

SOME FEDERAL-STATE DEVELOPMENTS IN IMMIGRATION LAW

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I plan to make four general points, all very briefly. First, I shall provide an overview of what I take to be the global trends with respect to devolution. Second, I shall discuss the structure of non-American federal systems bearing on immigration policy, on the distribution of power over immigration policy, and on immigration enforcement. Third, I shall review some trends in the United States concerning devolution generally, not only in immigration policy. Finally, I shall address the topic discussed in this conference—the distribution of power over immigration between the federal government and the states.

First, the movement toward devolution is extraordinarily powerful. In the United States, one finds many instances of devolution—in Congress, in the Executive branch, in the federal courts, within the states, and also in the private sector.¹ These forces are driven by a variety of powerful causes and are balanced by some countervailing pressures toward centralization. September 11 will probably accelerate or give greater weight to some of those centralizing pressures, but, on balance, power is being distributed downward.

Devolution is occurring despite broad traditions of national solidarity. Strong nation-states like the United Kingdom are facing important devolutionary pressures, and Parliament has responded with power-sharing institutions in Scotland, Wales, and Northern Ireland.² Countries like Belgium and Canada with proud national traditions are experiencing powerful devolutionary pressures that threaten to destroy their unity.³ This threat also exists in countries

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1. *See generally* PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 96–98 (2000).

2. Following a referendum in each country indicating popular support, legislative assemblies were established in Scotland, Wales, and Northern Ireland. Dudley T. Studlar, *Unwritten Rules: Britain's Constitutional Revolution*, *HARV. INT'L REV.*, Spring 1999, at 50.

3. *See A Worrying European Paradox*, *THE ECONOMIST*, Jul. 7, 2001, at 47; *Fine Distinctions*, *THE ECONOMIST*, Jul. 24, 1999, Survey: Canada, at 14.

like Spain, Mexico, and Indonesia.⁴ These examples suggest the extraordinary global reach of the technological, economic, political, ideological and other conditions that are pressing nation-states toward greater devolution.

Turning to the structure of federal systems outside the United States, it is important to recognize—because we so often simply assume that our own arrangements are universal—that federal systems in many immigration-receiving countries devolve immigration policy and enforcement authority much more widely and locally than the United States does. The Canadian provinces, for example, have no formal representation in the upper house of Parliament, but enjoy very broad powers with respect to immigration enforcement and standard-setting for immigrant benefits. In Germany, the *Länder*, the equivalent of the American states, have the power to administer citizenship laws and, even more surprisingly, the authority to determine whether German citizens may acquire dual nationality. The *Länder* differ considerably among themselves as to how they administer these laws. Naturalization rates, for example, are much higher in certain *Länder* with more liberal standards than in other *Länder*, even though Germany has had a strong Bismarckian national tradition from the 1870s until today. In Switzerland, the individual cantons exercise considerable authority to regulate the rights of citizens and aliens. In short, the conflict between national and sub-national authority over immigration policy is not peculiar to the United States.⁵ To my knowledge, no federal state allows aliens to vote in national elections. Some do permit aliens to vote in local elections, as do many countries that lack federal systems, such as Scandinavia. The existence of a federal structure does not seem to be a decisive factor with respect to alien suffrage.

In the United States, as mentioned above, strong devolutionary patterns exist in a wide variety of policy areas. These patterns are apparent among all the branches of government, in the private sector, and also at the state level—that is, devolution from state capitals to localities. However, September 11 has increased federal powers necessary to prosecute the war on terrorism and the attendant intelligence and law enforcement functions. Immigration pol-

4. See Emily Edmunds, Book Review, 42 *J. OF INTERAMERICAN STUD. AND WORLD AFF.* 157, 157–58 (2000); Stephen Hugh-Jones, *National Calm, Regional Turmoil*, *THE ECONOMIST*, Nov. 25, 2000, Survey: Spain, at 5; Rajan Menon, *Another Year of Living Dangerously?*, *THE NAT'L INTEREST*, Fall 2001, at 102–05; Seth Mydans, *Indonesia May Crumble Without Falling Apart*, *N.Y. TIMES*, Jul. 29, 2001, at D6.

5. See generally Peter H. Schuck, *Citizenship in Federal Systems*, 48 *AM. J. COMP. L.* 195, 216 (2000).

icy has been largely administered at the federal level since the 1870s, and this pattern will certainly continue.

With respect to immigration law enforcement, a lively discussion this morning explored whether and to what extent the deportation of criminal aliens should be facilitated by state and local governments. The speakers agreed that certain conditions must be met before state and local governments can play that role effectively. Information systems within the INS and local law enforcement agencies must improve substantially. Safeguards against abuse by state and local law enforcement officials must be established. Other kinds of coordinating policies must be designed. Only if these conditions are met will it be appropriate to shift important powers of that kind to state and local law enforcement agencies.

I wish to make several points about the inter-state differences in public benefits. First, note an important empirical fact. During congressional debates over the welfare reform law of 1996, a “race-to-the-bottom” with respect to the level of welfare benefits for aliens was widely predicted in the wake of increasing state authority, and this prediction buttressed the argument in favor of national uniformity and against the particular shape of the new law. But this race to the bottom did not occur. The major immigrant-receiving states responded quite differently than anticipated, not only restoring most of the benefits that had been eliminated at the federal level,⁶ but also providing some new benefits, particularly under Medicaid.⁷ Indeed, these states have extended important public benefits, such as lower in-state tuition at public universities, even to *undocumented* aliens.⁸ So while there may be persuasive arguments against permitting states to discriminate between citizens and aliens with respect to certain public benefits, the “race to the bottom” argument is weak, at least based on the post-1996 experience.

Second, in our system, for better or for worse—and I think the system reflects a broad and persistent conviction that, on balance, it

6. See WENDY ZIMMERMANN & KAREN C. TUMLIN, PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 25, 58 (Urban Inst., Occasional Paper No. 24, 1999), <http://newfederalism.urban.org/pdf/occ24.pdf>. While the report took a skeptical view of the adequacy of some of these replacement benefits programs, the fact that so many were created indicates clearly that no “race to the bottom” occurred.

7. See Jennifer Steinhauer, *Rulings on Medicaid for Immigrants Step Up the Pressure on Albany*, N.Y. TIMES, June 9, 2001, at B2.

8. See, e.g., *Some Illegal Immigrants to Get a Tuition Break in California*, N.Y. TIMES, Jan. 18, 2002, at A18; *In-State Tuition for Immigrants*, N.Y. TIMES, Aug. 10, 2002, at B3.

is for the better—the states differ from one another in virtually every area of public policy, such as education expenditures, tax policies, transportation, and housing. Given this pattern, which may certainly be criticized, it is difficult to understand why the fact that some states treat aliens and citizens differently with respect to welfare benefits ought to arouse surprise, much less moral opposition. The interstate differences in all of these policy domains, after all, affect American citizens as well as aliens, so it is strange to argue that there is something inherently anti-immigrant about such differences when they affect aliens.

My final point about federalism and immigration policy is very important but has not been mentioned. A large and systematic mismatch exists between the revenues that immigrants generate for government and the expenditures that governments make on behalf of immigrants. Because of their economic productivity, immigrants generate vast federal tax revenues in the form of payroll and income taxes. Very little of that revenue is returned to the states for purposes of serving immigrants, yet it is the states that incur almost all of the costs that immigrants impose in the form of expenditures for public education, health care, criminal justice, and other public services. This arrangement is unjust to those states, like California and New York, with large immigrant populations. Congress has never really remedied this fiscal mismatch. To do so would require substantial funding-streams from the federal government to those states that incur large immigration-related costs. I am concerned less with welfare benefits, which have declined significantly since 1996, than with the costs that undocumented immigrants, whom the federal government ought to be barring and removing from the United States because of their illegal status, impose on states and localities. Since the federal government has long assumed responsibility for controlling borders and enforcing immigration laws, it should reimburse states and localities for the expenditures occasioned by its own failure. Remedying this fiscal mismatch would greatly improve the services available to immigrants in the communities where they live.