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## Issue Brief

# **Restrictive State and Local Immigration Laws: Solutions in Search of Problems**

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# Restrictive State and Local Immigration Laws: Solutions in Search of Problems

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## I. Introduction

In its 2012 *Arizona v. United States* decision, the Supreme Court mostly struck down Arizona's unilateral attempt to create and enforce its own immigration enforcement scheme, intended to diminish the undocumented immigrant population within the state, and presumably the nation as well. Nevertheless, one important provision of the state law—directing state and local law enforcement officers to check the immigration status of those whom they stop, arrest, or detain—survived the Court's review and is now in effect. This outcome, both in what was enjoined and what was not, is significant for the field of immigration federalism. Similar cases from Alabama and Georgia will likely be appealed to the Supreme Court, and the laws of several local jurisdictions will be affected by *Arizona* and pending federal court cases. While a majority of the Court reaffirmed federal supremacy in the field of immigration, it also continued the process of carving out areas of appropriate subfederal, i.e. state and local, participation. The *Arizona* dissents viewed state power even more expansively, including one opinion suggesting that states had the inherent authority to expel unwanted persons from within their borders.

An important, yet overlooked, aspect of the case is the factual assumptions about unlawful migration, and the public policy challenges caused by such migration, proffered by both the majority and dissenting opinions. Justice Kennedy, writing for the Court, noted “the pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration.” While he did not specify what those consequences are, Justice Scalia's dissent was much more explicit:

Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.<sup>1</sup>

Notably, despite relying on these specific factual claims about the effects of unlawful migration, Scalia neglected to provide sources for these seemingly crucial truths. Judge Posner of the

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The ideas presented in this Issue Brief are developed in detail in Gulasekaram and Ramakrishnan, *The New Immigration Federalism* (awaiting submission, draft on file with authors) (forthcoming 2013), from which we have excerpted selected portions here. In addition, the politicized account of sub-federal immigration lawmaking is developed in detail in Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, *ARIZ. ST. L. J.* (forthcoming 2012).

<sup>1</sup> 132 S. Ct. 2492, 2522 (Scalia, J. dissenting).

Seventh Circuit Court of Appeals took Justice Scalia to task for this omission, arguing that such assertions are “sufficiently inflammatory to call for a citation to some reputable source of such hyperbole. Justice Scalia cites nothing to support it.”<sup>2</sup>

Instead of verifying his claims, Scalia relied on the intuitive and seemingly common-sense proposition that demographic changes have been driving Arizona’s immigration policies. By extension then, we might also believe that other states that have enacted similar laws – like Alabama, Georgia, Indiana, and Utah– are justifiably and necessarily forced to act. Indeed, Scalia’s sympathy for the plight of helpless states directly informs his implausible vision of a constitutional order in which states can create their own immigration laws. He, however, is not alone in believing that demographic changes and their attendant policy challenges galvanize and justify subfederal immigration lawmaking. Indeed, many elected officials, advocates, and even scholars have viewed the geographic spread of immigrants, and the geographic spread of restrictive legislation on immigration as intimately linked. For example, Lou Barletta, mayor of a small city in central Pennsylvania that was among the earliest to pass a restrictive ordinance, testified to Congress that “[i]n Hazelton, illegal immigration is not some abstract debate about walls and amnesty, but it is a tangible, very real problem.”<sup>3</sup> Immigration scholars, while mostly declining to endorse state and local enforcement schemes, have also assumed the salience of these factors in accounting for the rise of state and local immigration laws.<sup>4</sup> And, many media reports have also invoked this same wisdom, of immigration-induced changes leading inexorably to policy pressures and legislative action at the local level.<sup>5</sup>

Because of the pervasiveness of this demography-based explanation, we sought to verify the importance of migration shifts and policy problems in the rise of state and local responses. We empirically tested the rationales proffered to support such laws, to wit, increased recent immigration, economic stress, and language isolation. Surprisingly, our analysis revealed that demographic factors associated with new immigration and attendant policy challenges are neither necessary nor sufficient conditions for state and local immigration laws. That is to say, there are thousands of jurisdictions where demographic change does not lead to ordinance

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<sup>2</sup> Richard A. Posner, *Justice Scalia is Upset about Illegal Immigration. But Where is His Evidence?*, SLATE, June 27, 2012,

[http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_justice\\_scalia\\_offers\\_no\\_evidence\\_to\\_back\\_up\\_his\\_claims\\_about\\_illegal\\_immigration.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration.html).

<sup>3</sup> See *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Hearing Before the S.Comm. on the Judiciary*, 109th Cong. 11-13 (2006) (Statement of Hon. Louis Barletta, Mayor, City of Hazelton, Pa.).

<sup>4</sup> Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 806 (2008) (“A... factor leading to increased state and local involvement is the changing immigration patterns that have brought non-citizens to new parts of the country... and to suburban and rural areas.... [I]t is notable that the more punitive immigration measures often, although not always, are enacted in areas new to receiving significant populations of non-citizens.”); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609 (2008) (maintaining that the demographic shifts caused by globalization and immigration “are felt differently in different parts of the country, and the disruption immigration causes, as well as the viability of different immigration strategies, will vary....”).

<sup>5</sup> See, e.g., Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007 (Magazine), <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html>.

activity and there are many jurisdictions where restrictive legislation has been passed in the absence of significant local demographic pressures. Admittedly, necessary and sufficient conditions constitute a high bar for empirical verification, as outlier cases can invalidate claims using this deterministic approach. Even adopting a probabilistic approach and running multivariate regressions on state and municipal legislative activity, we find that demographic changes and their attendant policy challenges have no predictive power. Thus, the primary justifications undergirding most scholarly, political, and judicial explanations for this recent spate of state and local immigration regulations have little empirical support.

So, if immigration-induced demographic change does not explain this recent spate of state and local immigration laws, what does? The answer, not coincidentally, returns to where we started. Beyond its unsupported factual claims, commentators criticized Scalia's *Arizona* dissent for stepping outside the proper bounds of judicial temperament, and for its overtly partisan rhetoric. Scalia earned these scathing reviews in large part because of his conspicuous evaluation of the Obama Administration's recent policy decision to defer deportation prosecution for young, law-abiding undocumented students. This policy was announced two weeks after oral arguments in *Arizona* and is nowhere in the record or judicial documents relevant to the case. While oddly placed in a judicial opinion, the overtly political flavor of Scalia's dissent is symptomatic of a deeper change in immigration law and policy over the past three decades. Past Presidents like Ronald Reagan and Bill Clinton mustered bipartisan support for their federal immigration overhauls in 1986 and 1996, respectively. Since 2001, however, immigration has increasingly polarized along party lines, with determined and cohesive party-line votes blocking passage of widely-supported comprehensive federal overhaul efforts and very popular stand-alone bills like the DREAM Act.<sup>6</sup>

The role of partisanship and political maneuvering in advancing restrictive legislation is evident not only at the national level, but also at the state and local levels. What most subfederal jurisdictions with immigration enforcement laws share is not economic stress or overconsumption of public goods or heightened violent crime, but rather a partisan composition within their legislative and executive branches that is highly receptive to enforcement heavy proposals. Indeed, our nationwide study of 50 states and over 25,000 local jurisdictions, revealed that – after controlling for the demographic factors – political affiliation was the most important and significant factor in explaining the proposal and passage of these laws. These highly partisan contexts, in turn, serve as fertile ground for external issue entrepreneurs, such as the Immigration Reform Law Institute (IRLI) and Kansas Secretary of State Kris W. Kobach, who offer restrictive laws as pre-packaged solutions in search of immigration problems.

This Issue Brief briefly presents the data and conclusions from our empirical study of state and local immigration laws, and then considers some of the potential implications of these conclusions. It seeks to showcase the importance of partisanship in explaining the spread of state

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<sup>6</sup> Among other things, the Development, Relief, and Education for Alien Minors, or "DREAM," Act would provide legal status for certain undocumented youth. For more information, see *The DREAM Act: A Resource Page*, IMMIGRATION POLICY CENTER (Sep. 16, 2010), <http://www.immigrationpolicy.org/just-facts/dream-act-resource-page>; *Americans Agree: Protecting DREAMERS is a No-Brainer*, AMERICA'S VOICE ONLINE (June 2012), <http://americasvoiceonline.org/polls/americans-agree-protecting-dreamers-is-a-no-brainer/>.

and local laws, while discounting the conventional wisdom that these enactments are organic policy responses to pressing demographic needs. It cautions that judicial opinions, legal theories, and political rhetoric based on these commonly-held assumptions must be reconsidered.

## II. The Empirical Validity of Demographic Explanations for State and Local Immigration Regulation

Recently, states and localities have renewed their interest in immigration regulation. The National Council of State Legislatures reports over 7,000 state immigration proposals over the last five years.<sup>7</sup> States and localities are increasingly considering and passing laws that create state immigration crimes, enact state immigration enforcement schemes, regulate the renting of property to certain non-citizens, penalize businesses for hiring unauthorized workers, and discriminate in the provision of public services. In most instances, the stated aim of this restrictive legislation is to discourage entry or residence of unauthorized immigrants, or what many restrictionists have called “attrition through enforcement.”<sup>8</sup>

Our purpose in this section is to explore why subnational governments have vigorously reentered the field of immigration regulation, testing widely held assumptions regarding this question. More specifically, we ask: *Why do some places in the United States adopt restrictive legislation while others adopt more permissive legislation?* We focus on this question because if states and localities are responding to objectively measurable policy challenges, we would expect that other jurisdictions facing similar population changes and concerns would be likely to consider and replicate these legislative solutions.<sup>9</sup> We answer the question as it involves state laws and local ordinances, and we analyze corresponding sets of legislative data: a collection of state legislation and local ordinance information from 2005-2010.<sup>10</sup> In analyzing this data, our goal is to determine the relative importance and weight of several factors that have been proffered by commentators and elected representatives to explain the recent spate of subnational lawmaking. These commonly accepted explanations comprise what we term the “conventional” theory or model of subnational immigration regulation.

### A. The Conventional Explanation for State and Local Laws

The conventional explanation for the recent spate of state and local laws should be familiar to anyone paying attention to immigration policy. It holds that the policy stalemate at the federal level, combined with the pressure created by the public policy challenges of recent and rapid demographic changes, compel states and localities to legislate in a field they would rather

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<sup>7</sup> BROOKE MEYER & ANN MORSE, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JAN. 1–DEC. 7, 2011), NATIONAL CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx>.

<sup>8</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (explicitly invoking this frame in Section 1 of the law: “The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.”), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

<sup>9</sup> See, e.g., Cristina M. Rodríguez, *Significance of the Local*, *supra* note 4, at 609.

<sup>10</sup> A prior version of the research in this section appears in S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES (Monica Varsanyi, ed. 2011).

avoid, but now have no choice but to enter. In this explanation, federal inaction and subfederal activity are independent phenomena, unconnected both theoretically and descriptively – federal inaction simply happens, and that pre-existing fact serves as the starting point for analysis. Accordingly, state and local lawmaking is framed as a necessary response, occasioned by objectively understood, unique public policy challenges faced by particular jurisdictions.<sup>11</sup>

This sentiment was neatly encapsulated by Governor Jan Brewer of Arizona in her signing statement accompanying the passage of S.B. 1070, which created a state immigration enforcement scheme and provided state criminal penalties for immigration violations:

The bill I'm about to sign into law – Senate Bill 1070 – represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix.... The crisis caused by illegal immigration and Arizona's porous border.<sup>12</sup>

The City of Valley Park, Missouri also highlights specific problems purportedly caused by unlawful immigrants:

[I]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and our residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability, diminishes our overall quality of life, and endangers the security and safety of the homeland.<sup>13</sup>

The chief virtue of this conventional explanation is its simplicity and intuitive appeal; in other words, it just seems right. In addition to the widespread acceptance that immigration policy has reached a stalemate at the national level, it also makes intuitive sense that rapid migration and demographic change are causing significant social dislocation and prompting redistribution of some public goods. In addition, current economic study suggests that the fiscal benefits of immigration are more likely to be concentrated at the national level, while any short-term fiscal costs are more likely to be borne by specific localities, particularly with respect to the provision of public education, social services, and emergency room care.<sup>14</sup> Similarly, news stories have devoted extensive coverage of complaints by state and local government officials over overcrowded housing, schools, and emergency rooms.<sup>15</sup> And, it is evident that immigrants in

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<sup>11</sup> Cristina M. Rodríguez, *Significance of the Local*, *supra* note 4 at 575 (discussing the “familiar rhetoric” of federal failure as the justification of state and local involvement).

<sup>12</sup> Press Release, Arizona Governor Jan Brewer, Statement by Governor Brewer on the signing of Senate Bill 1070 (Apr. 23, 2010), [http://azgovernor.gov/dms/upload/PR\\_042310\\_StatementByGovernorOnSB1070.pdf](http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf).

<sup>13</sup> Valley Park, Mo., Ordinance 1722, § 1 C (2008) (stating purpose of city's illegal immigrant employment and rental law). *See also*, H.B. 56 § 2, 2011 Reg. Sess. (Ala. 2011) (“the State of Alabama finds that illegal immigration is causing economic hardship and lawlessness.”).

<sup>14</sup> NATIONAL RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 254-296, (James P. Smith & Barry Edmonston eds., 1997).

<sup>15</sup> *See Lou Dobbs Tonight: Broken Borders* (CNN television broadcast May 2, 2007); *See also* Alex Kotlowitz, *Our Town*, *supra* note 5.

recent years have been moving to “new destinations”—areas with little or no history of immigrant settlement in the past century.<sup>16</sup> The emergence of these new destinations augments the narrative of rapid, recent demographic change that many assume to cause state and local legislative reactions. Despite the several appealing aspects to this model of demographically-induced legislative action, upon closer evidentiary analysis, this model does not hold.

## B. Empirically Testing the Conventional Model

### 1. Hypothesized Factors Necessitating State and Local Response

Using our original data set of about 25,000 localities,<sup>17</sup> we tested the importance of the following factors hypothesized to contribute to the proposal or passage of subnational immigration regulation:

- *Population of New Immigrants, and Growth of Latino and Foreign-Born Populations*<sup>18</sup>
- *High Proportions of Linguistically-Isolated Households*
- *Overcrowded Housing*
- *Latino Share and Naturalized Share of the Citizen Population*
- *Economic Stress and Relative Group Deprivation*
- *State-Level Policy Climate*
- *Local Economic Interests*
- *Party Composition of the Electorate*

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<sup>16</sup> These so-called “new destinations” include places ranging from rural Kansas and North Carolina to suburbs in Long Island and Georgia that have had little recent history of immigration. TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA (Brookings Institution Press, Audrey Singer, Susan Wiley Hardwick & Caroline Brettell, eds., 2008).

<sup>17</sup> Our information on restrictive activity at the municipal level is based on lists collected by various legal defense organizations and validated by making phone calls to jurisdictions noted as considering or passing ordinances, as well as by monitoring news stories on local ordinances. We merged information on the proposal and passage of ordinances with census data from the larger universe of over 25,000 localities (municipalities, villages, and places). We use the shorthand “cities” to refer to these types of government, to contrast them with county governments. At the state level, two graduate student research assistants coded legislative summaries provided by the National Conference of State Legislatures based on their topic, valence, and severity.

<sup>18</sup> We use “recent immigrants” as a proxy measure for the likelihood of a high unauthorized migrant population. It is not possible to attain accurate data on numbers of unauthorized migrants in most localities, but we expect recent immigrants to be composed of a high percentage of unauthorized migrants. In addition, using this broader description accounts for the “new destinations” trope in current restrictionist discourse.

Immigrant criminality or increase in crime-rate could also be added as a hypothesized demographic factor causing state and local response. However, we do not independently test that hypothesis with our data set, and thus do not include it in our list of hypothesized and tested factors. Instead, we rely on the substantial empirical work already completed in this area by social scientists. They have proven that increased immigrant criminality is a “myth,” with lower incarceration rates amongst recent immigrants than the native-born population.<sup>19</sup> Further, in many jurisdictions passing restrictive ordinances, overall crime and violent crime have decreased in the past several years, in the same time span that the demographic problems purportedly caused by undocumented immigrants have captured state and local attention.<sup>20</sup>

Finally, while the presence or absence of prior state legislation is a potentially important factor in explaining municipal ordinance activity on immigration, it is also important to explain what factors, if any, explain restrictive laws at the state level. Many of the factors that we hypothesize to predict local legislative activity are also relevant for state activity, albeit at a different scale. Thus, we are able to obtain measures of the population of new immigrants, the growth of Latino and foreign-born populations, and the unemployment rates of whites and blacks at the state level.

## 2. Data and Statistical Findings<sup>21</sup>

### a. Cities

In our dataset of over 25,000 cities across the United States, from May 2006 to December 2011, 125 had proposed restrictive ordinances and 93 had proposed pro-immigrant ordinances, including measures limiting cooperation with federal authorities on deportations.<sup>22</sup> On the restrictionist side, approximately 63 percent of proposals had passed, about 12 percent had been voted down or tabled, and a quarter were still pending. On the “pro” side, the vast majority of proposals had passed, with only two pending and one classified as failed or tabled.

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<sup>19</sup> See RUBEN G. RUMBAUT AND WALTER A. EWING, IMMIGRATION POLICY CENTER, SPECIAL REPORT, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN BORN MEN 1-2 (Spring 2007).

<sup>20</sup> Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES, June 19, 2010 (“the rate of violent crime at the border, and indeed across Arizona, has been declining, according to the Federal Bureau of Investigation...”), <http://www.nytimes.com/2010/06/20/us/20crime.html>.

<sup>21</sup> We have not included a full explanation of our data set, our statistical methods, and models here. Readers interested in reviewing the statistical work and analysis in greater detail may contact the authors ([karthick@ucr.edu](mailto:karthick@ucr.edu) or [pgulasekaram@scu.edu](mailto:pgulasekaram@scu.edu)). In addition, Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L.J. (forthcoming 2012), contains a richer discussion of both the quantitative and qualitative empirical work referenced herein.

<sup>22</sup> The restrictive ordinances in our sample include measures whereby local governments use their official capacities to enforce federal immigration laws or to address perceived negative societal consequences of illegal immigration. Illegal Immigration Relief Act (IIRA) ordinances and variants of them constitute the majority of these restrictive measures. IIRAs commonly refer to the fiscal and governance challenges arising from the presence of illegal immigrants. The pro-immigrant ordinances in our sample include resolutions and mandates that express opposition to immigration raids and restrictionist national legislation, those barring the use of public funds to enforce immigration laws, and those with explicit “sanctuary” policies whereby local officials do not inquire about legal status and do not notify immigration authorities about the status of individuals unless they are convicted of serious crimes.

Cities with restrictive policies are but a small fraction of the thousands of communities in the United States that are transforming due to recent international migration. Among cities that passed restrictive ordinances, new immigrants averaged about 3 percent of the total resident population, slightly higher than the 1 percent average for cities across the country.<sup>23</sup> This small difference in the proportion of new immigrants diminishes even further in significance when conducting a statistical analysis that controls for other explanatory factors.

Even taking the case of a restrictionist city with the highest proportion of recent immigrants—Herndon, Virginia, where recent immigrants accounted for 14.5 percent of the town’s residents in 2000—we find that 129 other cities took no action, despite having even higher proportions of recent immigrants, including 23 with recent immigrants accounting for over 25 percent of the town’s residents. Indeed, the majority of jurisdictions that can claim to share the necessary demographic factors—such as growth in immigrant populations, having a recently-arrived immigrant population, or a high proportion of Spanish-speakers among immigrants—do not propose or pass immigrant-related laws.

Even if immigration-induced change within a jurisdiction is insufficient, by itself, to provoke legislative response, might such change be a shared characteristic of enacting jurisdictions? We find that 29 out of the 79 localities that have passed restrictive ordinances (or 37% of the cases) have recent immigrant populations that are below the national average for cities. Indeed, in a fifth of the cases (16 out of 79), recent immigrants accounted for fewer than 0.5 percent of the city’s residents, and in these places the proportion of Spanish-dominant households was less than 3 percent of all households in the city.

In order to arrive at more systematic answers about the conditions under which cities may consider and pass restrictive, we ran a multivariate regression that can show the contribution of each individual factor while controlling for all other factors.<sup>24</sup> How do each of these potential explanations fare?

***Population of New Immigrants, and Growth of Latino and Foreign-Born Populations.*** Having an immigrant population that is composed primarily of recent arrivals (or, having experienced a recent upsurge in Latino or immigrant populations) is not associated with restrictive ordinances. Indeed, it is associated with a greater likelihood of pro-immigrant legislation. Our alternative measure, of the growth of the foreign-born population between 1990

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<sup>23</sup> These figures are means (averages). We use data from the 2000 Census, given missing data in the 2005-9 American Community Survey file. The corresponding median figures are 1.72% for restrictive ordinance cities, and 0.16% for cities in the nation as a whole.

<sup>24</sup> Importantly, we remained attuned to issues of multicollinearity, where putting two factors that are closely related into the same explanatory model produces erratic results for those factors. Since some of these factors are highly correlated, we ran alternative model specifications instead of putting every factor in the same regression model. For full model results, see our working paper Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The Importance of the Political in Immigration Federalism* (unpublished manuscript), [http://karthick.com/workingpapers\\_assets/GR-submission-2-23.pdf](http://karthick.com/workingpapers_assets/GR-submission-2-23.pdf). We used CLARIFY to simulate the effects on the dependent variable of changes in each individual variable while holding other variables at their means. See Michael Tomz, Jason Wittenberg & Gary King, *CLARIFY: Software For Interpreting And Presenting Statistical Results*, 8 J. OF STAT. SOFTWARE 1-30 (2003).

and 2000, or between 2000 and 2007, also has no statistically significant relationship with restrictive ordinance activity, although it is associated with a lower likelihood of pro-immigrant ordinances. Finally, a fast-growing Latino population in the locality, regardless of their citizenship and immigration status, is associated with a marginally greater likelihood of restrictive ordinances being proposed, but not passed.

***Linguistically-isolated Households & Overcrowded Housing.*** Factors related to recent arrivals, such as the proportion of households that are exclusively Spanish-speaking and the proportion of households that are overcrowded, also bore no relationship to the proposal or passage of restrictive ordinances up until 2007. Since then, however, the growth of Spanish-speaking households has made a marginal difference in the probability of restrictive proposal and passage (increasing by 4% and 7%, respectively). These effects pale in comparison to those associated with local contexts of partisanship, discussed below.

***Latino share and naturalized share of the citizen population.*** We included these measures in two separate equations given their high level of collinearity. These factors do not bear any significant relationship to the proposal and passage of local ordinances, whether restrictive or permissive. This further reinforces findings from other studies of local immigrant incorporation that immigrant electoral power may be less important in predicting local government policies toward immigrants today than in the past.<sup>25</sup>

***Economic stress and relative group deprivation.*** There is no support for the contention that economic stress or relative deprivation (as measured by absolute or relative poverty rates, respectively) among white residents is related to the proposal or passage of restrictive legislation. Indeed, when relative measures of poverty are used, cities with whites who are relatively better off than Latinos are more likely to propose restrictive policies. However, when it comes to the passage of policies, there is no significant relationship. Finally, black relative deprivation is indeed associated with a higher likelihood of restrictive proposals, but not policy passage. It is unlikely that blacks are driving the proposal of restrictive legislation in most of these cities, since in none of these places are blacks the majority, and they are over a third of the population in only one case (Norristown, PA).

***State-level policy climate toward immigrants.*** This factor bears no significant relationship to ordinance activity at the local level. For state-local dynamics, neither the “steam valve” model (localities adversely reacting to state-level policy) nor the “demonstration effect” model (mimicking state level activity) are at play.

***Local economic interests.*** The prevalence of industrial sectors that are heavily dependent on immigrant workers is not significantly related to local ordinances, with one important exception: the likelihood of restrictive policies being passed is much lower in places where agriculture accounts for a sizable number of jobs. It is important to note, however, that the effects are evident in the stage of ordinance passage, but not ordinance proposal. This suggests

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<sup>25</sup> S. KARTHICK RAMAKRISHNAN & PAUL G. LEWIS, IMMIGRANTS AND LOCAL GOVERNANCE: THE VIEW FROM CITY HALL, SAN FRANCISCO, CA: PUBLIC POLICY INSTITUTE OF CALIFORNIA (2005).

that policy entrepreneurs in agricultural areas may have overreached by pushing for restrictive policies only to find an organized opposition from local businesses to such plans.<sup>26</sup>

***Partisan composition.*** Among our hypothesized factors, partisanship has the strongest and most consistent effects. After controlling for all other factors, cities in Republican-majority areas are about 2.5 times more likely to *propose* restrictive ordinances, and they are about 4 times as likely to *pass* such ordinances compared to Democratic-majority areas. By contrast, on the pro-immigrant side of enforcement, cities in Democratic-majority counties were about 4 times as likely as those in Republican-majority areas to propose and pass such legislation.

#### b. States

During this same period, legislation at the state level was much more common, with 1,321 laws enacted between 2005 and 2010. Of these, we coded 317 as restrictive, with at least one such law passed in 46 states. These laws ranged in terms of their policy area (e.g., education, law enforcement, public benefits) and in their severity (e.g., ranging from revoking licenses of notaries public who have been denaturalized, to laws denying access to state public benefits to unauthorized immigrants).<sup>27</sup> Taking into consideration only those restrictive laws that we classified as having a significant impact on a state's unauthorized immigrant resident population,<sup>28</sup> the number of laws during this time period drops to 155, with Arizona passing the most laws (15), followed by Virginia (10), and Georgia (9).

Illustrating again that demographic change is not sufficient to produce restrictionist legislation, of the top 25% of states where new immigrants make up a sizable portion of the overall population, only 6 of 13 states passed significant restrictive laws during this time. In the multivariate regressions, we test for several variations of demographic change, including the proportion of new immigrants, the proportional change in the foreign born population, and the absolute level of immigration in the area. On the other end of the demographic spectrum, we find that 9 of 12 states at the bottom quartile on this measure passed restrictive laws. Indeed, the passage of restrictive laws is highest for this bottom quartile of states, and lowest among the top quartile. Clearly demographic disruptions caused by recent immigration are also not necessary for state-level restrictive action.

In our multivariate regression analysis that controls for various other factors, the state-level models reveal no support for the hypothesis that restrictive legislation is more likely in states where immigrants have arrived recently, or alternatively, states with the biggest growth in the foreign-born population. Indeed, in some variations of our model, we find less restrictive activity in states with recent immigrant populations. For most of our demographic factors

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<sup>26</sup> Cf. Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738, 765 (1997) (noting the effects of strong union opposition).

<sup>27</sup> 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, 2-34 (rev. Jan. 31, 2008), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

<sup>28</sup> The legislative summaries were coded on an ordinal scale of 1: "low impact" and 2: "high impact" on immigrant rights and/or access to benefits, based on the provision's likely effects on immigrant life chances and the number of immigrants likely to be affected.

(including poverty rates and growth of the immigrant population), the findings are inconsistent, perhaps due to the small number of cases being analyzed (50 states).

In the case of partisanship, however, the results are consistently significant. After controlling for various demographic factors, states with a majority of Republican voters have passed more than twice as many significant pieces of restrictive legislation (four, on average, during this period) as those states with a high proportion of Democratic voters (1.6, on average). Another way to look at the state results is to differentiate between those states with multiple pieces of significant restrictive legislation (three or more) versus the rest. Republican-majority states are nearly 300% more likely to be in this group than Democratic-majority states.<sup>29</sup> Finally, we also update the analysis to account for laws enacted outside of the 2005-2010 period, by analyzing all current state laws on enforcement and work verification.<sup>30</sup> Here, too, we find that partisanship has the strongest effect on the existence of restrictive state-level policies, and that factors such as the growth of the foreign-born population or the recency of the immigrant population do not matter.

### C. Partisanship and the Political Process

To sum up, our analysis shows that the restrictive responses of local governments to undocumented immigration are largely unrelated to the objectively measurable demographic pressures credited in the conventional model of subnational immigration regulation. Our evidence discounts the saliency of recent immigrant population growth, the proportion of Spanish language-dominant households, and local economic and wage stress in the proposal and passage of such laws. These ordinances are also largely unrelated to the electoral empowerment of Latinos, given that places with large proportions of Latino residents and citizens are no more or less likely to propose legislation, whether restrictive or pro-immigrant.

Instead, we find that political factors not commonly cited by proponents of state and local immigration laws are more important.<sup>31</sup> Importantly, 67 percent of cities with restrictive ordinances are in Republican-majority counties. Although we do not have finer-grain data on partisanship for all localities in the United States, we were able to obtain such data on places with restrictive ordinances.<sup>32</sup> Here, too, we find that a high proportion of restrictive ordinances (77%) have passed in Republican-majority cities. And, partisanship has, by far, the strongest relationship at the state level. At the state level, nearly two-thirds of restrictive states had a

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<sup>29</sup> We report findings based on the partisanship of electorates in order to provide a comparable basis of comparison to our local partisanship measures. The results on partisanship are similar when using measures of party control of the state legislature.

<sup>30</sup> We utilize a resource available via Findlaw that summarizes current state-level policies and code it on the same restrictive to permissive scale (low to high) as in our analysis of enacted legislation in the 2005-2007 period. State Immigration Laws, FINDLAW, <http://immigration.findlaw.com/immigration-laws-and-resources/state-immigration-laws/>. Data is current as of December 31, 2011.

<sup>31</sup> The partisan composition of the area plays an important role, second only to city size. However, because city size is positively associated with both pro and restrictive ordinances, party composition is the only factor that displays statistically significant and theoretically consistent effects (negative on the restrictive side and positive on the pro side).

<sup>32</sup> Local party registration data for localities obtained from the voter statistics firm Aristotle, Inc.

Republican majority of voters during this time period, and for those who have passed major pieces of restrictive legislation on enforcement and employer verification, the proportion of Republican-majority states is much higher (94%).<sup>33</sup>

Thus, our fundamental conclusion on partisanship and subfederal immigration regulation leads to three important questions: (1) *Why is partisanship at the subnational level relevant to legislation on immigration?* (2) *How is partisanship utilized to enact immigration laws in places where demographic pressures are inconsequential?* and (3) *Who is utilizing and mobilizing the partisanship dynamic to achieve these legislative goals?* Due to space constraints, we limit the discussion here of the political dynamics that help explain these statistical findings, saving a larger exploration for our book project,<sup>34</sup> but we sketch some brief answers to these questions below.

First, there is ample survey evidence to indicate that Republican voters, and especially those who are active in party primaries, care intensely about immigration and hold restrictive views on the matter.<sup>35</sup> When this pattern in public opinion gets harnessed through the primary process, Republican-heavy areas have enabled primary challengers to mobilize against incumbents on the immigration issue. Republican incumbents, in turn, have either been defeated by more restrictivist challengers, or they have themselves taken more conservative positions on immigration to avoid primary defeat.<sup>36</sup>

Even in many cities where elected offices are often nonpartisan, contexts of local partisanship nevertheless continue to matter, as policy activists find it easier to promote restrictive legislation on immigration in Republican-heavy areas. For example, in 2010, the *Los Angeles Times* reported on the successful attempts of a local Tea Party activist in getting Republican-dominant cities in Southern California, such as Temecula and Murrieta, to pass restrictive measures, after failing to do the same in larger, politically diverse cities, such as Riverside and Ontario.<sup>37</sup> Even though city councils in California are nonpartisan bodies, the proportion of Republican voters in these cities nevertheless still matters for interest representation. Thus, even for nonpartisan elections and governmental bodies, Republican Party registration still signals the potential opportunities for policy entrepreneurs to promote restrictive legislation.

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<sup>33</sup> This compares to 57% of states with a Republican majority of voters in 2004.

<sup>34</sup> Karthick Ramakrishnan and Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012).

<sup>35</sup> Frank Newport, *Republicans Prioritize Immigration; Dems, Financial Reform*, GALLUP, (April 30, 2010), <http://www.gallup.com/poll/127607/republicans-prioritize-immigration-dems-financial-reform.aspx>; Lymari Morales, *Americans' Immigration Concerns Linger*, GALLUP, (January 17, 2012), <http://www.gallup.com/poll/152072/Americans-Immigration-Concerns-Linger.aspx>.

<sup>36</sup> This was evident in Arizona as far back as 2004 and 2006, as long-standing Republican incumbents such as Congressman Jim Kolbe faced competitive primary elections by challengers focusing on immigration and border-control issues. See Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. TIMES, Oct. 15, 2006 (Magazine), <http://www.nytimes.com/2006/10/15/magazine/15immigration.html>.

<sup>37</sup> Phil Willon, *Conservative Inland Empire Cities Crack Down on Illegal Workers*, L.A. TIMES, Feb. 14, 2011, <http://articles.latimes.com/2011/feb/14/local/la-me-0212-e-verify-20110214>.

Second, political dynamics at the subnational level on immigration are also tied to political dynamics at the national level. This is particularly true in the case of restrictive local policies on immigration, where activist groups such as the Federation for American Immigration Reform (FAIR) and NumbersUSA have sought to stall moderate legislation at the federal level that includes some form of legalization, while at the same time fomenting restrictionist legislation at the state and local level. Rather than hoping or waiting for federal legislative efforts at bipartisan immigration reform to stall, since 2004 these organizations have pursued a dual strategy: They purposefully promote legislative gridlock at the federal level, and then cite the very national legislative inaction they helped foment to justify restrictive solutions at the local level.<sup>38</sup>

Finally, since 2006, the work of proliferating legislation at the subnational level has found its strongest champion in Kris Kobach, a former law professor who has served as legal counsel for many states and localities that have passed restrictive legislation, both in an individual capacity and as an employee of the Immigration Reform Law Institute (IRLI), the legal branch of the restrictive group FAIR. Not only has Kobach provided legal counsel for cities such as Hazleton, PA and Farmers Branch, TX, he has also played a pivotal role in the crafting of legislation in many of the same jurisdictions, including cities like Hazleton, and states such as Arizona and Alabama.<sup>39</sup> Thus, while restrictive policies may have local sponsors in each jurisdiction, the evidence we have analyzed from a variety of news reporting reveals a nationally-involved group of actors (who we term “restrictive issue entrepreneurs”) who are advancing—through political rhetoric, legal justification, and the design and promotion of legislation—a proliferation of subnational policies aimed at “attrition through enforcement,” or making living and employment conditions so inhospitable to unauthorized immigrants as to encourage their departure.<sup>40</sup>

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<sup>38</sup> Our article, Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012), details the legislative involvement of FAIR and NumbersUSA. In 2004, while FAIR was striving to push back against legalization efforts in Washington D.C. following calls for comprehensive immigration reform by George W. Bush and John McCain, it also gave financial backing to Arizona’s Proposition 200 campaign, a measure modeled after California’s Proposition 187 that sought to deny unauthorized immigrants access to many public benefits. Steven Wall, *Efforts Against Illegal Immigrants Rise*, SAN BERNARDINO SUN, Nov. 9, 2004. Indeed, pro-immigrant advocacy organizations in Washington D.C. saw FAIR’s foray into Arizona as connected to its D.C.-based legislative strategy, as it sought to push back against moderate legislation being offered by Arizona’s Congressmen Jim Kolbe, Jeff Flake, and Senator John McCain. Interview with immigration advocacy organization (Apr. 12, 2012); see also Jim Behnke *The Tres Amigos - Kolbe, Flake, McCain*, SIERRA VISTA HERALD REVIEW, January 8, 2004.

<sup>39</sup> George Talbot, *Kris Kobach, the Kansas Lawyer Behind Alabama’s Immigration Law*, PRESS-REGISTER (Mobile, AL), October 16, 2011.

<sup>40</sup> NUMBERSUSA, *How Attrition Through Enforcement Works* (noting that immigration raids would be unnecessary if federal, state, and local enforcement effectively make “living illegally ... more difficult and less satisfying over time”), <https://www.numbersusa.com/content/learn/issues/american-workers/how-attrition-through-enforcement-works.html>. See also Michael Williamson, *Self-Deportation Proponents Kris Kobach, Michael Hethmon Facing Time of Trial*, WASH. POST, April 24, 2012 (quoting an Oklahoma representative who notes that Kobach and his partner at IRLI, Michael Hethmon “were the face and the muscle behind the effort that really synthesized it into a movement. Do I think it would have happened without them? Most certainly it would not have.”), [http://www.washingtonpost.com/politics/time-of-trial-for-proponents-of-self-deportation/2012/04/24/gIQAe6lheT\\_story.html](http://www.washingtonpost.com/politics/time-of-trial-for-proponents-of-self-deportation/2012/04/24/gIQAe6lheT_story.html).

While it is also possible for pro-immigration advocates to pursue a similar strategy—of promoting federal gridlock as a fruitful condition for subnational action—our review of news coverage and interviews with permissive and restrictive organizations in Washington, D.C., shows that pro-immigrant organizations still push for federal solutions as optimal policy, particularly on matters pertaining to immigration enforcement.<sup>41</sup> Accordingly, the integrationist strategy has focused on Congress enacting comprehensive immigration reforms that they hope will include DREAM Act provisions and other pathways to legalization. Meanwhile, pro-immigrant efforts on matters such as sanctuary city policies and in-state tuition for undocumented students are driven mostly by local sponsorship, with little coordination in activity.<sup>42</sup> By contrast, restrictive proposals often feature local sponsors and national organizations and issue entrepreneurs, with model legislation that is replicated across jurisdictions.<sup>43</sup> Importantly, the main national organizations promoting the spread of restrictive local measures (NumbersUSA and FAIR) are the same ones who also have played a prominent role over the past two decades in derailing congressional efforts on immigrant legalization, keeping viable a plausible case for local action.<sup>44</sup>

Thus, while local contexts of partisanship matter on both the restrictive and pro-immigrant sides of local legislation, the dynamics that produce them are more local in the case of permissive policies, while federated and coordinated with national organizations in the case of restrictive legislation. As we discuss in the next section, these differences may have some significant implications for considerations of federalism, including the relevance of functionalism, availability cascades, and party federation in producing this subnational variation in immigration policies.

### III. Implications for Immigration Federalism

As our empirical investigation shows, in subnational immigration regulation, demography is not dispositive. By in large, subnational regulations are not organic responses to demographic change, brought on by intractable public policy challenges. Instead, our data and analysis suggest that interested policy actors present pre-made solutions to politically receptive jurisdictions, regardless of the underlying demographic pressures in those jurisdictions. This conclusion challenges existing theories and assumptions regarding the rise, proliferation, and utility of subnational immigration regulations.<sup>45</sup> Specifically, we draw a contrast with “functionalist” theories of state and local action that assume the salience of demographic-change

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<sup>41</sup> We note here that this could also be influenced by the different legal analysis (federalism, preemption) applicable to pro-immigrant state and local ordinances (which often do not mention citizenship status at all), in contrast to the legal analysis of enforcement-type state and local provisions (which use immigration status as a trigger).

<sup>42</sup> Interview with Angela Kelley, Center for American Progress (2011); Interview with Frank Sharry, America’s Voice (2012); Interview with Clarissa Martinez, NCLR (2012).

<sup>43</sup> For more details, see our book Pratheepan Gulasekaram and Karthick Ramakrishnan, *Immigration Federalism: Its Political Underpinnings and Legal Implications* (unpublished manuscript). See also Ian Gordon, *How Did Harsh Immigration Laws Spread to Your Statehouse*, MOTHER JONES, March/April 2012; MODEL LEGISLATION, IMMIGRATION REFORM LAW INSTITUTE, [www.irli.org/laws](http://www.irli.org/laws) (last visited Oct. 11, 2012).

<sup>44</sup> See Ramakrishnan and Gulasekaram, *The Importance of the Political in Immigration Federalism*, *supra* note 34.

<sup>45</sup> An in-depth exploration of the theoretical and constitutional implications of our empirical investigation is featured in Gulasekaram and Ramakrishnan, *The New Immigration Federalism* (forthcoming 2013) (draft on file with authors).

for policy expression, and with “steam-valve” theories, which suggest that state and local restrictionist policies relieve pressure on national restrictionist efforts. Finally, we query the significance of our empirical conclusions for judicial evaluations of subfederal immigration laws.

The fact that partisanship matters more than any other factor suggests that, above all else, subnational immigration policy expression reflects naked political preference and opportunistic use of party polarization.<sup>46</sup> This conclusion contradicts the assumptions made by scholars who have argued that what is “missing” from debates over the constitutionality of subfederal enactments is “a functional account that explains why state and local measures have arisen over the past five to ten years, and how this reality on the ground should reshape our conceptual and doctrinal understandings of immigration regulation.”<sup>47</sup> Professor Cristina Rodriguez is correct that purely legal, constitutional debates over subfederal involvement in immigration – focusing on federalism and preemption questions – miss crucial “on the ground” factors that should influence judicial and popular evaluations of these laws. However, the missing reality is not necessarily the new demography and geography of immigration; rather it is the new politics of immigration.<sup>48</sup>

The political and partisan dynamics of immigration suggests that the various state and local policy instantiations are not the type of policy experimentation imagined by the Supreme Court<sup>49</sup> and legal scholars.<sup>50</sup> Our model proposes that restrictive subfederal laws are being proliferated and replicated in multiple jurisdictions, not because the legislation presents a unique method of addressing an emerging public policy concern, but rather because the political conditions are ripe for replication. Thus, the policy “experimentation” and replication currently occurring in the immigration field has little demonstrative value to other jurisdictions;<sup>51</sup> it changes the terms and tenor of the national debate on immigration, but does not solve the “on the ground” problems referenced by Rodriguez.

In addition, “steam-valve” theories of subnational policy proliferation also require reconsideration. It is tempting to agree with Professor Peter Spiro’s intuition that leeway for isolated, subfederal anti-immigrant regulation relieves pressure to promote the same restrictive

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<sup>46</sup> See *Supra* Part II; see also, Cass Sunstein, *Deliberative Trouble*, 110 YALE L.J. at 74-6 (2000) (showing how limited private information tends to make people follow others, and reach more extreme policy positions).

<sup>47</sup> Rodriguez, *The Significance of the Local*, *supra* note 4, at 571.

<sup>48</sup> We hasten to add that functionalist accounts of subfederal legislation may serve the important purpose of carving out a normative space for local involvement. It may very well be normatively desirable, as Rodriguez argues, to locate and institute integrationist measures at the local level. Further, we agree with Professor Rodriguez’s underlying point that uniformity in immigration policy across the nation may not be necessary or normatively desirable. *Id.*, at 611.

<sup>49</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>50</sup> See Matthew Parlow, *A Localist’s Case For Decentralizing Immigration Policy*, 84 DENVER U. L. REV. 1061 (2007); Huntington, *Immigration Federalism*, *supra* note 4; Rodriguez, *The Significance of the Local*, *supra* note 4 at 609 (“And perhaps most importantly, local experimentalism will be of tremendous value in this context.”).

<sup>51</sup> Many of these ordinances, however, do demonstrate the social and economic pitfalls of local regulation. Several states have abandoned or reconsidered their enforcement-heavy approaches after enactment, and after experiencing the consequences of such laws.

policies as federal legislation.<sup>52</sup> Thus, as per his “steam-valve” theory, even if subfederal restrictionist measures primarily reflect raw political preference (and not necessary responses to pressing policy problems), those measures in isolated localities could serve a normatively desirable purpose by providing a relatively contained outlet for anti-immigrant feelings.<sup>53</sup> Specifically addressing Arizona’s SB 1070 and the constitutional challenge to the law, Professor Spiro argues that “in the long run, immigrant interests will be better helped if the Supreme Court upholds S.B. 1070....[If the Court strikes it down], anti-immigrant constituencies will redouble their efforts to enact tougher laws at the federal level.”<sup>54</sup>

The manner in which these subfederal enactments have been proliferated, however, indicates that Spiro’s causal story must be reversed: Suppression of subfederal lawmaking does not promote effectuation of restrictionist measures at the federal level;<sup>55</sup> rather, purposeful suppression of moderate or compromised federal lawmaking provides the receptive legislative backdrop for promotion of extreme measures at the subfederal level. The issue entrepreneurs’ goal is to continue proliferation in every jurisdiction that is politically ripe for legislation. Each successive enactment builds, rather than dissipates, momentum. Specifically, in the immigration context, we suggest that interested policy activists coordinate activity between the local and federal levels so that legislative activity at the federal level does not stand as an obstacle to further subfederal proliferation.<sup>56</sup> In other words, part of the receptive context for continued subfederal policy proliferation is the strategic stalling of federal legislative responses, until an acceptable de facto national consensus on restrictionist policies can be instituted at the federal level.

Finally, our conclusions might have implications for the way courts evaluate state and local immigration laws. First, the doctrinal basis for subfederal participation in immigration requires that states establish the “vital necessity” of their immigration regulation.<sup>57</sup> In *Chy Lung v. Freeman* (1875), the Court found unconstitutional a California law that purported to allow state officials to make immigration decisions. In doing so, the Court seemed to leave open the possibility that states might constitutionally enact immigration enforcement laws, but only if Congress failed to act and it was absolutely necessary for states to protect themselves from

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<sup>52</sup> Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1636 (1997) (“Affording the states discretion to act on their preferences diminishes the pressure on the structure as a whole; otherwise, because you don’t let off the steam, sooner or later the roof comes off.”).

<sup>53</sup> The limitation has to be defined in terms of the quantity of subfederal jurisdictions; quality-wise, it is difficult to suggest that Alabama’s recent immigration law – which has had the effect of driving immigrant children out of school – is relatively harmless, even if it occurs only within an individual state.

<sup>54</sup> Peter J. Spiro, *Let Arizona’s Law Stand*, N.Y. TIMES, Apr. 22, 2012, <http://www.nytimes.com/2012/04/23/opinion/let-the-arizona-law-stand-then-wither.html>.

<sup>55</sup> *Id.*; Spiro, *Learning to Live*, *supra* note 52 at 1630 (“One must look to the consequence of such suppression and the possibility that frustrated state preferences may actually prompt the effectuation of anti-alien measures at the federal level.”).

<sup>56</sup> See Gulasekaram and Ramakrishnan, *The Importance of the Political in Immigration Federalism*, ARIZ. ST. L. J. (forthcoming 2012) (using qualitative empirical data to show the highly networked and coordinated work of immigration issue entrepreneurs at the federal and subfederal levels).

<sup>57</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

paupers and criminals.<sup>58</sup> Leaving aside whether Congress' recent failures to pass federal immigration law constitute the inaction described in *Chy Lung*, our conclusion undermines the narrative of necessity foregrounded in the purpose statements of the several state and local immigration laws at issue. By extension then, our analysis casts doubt on judicial opinions that rely on these unsubstantiated claims of state need. While any single jurisdiction might face objectively measurable policy challenges related to immigration, systemic claims of immigrant-induced problems cannot be substantiated.

Moreover, when enacting jurisdictions are selected because of their partisan composition (and not their demographic conditions), state and local immigration policy proliferation fails to achieve most federalism values. Traditional federalism theory suggests some constitutional leeway might be justified for subfederal policy experimentation that attempts to address regionally-specific concerns. However, as we have shown, demographic change and its attendant policy problems are not common to enacting jurisdictions. Therefore, any replication of subfederal immigration policies does not represent the type of useful policy experimentation imagined in traditional federalism theory. Indeed, restrictionist advocacy groups produce pre-packaged immigration legislation that restrictionist issue entrepreneurs shop to receptive jurisdictions, regardless of whether that legislation responds to policy challenges within the jurisdiction. In short, the current spate of state and local immigration laws are an example of solutions to imagined problems; these jurisdictions are not Justice Brandeis' idealized "laboratories of policy experimentation."

#### IV. Conclusion

Ultimately, Justice Scalia's indignation about Arizona's inability to defend itself from "bearing the brunt of the country's illegal immigration problem" is a rhetorically compelling story, but one that lacks empirical support. Unintentionally, however, his foray into an extra-judicial, political missive against the Administration's prosecutorial priorities sheds a spotlight on the genesis and essence of the current trend of restrictionist state immigration laws. These laws do not arise naturally out of economic or social necessity; instead they largely are the products of political opportunism. In the end, Scalia's dissent showcases why untested assumptions about undocumented immigrants are so dangerous. They help form the basis of impossible theories of the Union, whereby every state possesses the inherent power to expel inhabitants; they change the constitutional conversation about state immigration regulation, building an unsubstantiated empirical case for the necessity of state intervention; and finally, they obscure the highly partisan, well-organized mechanism at work in the creation of these restrictive laws.

The continuing importance of national immigration legislation was evident once again during President Obama's victory speech on the eve of his re-election in November 2012. In the speech, Obama spoke of "fixing our immigration system" as one of four important policy

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<sup>58</sup> *Id.* ("We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad....Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.").

priorities for his second term.<sup>59</sup> The same week, news outlets ran front-page stories with Republican strategists signaling a desire to pass immigration reform to improve their party's standing among Latinos.<sup>60</sup> Despite this seeming optimism, the party dynamics we uncovered will make such national legislative change difficult to achieve. Because immigration politics over the past decade has become victim to intense party polarization, very few, if any, moderate Republicans remain to create bipartisan reform. Further, as we have noted, the dynamics of our federalist system incentivize members of Congress to heed the more extreme nationalistic and xenophobic views of their state and local party compatriots. Finally, even if there is modest bipartisan support for measures such as immigrant legalization, it remains to be seen whether Congress will be able to design legislation that "wipes the slate clean" on state and local immigration laws, invalidating existing ones and preempting the growth of future subfederal legislation on immigration. Without such preemptive legislation, it is likely that the network of restrictive issue entrepreneurs will continue their efforts to proliferate legislation at the subfederal level.

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<sup>59</sup>*Audio And Transcript: Obama's Victory Speech*, Nat'l Public Radio, Nov. 6, 2012, <http://www.npr.org/2012/11/06/164540079/transcript-president-obamas-victory-speech>.

<sup>60</sup> See Carrie Budoff Brown, Jake Sherman & Manu Raju, *2012 Election Puts Spotlight on Immigration Reform*, POLITICO, Nov. 8, 2012, <http://www.politico.com/news/stories/1112/83552.html>; Brian Bennett, Hector Becerra & David Lauter, *Latino Role in Election to Fuel New Immigration Reform Push*, L.A. TIMES, Nov. 8, 2012, <http://articles.latimes.com/2012/nov/07/nation/la-na-latinos-20121108>.