Chapter 4
Immigration Federalism and Rights

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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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S. Baglay, D. Nakache (eds.), *Immigration Regulation in Federal States,*
International Perspectives on Migration 9, DOI 10.1007/978-94-017-8604-1_4,

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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