalism for Non-Citizens

Considering ongoing political debates within Switzerland, opinions diverge on whether the cantonal variety of integration policy is rather beneficial or detrimental for non-citizens.[12] On the one hand, proponents of cantonal autonomy argue that adapted, context specific solutions for the local issue of immigrant integration are better than a "one size fits all" national framework (cf. Bundesrat 2010, p. 32). This argument is not only shared by migration scholars who claim that decentralized solutions provide better opportunities for participative and responsive policy making due to the reduced distance between state and citizens (cf. Holzer and Schneider 2004; Abu-Laban 2009). It also corresponds with the prominent argument brought forward by federalist scholars claiming that Switzerland's federalist laboratory facilitates the evolution of cantonal "best practices" (cf. Kriesi and Trechsel 2010; Linder 2011; Vatter 2011).

Opponents, on the other hand, contend that subnational policy variations constitute a potential source of structural discrimination, and that the heterogeneous puzzle of cantonal integration policies challenges the formulation of a coherent national strategy in this area (cf. Kübler and Piñeiro 2010; EKR 2009). Skeptical voices can also be found in the migration literature which warns about a potentially detrimental impact of devolution in immigration regulation on non-citizens' rights, particularly keeping in mind the inherently discriminatory nature of immigration law (cf. Fitzpatrick 1995, 2011).

In what follows, I present a detailed discussion of both aspects, potential benefits and harms of subnational integration policy making for non-citizens. The discussion of benefits turns around varying shares and composition of cantonal immigrant populations. Using the examples of cultural obligations as well as religious minority rights as elements of cantonal integration policy, I will show that cantonal autonomy facilitates problem-oriented and pragmatic policy making. By contrast, I argue that harm or discriminatory potential arises primarily from immigrants' unequal access to civic and political rights, as access to these rights is clearly restricted in German speaking cantons compared to Latin Switzerland, where a more liberal citizenship conception prevails.

[12] This question was also at the core of the convention of the Federal Commission for Migration ("Eidgenössische Kommission für Migrationsfragen", EKM) in 2010, which was entitled "Federalism, blessing or curse for migration policy?" See: http://www.ekm.admin.ch/de/themen/foederalismus.php (last accessed: August 8 2012).

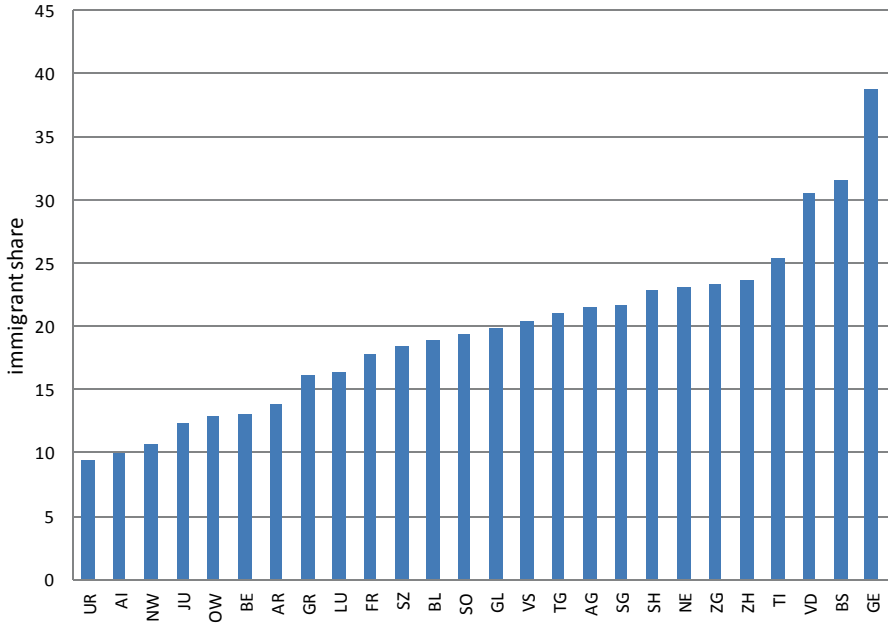

Fig. 9.1 Cantonal immigrant shares 2009 (in percent). *AG* Argovia; *AI* Appenzell Inner Rhodes; *AR* Appenzell Outer Rhodes; *BE* Berne; *BL* Basel-Country; *BS* Basel-City; *FR* Fribourg; *GE* Geneva; *GL* Glarus; *GR* Grisons; *JU* Jura; *LU* Lucerne; *NE* Neuchâtel; *NW* Nidwald; *OW* Obwald; *SG* St. Gall; *SH* Schaffhausen; *SO* Solothurn; *SZ* Schwyz; *TG* Thurgovia; *TI* Ticino; *UR* Uri; *VD* Vaud; *VS* Valais; *ZG* Zug; *ZH* Zürich. National average: 21.7%. (Source: Swiss Federal Statistical Office 2009, own illustration)

9.3.1 Benefits of Cantonal Autonomy in Integration Policy Making

The advantages of a federal solution to integration policy become already apparent considering the strongly varying immigrant shares between cantons. Figure 9.1 shows that the rate of non-nationals is clearly elevated in urban cantons such as Geneva, Basel-City or Zurich, whereas the rural cantons of Uri, Appenzell Inner Rhodes and Nidwald exhibit the lowest immigrant share. Overall, inter cantonal variance is considerable: in Geneva, non-nationals represent 38.7% of the whole population, which is four times higher than the immigrant share of Uri, which amounts to only 9.4%.

Thus, the challenges of integration are particularly salient in Swiss cities, i.e. urban cantons, with the highest concentration of non-national population. What is more, the composition of the immigrant population varies considerably between Switzerland's linguistic regions. As Fig. 9.2 reveals, 46% of immigrants in Switzerland's Latin region (i.e. French and Italian speaking cantons) stem from south-western Europe (Italy included), meaning countries with Romanic languages, whereas

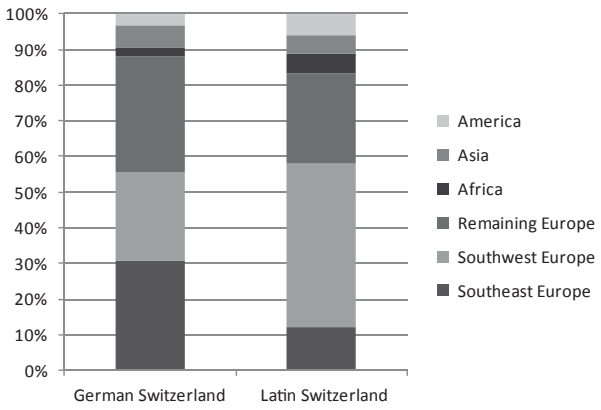

Fig. 9.2 Composition of immigrant population in Swiss linguistic regions 2009. (Source: Swiss Federal Statistical Office 2009, own illustration)

only 24 % of the immigrants in German-speaking Switzerland are supposedly German-speaking (i.e. of German or Austrian descent) and can benefit from familiarity with Germanic languages.

Obviously, these structural differences in extent and composition of cantonal immigrant populations require specific integration strategies. Autonomy in integration policy making allows the cantons for instance to take into account the varying ethno-linguistic composition of the non-national cantonal population when it comes to language acquisition. As Fig. 9.2 suggests, linguistic difficulties constitute a bigger challenge for immigrants in German speaking cantons, where only one quarter of the immigrant population is familiar with the local language (German), compared to Latin cantons, where almost half of the immigrant population speaks a local, i.e. a Latin language. Thus, one could expect that learning the local language is considered more important in German speaking than Latin cantons. A look at cantonal integration policies at least partly corroborates this assumption. From a legal perspective, language proficiency is considered roughly equally important in German speaking and Latin Switzerland: in 2008, the cantonal citizenship laws of eight out of overall 19 German speaking cantons mention linguistic skills as a requirement for naturalization (42.1 %), while in Latin Switzerland—Italian speaking canton Ticino included—it is four out of seven (57.1 %) (cf. Manatschal 2011). However, when considering cantonal practices, there is indeed a stronger emphasis on linguistic skills in German speaking than in Latin Switzerland. When the new aliens' law introduced the optional use of integration agreements, only German speaking cantons and the bilingual canton of Valais (German and French) applied this restrictive policy instrument systematically, which ties the allocation of residence permits to language proficiency (cf. Sect. 9.2.1). By contrast, Latin cantons applied integration agreements only selectively (Ticino, Neuchâtel, Jura, and Fribourg) or refrained completely from applying this restrictive policy instrument (Vaud and Geneva) (BFM 2008).

Another example for pragmatic policy making through cantonal autonomy is the demand for minority specific rights such as the right for an Islamic burial, which arose primarily in cities: in 2008, ten out of 26 cantons provided special areas for Is-

lamic cemeteries, mainly urban cantons, where most Muslims live.[13] This problem oriented subnational approach stands in a stark contrast to the national policy arena, where minority issues are more likely to become instrumentalized for symbolic party politics. The most prominent example thereof is the national ban on minarets which the Swiss population adopted in 2009. At that time, only four minarets existed in Switzerland, two in the canton of Zurich (cities of Zurich and Winterthur), one in the canton of Solothurn (city of Olten), and one in the city canton Geneva. In 2009, only one additional minaret was planned for the town of Langenthal in the canton of Berne. The administrative court of Berne decided in 2012 that this minaret conflicts with local building regulations and prohibited its construction, without however referring directly to the minaret ban.[14] The preceding discussion suggests that the difference between cantonal and national approaches can be traced back to varying degrees of polarization. This is in line with Richner's (2006) argument, according to which public attention combined with a party political polarization of immigrant specific rights hampers pragmatic policy making when it comes to the topic of non-Christian burials.

Cantonal autonomy does not only facilitate the formulation of pragmatic and problem oriented integration policy making which is optimally adapted to local needs. Ongoing policy learning processes within and between cantons suggest that cantons indeed represent a "federal laboratory", which facilitates evolution and diffusion of innovations and best practices in policy making. One example of this diffusion process is the popular slogan that integration implies rights and duties ("fördern und fordern") at the same time. The concept "fördern und fordern" was first formulated in the integration guiding principle of the canton Basel-City and is based on the assumption that equal opportunities for everyone require mutuality of rights and duties of immigrants and Swiss citizens alike.[15] The motto "fördern und fordern" did not only inspire other cantons, such as for instance the canton of Zurich, which included this slogan into its cantonal integration strategy,[16] but it also entered the national discourse and constitutes now one of the central tenets of Swiss integration policy (Bundesrat 2010, p. 6).

9.3.2 Discriminatory Potential of Swiss Immigration Federalism

The implications of Swiss immigration federalism are not only positive. Especially when considering the target population of immigrants, cantonal autonomy in migra-

[13] More specifically, these were the cantons of Zurich, Berne, Lucerne, Solothurn, Basel-City, Basel-Country, St. Gall, Ticino, Neuchâtel and Geneva (Manatschal 2011).

[14] See *Neue Zürcher Zeitung*, April 3 2012. Online: http://www.nzz.ch/aktuell/schweiz/gericht-verbietet-langenthaler-minarett-1.16242621 (last accessed: August 8 2012).

[15] See integration guiding principle of Basel-City. Online: http://www.welcome-to-basel.bs.ch/leitbild_original-2.pdf (last accessed: November 7 2012).

[16] See integration strategy of the canton of Zurich. Online: http://www.integration.zh.ch/internet/justiz_inneres/integration/de/integrationspolitik/strategie.html (last accessed: August 13 2012).

tion policy making can imply unequal and thus, potentially discriminatory treatment, which is an inherent consequence of legal regulations themselves (Fitzpatrick 1995, 2011). As Fitzpatrick (1995) observes, although the rule of law attempts to constitute itself in universal terms, in so doing it exposes its own particularistic and even racist underpinnings, since the legal discourse is always informed by nationalism and national identity.

Migration policy making in Swiss cantons offers a paradigmatic illustration of this seeming paradox, as cantonal integration policies reflect deeply embedded historical notions or "public philosophies" of citizenship and nationhood (Favell 2001b). Following this line of thought, national citizenship conceptions are assumed to crystallize in and shape integration policies of the respective countries as either restrictive and assimilationist or permissive and inclusive (Favell 2001b; Koopmans et al. 2005). The case is slightly more complex in multilingual and thus, multicultural countries, such as Switzerland. Here, it can be assumed that such citizenship conceptions and understandings of nationhood are transmitted by language, and thereby cross national borders. More specifically, different values, attitudes and norms of the cultural spheres in the countries surrounding Switzerland (i.e. France, Italy, Austria and Germany) are transmitted into French-/Italian- or German speaking cantons by way of diverse communication—(i.e. media) and exchange processes, shaping thereby the social culture in Switzerland's linguistic regions (Kriesi and Baglioni 2003).

The assumption that cantonal populations share varying citizenship conceptions and thus attitudes toward immigrant integration is corroborated on a regular basis in national votes on the topic, with Switzerland's French-speaking population being clearly less skeptical towards immigrants, and less restrictive regarding immigrant integration than its German-speaking population (Kriesi et al. 1996). Distinct historical-linguistic understandings of citizenship (French jus soli and Germanic jus sanguinis) indeed shape the cantonal public opinion regarding immigrants which, in turn, reflects in cantonal integration policies, resulting in a "limitrophe" coinage of integration policies in Switzerland's linguistic regions (Cattacin and Kaya 2005; D'Amato 2010; Manatschal 2012). This transnational pattern is no Swiss specificity but has also been observed in Belgium, another multilingual country, where Walloon and Flemish integration policies are said to be influenced by French and Dutch understandings of citizenship (Favell 2001a; Ireland 2006; Koopmans 2010).

The underlying argument that public sentiments such as exclusionary attitudes towards immigrants may be contagious and could, by being spread, influence government policies (Raijman 2010) has been proved by several international studies of countries as different as Spain (Zapata-Barrero 2009), New Zealand (Ward and Masgoret 2008), or more generally the countries of the European Union (Weldon 2006). By providing an immediate channel for popular participation, Switzerland's system of direct democracy seems particularly prone to such an impact of the popular will on policy formulation.

The varying cantonal integration philosophies imply that non-citizens living in one canton are treated differently compared to another canton. Due to the varying degrees of inclusiveness or exclusiveness of cantonal integration regimes (cf.

Eggert and Murigande 2004; Giugni and Passy 1997; Kleger and D'Amato 1995), cantonal integration regulations constitute a source of structural discrimination (cf. EKR 2009). More specifically, immigrants living in French speaking Switzerland enjoy more participation rights than non-nationals in German speaking cantons.

One example to illustrate this unequal treatment is political participation rights such as non-nationals' right to vote (cf. Sect. 9.2.1). In 2008, immigrants were endowed to vote in five out of six French speaking cantons at the municipal level, meaning Vaud, Fribourg, Jura, Geneva, and Neuchâtel, and in two French speaking cantons (Jura and Neuchâtel) even at the cantonal level (Manatschal 2011). The only exception is the bilingual canton of Valais, where immigrants have no right to vote. Similarly, non-nationals living in Italian speaking Ticino as well as in most German speaking cantons are not allowed to vote. Ticino is an exception only at first sight, which becomes feasible when extending our argument stipulating a limitrophe impact of citizenship regimes to Italy: similar to Germanic countries, Italy's citizenship regime corresponds to the restrictive jus sanguinis type (Zincone and Basili 2010). Thus, the Italian understanding of citizenship is in line with Ticino's restrictive stance when it comes to political participation rights. As for German speaking cantons, only three out of 19 cantons, Grisons, Appenzell Outer Rhodes and Basel-City, provide immigrants the right to vote, but only at the local level and in selected municipalities. At regular intervals, the topic of non-national's right to vote enters the political debate in German speaking cantons. In 2010, three cantons, Bern, Basel-City and Glarus, voted on the introduction or extension (cantonal level in Basel-City) of non-national voting rights.[17] Yet, the proposals were clearly rejected in all three cantons, corroborating thereby the restrictive Germanic citizenship regime. These cases illustrate how direct democracy helps to reinforce conservative popular tendencies and cultural perceptions of "who belongs to us", which inform cantonal integration policy making.

Immigrants' unequal access to rights within Switzerland's linguistic regions can furthermore be illustrated using the example of cantonal citizenship regulations. As already elaborated in Sect. 9.2.2.2, access to citizenship involves all three state levels in Switzerland, with cantons and federation providing formal eligibility requirements, whereas the responsibility for naturalizing foreigners is largely delegated to the local level, meaning that Swiss municipalities are the decisive authorities in this process. Nevertheless, formal requirements as they are defined in the 26 cantonal citizenship laws vary strongly. Overall, and in line with the expected pattern, these requirements are less demanding in French speaking and more restrictive in German speaking cantons. Besides the 12 years of residence required for naturalization at the national level, for instance, an applicant from the rural German speaking canton Nidwald has to prove that he lived for 12 years in this canton in order to be eligible for naturalization, whereas the same residence requirements in French speaking cantons Jura and Genève amount to only 2 years. Similar differences can

[17] From 2000 to 2010, cantons have been very active in this respect. During this period, 12 referenda were held in 10 cantons on voting-rights for non-nationals. See: http://www.ekm.admin.ch/content/ekm/de/home/themen/Citoy/stimmrecht.html (last accessed: October 25 2012).

be observed when it comes to requirements regarding cultural integration (cultural obligations): while applicants in the French speaking canton Neuchâtel are solely expected to know the local language (French), much more is expected from applicants in the rural German speaking canton Uri. Besides knowledge of the local language (German), an applicant must be integrated into the Swiss context, be familiar with the Swiss way of life, adapt to the laws, traditions and customs, respect the legal order and pose no threat to the internal and external security of Switzerland. While these last three points are likewise required by the national citizenship law (BüG) and thereby mandatory for immigrants in all cantons, eligibility for naturalization in the canton of Uri surpasses these requirements as applicants must also know the rights and duties related to Swiss citizenship and live in "ordered financial circumstances" (see article 5 of the cantonal citizenship law of Uri).

9.4 Concluding Remarks

The present contribution showed that Swiss immigration federalism is mainly shaped by three factors: firstly, the features of Swiss federalism, i.e. the principles of subsidiarity and executive federalism, which guarantee the cantons considerable autonomy in policy making and implementation, secondly, Switzerland's history as a guest worker country, which implied that the topic of integration was long time neglected by the national policy level, and thirdly, the regulatory logic of integration policy which addresses individual, locally embedded processes of immigrant incorporation into the larger society which ask for adapted, context sensitive policy measures.

Accordingly, national policy regulation regards mainly questions of immigration, i.e. immigrants' access to the country. As illustrated in part 1 of this chapter, immigration policy regulation involves the national and occasionally even the supranational level, while it is implemented by Swiss cantons. Thereby, immigrant selection constitutes a particularly contested policy field in non-EU member state Switzerland, as the country is increasingly confronted with supranational demands for free mobility of EU citizens from above, which conflict with protectionist popular claims for national sovereignty in the field of immigration arising from below. In this context, direct democracy turns out to be a particularly powerful tool for right populist anti-immigrant parties to counter international pressures for free mobility with protectionist and isolationist demands.

By contrast, cantons are the main regulatory units when it comes to immigrant integration policy. As the second part of this chapter illustrated, comprehensive cantonal autonomy allows for pragmatic, problem oriented and locally adapted solutions to challenges related to immigrant integration. At the same time, the devolution of integration policy making to Swiss cantons is not only for the benefit of non-citizens. Varying cultural notions of citizenship, which are more inclusive in French speaking cantons compared to German speaking cantons, imply unequal treatment, meaning unequal access to rights and obligations, for immigrants living

in different cantons. One might argue that this unequal access to rights or "voice" is not too problematic, as long as immigrants are granted "exit" options in terms of geographical and occupational mobility within Switzerland, which is de facto true for immigrants from EU/EFTA states as well as third-country nationals (see Sect. 9.2.2.1).[18]

Although cantonal integration policy making implies both, benefits and harms for non-citizens, I argue that policy devolution is preferable to a centralization of integration policy making for three reasons. Firstly, and as the discussion of benefits clearly showed, subnational units are closer to local needs regarding immigrant integration and therefore better able to formulate responsive and efficient policy measures. Secondly, and compared to the national level, cantonal integration policy making appears to be less prone to symbolic party politics and a polarization of the public opinion, which would clearly hamper pragmatic and problem-oriented policy making. Yet my third and most important point is that Switzerland's federal laboratory facilitates the evolution of best practices through policy diffusion, i.e. horizontal (between cantons) as well as vertical (from cantons to Confederation) policy learning processes.

Such policy-learning processes are facilitated by inter-cantonal exchange, which I consider a promising way to address questions of immigrants' unequal treatment across Switzerland's cultural-linguistic regions. Structures for an inter-cantonal dialogue already exist: regular horizontal and vertical exchange on the topic of integration policy takes for instance place through the "Tripartite Agglomeration Conference", which comprises representatives from all federal levels (Bundesrat 2010, p. 3). What is more, since 2008 every canton has an own integration delegate (see art. 57 AuG), meaning a cantonal expert for such an exchange. The only thing needed for inter-cantonal policy learning processes to unfold optimally is the political will for a truly integrative inter-cantonal exchange which overcomes cultural-linguistic differences and involves equally the experiences of all 26 cantons.

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[18] Unequal cantonal regulations can however be a problem for asylum seekers, who have no free mobility within Switzerland (cf. Holzer and Schneider 2004).

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Chapter 10
The Transformation of U.S. Immigration Federalism: A Critical Reading of *Arizona v. United States*

Jennifer Chacón

Abstract In the United States, the legal challenges to a recent spate of state and local laws aimed at regulating migration have revolved primarily around questions of immigration federalism. The primary argument of litigants challenging state and local ordinances such as Arizona's S.B. 1070 or Hazelton, Pennsylvania's ordinance concerning the employment and housing of unauthorized migrants has been a federal preemption argument. Simply put, the argument is that state and local immigration regulations are preempted by the comprehensive federal scheme regulating immigration. Defenders of the laws have taken the position—again relying on the jurisprudence that has evolved in the context of immigration federalism—that these laws and ordinances are not preempted because they exist in the interstices of and do not conflict with federal immigration regulation. Additional constitutional questions such as equal protection arguments or Fourth Amendment arguments have been raised as well, but those questions are being litigated in the shadows of the preemption arguments. Thus, the body of law concerning immigration federalism has been the primary tool used by courts thus far to resolve increasingly common questions about sub-federal immigration regulation.

As a result of the spate of litigation over sub-federal immigration ordinances, the jurisprudence of immigration federalism in the United States is becoming more nuanced—with increasing space created for state and local participation in immigration regulation. Courts still generally take the position that the federal government has primacy in regulating immigration laws, but recent decisions have shown an increasing tolerance for state or local regulations that do not contravene the federal regulatory scheme. This Chapter assesses the recent evolution of the jurisprudence of immigration federalism in the United States. Part I discusses several recent, high-profile cases involving challenges to state or local immigration regulations and explains how the courts have addressed the preemption arguments in each of these cases. Part II discusses the ways in which these recent court decisions are transforming preemption doctrine, allowing greater latitude for sub-federal regulation,

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but leaving unclear the permissible parameters of such regulation. Part III concludes with an analysis of the ways in which these decisions have interacted with political developments to substantially transform the landscape of immigration federalism in the U.S.

Keywords Court decisions • State and local law activities • Immigration regulation • Preemption doctrine • Discriminatory effect

Chief Justice Roberts	Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief.
General Verrilli	Where—that's correct, Mr. Chief Justice.
Chief Justice Roberts	Okay. So this is not a case about ethnic profiling.
General Verrilli	We're not making any allegation about racial or ethnic profiling in the case.[1]

Thus began the Solicitor General's argument in the landmark case of *Arizona v. United States* (2012). This might strike the casual observer as odd. After all, concerns about discriminatory policing and unlawful harassment, detentions and arrest were the core of the criticisms lodged against Arizona's controversial "Support Our Law Enforcement and Safe Neighborhoods Act" (generally referred to as "S.B. 1070") from the moment Governor Jan Brewer signed the bill into law on April 23, 2010. The President of the United States criticized the law as "undermin[ing] 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" (Archibald 2010). The Mexican American Legal Defense Fund decried the law as "a recipe for racial and ethnic profiling" (Archibald 2010). Cardinal Mahoney of Los Angeles declared that the provisions requiring state and local officials to verify immigration documents were akin to Naziism (Archibald 2010). Liberal commentator Rachel Maddow dubbed S.B. 1070 the "papers, please" law, and criticized it on similar grounds (Maddow 2010). In their initial challenge to the Arizona law, many immigrants' rights and civil rights advocacy groups raised challenges to the law based on the Fourth Amendment's prohibition on unreasonable searches and seizures and the Fourteenth Amendment's guarantee of equal protection.[2] Indeed, these challenges

[1] Official Transcript, Oral Argument, United States v. Arizona, No. 11–182, at 33–34 (argued April 25, 2012) (available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf).

[2] The American Civil Liberties Union (ACLU), Mexican American Legal Defense Fund (MALDEF), National Immigration Law Center (NILC), the National Association for the Advancement of Colored People (NAACP), the ACLU of Arizona, the National Day Laborer Organizing Network (NDLON) and the Asian Pacific American Legal Center (APALC) challenged the law on First, Fourth and Fourteenth Amendment grounds shortly after its enactment. *Friendly House, et al. v. Whiting*, First Amended Complaint for Declaratory and Injunctive Relief filed October 31, 2011, 2011 WL 5367286 (D.Ariz.) (Trial Pleading) United States District Court, D. Arizona.

have been renewed, thus far unsuccessfully, in the wake of the Supreme Court's decision in *Arizona v. United States* (2012).[3]

The Solicitor General immediately made it clear that those arguments were not before the Court in April of 2012. He framed his claim as a simple one: the state of Arizona had exceeded its authority in enacting S.B. 1070 and four sections of the legislation were preempted by federal immigration law.[4] Arguably, however, the Solicitor General immediately ceded too much ground in the first few seconds of his argument. On the one hand, the facial preemption challenge mounted by the federal government did not and could not rest on individualized showings of racial and ethnic profiling. On the other hand, it is precisely because the Arizona law is inconsistent with the antidiscrimination principles embedded in the text of federal immigration law and in contemporary federal enforcement policies that it was preempted. S.B. 1070's clash with federal antidiscrimination norms is one of the reasons why Arizona's law could have been deemed preempted; the profiling issue need not have been treated as a separate set of concerns that existed beyond the framework of the facial preemption challenge.

The Court's insufficient attention to antidiscrimination concerns helps to explain why the reaction to the Court's decision in *Arizona v. United States* (2012) has been so mixed. The ruling was actually a pretty clear victory for the federal government—at least as far as the preemption principles that were at stake (Martin 2012; Chacón 2012). And yet, in upholding Section 2(B), the Court left in place a provision that was a source of deep concern for opponents of the law, and effectively green lighted systematic state and local participation in immigration enforcement (Chacón 2012). Significantly, it did so in a way that failed to account for the discriminatory effects of such participation.

This Chapter analyzes the U.S. Supreme Court's decision in *Arizona v. United States*, with particular attention to the ways in which that decision illustrates the U.S. Supreme Court's growing reluctance to enforce the antidiscrimination norms of federal immigration policies through preemption. Rather than striking down sub-federal policing efforts that rely on investigations into immigration status by agents untrained in immigration law, the Supreme Court's decision endorsed such practices. Nor is the Court's endorsement of these practices limited to those states that enact policies like Arizona's, because the Court's decision rests on the problematic premise that *any* state or local officer has the power to investigate immigration status as part of their ordinary policing function. The Court disregarded the federal statutory provisions seeking to limit sub-federal investigations, and minimized the systemic harms generated when untrained agents investigate immigration status. This Chapter explores how the jurisprudential approach embraced by the Court—

[3] *See* Valle del Sol et al. v. Whiting, No. CV10–1061-PHX-SRB (D. Ariz. Sept. 5, 2012) (denying preliminary injunction of S.B. 1070 Section 2(B) sought on Fourth and Fourteenth Amendment grounds).

[4] The United States had initially contended that S.B. 1070 was preempted in its entirety, but Arizona District Court Judge Bolton rejected this argument, finding that only Sections 2(B), 3, 5(C) and 6 were preempted. United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

one that clearly privileges the enforcement goals over the antidiscrimination goals of federal immigration law—will inevitably result in discrimination and the racial harassment of minority citizens and lawful migrants in contravention of the requirements of federal immigration law.

This Chapter proceeds in three Parts. Part I of this Article outlines the Court's immigration federalism jurisprudence, focusing on its recent decisions, with particular attention to *Arizona v. United States*. In cases leading up to *Arizona v. United States*, the Court suggested that it might allow a much larger role for states in the creation and enforcement of immigration laws. But in the *Arizona* decision, the Court backed away from such suggestions, and hewed to a fairly traditional understanding of federal exclusivity, at least formally. This formal adherence to traditional federalism doctrine was hailed by some as a victory for the federal government and for federal primacy in immigration law. But the apparent triumph of federal primacy is somewhat illusory. Part II explores the reasons that the Court's formal adherence to traditional notions of immigration federalism will fail to translate into federal primacy in practice. Succinctly put, traditional judicial articulations of immigration federalism do not account for the sub-federal immigration enforcement discretion that has accumulated over the past two decades. Following the last round of comprehensive immigration reform in 1986, scholarly, legal, and political consensus seemed to exist around the notion that states and localities would play a limited role in immigration enforcement; a role that was largely confined to making occasional arrests for immigration crimes and in some cases notifying federal enforcement agents of immigration violators in state or local custody (Seghetti 2006; Rodriguez 2008; Su 2010). By 2010, an entirely different vision of state and local participation in immigration enforcement had replaced the older, more limited one. This Part maps these changes, and also demonstrates how the existing case law on immigration policing relies on a delineation between federal and sub-federal policing that has become increasingly illusory. Part III unpacks the Court's decision in *United States v. Arizona* to explain why the seemingly traditional approach to federalism espoused by the Court actually represents a substantial reformulation of immigration federalism principles. As previously noted, over the past two decades, sub-federal participation became a significant feature of the immigration enforcement landscape. Much of this participation was not sanctioned by federal immigration law, and recently, the federal government's immigration enforcement policies have moved in a direction aimed at bringing sub-federal enforcement efforts more closely into alignment with the letter of federal immigration law. The Court's decision in *Arizona v. United States* is insufficiently attentive both to the letter of federal immigration law and to the efforts of the federal government to move closer toward aligning practices with the letter of the law. Consequently, the Court's seemingly limited concessions to state authority in *Arizona v. United States* actually cede significant enforcement powers to sub-federal entities contrary to the requirements of federal immigration law. In the absence of federal legislation to normalize the status of some or all of the estimated 11.2 million unauthorized migrants in the United States, state and local law enforcement will substantially shape immigration enforcement and the immigrant experience in the

United States, notwithstanding the Court's formal endorsement of federal primacy. Moreover, the Court's disregard for federal immigration law antidiscrimination principles will mean that, for migrants, more aggressive and racially-motivated policing will certainly follow from the decision.

10.1 Academic Immigration Federalism in the U.S.: The Law on the Books

Preemption arguments such as those made by Solicitor General Verilli in *Arizona v. United States* are rooted in the Supremacy Clause, in Article VI of the U.S. Constitution, which provides that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding (U.S. Const, Art VI).

As a consequence of the Supremacy Clause, U.S. courts will invalidate as preempted state laws that conflict with federal laws (*Gade v. National Solid Waste Management Assn.* (1992); Chemerinsky 2011, p. 402). Preemption may be express; in such cases, Congress includes express language in the federal law to prohibit state regulation (*Gade*). But courts may also find a law to be impliedly preempted. Implied preemption takes three forms. First, a state law may be field preempted if "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (*Id.*) Second, a state law may be conflict preempted "where compliance with both federal and state regulation is a physical impossibility." (*Id.*) Third, a state law may be obstacle preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.*)

In the absence of a clear statement from Congress manifesting its intent to preempt state laws, U.S. courts generally start "with the assumption that the historical police powers of the State were not to be superseded by the Federal Act unless it was the clear and manifest purpose of Congress" (*Medtronic, Inc. v. Lohr* (1996); Chemerinsky 2011, p. 404). On the other hand, U.S. courts have long construed the regulation of immigration as an exclusively federal matter (*Chy Lung v. Freeman* (1875)). Moreover, the Court has previously noted that that "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution" and that it "was pointed out by authors of The Federalist in 1787, and has since been given continuous recognition by this Court" (*Hines v. Davidowitz* (1941). Thus, with regard to the regulation of immigration, "the law of the state, though enacted in the exercise of power not controverted, must yield" to federal law. (*Id.* at 66).

S.B. 1070 is one of many state and local ordinances that aim to do indirectly what a long line of constitutional case law indicates they cannot do directly—regulate immigration. As a legal matter, the bill's attempt to insert the state into immigration policy contravenes clearly accepted legal wisdom. By the time that the Supreme Court decided the *Chinese Exclusion Case* in 1889, the Court had articulated the principle that Congress has plenary power to regulate immigration. Other cases decided in the latter half of the nineteenth Century, for example *Henderson v. New York* (1875), affirmed the central role of the federal government—as opposed to the states—in setting immigration policy. Justice Scalia's dissent in *Arizona v. United States* (2012) hearkens to the early days of the republic, when states and localities played the dominant role in immigration law and its enforcement (Abrams 2009; Neuman 1993; Zolberg 2008). But by the late nineteenth century, cases like *Chy Lung v. Freeman* and *Fong Yue Ting v. United States* had already established an absolute and largely unreviewable federal authority to enact through Congress and enforce through the executive branch the nation's immigration laws. In the period that followed, even state statutory schemes that did not expressly conflict with congressional enactments were deemed preempted where they sought to regulate an area such as alien registration, for which Congress had already developed a comprehensive statutory framework. Thus, the Court in *Hines v. Davidowitz* (1941) struck down Pennsylvania's alien registration scheme in spite of the fact that it did not expressly conflict with the operation of the later-adopted federal scheme. The lesson was clear: the regulation of immigration was a matter for the federal government.

Over the past several decades, however, the Court has acknowledged some limited spaces for state and local involvement in immigration enforcement. Prior to the decisions of the Roberts Court, the most notable case in this regard was *DeCanas v. Bica* (1976). The question before the Court was whether a California law that imposed sanctions on employers who hired noncitizens unauthorized to work in the United States impermissibly infringed on federal immigration powers. The Court rejected the legal challenge to the California law, concluding that, in the absence of a comprehensive federal scheme to regulate the employment of unauthorized workers, California's law was not preempted by federal immigration law. *DeCanas* acknowledged the power of states to regulate immigration-related matters that fall under the states' traditional police powers (in this case, employment), provided the states' laws do not conflict with federal immigration law. The Court was able to distinguish *Hines* because of the absence at that time of a comprehensive federal statutory scheme governing the employment of unauthorized workers. In the years that followed the case, Congress did enact comprehensive legislation to address this issue. Specifically, the Immigration Reform and Control Act of 1986 (IRCA) created a statutory scheme requiring employers to maintain records of employees' work eligibility, penalizing employers who hire unauthorized workers, and protecting authorized workers from discriminatory hiring practices.

Interestingly, another case to suggest a space for sub-federal immigration regulation was *Plyler v. Doe* (1982)—a case that is generally considered the high water mark of constitutional protection of the rights of unauthorized noncitizens (Bosniak 2006). In that case, which involved a challenge to a Texas law that would have

required undocumented students to pay to attend public primary and secondary school, the Supreme Court struck down the state law on equal protection grounds. But in so doing, the Court suggested that a state "might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population" (*Plyler v. Doe* 1892, p. 228). As in *DeCanas*, the Court signaled that there may be spaces and occasions when sub-federal regulation of immigration matters might be permissible (Chin and Miller 2011). Both cases left unanswered the question of precisely how much leeway states have to regulate immigration.

Until recently, the Court did not have the opportunity to explore the scope of state authority to regulate immigration. In the intervening years, the most high-profile attempt by a state to regulate certain aspects of immigration—California's Proposition 187—was enjoined by a district court and the state subsequently abandoned its defense of the law (McDonnell 1999; *Lulac v. Wilson* (1995)). But in the past two years, the Court has issued two major decisions on the topic: *Chamber of Commerce v. Whiting* (2011) and *Arizona v. United States* (2012). Although these decisions modestly expand the potential sphere of state immigration policymaking and enforcement, the cases have appeared to hew surprisingly closely to traditional lines. As will be explained further in Part II, however, shifts in immigration enforcement practices have fundamentally transformed the role of sub-federal actors in immigration enforcement. The Court's failure to recognize and address these shifts has resulted in decisions that favor state and local enforcement policies over federal immigration priorities notwithstanding formal adherence to traditional preemption principles.

10.1.1 Chamber of Commerce v. Whiting: Feints Toward a More Permissive Immigration Federalism

The *Chamber of Commerce* case involved a facial challenge to an Arizona state law—the Legal Arizona Workers Act ("LAWA")—that allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly and intentionally hire unauthorized noncitizen workers (Ariz. Rev. Stat. Ann. § 23–212, 2009). The law created a procedure by which anyone can submit a complaint about a business's hiring practices to the state's Attorney General or a county attorney. The submission of such a complaint requires the official to investigate the claim and, if it is found to be neither false nor frivolous, to bring action against the employer (Ariz. Rev. Stat. Ann. § 23–212(B), (C), & (D) 2009). The Act also requires all employers to participate in E-verify—the federal automated program that allows employers to verify the work eligibility of employees (Ariz. Rev. Stat. Ann. § 23–212(A) 2009).

The Chamber of Commerce of the United States and various business and civil rights organizations sued to enjoin the law on the grounds that it was expressly and impliedly preempted by federal immigration regulation—and specifically by the provisions of the (IRCA) of 1986 (*Chamber of Commerce v. Whiting* 2011). The

plaintiffs also argued that even if federal law did not expressly preempt Arizona's employer sanctions law, LAWA was impliedly preempted because it was inconsistent with federal law providing for the voluntary use of E-Verify (*Whiting* 2011).

On May 26, 2011, the Court issued its decision, authored by Justice Roberts. The decision did not significantly expand states' abilities to regulate immigration law. It did, however, contain dicta that hinted that the Court was planning to apply a more limited version of obstacle preemption in future cases, although the Court's later decision in *Arizona v. United States* (2012) declined to seize or expand upon this dicta in the *Whiting* case.

The Supreme Court in *Whiting* found that LAWA's business license suspension provision was a licensing scheme that fell within IRCA's savings clause in 8 U.S.C. § 1324a(h)(2), which allows for state regulation of the employment of unauthorized workers through "licensing and similar laws." The Court thus rejected the express preemption argument raised by the Chamber of Commerce. That portion of the opinion was discrete, for it was limited by its facts to the carve-out language of IRCA, and unlikely to be particularly instructive in other contexts.

But the Chamber of Commerce had also argued that LAWA was preempted on an implied preemption theory of obstacle preemption because it upset the carefully balanced immigration enforcement and antidiscrimination goals of the federal immigration scheme. Like the lower courts before it, the Supreme Court rejected this claim as well. The Court noted that the state law tracked the federal scheme both in how it defined authorized workers and how it defined offenses, arguably suggesting that state laws the mirror the federal scheme are less likely to be deemed to conflict with or pose an obstacle to federal law. The Court then noted that Congress expressly welcomed state licensing laws in this area. "The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban. Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'…." (*Chamber of Commerce v. Whiting* 2011, p. 1985). To some commentators, this language suggested that the Court was likely to take a skeptical and narrow view of obstacle preemption in future immigration cases, including *Arizona v. United States* (Gilbert 2012a). But the question remained how far the Court would extend that reasoning in cases outside of the IRCA carve-out.

10.1.2 United States v. Arizona: Limiting Whiting; Reaffirming Federal Dominance

The Court's most recent foray into immigration federalism came with the case of *Arizona v. United States v. Arizona* (2012). The case arose out of litigation over Arizona's S.B. 1070. Section 1 of S.B. 1070 states in no uncertain terms that "the intent of [S.B. 1070] is to make attrition through enforcement the public policy of all state and local government agencies in Arizona" and that "[t]he provisions of this act are intended to work together to discourage and deter the unlawful entry

and presence of aliens and economic activity by persons unlawfully present in the United States" (S.B. 1070 § 1, 2010). To achieve this goal, S.B. 1070 creates or amends four sections of the Arizona Revised Statutes to impose criminal liability on the basis of unauthorized presence in the United States (Chin et al. 2010). Although proponents of the law argued that it merely "mirrors" federal immigration law, this is clearly not the case (Chin and Miller 2011), as the law creates criminal liability for some conduct that is not criminal under federal law and imposes more stringent penalties on other federally sanctioned conduct. S.B. 1070 also "imposes new duties and creates new powers designed to increase" state and local law enforcement' in "investigation of immigration status, arrests of removable noncitizens, reporting of undocumented status to federal authorities, and assistance in removal by delivering removable noncitizens to federal authorities" (Chin et al. 2010). The overall point is to have state and local law enforcement more involved in all phases of immigration enforcement.

The legal filings for injunctive relief certainly reflect the concern that the law would result in unreasonable searches and seizures and discriminatory law enforcement, and raise such claims under the Fourth and Fourteenth Amendment. But the leading arguments against S.B. 1070 were arguments over federal preemption. The briefs filed by the U.S. Department of Justice argued that the Arizona law was preempted by federal immigration law. The government relied on theories of both express and implied preemption, with the government taking the position that the entire law was preempted. Based on these arguments, Judge Bolton of the Federal District Court of Arizona enjoined four provisions of the law (*United States v. Arizona*, 703 F. Supp. 2d 980, 992–1006 (D. Ariz. 2010), and the Ninth Circuit upheld this decision (*United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011)). Arizona appealed the case to the Supreme Court. On June 25, 2012, the Supreme Court issued its decision in the case (*Arizona v. United States* 2012).

The Court first analyzed S.B. 1070 Section 3, a provision that created the new state misdemeanor forbidding the "willful failure to complete or carry an alien registration document" in violation of federal law (Ariz. Rev. Stat. Ann. § 13–1509(A), 2010). The Court found Arizona's alien registration to be "field preempted," declaring that "the Federal Government has occupied the field of alien registration" with its comprehensive registration scheme, thereby impliedly preempting Arizona's efforts to create auxiliary—and slightly more severe[5]—penalties for failure to comply with the federal scheme (*Arizona v. United States* 2012, p. 2502). Like the lower courts, the Supreme Court relied heavily on its 1941 ruling in *Hines v. Davidowitz*, the Court's earlier field preemption decision concerning an alien registration scheme. Of course, unlike the Pennsylvania scheme at issue in *Hines*, the Arizona law closely mapped onto the federal registration scheme. But this made no difference to the Court, which found that there was no room for additional state action, even complementary state action, given the existence of a comprehensive federal scheme (*Arizona v. United States* 2012).

[5] The Arizona law does not allow for probation as a penalty for failure to carry registration papers; the federal law does (*Arizona v. United States*, 2012, p. 2503).

The Court next evaluated Section 5(C), which made it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" (Ariz. Rev. Stat. Ann. § 13–2928(C), 2010). Citing to its 2011 decision in *Whiting*, the Court concluded that, unlike the federal alien registration scheme, the IRCA provisions do not fully occupy the field with regard to the employment of unauthorized workers. Indeed, the carve-out provision at issue in *Whiting* (8 U.S.C. § 1324a(h)(2)) expressly allows for certain sub-federal regulation in the field. Thus, there is room for states to legislate in this area. But the Court rejected the notion that Arizona's legislation was compatible with the federal scheme. The Court concluded that, "[a]lthough 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement" (*Arizona v. United States* 2012, p. 2505). The Court reasoned that the legislative history of IRCA reflects Congress' consideration of and rejection of criminal sanctions for workers. Thus, the Court concluded that the section is unconstitutional on a theory of obstacle or conflict preemption. This was the first signal that the Court was not planning to follow the logic of *Whiting* toward a significantly more restrained obstacle preemption analysis on questions of immigration federalism.

The next provision scrutinized by the Court was Section 6, which provided that a state officer "without a warrant, may arrest a person if the officer has probable cause to believe [that the person] has committed any public offense that makes [him] removable from the United States" (Ariz. Rev. Stat. Ann. § 13–3883(A)(5) 2010). The Court observed that even immigration officers do not necessarily have the authority to arrest someone upon having probable cause of removability. In the absence of a federal warrant, arrest based upon probable cause of removability is permitted only in a limited, statutorily prescribed set of circumstances. The Court therefore concluded that Section 6 provided Arizona's officials with "greater authority to arrest aliens on the basis of possible removability than Congress has given to trained immigration officers" (*Arizona v. United States* 2012, p. 2506). The Court also concluded that the result would be "unnecessary harassment of some aliens … whom federal officials determine should not be removed" (*Arizona v. United States* 2012, p. 2506). Finally, the Court noted that the federal statute specifies the circumstances under which state officers are entitled to perform the functions of immigration officers, such as by operation of a formal agreement with the federal government pursuant to 8 U.S.C. § 1357(g)(1). The Court found Arizona's arrest authority far more capacious, and therefore preempted. Here again, the Court engaged in a fairly robust application of obstacle preemption, notwithstanding the suggestion in *Whiting* of the desirability of another approach.

The final provision addressed by the Court was Section 2(B), which requires officers to request proof of status during otherwise lawful seizures upon "reasonable suspicion" that a person was unlawfully present. Section 2(B) also requires the determination of an individual's immigration status before their release after a lawful arrest. This was the most controversial of the law's provisions, and the only section that the Supreme Court upheld.

The Court reasoned that Section 2(B) does not come into play unless there is a legitimate state law enforcement justification for the initial detention or arrest. The Court found that, even without Section 2(B), Arizona officials are authorized to confer with federal officials about an individual's immigration status, and federal law requires that the federal government respond to such communications from state actors (8 U.S.C. § 1357(g)(10)(A)). Therefore, the Court did not see a problem with the state's authorizing or requiring immigration status checks during otherwise lawful stops or arrests (*Arizona v. United States* (2012)). Moreover, the Court read the powers that 2(B) bestows on state officials quite narrowly. The Court assumed for purposes of its conclusion that any stop or arrest would not be prolonged by an immigration status inquiry.

The Court therefore upheld the provision by reading Section 2(B) as not creating any additional arrest or detention powers over and above those that state officials already exercised in their ordinary law enforcement duties. Because the Court read Section 2(B) as merely codifying lawful enforcement practices, it found no reason to strike the provision down.

As a legal matter, *Arizona v. United States* makes no clear break from prior law. It reiterates a strong federal role in immigration policy and applies a fairly robust version of obstacle preemption in striking down Sections 5(C) and 6. As David Martin noted early on, the *Arizona* decision also rejects the "mirror image" theory of sub-federal immigration regulation. (Martin 2012). And yet the decision was greeted with significant concern by the President of the United States and by immigrants' rights advocates throughout the country (Obama 2012; Romero and Wang 2012; National Immigration Law Center 2012). The concern was based on the notion that Section 2(B), which seems so innocuous in the Supreme Court's decision in the *Arizona* case, would actually allow for the exercise of tremendous state power to regulate the lives of immigrants, and would do so in ways that fuel discriminatory policing practices against *Latinos* in general. It is almost certainly the case that it will. But this is not because of any recent, radical transformation in Supreme Court jurisprudence. Instead, it is because of a gradual and substantial transformation in the socio-legal context of immigration policing—one that has taken place over the past two decades. The next section describes those changes.

10.2 The Evolution of Immigration Federalism—the Socio-Legal Story

Reading *United States v. Arizona*, one might assume that not much has changed in the world of immigration federalism in recent years. The fact, however, is that the situation has changed substantially, but this change has come as a result of shifting enforcement policies rather than as a result of a recent edict of the Supreme Court. Following the last round of comprehensive immigration reform in 1986, scholarly, legal and political consensus seemed to exist around the notion that states and localities would play a limited role in immigration enforcement; this role was largely

confined to making occasional arrests for immigration crimes and in some cases notifying federal enforcement agents of immigration violators in state or local custody. By 2010, an entirely different vision of state and local participation in immigration enforcement had replaced the older, more limited one. State and local law enforcement had become the primary point of contact for many noncitizens coming into contact with the removal system. Moreover, the federal executive branch was one of the main architects of this new order. This section maps the changing sociolegal landscape of immigration enforcement. Subsection 10.2.1 discusses changes in immigration enforcement at the federal and sub-federal level. Subsection 10.2.2 discusses the static legal regime governing enforcement, which does not account for the new enforcement realities.

10.2.1 The Changing Nature of Immigration Enforcement

Over the past 20 years, states and localities have become increasingly involved in defining immigration policy and in enforcing immigration laws (Chacón 2012b). The forces that have brought states and localities to this larger role have come from above and below. On the one hand, greater sub-federal involvement in immigration enforcement has been authorized by Congress and, more importantly, instrumentalized by federal executive branch policies and pronouncements. On the other hand, some of this involvement has been generated by entrepreneurial efforts at the state and local level that have moved the baselines of acceptable state and local involvement in immigration policy.

Given the widespread acceptance of the principle—rearticulated in *Arizona v. United States*—that the federal government controls immigration policy, one would assume that any delegation of that power would come from Congress. But congressional inertia in the area of immigration reform has meant that Congress' role in the transforming landscape of immigration federalism has been slight. This is not to say, however, that Congress has been irrelevant. In 1996, Congress made four important changes to the immigration code with the goal of increasing state and local cooperation in immigration enforcement. (Chacón 2010). First, with the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") (1996), Congress authorized state officers to arrest and detain noncitizens who had "previously been convicted of a felony in the United States." Second, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") (1996) added a provision to the immigration law allowing the Attorney General to empower local officials to enforce civil immigration laws in instances involving "an actual or imminent mass influx of aliens … presents urgent circumstances requiring an immediate Federal response." Third, IIRIRA added section 287(g) to the Immigration and Nationality Act, which allowed the Attorney General to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the state or local agency and the Department of Justice (8 U.S.C. § 1357(g) 2006). Fourth, Congress prohibited states and localities from barring their employees from reporting

immigration status information to the federal government and required the federal government to respond to sub-federal agency inquiries concerning citizenship or immigration status "for any purpose authorized by law." Congress made all of these changes while also enacting legislation that gave states increased authority to deny certain services and benefits to noncitizens, particularly those present without authorization.

Congress was reacting to pressure from constituencies seeking a greater role for states and localities in immigration policy and enforcement—such as the advocates of California's Proposition 187. These changes to the law allowed for limited and controlled state and local participation in immigration enforcement. These provisions refute any notion that states have inherent authority to enforce immigration laws. These specific, limited grants of enforcement power are the only immigration enforcement powers that Congress has formally authorized states and localities to perform. The changes to the law signal noteworthy changes in the role that states and localities play in immigration enforcement, but the limited nature of these changes suggest that Congress continued to envision a limited role for sub-federal actors in immigration enforcement. Even the events of September 11, 2001 did not prompt any fundamental legislative changes in this regard. The only immigration "policy" that Congress has consistently and enthusiastically supported over the past decade is the increased funding of the federal immigration enforcement bureaucracy, which is charged with enforcing the nation's outmoded immigration laws (Chacón 2012).

But if Congress was largely inert, the executive branch moved much more aggressively in reshaping immigration policy, first expanding and then, more recently, seeking to limit state and local law enforcement efforts into immigration enforcement. In the years immediately after September 11, 2001, the executive branch engaged in unprecedented expansions of state and local power in enforcement—an expansion that has ebbed in more recent years. In the post-September 11 era, the executive branch used the immigration enforcement and detention system as a primary site of domestic anti-terrorism policy, notwithstanding the lack of nexus between much of the immigration enforcement and any actual terrorist threat (Chacón 2007). One important element of this increased enforcement was the federal government's increasing reliance on state and local law enforcement as a primary site of immigration enforcement (Wishnie 2004).

Michael Wishnie describes the three distinct initiatives that generated increased sub-federal involvement in enforcement in the early 2000s (Wishnie 2004). The first was a shift by the Department of Justice away from its traditional position that state and local officials lacked the power to enforce civil immigration laws in favor of the unprecedented position that they had the "inherent authority" to enforce these laws. The second was the decision to have the Immigration and Naturalization Service ("INS") enter several categories of civil immigration information into the National Crime Information Center ("NCIC") database that all law enforcement agents can access during routine policing. Third, the Attorney General and his senior staff used informal methods to encourage state and local police departments to prioritize immigration enforcement and to make immigration arrests (Wishnie 2004; Pham 2004).

These developments in executive policy led to a fundamental change in the culture of some state and local law enforcement agencies. Whereas once these agencies had assumed that their role in immigration enforcement was marginal at best, some now came to view immigration enforcement as a core function (Carter 2010; Eagly 2011). Interest in immigration enforcement spurred a number of states and localities to seek to enter into 287(g) agreements that would allow them to enforce immigration laws, at least in a limited way. Although the legislation providing for such agreements had been on the books since 1996, it was not until after September 11, 2001, that the executive branch actually began to implement such enforcement agreements with sub-federal entities. The number of agreements proliferated in the years that followed; the bulk of existing agreements were signed after 2006 (Capps et al. 2011). Currently, there are sixty-three participating agencies in twenty-four states (ICE 287(g) 2012). Despite the criticisms that these agreements have generated, including charges that the implementation of 287(g) agreements leads to racial profiling in participating jurisdictions (Chacón 2010a), the Obama Administration has chosen to continue the program. Under President Obama, existing 287(g) agreements were revised and federal training and oversight were purportedly strengthened (Capps et al. 2011). However, criticisms of the program have persisted (*Id.*). The Department of Homeland Security (DHS) recently has terminated 287(g) agreements upon findings that sub-federal agents abused their immigration enforcement authority by engaging in patterns of racial profiling (Napolitano 2011). This suggests that DHS is more closely monitoring implementation of the agreements, or at least that DHS is unwilling to continue agreements in jurisdictions where DOJ has made findings of egregious acts of discrimination. But the program remains operational in 63 jurisdictions.

The Secure Communities Program dwarfs all other prior efforts to involve states and localities in immigration enforcement, but it also signals an important shift away from reliance on sub-federal discretion in enforcement, in favor of consolidating discretion at the federal level. From a federal perspective, the advantage of Secure Communities is that it expands federal enforcement capacity by processing information about local arrests without bestowing the increased enforcement powers on sub-federal agents required by the 287(g) program. At least in theory, if not in practice, discretionary power concerning immigration enforcement is shifted back to the federal government.

The first appropriations for the program were authorized in December 2007 (Chacón 2010a). Currently, the program is operating in more than 3,000 jurisdictions across the country, including all jurisdictions along the U.S.-Mexico border (ICE, Activated Jurisdictions 2012). As Immigration and Customs Enforcement (ICE) describes the program, the fingerprints of individuals arrested or booked by state or local officials, which have long been submitted to the Federal Bureau of Investigation (FBI), now go through a second database as well.

Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action—prioritizing the removal of

individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors—as well as those who have repeatedly violated immigration laws (ICE, Secure Communities 2012: para. 3).

Defenders of the program argue that this is an ideal way to allow states and localities to multiply the forces of immigration enforcement agencies in a way that merely piggybacks on existing law enforcement efforts and therefore generates no negative racial profiling effects. Critics argue that the program's existence encourages racial profiling (National Immigration Forum 2012), and the charges have been viable enough that ICE recently has taken systematic steps to address some of these concerns (ICE, Frequently Asked Questions 2012). Regardless, it seems clear that the program is designed to take advantage of the force multiplier effect of state and local law enforcement without the downsides of relying on their discretionary immigration policing.

Recent executive branch efforts to reconsolidate immigration enforcement discretion in the hands of the federal government have run up against a rising tide of state and local laws designed to insert sub-federal actors in immigration enforcement. In recent years, states and localities have enacted a host of sub-federal ordinances aimed at immigrants (Cornelius 2010), many of which include criminal provisions designed to trigger the involvement of local law enforcement. Arizona's S.B. 1070 and the copycat legislation it inspired[6] have received the bulk of the media attention, but the U.S. is now checkered with local initiatives that deal with everything from restrictions on renting to unauthorized migrants[7] to solicitation of work[8] to "alien smuggling" (Eagly 2011) and human trafficking (Chacón 2010b). These laws provide local law enforcement with further facially legitimate reasons to engage in the policing of noncitizens.

With the nationwide implementation of the Secure Communities program and the growth of local laws targeting migrants, the role of state and local law enforcement in immigration has shifted nearly 180 degrees in the last two decades. In the mid-1990s, such involvement was rare. The limited attention given to the issue by

[6] *See* Hammon-Beason Alabama Taxpayer and Citizen Protection Act, H.R. 56 (HB 56), 2011 Ala. Acts 535 (Ala. 2011), *amended by* H.R. 258 (HB 258), (Ala. 2012); Georgia Illegal Immigration Reform and Enforcement Act of 2011, H.R. 87 (HB 87) (Ga. 2011); S. 590 (SB 590) (Ind. 2011); South Carolina Illegal Immigration and Reform Act, S. 20 (Act No. 69), (S.C. 2011); Illegal Immigration Enforcement Act, HB 497) (Utah 2011) (including Utah's Compact, H116, H466, H469 and H497.).

[7] See, e.g., Hazleton, Pa., Ordinance 2006–18 (2006, Sept 8), *invalidated by Lozano*, 496 F. Supp. 2d 477 (M.D. Penn. 2007),), *vacated sub nom*., City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958 (2011) (remanding in light of *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011).).

[8] See, e.g., Cent. Am. Refugee Ctr. v. City of Glen Cove, 753 F. Supp. 437, 439–42 (E.D.N.Y. 1990). (upholding against equal protection and First Amendment challenges local anti-solicitation ordinances that prevented day laborers from congregating); Lopez v. Town of Cave Creek, Ariz., 559 F. Supp. 2d 1030, 1035–36 (D. Ariz. 2008) (granting a preliminary injunction against a Cave Creek ordinance aimed at day-laborer solicitation).

courts had resulted in the pronouncement that state and local officials were not empowered to make civil immigration arrests (e.g., *Gonzalez v. City of Peoria* 1983), and this position was adopted by the Department of Justice (Waxman 1996; Wishnie 2004). In 2012, on the other hand, states and localities are not only enabled but are required (and sometimes required against their will) to submit arrest data for federal screening of immigration status, albeit indirectly (ICE 2012). Officials in many jurisdictions take an even more proactive role, either through participation in a 287(g) program, through the exercise of their purported "inherent authority" to perform immigration status checks during other law enforcement efforts (Eagly 2011), or through the enforcement of state and local criminal law provisions aimed at migrants (Eagly 2011; Chacón 2010a). Indeed, with the explosion of sub-federal involvement in immigration policing, it seems that states and localities are, in many cases, actually exercising the discretion that definitively shapes federal enforcement (Motomura 2011).

10.2.2 The Static Legal Regime Governing Enforcement

While state and local law enforcement involvement in immigration policing has exploded, enforcement agencies and courts have been insufficiently attentive to the nuances that have long divided immigration policing from the forms of policing that are generally the province of sub-federal law enforcement. Attention to these details reveals the potential pitfalls of sub-federal immigration enforcement.

First, immigration policing is one of the few areas where the courts and the executive branch continue to expressly sanction the use of racial profiling. (*United States v. Brignoni-Ponce* 1975; Chin et al. 2010). This remains true even after the Department of Justice prohibited the use of racial profiling in other forms of policing; the exception for immigration policing was retained by the Department of Justice in its 2003 memorandum prohibiting racial profiling (U.S. Department of Justice 2003; Johnson 2004; Johnson 2010). The enabling case law and the policies implementing it rest upon stated assumptions that the law enforcement agents who are relying on these forms of profiling will have a certain level of expertise in immigration enforcement that will allow them to assimilate the information about race into their superior training to attain accurate results (e.g., *United States v. Brignoni-Ponce* 1975). In other words, these cases generally assume that trained federal immigration agents are responsible for immigration enforcement.

Second, citing the strong national security interest of the (federal) government in effective policing of the borders, the Court has frequently deemed "reasonable" seizures that would be unreasonable in other contexts (Chacón 2010). This allows for suspicionless searches at ports of entry, even where such searches have involved the disassembly of a gas tank (*United States v. Flores-Montano* (2004)) or a review of laptop contents (*United States v. Arnold* (2008)). It justifies thirty-six hour detentions and strip searches at ports of entry upon "reasonable suspicion" (*United States v. Montoya de Hernandez* (1985)). It allows for suspicionless referrals to second-

ary inspection at border checkpoints in the interior of the country, even when such referrals are made on the basis of race (*United States v. Martinez-Fuerte* 1976). In short, the "strong" interest of the government in controlling national borders allows for stops and searches that, in other contexts, would likely be deemed unreasonable, and this has been true both at and away from the border.

Third, in the context of otherwise lawful stops, the Court has been unreflectively permissive about allowing federal officials to ask questions regarding an individual's immigration status (Kalhan 2008). In the case of *Muehler v. Mena* (2005), the Court confronted the case of a landlady who was handcuffed in the early morning hours and detained for several hours by federal agents executing a warrant for the arrest of one of her tenants. During her detention, federal immigration agents questioned her about her immigration status. She argued that her detention (including the questioning) constituted an unreasonable seizure for purposes of the Fourth Amendment. The Court concluded that the detention was reasonable as a means of protecting officer safety, and determined that her questioning did not constitute a separate seizure in violation of the Fourth Amendment. Analogizing the questioning to the use of drug sniffing dogs, the Court found that the questioning did not prolong the otherwise valid detention and that no further justification for the questioning was needed for Fourth Amendment (*Muehler v. Mena* (2005)).

Finally, courts have been reluctant to impose Fourth Amendment remedies in removal proceedings that would be comparable to those available in criminal proceedings, with the result that there is less deterrence for Fourth Amendment violations in cases that are likely to end with removal, not criminal charges (Chacón 2010a). In *INS v. Lopez-Mendoza* (1984), the Court declined to apply the exclusionary rule in civil removal proceedings, while noting the possibility that suppression might be appropriate in cases involving "egregious" violations and also suggesting that the rule could be revisited if violations were "widespread."

These legal rules form the backdrop for the Court's immigration federalism decisions but they are never acknowledged in *Arizona v. United States* (2012).

10.3 Re-Reading *Arizona*

Understanding the lay of the land in contemporary immigration enforcement sheds light on both the questionable assumptions that undergird the Court's reasoning in *Arizona v. United States* (2012) and the likely practical effect of the Court's ruling. Specifically, in upholding Section 2(B), the majority elided the distinction between civil and criminal immigration enforcement and between the authority of federal immigration agents and other law enforcement officials. These elisions made the decision to uphold Section 2(B) read like a self-evident outgrowth of existing law. In fact, however, this portion of the decision can also be read as the Court's first legal endorsement of the vast expansion of the power of sub-federal immigration enforcement that has taken place over the last decade. Thus, even as the executive branch seeks to bring sub-federal enforcement back under executive control, the

Court has endorsed a diffusion of immigration policing power with apparent indifference to the discriminatory effects of doing so.

In its analysis of Section 2(B) of the Arizona law, the Court employed the questionable starting assumption that individual officers are already empowered to perform immigration status checks under existing law during otherwise lawful stops. But the Court's reading of the applicable INA provisions is arguably quite overbroad. These provisions were aimed squarely at eliminating sanctuary ordinances that prohibited state and local officials from communicating to the federal government known information about the unauthorized status of a person in their custody (National Immigration Forum 2012). They were not intended to empower localities and states to investigate and punish immigration status. In case there were any doubts on that point, Congress imposed specific limits on sub-federal agents seeking to investigate and make arrests for immigration violations and crimes (INA § 287(g) 1997). Nor do the IIRIRA provisions requiring the federal government to respond to sub-federal inquiries about immigration status authorize ongoing practices in Arizona and elsewhere. Those provisions plainly state that the communication with the federal government must be for a "purpose authorized by law," and the remainder of 8 U.S.C.A § 1357(g) makes it clear that it is not "lawful" for sub-federal agents to investigate immigration status without federal authorization and training. Yet the Supreme Court sanctioned such unauthorized investigations and arrests in concluding that the police can be required to communicate with ICE in every situation where "reasonable suspicion" arises concerning immigration status.

The Court cites to *Muehler v. Mena* (2005) to conclude that, so long as investigative questions about status do not prolong an otherwise lawful stop, the questions themselves do not constitute a distinct, unlawful seizure. But *Mena* involved questioning by trained federal INS agents, not questioning by sub-federal law enforcement agents untrained in federal immigration law. Indeed, because the police officers who were executing the warrant in the *Mena* case thought there might be immigration violators at the site, they brought a trained INS agent with them to make the relevant inquiries about immigration status; they did not perform these inquiries themselves (*Muehler v. Mena* 2005). The federal agents in *Mena* plainly thought that INS agents were needed to investigate immigration status and immigration violations. Only by conflating the preemption question of who has the authority to investigate immigration status with the Fourth Amendment question of whether additional questioning constitutes an independent "stop" was the Court in *Arizona* able to sidestep the clear limitations that INA § 287 places on sub-federal investigative authority. But the Fourth Amendment question was not before the Court; the preemption question was. It would seem that the Court's majority deliberately answered the wrong question to avoid the clear preemptive effects of section 287.

Rather than simply assuming the constitutionality of sub-federal questioning concerning immigration status, the Court could have just as easily highlighted the distinction between the agents formulating and acting upon this suspicion. Had they done so, they would have noted that Congress requires special agreements and training for sub-federal agents seeking to investigate immigration status and enforce immigration laws (INA § 287(g) 1997) and concluded that any scheme that

allows for immigration policing in the absence of such training runs afoul of the express requirements of Congress' immigration enforcement scheme and is therefore preempted. Since, as a practical matter, the "reasonable suspicion" requirement will be triggered only when a noncitizen fails to satisfy an officer's investigative questioning about status, one could easily conclude that there is absolutely no way for the "reasonable suspicion" provision to be implemented consistently with the other requirements of INA § 287(g) and that Section 2(B)'s "reasonable suspicion" investigations were therefore preempted.

In upholding Section 2(B) against a preemption challenge, the Court continued a new tradition—first adopted in *Whiting*—that deemphasizes the antidiscrimination goals and rationales of federal immigration policy. In *Whiting*, the Court noted that Arizona's LAWA imposed a heavy sanction on businesses for failure to comply with IRCA's prohibition on the hiring unauthorized workers but had no comparable provisions requiring business' compliance with IRCA's accompanying antidiscrimination provisions (*Chamber of Commerce v. Whiting* 2011). It would be easy to conclude that such a structure encouraged discrimination in hiring and was therefore obstacle preempted by IRCA, which sought to balance immigration enforcement with discrimination protections. But the Court rejected this conclusion.

The Court's decision concerning Section 2(B) reflects similar tradeoffs. Although it is certainly the practice of many sub-federal agents to make arrests based on immigration crimes or even civil immigration status, that fact did not require the Court to find the practice constitutional. The Court could have concluded that authorizing such practices would result in the harassment of noncitizens in contravention of established law, and was therefore preempted (Guttentag 2012; *Takashi v. Fish & Game Comm'n* 1948). This would have had implications for law enforcement practices well beyond Arizona and S.B. 1070, but that did not preclude the Court from reaching such a conclusion and was arguably a reason for them to do so. Given Congress' clear intent to limit sub-federal immigration policing and to require training for such policing, this seems an obvious outcome. Yet the Court unanimously rejected it.

There is a separate provision in Section 2(B) not yet considered in the analysis above. In addition to the investigation provision, Section 2(B) also requires that an individual who is arrested not be released until the arrestee's immigration status is ascertained. The Court made clear that they were presuming that the checks would be made within the course of an authorized, lawful arrest, and concluded unanimously that so long as this was the case, there was nothing to preempt the requirement of an immigration status check in this context (*Arizona v. United States* (2012)). But as a matter of fact, this provision is in direct conflict with federal immigration policy goals.

Specifically, with the Secure Communities program, the federal government already makes determinations of immigration status based on state and local arrests. This is true not just in Arizona, but in all 3,074 jurisdictions in which the program has been implemented (ICE, Activated Jurisdiction, 2012). Localities that do not want the federal government to perform immigration status checks of their arrestees have tried, unsuccessfully, to opt out of the program. Given this existing

coordination of enforcement efforts, one could conclude (as the unanimous Court did) that Section 2(B) of the Arizona law, which required status checks for every arrestee, was consistent with federal policy and therefore not preempted.

On the other hand, one could more easily conclude that the Arizona arrest policy is completely inconsistent with the stated goals and the federal design of the Secure Communities program. In recent explanations of the goals of the Secure Communities program, the federal government has been clear that its goal is to *eliminate* state and local inquiries into status. Federal policy evinces concern that leaving such inquiries in sub-federal hands increases the risk of impermissible discrimination. As a matter of fact, this anti-discrimination rationale is cited as a central justification of the Secure Communities program (ICE Secure Communities 2012). The federal government argues that it is seeking to implement a uniform system whereby all arrestees have information processed by *federal* agents through a *federal* database without state law enforcement inquiries into status, rather than by state officials investigating status and making direct inquiries to federal agents about status.[9] The sub-federal investigative approach allows for inconsistencies and discrimination in the implementation of federal immigration law that is out of step with federal law and policy (Motomura 2011). And because it results in impermissible forms of alienage and racial discrimination that are in contravention of federal law and policy, it should have been deemed preempted. It is only by deemphasizing the anti-discrimination goals of federal policy that the Court is able to avoid a finding of obstacle preemption with respect to Section 2(B).

10.4 Conclusions

The courthouse doors are not closed to the opponents of S.B. 1070. The Court has made it clear that it will entertain future preemption claims if the Arizona law is implemented in ways that conflict with federal law (*Arizona v. United States* 2012). The Court is also willing to hear cases arising out of violations of the Fourth Amendment's prohibition on unreasonable seizures or the Fourteenth Amendment's guarantee of equal protection. And the Court has made it clear that it will continue to guard federal primacy as a formal legal matter in immigration law and policy. But in deciding the *Arizona* case as it did, the Court missed an opportunity to clarify the unconstitutionality of a host of ongoing immigration enforcement practices that undercut federal authority in immigration policy. The most notable feature of the decision is the Court's ongoing willingness to disregard the antidiscrimination goals

[9] Of course, critics contend that Secure Communities does not eliminate discrimination in policing. *See*, *e.g.*, Aarti Kohli et al. (2011), Secure Communities by the Numbers, Chief Justice Warren Inst. On Law & Soc. Policy. I share these concerns. The point here is simply that the federal government's explicitly state goal in rolling out the program is to eliminate sub-federal discretion (and discrimination) in immigration policing.

of federal immigration policy even as the Court purports to reify federal primacy in immigration law.

Of course, federal immigration enforcement has never been free from the taint of racial profiling and other abuses of discretion. Federal immigration agents have been responsible for egregious profiling in immigration enforcement in the distant and the recent past. But the dispersal of immigration enforcement powers is likely to amplify such problems, both because sub-federal agents are even less likely than federal agents to be trained appropriately with respect to the specific demands of immigration enforcement and because there is no centralized mechanism for tracking or disciplining constitutional rights violations that occur in sub-federal enforcement (Chacón 2010). Unsurprisingly, past studies have demonstrated increased racial profiling by local law enforcement in jurisdictions that adopted 287(g) agreements or that began participation in the Secure Communities program. This is particularly striking because these programs, unlike policing under S.B. 1070 Section 2(B), involved either formal federal oversight or an absence of sub-federal immigration enforcement discretion. Now that the Supreme Court effectively has constitutionalized sub-federal participation in immigration investigations without the formal limits of these earlier programs, it seems likely that the "force multiplier" effect of sub-federal enforcement will also multiply the negative externalities of immigration policing experienced by *Latinos* in the United States.

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Chapter 11
Immigration Regulation as a Battleground: The European Union's Anxiety over Federalism

Elspeth Guild

Abstract The EU is not a federal state but as the competences of the EU have been extended to the field of immigration and as it has adopted an ever increasing number of measures in the field of immigration, the position can be loosely assimilated to that of a federal state. The EU, while consisting of 28 sovereign states which have entered into an international agreement to cede sovereignty in a number of areas to it, nonetheless enjoys a system of law which requires the Member States faithfully to apply EU law in the area of immigration. While some areas of immigration are not regulated by the EU (as yet) such as low skilled migration, many others are.

Once the transitional periods for national implementation of EU directives and regulations have past, the Member States are obliged to apply EU law rather than national law. If the authorities apply the incorrect legal regime, then their courts are under a duty to correct the error and in doubt can request clarification from the Court of Justice of the European Union. In this chapter, I will examine how this system works as regards migration to the EU. I will examine the scope of EU law in the field and how it has been applied in the Member States—where the strengths and weaknesses of the system are and how the legal challenges are resolved. I will seek to draw some broad conclusions on how the EU resolves issues of divergence and difference within the 28 Member States as regards migration.

Keywords Skilled labor migration • EU labor market • Nationals of EU Member States vs. third country nationals • Freedom of movement • Work restrictions

11.1 Introduction

The European Union (EU), established by a series of treaties in the 1950s, does not call itself a federal state. If one were to reduce the concept of federalism to its bare bones, it is a concept used to describe how power is structured within space and who is entitled to exercise it over time where there is a formal recognition of the role of multiple actors and claims which must be defined and where the result is multiple

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as opposed to centralised (Laursen 2010). The possibility of a federal EU excites quite opposing views, although some might argue that by definition the EU is a sort of federal entity. There are non-governmental organizations in the EU, such as the Union of European Federalists[1] or the Federal Union in Europe,[2] which actively support more federal-style development. Other groups are less positive, even suggesting that the institutions established by treaties are 'federal' rankles. The issues have been well expressed by the contributions to Laursen's book on federalism in the EU which I will not repeat here (Laursen 2010). In this chapter, I will start from examining how immigration is classified and regulated in order to cast new light on just how 'federal' the EU may be considered. Movement of people across borders of state sovereignty in the EU is a matter of substantial struggle and thus provides a particularly revelatory angle from which to examine the question of federalism.

Is the movement of EU nationals from one Member State to another to seek employment labour migration or does the term used by the EU institutions of EU mobility better describe the activity? Does it matter whether the people moving to seek work are nationals of any Member State, of one which only joined the EU recently and in respect of whom transitional arrangements on free movement of workers apply, third country national family members of those EU nationals or others? At the time of writing in 2013, two Member States (Bulgaria and Romania) were enjoying the end of transitional arrangements on the basis of which their nationals did not have the right to go and seek work in any other Member State unless that Member State, in accordance with its national law, has desisted from the application of the transitional measures.[3] In considering the issue of migration and federalism from an EU perspective, it is important to remember that the EU has not stopped growing. Croatia joined the EU on 1 July 2013. There are a number of other candidate countries for EU membership including: Iceland, FYRM Macedonia, Montenegro and Turkey. Potential candidate countries include: Albania, Bosnia Herzegovina, Serbia and Kosovo (a non-state seeks to join a non state group).

Some observers do not count as EU labour migration movement which involves only nationals of one of the Member States moving to live and work in another Member State (Carling 2011; Joppke 2011). The assumption is that nationals of EU Member States are not foreigners and therefore do not engage in intra-EU international migration. The usual term in EU speak for 'foreigners' is third country nationals (as for foreigners), which means anyone who is not a national of an EU Member State. However, this terminology is fraught with difficulties not least as some third country nationals, for instance, those who have an EU national family member, are assimilated to the position of EU nationals. Other third country nationals have rights equivalent to EU nationals as a result of agreements between their states and the EU (for instance Iceland, Norway and Switzerland) while yet others

[1] See http://www.federalists.eu/ (visited 1 July 2012).

[2] See http://www.federalunion.org.uk/federalism/ (visited 1 July 2012).

[3] COM(2011)729 final.

have more limited but important rights of continued access to employment, first access to self employment under privileged rules and protection against expulsion (for instance Turkish nationals under the EEC Turkey Association Agreement 1963 and its 1970 Protocol) (Gutmann 2000).

Leaving aside the above complications, there are two angles to labour migration by third country nationals—first the movement for employment of third country nationals who are already within the EU; secondly the movement of third country nationals into the EU for the purposes of labour migration which have been the subject of EU legislation (Groenendijk 2008a). Both of these forms of migration are regulated mainly or exclusively by EU law, not the law of the (currently) 28 Member States. This may be seen as evidence of a move towards federalism where the power to adopt law in this field has been ceded to an entity other than the nation state, though as I will discuss below there are limitations to this approach. The first is that there is a fundamental question regarding the nature of the EU labour market. Is there one EU labour market or 28[4]? The answer to that question seems to depend on who the individual is, as I will examine below. Secondly, the EU chops up migration into various kinds and types. For EU nationals exercising free movement rights, some acquire rights as workers but others acquire rights as self employed persons and still others as service providers (Condinanzi et al. 2008). I will only refer to these other categories which are wider than labour migration in passing when necessary. For third country nationals the situation is rather complicated as not only has the EU chosen to consider them under the headings of workers, self employed and service providers (and their employees) but also sectorially. When dealing with third country nationals, I will seek to clarify the complexity and what it means for European federalism.

To examine these questions in this chapter I am going to divide the subject into three main sections, with relevant subsections. First, I will look at labour migration by EU nationals and their third country national family members within the territory of the EU. This section will be divided into those EU nationals who are not subject to transition restrictions followed by a short section covering the scheme of transitional restrictions. In the second section, I will describe labour migration of third country nationals who have been admitted to the labour market of at least one Member State. How does EU law deal with them? This section will subdivide into five main subsections: long term resident third country nationals; highly qualified workers; researchers; refugees and beneficiaries of international protection and the family members of all of the above. In the final section, I will deal with first access to the labour market for third country nationals who are residents outside the EU. From this examination I will draw some conclusions on the nature of federalism in the EU resulting from the treatment of the movement of workers across state sovereign boundaries.

[4] Soon to be 28 when Croatia joins the EU in 2013.

11.2 Labour Migration and EU Nationals

11.2.1 EU Nationals not Subject to Transition Arrangements

There are two fundamental sources of the right of free movement for EU citizens across the borders of the Member States. Both are contained in the Treaty on the Functioning of the European Union (TFEU) and are the subject of subsidiary legislation (in the form of directives and regulations). The first (in order of appearance in the TFEU but only coming into existence in 1993) is citizenship of the European Union (Article 20 TFEU). The second is the right of free movement as a worker, self employed person or service provider (or recipient) which was the first in time, included in the 1957 treaty. Dealing with the foundation rights in their chronological order, the right to free movement of workers is one of the four freedoms of the European Union. It was included in the first EEC treaty in 1957 and provides that free movement of workers shall be secured in the EU (currently Article 45 TFEU) (Carlier and Guild 2008). The principle, free movement of workers, is defined in Article 45(2) as entailing the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The original treaty provided for a transitional period for the achievement of free movement of workers until 1968. By that date the Member States were required to make it a reality. Between 1957 and 1968 a series of directives and regulations were adopted by the EU legislator paving the way to free movement of workers. I have examined these in some depth elsewhere (Guild 2011). The definition of rights set out in these measures has remained fairly stable—including wide family reunification rights including with third country national family members, employment access rights and equality of treatment in social and tax benefits (Guild 1999).

Article 45(3) TFEU provides four main rights as the core of free movement of workers:

- First: the right to access offers of employment actually made. This right has been interpreted by the CJEU as including the right to move to any Member State for the purpose of seeking employment even if the individual does not already have an offer of employment.[5]
- Second: the right to move freely within the territory of Member States for this purpose. The CJEU has consistently rejected the questioning of EU work seekers at intra Member State borders regarding the purposes of their movement.[6]
- Third: the right to stay in a Member State for the purpose of employment. This right also includes remaining in a host Member State after employment has ended

[5] C-292/89 *Antonissen* [1991] ECR I-745.

[6] C-68/89 *Commission v Netherlands* [1991] ECR I-02637.

so long as there are continuing rights engaged.[7] As yet it is unclear when these rights end but so long as there is a real chance that the individual will gain work in the Member State his or her right to reside is assured.

- Fourth: the right to remain in a host Member State after employment which may also be a continuation of the right to remain to seek employment (Guild 2004).

The four rights are subject to two limitations, one territorial and the other occupational. Member States are permitted to limit the entry and residence of a national of another Member State to its territory on the grounds of public policy, public security and public health (which can only be applied on first admission). The CJEU has consistently interpreted these limitations restrictively as they diminish the underlying right of free movement.[8] Most commonly pleaded by Member States seeking to expel EU national workers is public policy which includes criminal behaviour. The implementing legislation in respect of expulsion (originally Directive 221/64 which was repealed with the introduction of Directive 2004/38 where the rules are now found) prohibits Member States from using expulsion to achieve economic ends. Thus Member States cannot expel nationals of other Member States simply because they are unemployed and claiming benefits. Where the ground is criminality, the individual needs not only to have been convicted by a duly constituted criminal court but must also be a present and immediate threat to a fundamental interest of society. This is a high threshold which, sadly, is not always respected by all Member States. However, as the law on permissible expulsion it provides substantial protection to workers and work seekers who are nationals of a Member State resident on the territory of another. The grounds of public security (ie terrorism) and public health have not been the subject of jurisprudence at the EU level. They do not seem to be used frequently to justify expulsion.

The protection of EU workers from expulsion by a Member State was strengthened on the revision of rights contained in Directive 2004/38. A three step approach has been incorporated into the law: for the first 5 years, the worker is protected under the rules set out above. After 5 years the Member State must justify any attempt to expel an individual on the basis of serious grounds of public policy or security.[9] After 10 years of residence on the territory of a host Member State, only imperative grounds of public policy may be used as the reason to commence expulsion proceedings against an EU national.

The second exclusion permitted to the Member States by Article 45 TFEU relates to the public sector. Free movement of workers does not apply to employment in the public service. No secondary legislation has ever been adopted (by 2012) to define what this provision means. As a result the questions: what is public service, what is the scope of the exception and how does it apply, have fallen on the CJEU. Once again, following the principle of restricting the scope of exceptions to free

[7] C-22/08 *Vatsouras* [2009] ECR I-4585.

[8] C-157/89 *Pieck* [1980] ECR I-02171.

[9] C-145/09 *Tsakouridis* 23 November 2010.

movement rights, it has defined narrowly the exception.[10] Only where the position involves direct or indirect participation in the exercise of public authority and duties designed to safeguard the general interest of the state may it be restricted to nationals. Further, the criteria must be assessed on a case-by-case basis, taking into account the tasks and responsibilities covered by the post, according to the CJEU.

The key change which the EU approach to labour migration described above inscribed into the Western European imagination towards the end of the twentieth century is that people have the right to move to sovereign states other than that of their nationality to seek employment and that this is recognised as beneficial to the state as well as the individuals. The labour migrant is entitled to have the objective of improving his or her life circumstances and those of family members without fearing that this motivation will be used against him or her as a reason to reject the application and expel the individual. Further, the free movement of workers as a labour migration paradigm means that the state is not entitled to exercise control over the individual as regards residence and employment unless the state can justify the interference on the basis of public policy, public security or public health. The entitlement to move or not to move belongs to the individual (Guild 1999). The state can only seek to interfere with that right where the state can justify its action on grounds over which it does not have interpretative control (that belongs to the CJEU). However, this does not constitute an entitlement of the kind which international law requires for effective citizenship that the individual always has the right to enter and live in his or her country of nationality. Exclusions are still possible but there is a reversal of the state sovereign logic which approaches in its results some aspects of federalism.

The second fundamental source of the right of free movement is citizenship of the European Union (Article 20 TFEU) (Vink 2005). This was created in 1991 (coming into effect in 1993). Article 21(1) TFEU provides that the every citizen of the Union shall have the right to move and reside freely within the territory of the Member States. However, this right is subject to the limitations and conditions laid down in the Treat(ies) and by measures adopted to give them effect. Three directives, all now replaced, were adopted in 1990 which provides a right of residence for students, the economically inactive and pensioners but all on the basis that the citizens were economically self sufficient and that they have sickness insurance. These rights are now found in Directive 2004/38. While the economically active already had the right of free movement and residence as described above, this development in 1990 and consolidated in the 1991 treaty changes, extended the right of free movement and residence to all EU nationals. While the economically active were subject to the specific conditions set out above, the economically inactive where not only subject to the same limitations but also to two further requirements—economic resources at least at the level of social assistance and sickness insurance. According

[10] 152/73 *Sotigiu v Deutsche Bundespost* ECR [1974] 153; 149/79 *Commission v Belgium* ECR [1980] 3881.

to the CJEU citizenship of the Union is destined to become the fundamental status of all nationals of the Member States.[11]

What happens in practice in the EU? According to the EU's statistical agency, in 2010 of an EU total population of over 500 million, only 12.3 million live in a Member State other than that of their underlying nationality.[12] Bearing in mind the diversity of unemployment rates, according to Eurostat the lowest unemployment rates in September 2011 were recorded in Austria (3.9%), the Netherlands (4.5%) and Luxembourg (4.8%), and the highest rates in Spain (22.6%), Greece (17.6% in July) and Latvia (16.1% in the second quarter of 2011), that the unemployed do not move is surprising.[13] Third country nationals form the largest group of non-nationals living in the Member States amounting to 20.2 million.

11.2.2 Those Subject to Transitional Arrangements

From six original Member States in 1957, the EU currently has 28 Member States. The first enlargement in 1973 brought Denmark, Ireland and the UK in. Although there were concerns about immigration, in particular of Black and Asian British nationals to France and the Netherlands (Böhning 1972), in fact the movements do not appear to have been substantial. In any event, no transitional restrictions were placed on the free movement of workers. The next enlargement, in 1981 brought Greece into the EU. Fears of substantial movement of workers from Greece to other Member States lead to the inclusion of a temporal restriction on the free movement of workers for 7 years. This restriction did not affect the right of Greeks to move to other Member States immediately for other economic purposes such as self employment. Further it was accompanied by strict protections for Greek workers already admitted to the labour market of other Member States.

The third enlargement in 1986 of Portugal and Spain was similarly limited by a transitional arrangement against free movement of workers for 7 years. As in the case of Greece, the self employed were not subject to a limitation. The transitional restrictions were actually lifted a year early in light of German reunification. When Austria, Finland and Sweden joined the EU in 1995 no transitional restrictions were applied. Ten states joined the EU in 2004. No transitional restrictions were placed on workers from the two island states, Cyprus and Malta exercising their free movement rights as workers. For the other eight states (EU8),[14] transitional arrangements were included in the accession treaty whereby their nationals would be subject to

[11] C-184/99 *Grzelczyk* [2001] ECR I-6193.

[12] EUROSTAT *Statistics in Focus* 34/2011, Luxembourg 2011.

[13] EUROSTAT http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics#Recent_developments_in_unemployment_at_a_European_and_Member_State_level visited 21 November 2011.

[14] Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Slovenia.

national immigration law as regards movement of workers for the first 2 years, then a review would take place. Following the review, a further 3 years of restrictions were available for Member States. Where Member States feared a grave disruption to their labour market they could apply a further 2 year restriction to EU8 nationals access to their labour market. In the event, most Member States lifted restrictions on EU8 workers within 3 years of accession (Currie 2008; Burrell 2009). The only states to use the final 2 year period were Austria, Germany and the UK.

In 2007 Bulgaria and Romania joined the EU and their nationals have been made the subject of the same restrictions as regards workers as the EU8.[15] Transitional restrictions on their nationals were lifted on 1 January 2014. Croatia joined the EU on 1 July 2013 and its nationals are subject to a seven year transitional restriction on movement for work. Future enlargements of the EU are likely also to include transitional arrangements as regards workers, except as regards Islands. In respect of Turkey, the Commission suggested that long (and possibly indefinite) arrangements might have to be made. In terms of the political motivation of restrictions, protection of the Member States labour markets seems to be the driving force.[16]

The right of EU national workers to seek employment anywhere in the EU is premised on the idea that the EU has one labour market which is part of the internal market (Barnard and Scott 2002). However, transitional restrictions on free movement of workers are based on the opposite approach that there is a segmented labour market, one belonging to each Member State. This is clear as workers subject to restrictions but who gain access to the labour market of a Member State applying restrictions acquire free access to the labour market of that Member State only after 12 months' employment. Nationals of acceding Member States become citizens of the Union immediately on accession. They are entitled to move and reside anywhere in the Union on any ground other than employment. If they obtain authorisation to take employment in any Member State applying restrictions, even after those restrictions must be lifted the worker is limited to one Member State only—the one where he or she completed the 12 months employment. Thus, the practice of free movement of workers includes at its heart a deep ambiguity about the nature of the EU labour market. But this ambiguity is temporally limited to the length of the transitional arrangements.

11.2.3 Family Members

After access to the territory and labour market, family reunification is one of the overwhelming preoccupations of migrant workers. The right to live with the family

[15] European Commission *Report on the Functioning of the Transitional Arrangements on Free Movement of Workers from Bulgaria and Romania* Brussels 11 November 2011, COM(2011)729 final.

[16] European Commission: Communication from the Commission to the Council and the European Parliament—Recommendation of the European Commission on Turkey's progress towards accession COM(2004) 656.

members in the host Member State engages all those who move for employment whether young or old. When the original treaty was negotiated, it seems that the main interest in family reunification came from the Italian delegation. The right to family reunification was included in even the earliest directives applicable during the transitional period before 1968 (Guild 1999). In practice, it is third country national family members of migrant EU nationals who form the source of some friction in a number of Member States. The reason for this is twofold. First, the group of family members with which an EU national has an entitlement to family reunification when he or she moves to another Member State as a worker is large. It includes spouses, registered partners (if recognised in the host state), direct descendants of either party who are under 21 and if dependent of any age, dependent relatives in the ascending line of either party (Article 2(2) Directive 2004/38). Secondly, Member States are obliged to facilitate entry and residence of any other family member who, in the country from which they have come, are dependents or members of the household of the Union citizen with the primary right of residence or where serious health grounds strictly require the personal care of the family member by the Union citizen (Article 3(a) Directive 2004/38). Finally, there is also a facilitation obligation regarding partners with whom the Union citizen has a durable relationship duly attested (Article 3(b) Directive 2004/38). Where the EU national is a worker, the Member State cannot apply sickness insurance or resources requirements. The family is entitled to any social benefits which are available for own nationals of the state under the principle of equal treatment in social and tax advantages. Similarly, these family members cannot be subject to a requirement to meet integration conditions either before or after arrival in the state. The family members also have immediate access to employment. The same rules apply to the Member States own nationals who have moved as workers to another Member State and then seek to return to their home Member State and be joined by third country national family members.[17]

The sticking point for a number of Member States is that these rules are more generous than those which they apply to their own nationals seeking family reunification with their third country national family members (Walter 2008). This phenomenon is known as reverse discrimination and is problematic for Denmark, Ireland, the Netherlands and the UK (Handoll 2009).

The fact that nationals of a state may have better family reunification rights when they are outside their state of nationality indicates that a federal practice is at work. The law on family reunification which Member States must comply with for nationals of other Member States (or indeed their own nationals returning after living in another Member State) is not controlled by the state authorities but only implemented by them. Thus an authority outside the state provides family reunification rights directly to individuals whose rights are implemented by the state authorities. As a federal arrangement of powers between different entities within a single legal

[17] C-370/90 *Surinder Singh* ECR [1992] 265; C-291/05 C *Eind* [2007] ECR I-10719.

structure this example fits particularly well but for the fact that Member States can exclude their own citizens who have never exercised a free movement right from its enjoyment.[18]

In the following two sections (3) and (4) I will examine how EU law regulates the right of migrants (third country nationals) to work in the EU Member States. By this I mean the regulation of those third country nationals who have already been admitted to at least one Member State under national law (or possibly EU law) and those who are seeking admission for the first time to the EU territory. In so far as the EU labour market is one single labour market, I must look at which third country nationals are subject to EU regulation on access to that single market. I will do this in section 11.3. In so far as the EU labour market consists of 28 separate labour markets in respect of which access to one of these labour markets does not give any access to any of the others, one could say that the federal effect is much more limited. I will examine EU regulation of third country nationals first access to the labour market of one single Member State in section 11.4.

In both sections I will examine the same five EU regulations, the only ones at the moment which cover labour market access of third country nationals (other than those associated with an EU national principal). These are:

- Directive 2003/109 on long term resident third country nationals;
- Directive 2009/50 on the entry and residence of highly qualified third country nationals;
- Directive 2011/95 (replacing Directive 2004/83) on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection;
- Directive 2005/71 on the admission of third country nationals for research purposes;
- Directive 2003/86 on family reunification for third country nationals.

By examining the two separate systems of regulation—that of the EU's approach to first admission and that of the treatment of third country nationals already admitted, one can see the extent to which there has been a federal move of authority to adopt legislation which operates consistently across the common territory (in other words where EU legislation permits third country nationals access to the labour market of the 28 Member States as if this were one single labour market as it is for EU citizens). Alternatively one can analyse to what extent EU legislation remains captured in the labour market of each separate Member State and thus while there is a common set of rules they are applied by national authorities in strict isolation from one another and there is no mutual recognition of the consequences of the decision of each national authority on the territory of the other 27 Member States.

[18] C-256/11 *Dereci* (not yet reported) 15 November 2011.

11.3 Third Country Nationals Resident Within the EU[19]

11.3.1 Long Term Resident Third Country Nationals

In 1999, on revision of the EU treaties, the Union was given expanded competence to adopt legislation in the field of visas, border controls, asylum and immigration.[20] Under this new competence, a number of measures had to be adopted within a 5 years period (ie by 2004). A measure on long term resident third country nationals was not among those. However, it was nonetheless among the first which the EU adopted under the heading of legal migration. Directive 2003/109 created the conditions under which third country nationals are entitled to an EU status of long term resident third country national and the benefits which apply to holders of the status. According to the directive, its personal scope includes all third country nationals whose residence has not been formally limited (Groenendijk 2007). This limitation on scope is potentially problematic. While the original directive excluded refugees and beneficiaries of subsidiary protection, an amendment in 2011 has brought that group within the scope.[21]

As regards acquisition of the status the most important conditions are that the individual has resided lawfully in a Member State for 5 years, has sickness insurance and stable and regular resources. Member States are permitted to apply an integration measures requirement on the acquisition of the status. The main rights which the directive provides for third country nationals, including the right to equal treatment in employment, apply only within the Member State where the status is acquired, once again reinforcing the impression that the EU consists of many labour markets, not one single one. However, in addition to the creation of the status, the directive aims also at facilitating intra-EU movement of long term resident third country nationals. These provisions are contained in Chapter III of the Directive. Although Article 14 states that a long term resident may reside in a second Member State to exercise an economic activity, a number of limitations are available to the Member States' authorities to make access to the labour market difficult. First, Member States are allowed to examine their labour market and apply their national procedures regarding requirements for filling vacancies or for exercising economic activities. They may also give preference to EU nationals and to third country nationals assimilated to the position of EU nationals, effectively family members, and third country nationals who reside legally and receive unemployment benefits in the Member State (Article 14(3)). If the Member State had quotas on third country

[19] Denmark does not participate in any of the measures discussed in in these sections as a result of a protocol to the treaties. Ireland and the UK are entitled to choose whether they will to opt in or out. By the end of 2012, they had chosen not to participate in any of the measures discussed in sections 3 and 4 with one exception. The UK participates in the Qualification Directive 2004/83 but has opted out of the re-cast. All of the intra-EU mobility provisions discussed here are subject also to a requirement that the individual is not a threat to public policy, public security or public health.

[20] Now Articles 78 and 79 TFEU.

[21] Directive 2011/51.

nationals' access to their labour market when the directive was adopted on 25 November 2003, they could maintain those quotas and apply them to these third country nationals as well. Second, there is no automaticity in obtaining the right to reside and work in a second Member State for a long term resident third country national. The individual has to apply for a permit and prove that he or she has sickness insurance, stable and regular resources and possibly also complies with integration measures if these were not applicable in the first Member State of residence (Article 15(2) and (3)). Finally, Member States are permitted to restrict a long term resident from changing employment from that authorised in the residence permit for a period of 12 months (Article 21(2)).[22] Clearly, as regards this group of persons, there are 25 quite different labour markets in the EU though the boundaries among them are intended to be permeable.

The European Commission issued its report on the implementation of the directive in September 2011.[23] The Commission notes that transposition by the Member States has been less than ideal and fails the objective of the measure. Some Member States are applying quotas of dubious conformity with the directive. Others are applying income requirements which are higher than permitted by it. Clearly intra-EU mobility for third country nationals who do not enjoy a family relationship with a migrant EU national is substantially circumscribed.

11.3.2 Highly Qualified Migrants

On 25 May 2009 the EU finally adopted the first measure designed to admit third country nationals to the EU from outside the 25 participating Member States.[24] The so called Blue Card Directive (Directive 2009/50) had to be transposed by the Member States into their national law by 19 June 2011 according to Article 23. It may seem somewhat surprising that the EU adopted a measure to allow third country nationals to move around the EU and seek employment (see above Directive 2003/109) in 2003 but did not manage to agree on any rules on first admission of third country nationals for employment until 6 years later. This is undoubtedly the result of sensitivities in a number of large Member States about control over access by foreigners to their labour markets. It is worth recalling that in the Lisbon Treaty which entered into force on 1 December 2009, a new provision was added, Article 79(5), which places a limitation on the EU competence on labour migration (amongst others) whereby Member States are entitled to continue to determine the volumes of admission of third country nationals to their territory (not elsewhere in the Union) for the purpose of seeking work.

[22] This could also include re-employment for the first 12 months.

[23] COM(2011) 585 final.

[24] Directive 2003/109, discussed above only applies to third country nationals who have already completed 5 years residence in one Member State and thus not to first admission to the territory of the Member States.

According to its preamble the directive is intended to contribute to the EU's programme aimed at becoming the most competitive and dynamic knowledge-based economy in the world (preamble (3)). From this it is clear that the directive reflects the intention of the legislator that the EU has only one economy not 28. It is also intended to address labour shortages by fostering admission and mobility (preamble (7)). The use of the two terms is helpful as it provides some guidance on how one is to refer to immigration from outside the EU into the EU (admission) and movement of third country nationals around the 28 Member States for employment purposes (mobility). The mechanism by which these objectives are to be achieved is through the facilitation of admission of highly qualified workers and their families by establishing a fast-track admission procedure and by granting them equal social and economic rights as EU citizens. Below in I will consider the rules under this directive for first admission to the EU labour market. Here, I will only consider mobility within the EU for those already admitted.

Article 18 provides that after 18 months of legal residence in a Member State, a person admitted to that Member State as a Blue Card holder may move to another Member State for the purpose of highly qualified employment. Highly qualified employment is defined as employment of a person who is performing genuine and effective work as an employee, paid and has adequate and specific competence as proven by higher professional qualifications (Article 2(b)).[25] The second Member State is entitled to re-examine whether the conditions of high qualification and work are fulfilled and the individual is not entitled to commence work until so authorised (Article 18(2)). So, the objective of a common labour market for highly qualified migrants is not really achieved. While there is movement towards the objective, Member States are still permitted to place substantial obstacles in the way of the Blue Card holder who seeks to exercise the mobility right.

11.3.3 Refugees and Beneficiaries of International Protection

Directive 2011/95 was adopted on 25 November 2011. It replaces in part Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection. The original directive was adopted on 29 April 2004 (2 days before 10 Member States joined the EU). It covers two different cases—refugees as defined in the UN Convention relating to the status of refugees 1951 and its 1967 Protocol (the Refugee Convention) and beneficiaries of subsidiary protection whose right to protection arises from multiple sources including the UN Convention against Torture 1989, the European Convention on Human Rights and elsewhere. The re-cast Directive defines persons recognised as refugees or granted subsidiary protection as beneficiaries of international protection.

[25] In their turn, higher professional qualifications are defined as meaning qualifications attested by evidence of higher education qualifications or by at least 5 years professional experience of a level comparable to higher qualifications and relevant in the profession or sector.

However, the directive does not address the issue of intra-EU mobility. As far as the provisions of the directive are concerned, beneficiaries of international protection have access only to the labour market of the state which recognised or granted their status. I will deal with this below in section 11.4. They only acquire mobility rights if they can fulfil the conditions of the long term residents' directive as it has been adjusted to include them.[26] Thus this Directive falls within the group which confounds a federal approach to migration in the EU. Although there is EU legislation which must be applied in respect of the subject matter, the adjudication of an application for entry to the labour market by the authorities of one Member State has no consequence for labour market access for the individual in any other Member State.

11.3.4 Researchers

The admission to the EU of third country national researchers is regulated by Directive 2005/71. It also covered intra-EU mobility, albeit in a rather cursory manner. Researchers are defined as third country nationals holding appropriate higher education qualifications which give access to doctoral programmes and who are selected by a research organisation to carry out a project for which the qualifications are required (Article 2(d)). Article 13 of the directive provides that researchers admitted in accordance with it shall be allowed to carry out part of their research in another Member State. Where the researcher stays in another Member State for less than 3 months he or she remains covered by the academic arrangements in the first Member State provided he or she has sufficient resources. Where the stay in a second Member State will last more than 3 months, then the second Member State may require the researcher to jump through most of the hoops which applied to him or her in the first Member State including finding a host institution, obtaining a hosting agreement etc. which I describe below in section 11.4. This group of migrants are similarly subject to a limited degree of federalism as, although the Directive which regulates their admission to each Member State is singular, the decision on implementation of that Directive by the authorities of each Member State has limited consequences as regards labour market access in any other Member State.

11.3.5 Family Members of Third Country Nationals

The EU legislator adopted a directive on the admission of third country national family members of third country nationals residing in the EU in 2003 (Directive 2003/86). It sets out the conditions for admission to the territory and access to the labour market of these persons. I will look at the provisions on first access to the labour market for these third country nationals below in section 11.4. The rules on

[26] Directive 2011/51 which extends the application of Directive 2003/109 to beneficiaries of international protection.

intra-EU labour mobility for the family members of third country nationals can be found in two different places—first, Directive 2003/109 on mobility rights of third country nationals and secondly, Directive 2009/50 on highly qualified migrants a both of which I have discussed above regarding the movement of the principal. I will deal here, however, with the intra-EU mobility rights of family members of both categories.

The third country national family members of third country nationals resident in the EU get access to the labour market of a Member State other than the first one which admitted them depending on the movement of their principal (ie the third country national who invited them to the EU at all). Article 16 of Directive 2003/109 provides that where a third country national moves to another Member State under the directive, those family members who had already joined him or her in the first Member State and who fulfil the conditions of Article 4(1) Directive 2003/86 are entitled to accompany or join the principal. The permitted family members are limited to spouses (one per principal only) and minor children (defined as below the age of majority of the host Member State and unmarried, but including adopted and custodial children). Member States may include wider family members to join a third country national holding long term resident status but they are not required to do so. Member States are also permitted to require the family members (spouses and children) to show that they have stable and regular resources which are sufficient to maintain themselves without recourse to the social assistance of the state or that the long term resident has such resources and sickness insurance covering all risks in the second Member State (Article 16(4)(c)) (Groenendijk et al 2006).

The question of access to employment is fairly convoluted. Article 21(3) Directive 2003/109 provides that family members of a long term resident third country national who moves to a second Member State are entitled to the rights contained in Article 14 of Directive 2003/86 (family reunification) once they have their residence permits. Article 14 of Directive 2003/86 provides that these family members may have access to employment but Member States may limit this to the same employment right as that of the sponsor or principal. Article 14(2) further provides that Member States may place conditions on access to employment for these family members (presumably including a ban) limited to 12 months. During that 12 month period, the second Member State is entitled to examine the situation of its labour market before authorising a family member to take employment.

The family members of highly qualified migrants who entered the first Member State in accordance with the provisions of Directive 2009/50 (Blue Card holders), are covered by Articles 18 and 19 Directive 2009/50. Only if the family was constituted in the first Member State may the family members move under these provisions to a second Member State with their principal. However, family members are entitled to move to a second Member State for the purpose of highly qualified employment after 18 months of legal residence in the first Member State. There is no possibility of conditions or delay in access to the labour market but there is a limitation to highly qualified employment. Family members of beneficiaries of international protection do not get any mobility right to live and work in a second Member State until their principal acquires such a right under Directive 2011/51.

Similarly, for family members of researchers moving among Member States there are no provisions regarding labour market access.

For family members of third country nationals resident in one Member State and seeking to move to another Member State, the same limitations apply to access to the labour market as for their principal.

11.4 First Access to the EU Labour Market: Access to One Member State Only

Following from the previous section which examined the situation of third country nationals who have been admitted to the territory of one Member State and whether they are able to access the labour market in any other Member State, in this section I will move geographically beyond the EU and examine the application of EU migration legislation to third country nationals who are seeking to access the labour market of any one Member State for the first time (usually in the context of arriving or seeking to enter the EU).

Once again, the argument which I am making here is that there is a hybrid sort of federal move going on. On the one hand, there is one single common regulation which applies to the Member States regarding access to the labour market by third country nationals which indicates a federal move vis-à-vis the Member States as the authorities of those Member States are no longer competent to adopt legislation which conflicts with its EU counterpart. On the other hand, the application of the EU measure by the authorities of any one Member State has no consequence for the other Member States. The individual must start the whole procedure all over again from the start if he or she seeks to move from one Member State to the other and obtain labour market access. This evidences a degree of autonomy of the national authorities which is less indicative of a federal move.

11.4.1 Workers

The only EU measure which in 2012 directly provides for the admission of third country national workers to take up employment in a Member State is the Blue Card Directive (2009/50). While the Commission has made a number of proposals for admission of other kinds of workers (intra-company transferees, seasonally workers, trainees) by the end of 2013 none had been adopted. Under the Blue Card Directive, highly qualified third country nationals (see above for the definition) who fulfil the conditions set out in the directive must be issued a Blue Card (Article 7). The scope of the directive is limited in Article 3 to exclude anyone who is seeking or has sought international protection, researchers, third country national family members of EU nationals and those who have long term residence status. It permits Member States to issue residence permits for any purpose of employment outside the Blue

Card scheme (in which case intra-EU mobility does not apply—Article 3(4)). The criteria for admission include:

- A valid work contract for highly qualified employment;
- Permission to exercise a regulated profession (if relevant);
- Evidence of high qualification (or work experience);
- A valid travel document, visa application etc;
- Evidence of sickness insurance for all risks.

Member States are permitted to apply limitations of volume of admissions of third country nationals under this category (Article 6). The individual who fulfils the criteria is entitled to a Blue Card and in the event of rejection of the application a right to procedural safeguards (Article 11). After 5 years of work and residence the Blue Card holder is entitled to a long term residence permit under Directive 2003/109 (see above) on which it is noted that he or she was a Blue Card holder (Article 17(2)). This labour migration measure treats the EU territory as 25 separate ones (three Member States do not participate: Denmark, Ireland and the UK) which only converge into one after 5 years, with a relaxation of rules after 18 months (see section 3.4).

11.4.2 Researchers

The first admission of researchers to the EU Member States is governed by Directive 2005/71. The application must be sponsored by a state approved research organization which has a hosting agreement with the researcher (Article 6). The researcher must present the relevant documents to receive a visa. There are no provisions for the researcher to take employment, only to carry out research. Article 11 permits researchers to teach in accordance with national legislation though this may be subject to a maximum number of hours. Researchers are entitled to equal treatment with nationals as regards working conditions including pay and dismissal (Article 12(b)). Once again, for researchers, the EU space is segmented and limited regarding labour market access.

11.4.3 Beneficiaries of International Protection

By the same competence which gave the EU power to adopt legislation in the field of immigration, power to adopt legislation on asylum was also extended to the EU institutions. The objective is to create a Common European Asylum System over a series of phases which started in 1999. At the moment the Common System is still one based on the principle of minimum standards. Thus Member States are entitled to maintain higher standards than those required by the measures in the System but must conform at least to the lowest standards. What interests me here is the content of that protection and specifically access to employment.

According to Article 26 of the Directive, Member States are obliged to authorise these persons to engage in employed or self-employed activities subject to rules generally applicable to the profession or to the public service as soon as protection has been granted. Access to the labour market is a requirement under Articles 17–19 Refugee Convention as regards refugees (Edwards 2011). However, there is no clear counterpart as regards beneficiaries of international protection arising from other sources. The right to employment also includes the right to vocational training, workplace experience and counselling services. Member States must facilitate full access. Beneficiaries of international protection are entitled to the protection of national law on remuneration, access to social security systems and other conditions of employment. In the first directive on the subject, there was the possibility for Member State to limit access to employment for beneficiaries of subsidiary protection (though not for refugees). When the Commission examined the practices of the Member States in applying the Directive[27] it discovered that the vast majority of Member States authorised access to the labour market to all beneficiaries of international protection. Only three Member States (Cyprus, Germany and Luxembourg) applied a limitation as regards beneficiaries of subsidiary protection. Nonetheless, the Commission did find problems with the transposition of employment related obligations relating to educational opportunities in a number of Member States. When the directive was renegotiated with the intention of harmonising the rights of refugees and beneficiaries of subsidiary protection a common minimum standard was reached. Thus for beneficiaries of international protection, again, the EU labour market consists of 25 separate segments to which they will have access only to one.

11.4.4 Family Members of Third Country Nationals

Directive 2003/86 was the first substantive measure to be adopted after the EU legislator had been given the competence to make law in the field of immigration and asylum in 1999. It was heralded by the Commission as a substantial success although in the legislative process, it was required to return to the drawing board and submit a new substantially different draft three times before the directive successfully passed the Council (at that time the European Parliament did not have co-decision powers with the Council). First access to the EU for family members of third country nationals is premised on the sponsor holding a residence permit issued by a Member State valid for at least 1 year and to have reasonable prospects of obtaining the right of permanent residence (Article 3).[28] Those seeking international protection are excluded though family members of recognised refugees are included. As mentioned in section 11.3, family members are limited to a spouse and

[27] COM(2010)314 final.

[28] Article 8 permits Member States to delay family reunification until the sponsor has stayed lawfully for 2 years in their territory, and there is a derogation where national law so provided at the same of adoption of the directive of a waiting period of 3 years.

children (with a fairly wide definition of children) who are minors under national law and unmarried. Member States may admit other family members but are not required to do so. The sponsor must have adequate accommodation for the family, sickness insurance in respect of all risks for the family members and stable and regular resources sufficient to maintain the family without recourse to social assistance (Article 7). Member States are also permitted to require family members to comply with integration measures under national law (Article 7(2)). This seems to include integration measures which must be completed abroad before a visa will be issued.

Once admitted to the host Member State, the family members gain access to employment which can be limited to the same access to employment as the sponsor (Article 14(1)(b)). This permission can be delayed for a maximum of 12 months during which the Member State may examine the situation of its labour market before permitting employment of these family members. Further, employment may be restricted to first degree family members.

The admission of family members of recognised refugees is also covered by the Directive but the conditions are relaxed specifically as regards the conditions of accommodation, resources, sickness insurance and integration measures. A requirement that the refugee applies for family reunification within 3 months of his or her recognition may be applied but not the requirement to complete integration measures. Similarly no residence requirement for the sponsor can be applied (Article 13). These family members enjoy access to employment in the same way as the third country national family members of other third country nationals. As their principal is permitted to take employment, so are they.

According to the Commission's report on the implementation of the Directive[29] some Member States, such as Austria, the Netherlands, Malta and Germany, limit access to employment of family members exactly as stated in the Directive. This means there are three categories depending on the sponsor's status—no access, access only with a work permit or free access. Other Member States, including Estonia, Finland, France and Luxembourg, do not impose restrictions. At the time of the report, the Commission noted that seven Member States used the 12 month delay provision (including Austria, Cyprus, Germany, Greece, Hungary, Slovenia and Slovakia).

There are no provisions for the family members of researchers under Directive 2005/71 to take employment.

11.5 Conclusions

In this chapter I have looked at the EU's legislation regarding labour migration in order to understand the extent to which the EU has one or 28 labour markets for the purposes of migrants seeking access. This is important for the investigation of federalism in the EU as a feature of immigration in federal states is that admission

[29] COM(2008)610 final.

of people to one part of the federal entity has legal consequences for their status anywhere on the federal territory. Thus the more 'complete' the EU's internal market for people to move and reside the greater the convergence of the EU to a federal model may be. In order to undertake this study, I looked first at the legal regime relating to nationals of EU Member States and their family members moving across intra-EU borders looking for and taking work. Here it is clear that EU legislation operates to promote a single common EU labour market where nationals of any Member State accompanied by their third country national family members can move freely and seek employment anywhere. While there are occasional teething troubles, the system may be considered to have a federal element. The constituent parts of the EU cannot unilaterally decide to protect their labour markets from nationals of other Member States (transitional arrangements notwithstanding).

On the other hand, when one examines EU legislation relating to third country nationals who are not family members of EU nationals, one encounters a bewildering array of measures which seem to be divided up on the basis of principles which are unclear and overlapping. Third country nationals who are admitted to the EU in accordance with national legislation of a Member State come under one set of rules regarding intra-EU labour mobility once they have completed 5 years' residence in one Member State and fulfilled various conditions. In 2011 beneficiaries of international protection were finally added to this group. Highly qualified migrants admitted to any Member State under EU rules have rather qualified EU employment mobility rights after 18 months' work and residence in one Member State. Researchers have very limited employment mobility rights after admission to one Member State under EU legislation. Family members of any of these groups tend to follow the rule of their principal or are excluded from intra-EU employment mobility rights altogether (such as the family members of researchers).

First admission to the EU labour market for third country nationals coming from outside the EU is similarly subject to a wide diversity of conditions, requirements and restrictions. Depending on what the individual is likely to be doing his or her access to the territory and labour may be facilitated or limited. Further, first admission of third country nationals to EU territory is always limited to one Member State even where that admission is regulated by EU law. Thus for the third country national seeking to enter the EU for the first time, the EU labour market consists of 28 different national markets to which access is granted only to one even if the same rules are applicable in 25. Access to the labour market of more than one Member State is usually a benefit which the third country national may acquire after a period of time—18 months for the Blue Card holders, 5 years for long term resident third country national, beneficiaries of international protection and their family members.

The nature of the EU labour market for third country nationals is thus dependent on the passage of time. It commences as a highly segregated place cut into national labour markets with impermeable borders among them. But as time goes on these borders begin to dissolve until the 5 year mark where they become passable, albeit subject to obstacles.

What does this picture tell us about federalism in the EU? Space and time do not reveal a clear image. If a federal state is one where there is a convergence

of space and regulation over movement of persons including for the purpose of economic activities (of which the most sensitive is usually employment) then the EU is a place of struggles around federalism. While the movement of persons for economic activities is almost completely regulated by the supranational entity for the purposes of some people—EU nationals and their third country national family members—for others there is a highly complex regime. To understand whether a specific individual is entitled to rely on the supra national regulatory regime or is subject to the national one is not always self evident. Indeed, in many cases there will be overlap between the two, as I have outlined above. While the objective in the EU is to achieve one common European migration scheme, three Member States have chosen to remain outside the system, Denmark, Ireland and the UK. The EU appears to be a partially federalized entity for some aspects and in some spaces of migration regulation but not others. This incomplete picture is further complicated by the variable geometry of the EU's geography in this area where whole parts are claiming state sovereignty against the rest.

What is the result of the complexity which I have described for our general theme of migrants' rights? Complexity in the regulation of migration is usually suspect as behind it is the differentiation of people according to often quite arcane criteria into groups with different types of rights. Thus as I have shown in the first part of this chapter, EU nationals are the subject of fairly straight forward rules which apply to all of them as soon as they leave their Member State of origin. The main difference lies between those who are economically active and those who are not. Only the later must show that they are economically self sufficient and have health insurance in order to justify their right of residence. Third country nationals, however, are carved up into increasingly complicated groups each covered by different legislation (directives and regulations). The outcome of the separation is that people have very different rights as regards access to the labour market. This is complicated even further as there is a very uncertain federal move in respect of them. The assessment by the authorities of each Member State in respect of many of these categories of people has no element of mutual recognition. The authorities of every Member State remain sovereign to assess for the purposes of that Member State whether the individual shall get access to the labour market of their Member State. The result for the foreigner is few rights which are harder to exercise. In the EU context, the more federal the approach to labour migration, the greater the rights for the individuals concerned.

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