Toward a More Federalist Employment-Based Immigration System

Davon M. Collins†

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INTRODUCTION

In this age of international terrorism, the American immigration system is caught between our national security needs and a socioeconomic imperative to remain a “nation of immigrants.”1 Yet the system can be reconceived and administered in a way that further increases economic opportunities while better protecting the homeland. To that end, this Note advocates reshaping our economic immigration system into a cooperative federalist system2 in which the federal government allows states more responsibility for selecting employment-based immigrants while simultaneously shifting greater federal resources into immigration services and enforcement.

Specifically, Congress should affirmatively decentralize4 to the states administrative control over employment-based (EB) immigration decision-making, in the model of the 1996 welfare reforms and emissions trading.

1. Prior historical examples of this tension include America’s late-nineteenth-century need for Chinese labor amid a fear of “vast hordes . . . crowding in upon us.” See Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).
2. “Cooperative federalism” is one of three models of federalism offered by Peter Spiro, the other two being central government hegemony and devolutionary federalism. Cooperative federalism, in the immigration context, entails a “central government retain[ing] primary control and supervision over immigration decision-making, but enlist[ing] subnational authorities as junior partners and allow[ing] them some discretion to assert or account for particular subnational needs.” Peter J. Spiro, Federalism and Immigration: Models and Trends, 167 INT’L SOC. SCI. J. (UNESCO) 67, 67 (2001).
3. American immigration control has been considered to be solely a federal power, justified on foreign policy considerations and notions of powers inherent in national sovereignty. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (describing the power to “expel undesirable aliens” as “inherently inseparable from the conception of nationality”); Ekiu v. United States, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”). But see Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 COLUM. L. REV. 1833, 1839 (1993) (challenging the assumption that American immigration has always been a federal activity closely linked to foreign relations).
4. Peter Schuck has distinguished two ways in which a federal policymaker can devolve its power. The first and most common way is termed “default decentralization,” and it entails the “federal policymaker simply allow[ing] the power to make and implement decisions that might constitutionally be made at the national level to remain instead where it already is— with a lower level of government or with private actors.” Peter H. Schuck, Introduction: Some Reflections on the Federalism Debate, 14 YALE L. & POL’Y REV. 1, 20 (1996). The second type, and the one which I adopt for this proposal, is called “affirmative decentralization,” in which a “federal policymaker actively delegates—downward or outward—power that she is presently exercising.” Id. (emphasis added).
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credits. As discussed in greater detail below, many scholars and policymakers have called for increasing the states' role in law enforcement or in distributing public benefits. This Note proposes instead that states exercise greater control over the admission of employment-based immigrants.

Three basic premises underlie this proposal. First, lawful immigration produces net benefits for the United States and should be encouraged. Second, employment-based immigration primarily implicates local economic interests, such as education and labor regulation. Third, the federal and state governments' distinctive competencies should be exploited to the benefit of both immigrants and the entire nation. While the states are more responsive to local economic needs and interests, the federal government is better positioned to regulate aspects of immigration affecting the nation as a whole, such as security, overseas consular administration, and the prevention of spillover and race-to-the-bottom effects. I elaborate upon these themes throughout the Note.

This Note proceeds in three parts. Part I provides an overview and critique of America's employment-based immigration system. Part II details my proposal for greater decentralization in immigration administration from the perspective of the federal and state governments. It includes two existing models of cooperative federalism to place this proposal in context, as well as three hypothetical scenarios that show the many uses and benefits of reform. Part III discusses the likely national consequences of this proposal.

I. AN OVERVIEW OF THE U.S. IMMIGRATION SYSTEM

A. Immigrants vs. Nonimmigrants

To begin, it is useful to define some terms. All noncitizens admitted into the United States are divided into two categories: immigrant and nonimmigrant. An immigrant is anyone admitted for the purpose of becoming a lawful

5. For an extremely critical view of cooperative federalism, see Michael S. Greve, Against Cooperative Federalism, 70 Miss. L.J. 557, 559 (2000), who argues that “cooperative federalism is a rotten idea, its political popularity notwithstanding. Cooperative federalism undermines political transparency and accountability, thereby heightening civic disaffection and cynicism.... The sooner we can think of viable means to curtail cooperative programs and to disentangle government functions, the better off we shall be.”


8. A note on terminology: I use the term “noncitizen” instead of the more familiar “alien” throughout this Note, except when “alien” is used in quotation or as a legal term of art.

permanent resident (LPR). Immigrants are divided into five categories: family-sponsored, diversity, employment-based, refugees, and asylees. Visas for the first three categories are allocated on the basis of preference categories, subject to an annual quota. Family-sponsored (FS) immigrants have certain qualifying relatives, namely spouses, parents, and adult children and siblings, living in the United States. "Diversity" immigrants, on the other hand, are immigrants admitted under a complex admissions system of interlocking formulae and multiyear measurements created by Congress in 1990 to increase immigration opportunities from underrepresented countries and regions of the world. Together, family-sponsored and diversity immigrants comprise about half of all lawful entrants into the United States each year.

Nonimmigrants, by contrast, are defined in certain subsections of the Immigration and Nationality Act (INA). Generally, any noncitizen seeking admission to the United States is "presumed to be an immigrant," and therefore, to rebut that presumption (and its attendant higher entry requirements), must fit herself into one of the statutory nonimmigrant classes. Each subsection of section 101(a)(15) of the INA classifies a type of nonimmigrant, and these subsections have come to be popularly associated with that category of admission. Thus, for example, the largest noncitizen group, the “B tourist visa," is in fact a section 101(a)(15)(B) class of nonimmigrant, and an “H-1B specialty occupation visa” is defined in section 101(a)(15)(H)(i)(b), and so on. Other classes of nonimmigrants include diplomats, students, fiancées of American citizens, foreign media representatives, and guest workers. While all nonimmigrants are alike in

10. Technically, however, immigrants are defined by the INA through a "process of elimination," STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW & POLICY 3-1 (2005), in which an immigrant is any noncitizen who does not fall within the specific classifications of INA § 101(a)(15)(A)-(V).

11. INA § 101(a)(42) (defining “refugee” as a person outside of her country of nationality “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

12. Id. § 208(b)(1) ("[The Attorney General may grant asylum to an alien . . . [who] is a refugee within the meaning of section 101(a)(42)(A)").


15. Id. § 214(b) (emphasis added).

16. Id. § 101(a)(15)(B) (concerning "an alien . . . who is visiting the United States temporarily for business or temporarily for pleasure").

17. Id. § 101(a)(15)(H)(i)(b) (concerning "an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation").


20. Id. § 101(a)(15)(K)(i).


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that they are temporally and/or functionally restricted in their access to the United States, most are not numerically restricted. In FY2005, of the 32 million nonimmigrants admitted, over 28 million came for business or pleasure.23

B. A Detailed Account of the Current Employment-Based Immigration System

1. Labor Certification

Labor certification is required for permanent employment-based immigrants, though petitioners for employment-based nonimmigrants must also undergo a less rigorous certification procedure. Certification purports to ensure, first, that there are not “sufficient [American] workers who are able, willing, qualified . . . and available at the time of application for a visa”; and second, that should the applicant noncitizen be admitted, the “employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”24

If the petitioned-for occupation is not on a pre-approved list such as the Department of Labor’s “Schedule A,”25 the process is quite complicated. First, the petitioning employer must file a Department of Labor (DOL) application with the local Employment and Training Administration office (the “local office”) serving the area where the applicant is to be employed.26 Significantly, the local office, also known as a State Employment Security Agency, is an agency of the state and not of the DOL.27 Thus, state officials are the gatekeepers to whom petitioners must first apply.

Under the supervision of the local office, employers must advertise the job opportunity to the local community.28 Moreover, the employer must match or exceed the local prevailing wage for that job occupation.29 After the completion of these requirements, a “Certifying Officer” makes the final administrative

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22. See, e.g., id. § 101(a)(15)(H), (L), (O).
25. The Department of Labor publishes a short list of pre-certified occupations as “Schedule A.” See 20 C.F.R. § 656.5(a) (2006). Noncitizens applying for these occupations may bypass the Department of Labor and may be reviewed directly by an immigration officer in the U.S. Bureau of Citizenship and Immigration Services, see id. § 656.15(a), who then determines whether the applicant is qualified or not for the occupation.
26. Id. § 656.17(a).
27. See id. § 655.715 (defining a “State Employment Agency” as “the state agency designated . . . to cooperate with . . . the Department of Labor in the operation of the national public workforce system”). Congress had required the states, in order to receive certain employment-related appropriations, to “designate or authorize the creation of a State agency vested with all powers necessary to cooperate with the Secretary [of Labor].” 29 U.S.C. § 49(c) (2000).
28. See 20 C.F.R. § 656.17(e).
29. See id. § 656.17(f)(7).
determination subject to administrative court review. Notably, this Certifying Officer is the first federal official engaged in the application process, who thereafter makes the determination whether to grant the application for labor certification.

2. Employment-Based Immigrants

As with family-sponsored and diversity immigrants, employment-based (EB) immigrants are similarly divided into preference categories. The five categories, in order of descending preference, are: priority workers (EB-1); members of the professions holding advanced degrees, or who are of exceptional, as opposed to extraordinary, ability (EB-2); skilled workers and professionals without an advanced degree (EB-3); certain "special immigrants" (EB-4); and entrepreneurs (EB-5). The worldwide quota for EB immigrants is currently set at 140,000, plus any remaining family-sponsored visas from the previous fiscal year. Spouses and children of EB immigrants are also deducted from each relevant category, and thus the actual number of EB "workers" is far less than it might seem.

Further restrictions apply to each preference category. Some of the categories are assigned quotas of their own, with EB-1 priority workers, for example, receiving 28.7% of the EB quota, as well as any remaining visas not used by the EB-4 and EB-5 preference categories. The categories are also divided into smaller classes: priority workers are composed of (1) applicants with a proven extraordinary ability in the sciences, arts, education, business, or athletics; (2) outstanding professors and researchers; and (3) certain multinational executives and managers. These subgroups may have their own

30. See id. §§ 656.24(b), 656.26(a).
31. See id. § 656.3 (defining "Certifying Officer").
33. See id. § 201(d)(1)(A), (C). In FY 2005, of the 246,878 total EB immigrants accepted, the number of visas issued in each of the five categories was 64,731, 42,597, 129,070, 10,134, and 346, respectively. See 2005 YEARBOOK, supra note 13, at 18 & tbl.6. Some categories used fewer than the full number of visas allowed by law.
34. See INA § 203(d).
35. See id. § 203(b)(1).
36. Federal regulations define "extraordinary ability" as "mean[ing] a level of expertise indicating that the individual is one of that small percentage who [has] risen to the very top of the field of endeavor." Petitions for Employment-Based Immigrants, 8 C.F.R. § 204.5(h)(2) (2007) (emphasis added). Evidence of extraordinary ability may include such things as published material in professional publications, membership in elite professional associations, evidence of commercial success in the arts as shown by box office receipts, etc. See id. § 204.5(h)(3).
37. "Outstanding" professors and researchers must be recognized internationally as outstanding in their academic field. Id. § 204.5(i)(3)(i). Evidence acceptable for proving that an applicant is outstanding include such things as published material in professional publications, membership in academic associations, and major prizes or awards. Id.
38. See INA § 203(b)(1)(A)-(C). In contrast to the other EB-1 categories, multinational executives need not be either extraordinary or outstanding, but merely must have been "employed outside the
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caps or quotas to apply.\textsuperscript{39}

Moreover, the labor certification requirements can vary among preference categories. While EB-1 applicants, unlike most EB immigrants, do not require labor certification,\textsuperscript{40} all except extraordinary ability applicants require a job offer from a U.S. employer.\textsuperscript{41} Merely being an applicant with a particular extraordinary ability is insufficient, however; one must enter in order to continue work \textit{in the area of} that extraordinary ability.\textsuperscript{42} Therefore, a Nobel Prize-winning economist may not enter to pursue her dream of becoming a country western singer (at least not before she adjusts to LPR status).

3. \textit{Employment-Based Nonimmigrants}

Nonimmigrants who can engage temporarily in some form of work or employment encompass many of the different categories of nonimmigrant visa. Thus, for the purposes of this Note, I use the term “guest worker” to refer to those nonimmigrants admitted to the United States \textit{solely} for the purpose of working temporarily in their \textit{individual} capacities. I use this term in contrast to nonimmigrants whose work eligibility is ancillary to some other purpose, such as diplomacy, international commerce, or cultural and religious exchange. Removing those nonimmigrant classes, I use “guest workers” only to refer to classes “H” and “O.”

The H class of guest workers is particularly relevant to this Note.\textsuperscript{43} Excluding trainees,\textsuperscript{44} there are four H subgroups, all of which require a job offer and labor certification. The first, the “H-1B,” may be the most well-known of all the guest worker classes. H-1B guest workers come to the United States for at least one year in a managerial or executive capacity by a firm or corporation.\textsuperscript{8} C.F.R. § 204.5(j)(3)(A). Also, compare the multinational executive immigrant category with the “L” nonimmigrant class, which includes noncitizen managers, executives, and those with “specialized knowledge.” INA § 101(a)(15)(L).

39. For example, religious workers, a subclass of the EB-4 “special immigrants” category, are capped at 5000. INA § 203(b)(4).
40. See 8 C.F.R. § 204.5(h)(5), (i)(3)(iii), (j)(5).
41. See id.
42. See INA § 203(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5).
43. The O class, in which there were 37,350 people admitted in FY 2005, see 2005 YEARBOOK, supra note 13, at 66 tbl.26, is reserved for noncitizens (including their support staff) with an “extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim.” INA § 101(a)(15)(O)(i). Required evidence for this special class includes major awards like the Nobel Prize, publications in major journals, command of a high salary, critical acclaim, or nomination for an Academy Award. See 8 C.F.R. § 214.2(o)(3)(i)(v). Guest workers on an O visa may remain for a maximum of three years, which must be petitioned for by an employer, but no labor certification is required—though there are special provisions for the denial or suspension of the visa in the event of strike or work stoppage. See id. § 214.2(o)(1)(i), (6)(iii), (14).
44. See INA § 101(a)(15)(H)(iii) (concerning an individual “who is coming temporarily to the United States as a trainee . . . in a training program that \textit{is not designed primarily to provide productive employment}” (emphasis added)).
States to perform services "in a specialty occupation," such as computer programming, and must be approved by the DOL. Unlike numerically unrestricted nonimmigrant classes like "F" students and "B" tourists, H-1Bs are currently restricted to a quota of 65,000. Furthermore, they may remain in the United States for a maximum of six years, though they may apply for adjustment to LPR status during that period. The second subgroup, the H-1C, is a three-year category for nurses created by Congress in the Nursing Relief for Disadvantaged Areas Act. This visa class was added in 1999 to address a perceived shortage of nurses. Though only a modest addition—the number is capped at 500 foreign nurses for the entire nation—H-1Cs are also subject to labor certification.

The two H-2 categories, by contrast, govern relatively unskilled, seasonal labor. H-2A pertains to agricultural workers, while H-2B covers nonagricultural workers coming to fill an unmet labor need. The employer must file a petition with the Local Employment Service office certifying that the conditions of wage, labor conditions, and seasonality are all present. These procedures are relatively straightforward, and applications are typically approved or rejected within seven days of filing.

C. A Critique of the Current Employment-Based Immigration System

Our current employment-based immigration regime ill fits our economic system. In arrogating the entirety of immigration power to itself, the federal government has created a rigid national system resistant to experimentation and unresponsive to local economic conditions. As an exercise in contrast, one need only imagine a similar system for other local economic matters, such as roads or schools. If every dollar spent on road construction had to be appropriated in Washington, undoubtedly it would be more difficult for local community members to lobby for their streets to be repaved. Similarly, if all school textbooks had to be purchased at the federal level, it would be more difficult for

45. See id. § 101(a)(15)(H)(i)(b); see also 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). "Specialty occupation" is defined by statute as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty." INA § 214(i)(1).
47. See INA § 214(g)(1)(A). Note that in certain past years the quota has been much higher. Also note that the quota applies only to actual workers; their accompanying spouses and children are not deducted from the quota. See id. § 214(g)(2).
48. See id. § 214(g)(4).
50. INA § 212(m)(2)(F)(iii)(4).
51. See id. § 212(m)(2).
52. See id. § 101(a)(15)(H)(i).
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each school to take into account local preferences, priorities, ideas, and sensibilities.

Moreover, the administrative burdens of our immigration system have long been accused by many of hobbling American business and economic growth. For example, the Committee for Economic Development has criticized the prevailing wage certification process as a difficult one at best. In its place, the Committee has recommended an attestation requirement, bolstered with small, random audits. Similarly, the U.S. Chamber of Commerce has supported a more flexible prevailing wage standard that includes at least four wage levels.

Slow processing is another critical failure of the current system. Months or years of delay represent not only great economic costs, as needed jobs go unfilled, but also incalculable human costs for noncitizens uncertain of their futures. While it is still admittedly too soon to tell conclusively whether the recent reorganization of the former INS into the Department for Homeland Security will produce salutary results for speed and efficiency, the increased security demands on the Department do not portend positive change. Today it can take as long as 80 to 100 days in some cities for an immigrant applicant just to get a consular interview. In short, our economic immigration system may still fairly be described as one “marked by inefficiency, delay, and frustration . . . [that] fails to meet the demands of a global marketplace that rewards mobility and skills.”

Additionally, the mentality of our current employment-based immigration system is arguably out of date and ill-suited to a modern knowledge-based economy. Our economic immigration system was created with labor shortages of largely fungible workers in mind. This mentality is “strikingly at odds with today’s competitive realities, where firms often choose workers (U.S. or foreign) because of small differences in qualifications . . . that can lead to substantial differences in the firm’s ability to compete.” In the current system, an economic immigrant is admitted only to provide labor and expertise when no


55. See COMM. FOR ECON. DEV., supra note 54, at x.


57. See COMM. FOR ECON. DEV., supra note 54, at 24.

58. See id. at 25.


60. COMM. FOR ECON. DEV., supra note 54, at ix.

domestic workers are “able, willing, qualified and available.” Thus, in theory, a minimally qualified domestic applicant (a citizen or legal permanent resident) must be taken over a more qualified foreign applicant.

But while protecting American labor and ensuring that foreign labor is turned to only as a last resort can be seen as a reasonable, even laudable, goal, the system arguably fails even at that. While a rigorous and cumbersome labor certification system may protect domestic labor by discouraging applications and artificially keeping admissions below quota (which, incidentally, increases the number of family-sponsored immigrants admitted, per the current system’s interconnected admissions calculations62), its complexity and susceptibility to employers willing to game the system fail to protect American workers.

Labor certification’s advertising requirements are a good example of this match of wits between employers and the DOL. A veritable cottage industry of fake job advertisements is available to fit the foreign applicant so exactly that domestic applicants can be rejected as unqualified.63 When challenging the “inside hiring” of a Kansas manufacturing company, a DOL official noted: “It appears the employer is nitpicking in order to reject the (nonalien) applicants.”64 Even former Secretary of Labor Robert Reich admitted as much, stating, “The programs as authorized by the INA are flawed and do not serve U.S. workers well . . . . U.S. job applicants have little real chance of being accepted for many positions.”65

Finally, the federal identification and management of labor shortages is neither accurate nor helpful. The recent history and controversy surrounding the H-1B program is illustrative.66 As described above, the H-1B is a guest worker visa for specialty occupations created by Congress in 1952. Also recall the many restrictions on H-1B workers: labor certification, annual numerical cap of 65,000, and six-year limits. In response to the tech boom of the late 1990’s, Congress dramatically increased, albeit temporarily, the cap on H-1B workers.67 In the American Competitiveness and Workforce Improvement Act of 1998, Congress increased the annual cap on H-1B’s from 65,000 to 115,000 for two years.68 Again, in the American Competitiveness in the Twenty-first

63. See PAPADEMETRIOU & YALE-LOEHR, supra note 61, at 109-10.
64. Mike McGraw, When Foreign Labor Programs Lend a Hand or Go Awry, KAN. CITY STAR, July 16, 1995, at A15.
65. PAPADEMETRIOU & YALE-LOEHR, supra note 61, at 111.
66. There are few areas of immigration policy that have received more media attention and criticism than the H-1B program. One prominent critic, Microsoft Chairman Bill Gates, recently lambasted the H-1B caps, saying that they undermined American competitiveness and its role as the world’s science and technology leader. See Editorial, High-Tech Brain Drain, WALL ST. J., May 5, 2005, at A14.
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Century Act of 2000, Congress further raised the cap to 195,000 for the fiscal years until 2003. Yet now it is clear that Congress was increasing the supply of specialty guest workers just as the tech boom was ending and the country was entering recession. This exposes the underlying problems with the belief that the federal government can accurately respond to shifts in supply and demand in a timely manner.

This belief in government competence at managing immigration supply and demand is especially dubious when one takes into account the heterogeneous nature of the American economy. Although after the end of tech boom Congress’s best option for the interests of the entire country may have been to again reduce the quota of H-1B visas, this would not have been the best solution for all states or regions. While many states may have desired a cap, other states, such as Virginia or Texas, may have been actively looking to increase the influx of skilled workers. Still others might have seen the decline in wages as an opportunity for needed technological investment in their states. If state governments had a greater role in decision-making, it would be less likely that the needs of the few would have to be sacrificed for the needs of the many—especially when those two needs are not necessarily incompatible.

Of course, decentralizing EB immigration decision-making, as this Note proposes, is no panacea for the inadequacies of government labor management. A state could operate an economic immigration system substantially similar to the current federal system—and could do so even more ineptly. Nevertheless, when the demand for foreign labor is concentrated in a small number of states, such as technology workers in California and Washington, state governments would arguably be more keenly aware of these local labor shortages, more eager to fix the problem, and more nimble and responsive to labor conditions. Moreover, the difficulties created by immigration are also typically local: increased need for local public services, depression of local wages, or displacement of local workers, for example. Thus, state governments could better manage the entire trade-off, not just businesses’ need for labor. Finally, allowing the states the opportunity to try different things, and even to make mistakes, is possible under decentralization without risking the nation’s entire economic system.

A decentralization proposal must be rooted in a normative judgment regarding the ideal role of the states in our federal system. And what decentralization offers are the virtues of federalism generally—including experimentation, local adaptability, greater accountability, competition, and more avenues for lobbying. These virtues are a part of what David Super calls

(iv) (2000)).

the pluralist theory of federalism: absent a pressing need to speak with one national voice or greater economic efficiency, decentralization of authority will yield a variety of different responses to common problems. This Note seeks to demonstrate how those virtues might apply in the economic immigration context.

II. PROPOSED REFORMS

A. Details of the Proposal

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, decentralizing to an unprecedented degree the nation's system for administering aid to needy families. The core of welfare reform was the block grant, which was essentially a fixed grant of federal money which each state had increased autonomy and flexibility in administering—though Congress had attached various conditions, as well as bonuses for meeting certain goals such as reductions in illegitimate childbirth. The proposal of this Note, decentralized employment-based immigration (DEBI), seeks to apply that general approach to our employment-based immigration system. However, in lieu of money grants, the federal government will grant the states decision-making authority for blocks of visas.

Instead of the current procedure, outlined in Section I.B, by which Congress creates complex formulae governing how many employment-based (EB) immigrants and guest workers may enter the country, Congress should first abolish all of the employment-based permanent and guest immigration categories listed in Section I.B, and in their place create two classes of EB admission, one for permanent immigrants and one for guest workers. In establishing the guest worker class, Congress would have to set a number of maximum allowable years, say, six; individual states could choose to permit guest workers to stay for periods shorter than the maximum allowed. Congress would then set an annual national quota, one for EB immigrant visas and one for guest worker visas, and then distribute that amount to the participating states in proportion to each participating state's total or working-age population or past immigration levels.
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A system of initial visa distribution based on population would disadvantage states that currently receive a disproportionate share of immigrants, such as California. However, the precise manner of distribution is not critical to the proposal, as long as the system is widely considered to be fair and equitable. (Thus, another option could be to base distribution on past immigration levels.) Moreover, the visa distributions to each state would not be fixed, but would merely serve as a starting point for possible trading among the states, analogous to an emissions trading system, in which the national quota would operate as a cap on aggregate allowable economic immigration. Alternatively, if the EB quota market proved too small or too illiquid, the trading price could be set by federal law or forced-auction.

Thereafter, each state government would decide, in whatever manner it thought best, to which individual applicants the visas would go. To make that determination, the state would need to answer a host of other questions: Which occupations and skill sets should be favored or expedited? Which companies and industries should be allowed to sponsor applicants? Should workers be bound to a particular employer or free to change employers—i.e., to what extent should portability be allowed? Should an applicant’s renewal application be granted? What reasonable fees should be imposed?

Perhaps most importantly, each state would have to decide whether to use any of its visa allotment at all, because a state’s power to select the type of EB immigrant would include the power to refuse all economic entrants. Thus, states with excess visa allotments could also give, trade, or sell them to states with a greater appetite for employment-based immigrants. But in order to prevent unexpected or unwanted surges in EB immigration, it would be necessary for Congress to set a period of time, perhaps one to two years, in which a state must use or lose its visa allotment. States, with congressional approval, could also form compacts and pool their allotments for regional benefits. In short, the guiding principle of DEBI is for the states to have as much flexibility and freedom of choice possible within a comprehensive system of overall restraints set by the federal government.

discussed infra Subsection II.A.5. From here forward, I consider any state acting within the DEBI framework a participating state.

77. Emissions trading is a market mechanism for managing pollutants, typically greenhouse gases, in order to prevent climate change. It operates by establishing a cap on the aggregate allowable amount of pollutants and then “allow[ing] market forces to continually move the allowed emissions to the highest value uses.” Int’l Emissions Trading Ass’n, Market Mechanisms: Introduction, http://www.ieta.org/ieta/www/pages/index.php?IdSiteTree=26 (last visited Apr. 16, 2007). Thus, “a company with a low cost opportunity to reduce emissions below its allocation of emission rights can sell these unneeded rights to a company with limited or uneconomic emission reduction opportunities.” Id.

78. This approval of compacts for pooling and trading would be akin to (and perhaps a component of) Congress’s Article I oversight of interstate compacts. U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .”). However, it bears repeating that the states, in choosing to form compacts, would be administering federal power, not state power.
1. **Role of the Federal Government**

In such a system, what role would be left to the federal government? Though this system would decentralize the administration of employment-based admissions, it would also *enhance* federal power over other areas of immigration. The DEBI system would exist at the intersection of what Peter Spiro calls immigration benefits and cooperative federalism. The states would be given greater input only in the area of admissions for federally qualified EB applicants, while the federal government would retain standard-setting and supervisory powers. The states would not be given any powers over citizenship, though DEBI would have important implications for the naturalization power, which will be discussed at greater length below.

2. **Congress**

Congress would be the main federal partner in this cooperative federalist system. Focusing on its core boundary-defining and supervisory powers, Congress could afford to look at the big picture with respect to employment-based immigration. Procedurally, Congress could enact DEBI by adopting individual state immigration proposals as federal law at periodic intervals. So, for example, Congress could every two or four years enact a revision to the employment-based sections of the immigration code, incorporating any state proposals—at what can be called the adoption stage. In the act of adoption, Congress would have its primary opportunity to review state proposals for areas of concern. Moreover, because adoption would require bicameralism and presentment, the President would also have an opportunity to review proposals and exercise a check (albeit a crude one) through the veto option.

In the alternative, Congress could also delegate to the executive, through

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79. Spiro has proposed a two-axis, three-by-three model of immigration federalism, which I adopt for this proposal. See Spiro, supra note 2, at 67-68. On the first axis, that of immigration power, Spiro lays out three categories: immigrant rights, immigration enforcement, and immigration benefits. Immigrant rights include social service benefits for noncitizens as well as the civil and criminal law governing noncitizens. Immigration benefits, which DEBI attempts to reform, include the power to grant admission and to confer citizenship. Lastly, immigration enforcement is concerned with border control, deportations, and other enforcement issues. *Id.* at 67.

The second axis, the federalism axis, also has three categories: central government hegemony, cooperative federalism, and revolutionary federalism. Central government hegemony is a system of government in which the subnational units only have indirect, peripheral roles in decision-making. In a cooperative federalist system, in contrast, the subnational units have greater discretion "to assert or account for particular subnational needs," though the central government retains primary control and decision-making power. *Id.* Lastly, in a revolutionary federalist model, primary decision-making power has shifted to the subnational units. *Id.* Another simpler framework would be to distinguish between "immigration law" and "alienage law." "Immigration law" would be restricted to the admission and expulsion of noncitizens, while "alienage law" would encompass public benefits, access to public education, the franchise, etc. See Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202 (1994). Under such a framework, DEBI would only apply to immigration law; alienage law would remain unchanged.

80. See infra Subsection III.C.3.
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the Department of Homeland Security, the power of adoption. Then federal immigration authorities would issue rules to implement each state's proposals. This would result in a perhaps less cumbersome and more professionalized adoption stage. However, the executive would then be primarily responsible for reviewing the state proposals. Congress would, of course, retain the supervisory powers it holds over all administrative agencies, including committee hearings and budgetary powers, but its role would be reduced in the process nonetheless.

Regardless of the branch of government given primary supervisory authority, each state, in its proposal, would prescribe its criteria for admission and its procedures for protecting and monitoring the status of EB immigrants. Additionally, each state would be authorized to charge reasonable fees to finance their programs' administrative costs. In the event of conflict between the federal government and a state, the proposal would be rejected and the state would be invited to resubmit without the objected-to provisions. However, as a matter of federal-state comity and in accord with the cooperative federalist principles of DEBI, Congress should refrain from unilaterally altering a state's proposal.

This mechanism for enacting DEBI, though slightly complicated, would avoid any potential constitutional issues that might arise were Congress to devolve or delegate its immigration power to the states. Moreover, the decentralization mechanism of DEBI, with its strong federal oversight, has been designed partially in response to critics of an increased state role in the immigration process. Some fear that states are more vulnerable to nativism or fiscal belt-tightening at the expense of noncitizens. More specifically, the history of anti-immigrant legislation in individual states, such as Texas or California, might give a proponent of immigration pause in endorsing any form of immigration federalism. In the end, although periodic congressional oversight of individual state systems might not be a complete prophylactic against excessive immigration restrictions (nor should it be, democratically speaking), such a strong role should go far in allaying fears of giving states a

81. Thus, henceforth, wherever I refer to Congress's role in the adoption process, the executive can also be considered in that role.
82. Each state would also indicate its designated person or body responsible for decision-making and access to the national immigration database discussed infra Subsection II.A.3.
83. I would define a fee as "reasonable" if the money collected in total were equal to or less than the cost of administering the application program. States using fees to make a profit might appear unseemly, as if they were taking advantage of desperate applicants. The nation would have a public relations interest, at least, in preventing this type of abuse.
84. See, e.g., Michael J. Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 N.Y.U. L. REV. 493, 527-58 (2001) (arguing that the immigration power is, for textual and policy reasons, an exclusively federal power, which Congress may not devolve by statute); see also infra Subsection II.A.5.
85. See Wishnie, supra note 84, at 554.
86. Though one perhaps may not consider measures targeting only illegal immigrants as "anti-immigrant" per se.
greater role in employment-based immigrant selection. Finally, built-in federal review will provide a continual democratic check on the national DEBI experiment as a whole.

At this adoption stage, Congress could set the total number of EB immigrants for that year, confident that each state would make the sorts of determinations best suited to its own conditions. Congress would have a special responsibility to prevent or mitigate the various race-to-the-bottom or spillover effects that decentralization might permit. The utility of a federal standard can be seen in areas like minimum wage or child labor laws, in which a national floor allows for all states to benefit from a widely desired standard without fear of employers decamping for a sister state with lower standards. Some scholars, such as Akhil Amar, have argued that managing these economic ill effects should be the main concern of Congress under its Commerce Clause powers.  

Although one state’s proposed admissions standards might not be of concern when viewed in isolation, a facially legitimate admission standard might still disadvantage sister states. For example, heavy admissions coupled with inadequate labor standards and enforcement might create a destabilizing economic (and, indeed, human rights) situation for an entire region. And while the states already play a key role in the setting of labor standards, the possibility of outlier states will always exist. In such a case, Congress would regulate the conflict by prescribing certain minimum standards for all states, for example regarding age, education level, or workplace safety.

Furthermore, federal law would remain the positive source of visa-issuing authority, and Congress could either refuse to issue visas for certain types of individuals—in effect maintaining inadmissibility criteria—or even reject a state’s proposal entirely. Congress could also delegate this oversight to the executive, as it currently does with all immigration administration. This power would be a critical national check on the expanded opportunities for state experimentation under DEBI. For example, if a state were to institute a

87. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 108 (2005) (“Under a broad reading, if a given problem genuinely spilled across state or national lines, Congress could act. Conversely, a problem would not truly be ‘with’ foreign regimes or ‘among’ the states, so long as it remained wholly internal to each affected state, with no spillover. On this view, legal clarity might be advanced if lawyers and judges began referring to these words not as ‘the commerce clause,’ but rather as ‘the international-and-interstate clause’ or the ‘with-and-among clause.’”).


89. This federal, or congressional, veto would be similar to James Madison’s proposal that the federal government have a veto over obnoxious state laws generally. See Letter from James Madison to George Washington (Apr. 16, 1787), available at http://press-pubs.uchicago.edu/founders/documents/v1ch86.html (“[A] negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions.”).

90. See, e.g., INA § 240A(a) (delegating to Attorney General power to cancel removal for aliens in certain situations).
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The visa application process that limited qualifications to a certain ethnic or religious group, Congress might decide that such a procedure offended national principles and might refuse to approve that state’s system.

Though Congress may choose to engage in this type of oversight of state systems, there would be limits to its freedom of action ex post. Specifically, while Congress may restrict or forbid certain types of applicants, it could not revoke applications for certain individuals, once admitted. Congressional singling out of individuals for disfavored treatment would pose grave constitutional problems with respect to bills of attainder, as well as legislative encroachment on the proper adjudicatory functions of the judiciary and the executive.

Congress’s role in DEBI, though the most powerful as the source of positive law, would ideally be used sparingly. To ensure maximum state flexibility of action, Congress must set boundaries as permissively as national needs allow. Thus, while setting a maximum (or even minimum) level of immigration or basic diversity criteria would be both necessary and proper, merely importing into DEBI the complex formulae and restrictions from the diversity visa program, for example, would be highly undesirable.

3. The Executive

Under DEBI, the executive would continue its administration of the nation’s entry and exit system and its prosecution of lawbreakers, with the most significant change being the abolition of the DOL’s certification role—to be replaced by each state’s own labor protection agencies, if desired. The DOL could thereafter shift its focus to other areas of greater institutional competence. For example, a DOL priority could be to ensure that immigrants were not being exploited by employers or states. The executive would also maintain its bureaucratic role in screening and processing applicants abroad and at the borders. Thus, within the Department of Homeland Security (DHS), immigration enforcement is currently run by two agencies, the Bureau of Customs & Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE). As CBP’s main responsibility is protecting the borders and preventing illegal entry, there would be no change under DEBI in that agency’s role. The role of ICE—i.e., the prosecution and enforcement of the immigration laws—would also remain essentially unchanged.

The main issue that decentralization would raise for ICE would be one of coordination. Yet with modern database technology, coordination is not a particularly difficult problem to solve conceptually, though it might be in practice. ICE, as a law-enforcement agency, must necessarily be spread out

91. See U.S. CONST. art 1, § 9, cl. 3.
among all the states. Therefore, one solution would be the creation of a secure centralized database capable of tracking the status of all noncitizens throughout the United States—a “National Immigration Database.”

In creating such a database, the United States could draw on the expertise of other nations. For example, in Germany, a nation with a history of immigration federalism, immigration coordination is accomplished through the Central Aliens Register, a database containing more than 20 million records on all foreigners residing in Germany for more than three months. In 2003 alone, over 17 million queries and entries were made to the Register, allowing immigration to be managed at the local level with complete information. With such a system, a state immigration official in Hamburg has access to the same information as a federal official in Berlin. Criminal activity, economic data, re-entry information, and the like may all be easily accessed through the Register.

This Register can thus serve as a model for a national immigration database. And as a comprehensive American database would be far larger than the German one, it would be especially critical to create a system with the best elements of the German example, yet that is compatible with existing American federal-state databases such as the Federal Trade Commission’s “Consumer Sentinel” database or the FBI’s National Instant Criminal Background Check System.

Within DEBI, state administrative bodies would then need access to such a national immigration database. Thereby, states could alert ICE when, for example, a guest worker overstays her work authorization period or an immigrant changes employment or moves to another state. And for maximum efficiency purposes, there would need to be only one database for all noncitizens, EB and non-EB, by which ICE could be kept abreast of the status of all legal entrants to the country. Indeed, in our post-9/11 security environment, efforts are already underway to better link state law enforcement agencies to federal immigration databases. Thus, a national immigration


94. See id.


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database within DEBI could take advantage of that momentum toward greater federal-state coordination.98

As with CBP, the Department of State would continue in its role as administrative gatekeeper through America’s network of consulates. However, that role would become more complex. For non-EB applicants, there would be no change. But for EB applicants, a double form of screening would be necessary. Thus, an EB applicant would apply at her nearest consulate99 for a visa, and the application would then be forwarded to any states to which she wished to apply.

Once a state has approved an applicant and that applicant has accepted the terms of admission, she would be subject to federal screening by the consular officers, ensuring that the applicant is admissible by national standards—for example, not a known terrorist or a carrier of an infectious disease. After successful screening, the consulate would issue the appropriate visa, which would include information on the host state and the terms of validity. Prior to entry, all of this information would be entered into the centralized database within the Department of Homeland Security. And, as it does now, the executive would continue to have an absolute veto over any visa issuance or admission for national security or policy reasons.100

The Department of Justice would retain its immigration adjudicatory body, the Executive Office for Immigration Review, which includes the Board of Immigration Appeals (BIA). Their roles would not change. While states would be free to add layers of procedural protection within their state administrative bodies, the BIA would remain the ultimate and final administrative body before access to the federal court system is allowed. Indeed, maintaining the dominant position of the BIA for EB immigrants and guest workers and for non-EB immigrants would be one of the federal government’s primary ways of exercising oversight in this cooperative federalist model. Moreover, the BIA would ensure that state administrative processes were complying with national notions of fairness and due process, and that noncitizens were not being deprived of their rights arbitrarily or capriciously. Statutorily, the BIA’s job

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98. There might be some concern that greater federal-state law enforcement coordination in the immigration context might discourage illegal noncitizens from cooperating with police. However, the creation of a national immigration database has no bearing on whether states or localities enact laws requiring police to arrest known illegal noncitizens. The database would merely enable federal and state authorities to keep track of the status of noncitizens efficiently; what local police do with that information is a separate issue.

99. Incidentally, consular officials could play a role prior to this stage through the dissemination of materials to the host country and to applicants of information on each state (for example, its geography, climate, or history) and the types of candidate favored by each state (e.g., young applicants for Iowa, applicants with nursing experience for Florida).

would become more complex, as it would be responsible for interpreting a federal code with dozens of state-by-state subsections. But, analogous to the constitutional command that federal courts apply state law on nonfederal questions, this is an unavoidable cost to having a federal system.

Though the DEBI system would reshape only the employment-based part of American immigration law into a cooperative federalist mold, it would still have a profound impact on other aspects of the immigration power—most evidently for the executive. In short, DEBI is a call for the executive to shift its limited resources to the broader goals of homeland security, enforcement, and abuse prevention, and not to the processing of EB immigration applications and worker certifications. More specifically, a focused federal government could seek greater speed and efficiency in the admission, naturalization, investigation, incarceration, and removal of noncitizens.

4. The Judiciary

Of the three branches of government, the judiciary would change least in a decentralized system. The federal court system would continue to adjudicate removals and naturalizations and to exercise oversight over administrative bodies such as the BIA. Moreover, the courts would continue to be constrained by the jurisdiction-setting and review-limiting powers of Congress. Thus, DEBI would have no effect on recent legislation to limit all federal review of final orders of removal to the circuit courts under the REAL ID Act.

5. The Role of the States

If the states are to become more than mere “field offices” of the federal

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101. Cf. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (holding that, except in matters governed by the U.S. Constitution or by acts of Congress, state law is to be applied in diversity cases).

102. For a more critical view of the federal government’s immigration enforcement efforts, see Schuck & Williams, supra note 6, at 372, which describes “the INS’s failure to establish an effective criminal-alien removal system.” Peter Schuck and John Williams conclude that the root cause of the INS’s failure is “[a] mismatch in government incentives”: while the INS “is solely responsible for enforcing the nation’s immigration laws,” it is unable to administer “the radically fragmented removal system,” and while local agencies “spend money arresting, identifying, detaining and supervising criminal aliens,” they do not have power to enforce federal immigration policy “unless the INS explicitly delegates it to them.” Id. at 458. Schuck and Williams also call for a federalist solution to this problem, namely “the devolution of some immigration enforcement authority.” Id. at 376. Though my Note calls for the concentration of federal energies into enforcement instead of benefits, it does not rule out the implementation of the policy initiatives in the Schuck and Williams proposal.

103. A word on the mechanics of DEBI: I envision that the federal government and the states would interact primarily through the centralized database. Thus, a state could submit a visa approval to the system, which would then be transmitted to the executive for security screenings and consular approval. Likewise, a state could report a noncitizen in violation of his or her employment conditions, which would then alert ICE to initiate removal proceedings.


105. FERC v. Mississippi, 456 U.S. 742, 777 (1982) (O’Connor, J., concurring in the judgment in
immigration bureaucracy, DEBI cannot be enacted by the federal government alone—it must be affirmatively and legally embraced by the state governments. Thus, each participating state must produce a slate of desired applicant criteria and procedures in its state proposal for Congress to review and accept at the adoption stage. In the simplest scenario, each state would pass a resolution to be submitted to Congress through its normal lawmaking procedures.

However, DEBI, and cooperative federalist programs in general, raise two broad constitutional issues. The first is the “anticommandeering” principle, which holds that the federal government cannot force the states to enact or carry out federal laws. In New York v. United States, the Supreme Court held that the federal government could not compel the state of New York to take title to low-level radioactive waste. The Court concluded that when Congress has the authority to regulate private activity directly, it may offer the states a choice between regulating according to federal standards or having state law pre-empted by federal regulation. Moreover, the Court reaffirmed Congress’s broad authority under the Spending Clause to condition the receipt of federal funds on state compliance.

The Court shortly thereafter reinforced its New York decision in Printz v. United States. In Printz, the Court held that, just as the federal government could not compel state legislatures to enact or enforce federal regulatory programs, the government could not conscript state executive officers to enforce a federal program. Additionally, the Court clarified that mere compensation of states for regulation efforts would not immunize federal coercion from constitutional attack. Thus, these federalism decisions were not strikes against unfunded federal mandates, but strikes for state sovereignty principles rooted in the separation of powers, the Tenth Amendment, the unitary executive theory, and other structural arguments.

The second constitutional issue is whether and to what extent state agencies may justify their actions based on federal law. According to Philip Weiser, this fundamentally state law question is an area of “increasing dissonance” between reality and jurisprudence. Because state agencies would process applications part and dissenting in part) (“State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study.”).

106. Because states could not, constitutionally, pass an immigration law, states would have to issue some nonbinding final legislative product, such as a resolution, which would not have the force of law unless and until Congress adopts it.
108. See id. at 167.
109. See id. at 145.
111. Id. at 935.
112. See id. at 930.
113. See Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79
and provide services to admitted EB immigrants in accordance with federal law under DEBI, this issue might well arise. Thus, for example, a state court might find that a local agency has no authorization under state law to enforce federal immigration rules or to provide services to EB immigrants in the state.

DEBI avoids these two constitutional problems through incorporation of only participating states into the system. Furthermore, while the Court has yet to articulate a clear limit to Congress’s power to coerce under the Spending Clause, DEBI does not seek to come into force through such heavy-handed tactics. States would be asked to join of their own volition and, additionally, would be allowed an exit option from the program. However, the inability to receive any allocation of EB visas would likely be a strong inducement for states to join and remain within the program.

B. Other Examples of Cooperative Federalism

As an example of cooperative federalism, DEBI would not be unprecedented. This Note offers as examples two existing models of cooperative federalism from the United States and Canada: the State Children’s Health Insurance Program (SCHIP) and the federalist immigration pact between the Canadian national government and the province of Quebec.

1. The State Children’s Health Insurance Program

SCHIP was created in 1997 to provide funds to the states in order to “initiate and expand the provision of child health assistance to uninsured, low-income children.” The Act further provided that the Secretary of Health and Human Services should provide billions of dollars to states with federally approved plans to extend healthcare coverage to children not already covered by Medicaid. SCHIP was supposed to represent “a new form of cooperative federalism where the federal government provides the primary financing, formulates the basic framework for the program, and sets a minimum set of performance standards (a floor) that the states must meet.”

As a matter of primary government responsibility, healthcare differs

114. See supra note 76.
115. See, e.g., South Dakota v. Dole, 483 U.S. 203 (1987) (upholding a federal statute withholding a portion of highway funds from states that permitted the purchase of alcohol by those under twenty-one).
116. See Weiser, supra note 113, at 696-97 (discussing the importance of state exit options to the anticommandeering doctrine).
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significantly from the immigration area. As discussed above, regulation of immigration is solely the province of the federal government under the Constitution. Indeed, some scholars argue that immigration can only be regulated by the federal government. Healthcare policy, on the other hand, is not explicitly assigned in the Constitution either to the federal government or to the states. Thus, as a default, healthcare policy must properly be considered an area reserved to the states per the Tenth Amendment.

Despite these differences, SCHIP represents many positive aspects of cooperative federalism, such as state flexibility in policy implementation, precise federal parameters, and rigorous federal oversight. States choosing to enroll in SCHIP have great discretion in setting eligibility and cost-sharing requirements, creating outreach programs, and measuring program performance. They may choose whether to include such services as mental and vision services or whether to charge co-pays, but they must operate within clear federal guidelines. For example, though the states have discretion in deciding whether to include certain services, basic services, such as surgical care, x-ray services, and impatient care, are required by the federal government. Additionally, while states may charge co-pays, the federal government places restrictions on the use of co-pays for preventative services and for children in families below 150% of the poverty level.

These aspects of SCHIP are very similar to how DEBI would operate. For example, while states would be able to charge application fees to pay for all or part of the costs of administration, the federal government could cap the fees or could place restrictions on fees for certain types of applicants, such as guest workers applying for adjustment to LPR status. Additionally, the federal government could mandate minimum services (a floor) that states must provide to EB immigrants once they arrive in the country. In essence, the law would say, “If you choose to join this program, you agree to provide a certain basic quality of care to our guest workers.” But, as with SCHIP, states would be allowed to exceed that minimum standard. Indeed, in a competitive

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120. See supra text accompanying note 3; see also DeCanas v. Bica, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power... But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power.”).

121. See Wishnie, supra note 84, at 527-58.

122. See James E. Holloway, Revisiting Cooperative Federalism in Mandated Employer-Sponsored Health Care Programs Under the ERISA Preemption Provision, 8 QUINNIPIAC HEALTH L.J. 239, 245 (2005) (discussing whether healthcare policy is an inherent government obligation under the Federal Constitution or state constitutions).

123. See Rich et al., supra note 119, at 114.


125. Id. § 1397cc(c)(1)(A).

126. Id. § 1397cc(c)(1).

127. Id. § 1397cc(e)(2)-(3).
environment, quality of service and outreach might be a way in which states attempt to distinguish themselves from others.

Both DEBI and SCHIP are intertwined with larger programs dominated by the federal government—Medicaid and the national immigration system, respectively. Thus, changes ushered in by SCHIP or DEBI will affect the functioning of the larger federal programs. For example, because SCHIP funding cannot be used to replace Medicaid funding, this necessarily affects the eligibility criteria for low-income children under SCHIP. Likewise, because spouses and unmarried children of LPR immigrants are given some degree of family-sponsored preference, employment-based LPR immigrants will also have chain effects through the federally controlled family-sponsored system.

Moreover, the connections between all of these programs are dynamic, so one must always be conscious of the effects that change in one program might cause in others. For instance, if Congress were to expand the entitlement coverage of low-income children under Medicaid, state SCHIP plans, outreach efforts, and financial considerations might all be affected. And if Congress ever altered, expanded, or contracted the eligibility criteria under the family-sponsored program, the stream of immigrants into the states would also fluctuate. This connectivity is not a problem per se, but rather an area that both sides, particularly Congress, should take into account when considering any changes to the connected programs.

Rigorous federal oversight would also be brought to bear in DEBI as with SCHIP. In SCHIP, the Secretary of Health and Human Services is empowered to issue rules and regulations, to require data reporting, and generally to hold states to their submitted proposals. Most importantly, the Secretary has the ultimate authority to approve each state's plan of action and to sanction states for noncompliance through the withholding of funds. Similarly, states under DEBI would be subject to audit and review by the Departments of Homeland Security and Labor. Moreover, in addition to its review of state plans at the adoption stage, Congress could empower the executive to suspend plans in the event of state malfeasance or plan noncompliance.

Finally, the nature of goals in both DEBI and SCHIP differ at the federal and state levels. In SCHIP, it is expected that federal and state goals will overlap, yet not be the same. Thus, the federal goal for SCHIP was the extension of healthcare coverage to 25% of the nation's estimated 10.7 million

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128. See Rich et al., supra note 119, at 115.
130. 42 U.S.C. § 1397hh(c).
131. See Rich et al., supra note 119, at 115.
133. Id. § 1397ff(d)(2).
134. See infra Section III.D.
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Uninsured children. By contrast, a state may have had the less lofty goal of increasing its type of coverage, for example by adding vision care, or expanding the number of children with basic coverage. Similarly, as will be discussed in the next Section, while the goals of the federal government may be more abstract, i.e. immigration and economic growth, the policy goals of the several states may vary greatly—from meeting nurse shortages to addressing depopulation crises. But, ultimately, it is enough that the goals of all are not mutually exclusive and both federal and state governments are moving in the same direction.

2. The Example of Quebec

Under Canadian federalism, regulation of immigration is an area of concurrent jurisdiction, albeit with federal supremacy. Immigration has been part of the 300-year-old struggle of how best to accommodate a distinct Quebec within a united Canada. There have been two important immigration compacts between the Canadian federal government and Quebec. The first, the Cullen-Couture Accord of 1978, allowed for unprecedented Quebecois control over immigration into that province. Quebec was given broad authority to select immigrants, in particular by favoring applicants with French language skills. Quebec’s special place in the Canadian immigration system was highlighted by the fact that Quebec was the only province with its own Ministry of Immigration, permitted by then-Prime Minister Brian Mulroney to operate separate immigration offices in Canada’s embassies abroad.

The second agreement, the Quebec-Ottawa Accord of 1991, entrenched and expanded Quebecois prerogatives. Quebec was given exclusive control over immigrant selection. Additionally, Quebec won a guarantee of 30% of total Canadian immigration, direct control over immigrant services, large monetary federal grants, and official recognition of its overseas immigration offices. The federal government retained responsibility for setting national standards.

135. See Rich et al., supra note 119, at 131.
136. Canadian and American systems of federalism differ in certain significant respects. For example, they differ with respect to the Canadian federal government’s ability to form compacts with the individual provinces in making immigration regulations and the provinces’ ability to insulate unconstitutional legislation “notwithstanding” the Canadian Charter. See Martha A. Field, The Differing Federalisms of Canada and the United States, LAW & CONTEMP. PROBS., Winter 1992, at 107, 116-17 (discussing the “notwithstanding” clause of the Canadian Constitution).
137. See Kevin Tessier, Immigration and the Crisis in Federalism: A Comparison of the United States and Canada, 3 IND. J. GLOBAL LEGAL STUD. 211, 222-23 (1995).
138. See id. at 224-25.
139. Id. at 225.
and goals, defining immigrant classes, establishing overall immigration levels, managing entry to the country, and conducting enforcement activities. The Accord was widely seen as a triumph for Quebec, and may have been a large factor in the reduction of secessionist sentiment in the province. Indeed, the Accord ushered in a series of other bilateral immigration compacts, though far less expansive in scope, with Manitoba (1996), British Columbia and Saskatchewan (1998), and Prince Edward Island and Yukon (2001).

If the purpose of the federalist immigration pacts was to allow Quebec to preserve its distinct heritage and thus to preserve the union, perhaps now, fifteen years later, proponents of the Accords can call them a success. Quebec has, for now, avoided the fate of Louisiana and has managed to preserve its language and culture. Moreover, support for Quebec's sovereignty has recently fallen to a low of 37%.

Of course, DEBI is not a response to any perceived constitutional crisis in the United States. Moreover, the relationship between the U.S. federal government and the states differs in both law and history from that of the Canadian federal government and its provinces. However, one notable lesson from the Canadian experience—other than the benefits of pluralism generally—is the impact of federalist immigration systems on foreign policy. While DEBI does not call for the states to set up shop in American embassies across the globe, neither does it call for the states to stick their heads in the sand. After all, it would be unrealistic to expect any sharing of the immigration power, rooted in notions of foreign policy and sovereignty since the late nineteenth century, not to affect American foreign policy.

Thus, the question is to what extent the states may intrude on that foreign policy. Most likely, states will operate abroad solely as salespersons and representatives. Just as states now send governors and trade missions abroad to solicit business and investment, they may send delegates and employees to trumpet the benefits of immigration to their states. This all might be part of a
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decaying trend of federal exclusivity in foreign relations matters, but there must be limits: states are already prohibited under the Constitution from entering into treaties or alliances. The most reasonable additional constraint under DEBI would be for any preference for a particular foreign nation in a state’s admissions plan to receive the explicit consent of Congress at the adoption stage. Beyond that, states should be given as free a hand as possible to pursue state goals.

C. Scenarios

The benefits and limitations of the DEBI system in comparison to the current system are best shown through the following three detailed possible scenarios.

1. Florida

Florida is a large state with a diverse and growing economy. Under DEBI, assuming a national quota (as in 2004) of 140,000 for EB immigrants and 131,000 for guest workers, Florida would be entitled to 8519 EB visas and 7915 guest worker visas based on its relative population. The DEBI system would shift the political locus of immigration decision-making from Washington to Tallahassee. Florida could now set up an application system (within the constraints set by Congress) that accurately reflected the competing needs and demands of its citizens, business interests, and general economic condition. And though this specific power would be new and expansive, the responsibility and accountability of Florida’s democratic government would not be new. State officials must constantly weigh these competing interests when deciding on any number of issues, from state benefits to regulatory enforcement. Thus, there is no particular reason why Florida could not exercise this new administrative power as competently as its other powers.

Citizens could now petition their government to decrease or increase its admission of EB immigrants and/or guest workers. Additionally, businesses and unions in Florida could bring their influence to bear on the state government. For example, two of Florida’s largest industries, “Big Sugar” and


149. U.S. CONST. art. 1, § 10, cl. 1.
“Big Citrus,” could lobby Tallahassee to use its guest worker visa allotment for their industries. Citrus growers, in particular, have acute labor needs, growing foreign competition, and difficulties in securing legal farmworkers.

This kind of federalism would facilitate local solutions to local problems. The nation’s critical shortage of nurses, for example, is particularly problematic for states like Florida with large, growing populations of retirees. Congress has responded to this nationwide problem by passing in 1999 the aforementioned Nursing Relief for Disadvantaged Areas Act, which created the H-1C.

However, that approach was inadequate for a variety of reasons. First, Congress provided for a class of guest workers—unlike in this scenario, in which Florida has the option to pursue the recruitment of foreign nurses as permanent EB immigrants. Second, the national nursing lobby persuaded Congress to attach stringent conditions for medical facilities to qualify to hire these H-1C nurses. Finally, strict caps on the number of H-1C visas were included in the legislation—a mere 50 visas for states with populations over 9 million, and 500 for the nation as a whole.

Under DEBI, however, Florida would not be constrained by national compromises in attending to local problems. In deciding that recruiting nurses was a long-term goal, Florida would be constrained only by its allotment

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152. Peter Wallstein, Sugar, Citrus Industries at Odds with Bush over Free Trade, MIAMI HERALD, Nov. 3, 2003, at 1B ("Big Sugar and citrus growers are two of Florida’s most influential industries.... Touting a combined economic impact of $12 billion and more than 100,000 jobs in Florida, the two industries have embarked on aggressive campaigns designed to remind White House trade negotiators that if they craft a deal harmful to sugar or citrus, they do so at the president’s electoral peril.").

153. Fritz Roka & Stuart Longworth, Labor Requirements in Florida Citrus 3 (Sept. 2001), http://edis.ifas.ufl.edu/pdf/FE/FE30400.pdf ("A real concern remains regarding long-term labor availability in Florida.... So long as the Florida citrus industry is dependent on imported foreign labor of questionable legal status, a steady long-term supply of harvest labor will be vulnerable.").

154. See, e.g., Sanjay Gupta, Special Report: U.S. Nursing Shortage 'Going into Crisis,' CNN.COM, May 8, 2001, http://archives.cnn.com/2001/HEALTH/05/07/nursing.shortage/index.html (describing the "nursing shortage sweeping the United States" and adding that "by the year 2008, another 450,000 nurses may be needed to meet demand, according to government projections"); Nursing Shortage in Critical Stage, CBS NEWS, Jan. 17, 2003, http://www.cbsnews.com/stories/2003/01/17/60minutes/main536999.shtml ("American hospitals are in a serious crisis.... [including] a severe and dangerous shortage of nurses, a shortage that can best be summed up by the fact that there are now over 120,000 open positions for registered nurses nationwide.").


156. INA § 101(a)(15)(H)(i)(c) (addressing applicants "who are coming temporarily to the United States to perform services as... registered nurse[s]....").

157. For example, a facility must prove to the Secretary of Labor annually that it is doing such things as: operating or financing a training facility for registered nurses, paying above-market wages for registered nurses, and "[p]roviding reasonable opportunities for meaningful salary advancement" for nurses. See id. §§ 212(m)(2)(B)-(C).

158. Id. § 212(m)(2)(F)(iii)(4).

159. Cf. Schuck & Williams, supra note 6, at 376 ("Rather than forcing states to seek relief in Washington from burdens relating to criminal aliens, federal policymakers should encourage states to contribute to local solutions.") (emphasis added)).
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of visas and the global supply of willing immigrant nurses and trainees. This option, of course, would not preclude the state from seeking other solutions to the nursing shortage, such as expanding nurse training and scholarship opportunities, but it would be a potent option that is currently unavailable. Thus, this scenario illustrates how one state within DEBI might prioritize currently underserved occupations.

2. Iowa, Kansas, and Nebraska

Depopulation and the brain drain are specters that now haunt many states in the Midwest, particularly the Great Plains area. Depopulation and its negative consequences—lost tax revenues, declining standards of living, even a permanent loss of a “cool factor”—can mutually reinforce each other, potentially trapping the states in a dangerous downward spiral. Many of the affected states have responded with a variety of creative (or desperate) proposals to stop or reverse the drain—such as exempting young residents from state taxes (Iowa), giving residents free land (Kansas), and forgiving the student loans of college graduates (North Dakota). Moreover, in an attempt to “repopulate dying towns,” Congress has considered a New Homestead Act. The proposed legislation would offer personal and business incentives for rural young people and entrepreneurs, including college loan repayments,

160. One large source of foreign nurses in past years has been the Philippines. See Warnings Raised About Exodus of Philippine Doctors and Nurses, N.Y. TIMES, Nov. 27, 2005, at A16.
163. See Ronald A. Wirtz, Plugging the Brain Drain, FED. GAZETTE, Jan. 2003, at 6-7, available at http://minneapolisfed.org/pubs/fedgaz/03-01/cover.cfm (“[N]ot even good jobs and wages will stop out-migration of the young and educated. The wild card [is] . . . the nebulous ‘cool factor’ of the host state or region.”).
164. See Christie, supra note 162.
166. Wirtz, supra note 163, at 1 (“Voters in North Dakota considered a November ballot measure that would have provided $5,000 for both income tax reduction and student loan forgiveness over five years to any North Dakota college graduate who stayed in state.”).
tax credits for home purchases and business investments, accelerated equipment depreciation, and venture capital funds, to individuals who locate in “high out-migration counties.”  

States in this predicament have two real problems—one immediate, the other more long-term. The immediate problem is labor: depopulation leads to labor shortages (assuming that high unemployment is not what is causing the depopulation in the first place), which further exacerbates the state’s economic and fiscal situation. The addition of willing immigrant labor might help to alleviate the situation, for example with Iowa’s large agriculture and hog-raising industries.  

The second underlying problem is demographic. How can these states reverse the trend? They can attempt to woo people to their states with financial incentives, as illustrated above. They can pitch their quality of life advantages, as Iowa’s Governor Vilsack has done. They can lobby Congress for more federal funds and attention, as they did with the New Homestead Act. All of these things have been done, and may yet be successful. However, DEBI would offer another tool for these states. With the ability to invite employment-seeking immigrants, the affected states would be able to address both the immediate and long-term problems in a new way. Perhaps an immigrant who comes to Kansas for a short-term job might decide it is in her best interests to stay for a longer period of time.

Also, with their visa allotment, these states would be able to woo immigrants who might not otherwise have considered living in the heartland. Of course, these immigrants, particularly the permanent ones, could not be forced to stay. While guest workers might be geographically constrained due to the necessity of remaining near their place of employment, LPR immigrants would be completely free, as they are now, to move and work anywhere in the country, and therefore would not be subject to state influence beyond the application stage. Thus, states would only have a window of opportunity to recruit or woo immigrants to stay longer. At the very least, however, these states would gain the benefit of guest workers. Indeed, it is even possible that the addition of more immigrants, with their accompanying restaurants, shops, and culture might add to these states’ “cool factor.”

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169. For more information on migrants and Iowa’s $28 billion hog industry, see Migrants and Pork, RURAL MIGRATION NEWS, Apr. 1999, http://migration.ucdavis.edu/mn/more.php?id=375_0_S_0.

170. See Paulson, supra note 162, at 1.

171. The degree of constraint would depend upon their host state’s rules on visa portability. If visas are very portable, guest workers could move about the state with more ease.

172. See Shaila Dewan, Cities Compete in Hipness Battle To Attract Young, N.Y. TIMES, Nov. 25, 2006, at A1 (noting that large international and gay urban populations are strong indicators of popularity with young, college-educated workers).
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Another possibility with this scenario would be the utilization of compacts. Clearly the difficulties these states are facing are not isolated to any one state alone—they are regional issues. Compacts, duly approved by Congress, would enable a regional approach to the problem. Forming such a compact, Iowa, Kansas, and Nebraska could pool their visa allotments, harmonize their admissions and labor protection criteria, and jointly prioritize the type of labor needed. Such an approach could showcase the entire region and go hand-in-hand with other joint economic regional initiatives such as the New Homestead Act. Immigration is not a panacea to the region’s problems, but the DEBI system would offer a new, more targeted option to these states, without necessarily detracting from the needs of their sister states.

3. Oregon

Federalism encourages states to act as “laboratories” for experimentation.\(^\text{173}\) To take a state with a recent history of such varied policy experimentation (including mail-in voting and physician-assisted suicide), suppose that Oregon decides to further decentralize its admissions system under DEBI by auctioning its yearly visas or by allocating them on a first-come, first-served basis and avoiding state labor certifications or other administrative hassles. The state would only check for basic health information, a criminal record, and an employment offer.

This type of system would resemble the proposals of some academics. For example, Michael Trebilcock at the University of Toronto Law School has proposed such a completely decentralized system:

Current policies in many countries requiring that employers first ensure that no domestic workers are qualified for the job, or demanding that the employer demonstrate that the employment of the foreign worker at issue would not harm domestic workers, should be abandoned. If an employer has extended its recruitment drive to encompass foreign labor markets and is willing to absorb the additional transaction costs associated with sponsorship of a foreign worker, then this commitment should be considered to be prima facie evidence that equally qualified workers are not available domestically.\(^\text{174}\)

While adopting such a system at the national level under our current system might appear too radical, and might meet fierce resistance from certain interest groups, a state could afford to experiment with simpler, more streamlined administrative procedures without imperiling the entire nation.

The *sine qua non* of that system would be the offer of employment, which

\(^{173}\) See, e.g., Blakely v. Washington, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) (“[B]ut also the interest of the States to serve as laboratories for innovation and experimentation.”); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (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.”).

"is the best single assurance that an economic need is being met . . . and that economic-stream immigration occurs in an orderly fashion." Furthermore, the application fees could be modified as they are in an auction to reflect supply and demand in the state. Only those employers willing to pay more to sponsor EB immigrants or guest workers would even apply. Minimum wage laws and labor standards would also still apply, so the risk that employers would be willing to pay high sponsorship fees in order to recoup their costs through exploitation would be minimal. Finally, the executive, in its national security capacity, would continue to screen through the visa process to ensure that those being sponsored pose no danger to the country.

Alternatively, Oregon might adopt an objective point system for its EB immigrants, as Canada has done. Because EB immigrants, as opposed to guest workers, are permanent additions to the country and labor force, Oregon might consider it more of an imperative to seek people with the skills necessary for long-term success, including language ability, education, and technical skills. Finally, Oregon might adopt other reforms and proposals, such as privatizing the verification and processing of visa applications.

III. NATIONAL RAMIFICATIONS OF DEBI

DEBI proposes to abolish one central regime, with all its benefits and flaws, and to replace it with a federal one composed of over fifty different systems. Such a change is not to be undertaken lightly. The reform would not be as drastic as it might at first appear, however, and its many benefits would outweigh its costs.

A. Complexity of the Immigration System

Under what Peter Schuck calls the "audience principle" of legal complexity, the "complexity of a rule should be tailored to the sophistication and cost-bearing capacities of those who will have to interpret and implement it." Thus, any change in complexity must first be viewed from the

175. PAPADEMETRIOU & YALE-LOEHR, supra note 61, at 147.
177. Cf Stephen Yale-Loehr & Christoph Hoashi-Erhardt, A Comparative Look at Immigration and Human Capital Assessment, 16 GEO. IMMIGR. L.J. 99, 107 (2001) ("Even if a point system were not clearly superior to other methods of selecting skilled migrants as determined by the long-term economic contributions made by those migrants, implementing such a system would still yield a separate procedural advantage: streamlining the immigration process and yielding transparent, objective, and flexible criteria for selecting skilled immigrants.").
178. See COMM. FOR ECON. DEV., supra note 54, at 33.
perspective of the various members of our audience. An initial perspective is that of the immigrant-applicant, who might file her own application (a self-petitioning applicant) or be sponsored by an employer who files on her behalf (a non-self-petitioning applicant). If a state allowed certain EB applicants to self-petition, in a cost-distribution analysis those self-petitioners might disproportionately bear the burden of familiarization with multiple state systems. Though this difficulty would be limited only to states that allowed self-petitions, there would likely be more material for a potential self-petitioner to process, not less.

However, this increased difficulty for self-petitioners would be mitigated by two aspects of DEBI. First, under the current system, only EB-1 “priority workers” may self-petition without a job offer or labor certification. And this preference category, due to its high bar of “extraordinary ability,” is small. Thus, if the states ultimately, in the aggregate, created more self-petition categories than are currently allowed, the greater variety and rule complexity of DEBI would likely be offset by the greater freedom and number of slots allowed. If, on the other hand, states slashed or eliminated self-petitions, the greater rule complexity (i.e., the difficulty in interpreting the law) would not matter, and the group of EB-1 immigrants affected would be a small fraction of the number of economic immigrants allowed in.

Secondly, as mentioned above, self-petitioners would be able to cope and adapt to a more diverse system through the assistance of legal counsel. In fact, any greater complexity would be handled mainly by immigration specialists and not by the applicants themselves. This is not to imply that there would be no added costs, as this might add to the cost of legal services. However, coupled with increased entry opportunities due to the possibility of more self-petitioning visas, it would counterbalance the negative impact of change. Additionally, if some states adopted more transparent admissions criteria (like Canada’s point system) than our current system employs, self-petitioners might also find those expanded opportunities to more than compensate for any change.

As for non-self-petitioning EB immigrants, any increase in complexity (from rules or otherwise) would be borne by their sponsor-employers. If the main requirement for most EB visas is a valid job offer given by a knowledgeable employer, then it would not matter to the immigrant whose laws

180. See id.
181. See supra note 40 and accompanying text.
182. See DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 266-67 (1986) (discussing three forms of complexity within the context of the income tax).
183. This might, admittedly, be seen as a self-serving solution to the problem of legal complexity, coming as it does from a law student.
184. See supra note 176.
were being followed, so long as the employer knew and complied. For most employers, moreover, the changes of DEBI would have little negative impact. As most businesses are not continent-spanning Fortune 500 companies, an employer interested in hiring foreign help would only have to acquaint itself with the relevant laws and regulations in the states in which it operates. This might well be balanced by small- to mid-sized businesses’ enhanced opportunities for lobbying at the state level. Thus, overall, the shift in complexity should be neutral for businesses of this size.

Large corporations, on the other hand, would encounter most of the challenges and opportunities of change. Rule and compliance complexity would undoubtedly increase, as large corporations would need to familiarize themselves with the rules of several states instead of just one national system. However, this increased complexity would also give large corporations the opportunity to “shop” for states with the least complex or cumbersome immigration rules. Under the current system, if a large agribusiness, such as ADM, wanted to hire more unskilled farm workers and was denied, they would have no other (legal) recourse. Under DEBI, by contrast, that company could selectively apply for EB visas in receptive states, and would have opportunities for greater lobbying clout in state capitals. While not a perfect solution in that a company might perhaps be unable to hire workers in all its desired states, it could at least hire workers in some of them. States would also have the proper incentives to compete with one another for business with regard to transparency, efficiency, speed, and other factors. Thus, from both cost distribution and audience principles, corporations, as sophisticated market players and the most likely beneficiaries of DEBI, should bear the costs in an equitable reform.

Finally, the efficiency of a decentralized system need not compare unfavorably to the current system. This is primarily due to the fact that our immigration system, with its dispersed enforcement and service facilities, is already unavoidably decentralized. Therefore, the crux of the efficiency matter is, as with enforcement, coordination through information technologies. But as Schuck notes, the pursuance of efficiency often requires more complex rules. For example, DEBI’s use of a national immigration database, though simple in concept, requires a system of reporting requirements, access criteria, security policies, and other technical regulations. However, regardless of whether DEBI is implemented or not, the federal government will still need to coordinate its diffuse administrative network with the states in order to work effectively. Indeed, more effective coordination among government agencies was one of

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185. “Compliance complexity” refers to how difficult it is to comply with the law. For example, in the tax preparation context, this would include such things as record keeping, filling out the proper forms, calculating numbers properly, and so forth. See BRADFORD, supra note 182, at 266-67.

186. See Schuck, supra note 179, at 37.
the main motivating factors behind the incorporation of the immigration bureaucracy within the Department of Homeland Security. Linking state bodies to this network under DEBI could be merely one part of this upgrading effort.\textsuperscript{187}

B. \textit{Financial Ramifications}

Implementation of DEBI would cause a moderate shift in administrative costs from the federal government to the states, for three reasons. First, the states already administer, and pay for, a large part of our current immigration system, particularly in the labor certification area. Second, the federal government would retain many important and costly aspects of immigration. And third, the states would be expected to finance administrative expenses through application fees and/or taxpayer funds.

As is noted above,\textsuperscript{188} the State Employment Security Agency is the administrative gatekeeper to the labor certification system. Thus, states are already responsible for much of the cost of this system. And though the federal government may reimburse the states for some of their costs, as it did in originally imposing the mandate,\textsuperscript{189} the responsibility for maintaining these offices already rests with the states. If states had greater power to add to their current responsibilities, they could enact fee-based immigration systems that could pay for any administrative costs. The states would not be dependent on disbursements from the federal government. The federal government’s responsibilities and expenses in the areas of enforcement and overseas/border administration would remain unchanged.

Additionally, the enactment of application fees would have a salutary effect on the complexity of the system as a whole. Reasonable processing and application fees would deter most applicants from random or frivolous applications and would prevent the number of applications from growing to an unmanageable degree. Moreover, because a fee-based application system would finance itself, states could hire more processors to address the demand. And, of course, states could choose to underwrite part or all of the cost of their systems to compete with other states.

C. \textit{Naturalization, Adjustment of Status, and Changing of Status}

1. \textit{Adjustment of Status}

The barrier between immigrants and nonimmigrants is not impermeable.

\textsuperscript{187} See Lyman, supra note 97.
\textsuperscript{188} See discussion supra Subsection 1.B.1.
\textsuperscript{189} See 29 U.S.C. § 49(c) (2000).
Under section 245 of the INA, certain nonimmigrants can adjust to permanent resident status while still in the United States.\(^{190}\) Under the current system, nonimmigrants seeking adjustment must still meet all the admissions criteria for immigrants and not be inadmissible under any of the provisions of INA section 212. And if they are approved, there is a corresponding reduction in the class of preference visas to which the noncitizen had been admitted.\(^{191}\) Thus, a nonimmigrant from Argentina, admitted on a “J” student visa, who marries an American citizen could adjust to permanent resident status as an “immediate relative” subclass of family-sponsored visa.\(^{192}\) Correspondingly, there would be a reduction of one in the number of preference visas authorized to the FS immigrant category and Argentina for that year.

Adjustment of status for employment-based noncitizens would operate similarly under DEBI. As described above, states would be given as free a hand as possible to use their entire quota of EB visas within the time period prescribed by Congress. However, adjustment of status under DEBI would pose slight logistical issues, depending on whether the adjustment was within a state or across states. Thus, internally, a state would be able to adjust a guest worker to LPR status, so long as the state still had an available immigrant visa from its annual allocation. For example, if a guest worker in North Carolina applied for an LPR slot from any state and was accepted, the accepting state’s LPR allotment would be reduced by one. The status of the vacated guest worker slot, on the other hand, would depend on the amount of elapsed time from the original allotment to the state. If still within the use-or-lose window, North Carolina would be able to reuse that slot for another suitable candidate. If past that window, the slot would simply expire.

Adjustment of status across states would be only slightly more complicated, in that two states instead of one would need to notify the federal government of the adjustment through the national immigration database. Such adjustments would offer another area for interstate competition, as states actively seek out desirable LPR candidates from both their own and other states’ guest worker populations. Thus, returning to the second scenario in Section II.B above, as Iowa’s Governor Vilsack toured other states encouraging young people to consider his state, one could imagine a state official visiting

\(^{190}\) See INA§ 245, 8 U.S.C. § 1255 (2000). Lawfully admitted permanent residents have the right to travel and work in most professions, and so have no need to adjust to nonimmigrant status. See U.S. Citizenship and Immigration Services, Now That You Are a Permanent Resident, http://www.uscis.gov/portal/site/uscis (search for page title) (last visited Apr. 17, 2007).

\(^{191}\) See INA § 245(b) (“[T]he Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 202 [concerning foreign state numerical limitations] and 203 [concerning immigrant preference categories] within the class to which the alien is chargeable for the fiscal year then current.”).

\(^{192}\) The nonimmigrant in this case would, of course, have to prove that the marriage was bona fide. INA § 245(e) (conditioning status on whether “the alien establishes by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith”).
other states’ guest workers and encouraging them to apply.193

2. Changing and Renewal of Status

Changing of status, the term for moving from one type of nonimmigrant visa to a different type of nonimmigrant visa, would be slightly more complicated. In its simplest form, however, the changing from a non-employment-based visa to a guest worker visa would also result in a corresponding deduction from a state’s quota. So, for example, if a foreign student on a “J” visa applied for and received a guest worker visa from Iowa, one visa would be deducted from Iowa’s allocation. By contrast, if Hawaii divided its guest worker allocation into four classes, a worker’s switching from one class to another would be purely an internal state administrative matter and would not result in any deduction.

Changing of status also touches on the question of whether a state would be permitted to “renew” a guest worker’s status under DEBI. Though it should be permitted, that question ultimately must be decided by Congress. The possibility of multiple renewals, with no pathway for lawful permanent residence, might strike some as unethical, undesirable, or prone to abuse. Thus, there might need to be limits on the possibility or frequency of renewals. Yet should renewals be permitted, guest workers could change status across states, as with adjustment of status. Finally, states would have to notify the federal government through the national immigration database of any change, adjustment, or renewal of status. That notification would allow the federal executive branch to formally approve and finalize the process, as under current immigration law.194

3. Naturalization

Naturalization is the conferring of U.S. citizenship upon a person after birth,195 and under DEBI it would remain solely a federal matter. Congress would set the criteria—e.g., good character, residency, English proficiency—

193. This role is not at all unusual for public officials at the state and local levels. As mentioned above, Mayor Richard Daley of Chicago has visited China, seeking greater Chinese investment. While he was there, officials bemoaned the visa difficulties that Chinese investors encountered in the United States as compared to Europe. See Osnos, supra note 147.

194. INA § 245 (requiring the executive’s approval for adjustment of status applications).

195. 2005 YEARBOOK, supra note 13, at 1. There are several requirements for naturalization. They include residence in the United States for five continuous years immediately preceding application, see INA § 316(a), an understanding of the English language, see id. § 312(a)(1), and an oath of renunciation and allegiance, see id. § 337. There are also many exceptions and special naturalization procedures for various categories of applicants. See, e.g., id. § 316(f) (persons making extraordinary contributions to national security); id. § 328 (naturalization through service in the armed forces); id. § 329A (posthumous citizenship through death while on active-duty in the armed forces in any period of military hostilities). Generally speaking, however, a lawfully admitted permanent resident who meets all the aforementioned requirements and is “of good moral character” can be naturalized. See id. § 316(a)(3).
and only the federal government could approve a noncitizen’s application for citizenship. Moreover, the federal government would continue to confer citizenship for LPR immigrants admitted under the family-sponsored or diversity programs as well as certain groups of special concern, such as noncitizens who have served in the U.S. armed forces.196

However, as residency currently is one of the main requirements for citizenship,197 the states through DEBI would affect the naturalization process. As the gatekeepers for employment-based immigration, the states would also become the selectors of a large part of each incoming naturalization class. Short of separating the residency requirement from naturalization entirely, states could not have a role in the selection of permanent immigrants without also impacting the naturalization pipeline. And while the executive could always choose to reject citizenship applications for national security or other reasons, the vast majority of interested noncitizens, once in possession of a green card, would likely be approved over time. In the end, there is no escaping this ramification of DEBI. However, if states can be considered competent to select those immigrants willing to work and build lives in our country, the fact of these workers eventually becoming citizens might not appear to be such a negative at all.

D. Immigrant Rights

Federalism can also function as a steam-valve. In the immigration context, Spiro has described this steam-valve effect as the capacity of “those states harboring intense anti-alien sentiment to act on those sentiments at the state level, thus diminishing any interest on their part to seek national legislation to similarly restrictionist ends.”198 The absence of such a steam-valve in the immigration arena has been thought by some to be a contributing factor to the flashes of anti-immigration legislation at the national level, such as those that prompted the Chinese Exclusion Act. Presumably, areas with high anti-immigrant sentiment are unable to affect change at the local level, and thus forced to seek immigration restrictions in Congress. And due to the nature of political logrolling, a small interest group with an intense preference pitted against the neutral posture of other, larger groups may prevail in the legislature.199

While some scholars dispute this steam-valve theory as an explanation for every instance of major restrictionist legislation,200 steam-valve federalism is a

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196. See INA § 328.
197. See id. § 316(a)-(c).
198. Spiro, supra note 7, at 1627.
199. Id. at 1634; see also Peter H. Schuck, Citizenship in Federal Systems, 48 AM. J. COMP. L. 195, 205 (2000).
200. See Wishnie, supra note 84, at 556 (“But the [clogged steam-valve] claim does not explain
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well understood aspect of public choice analysis generally. Thus, greater local input in EB admissions under DEBI might help to reduce pressure at the state level before it percolates up to Washington. For example, interest groups currently threatened by the influx of tech workers from such places as India would be able to oppose their entry within their own states. Perennial high-stakes fights in Congress over the number of H1-B visas might thereby be scattered across the several states, as congressional debate focused on total immigration cap-setting. Ultimately, tech workers might be funneled through the visa market into high-demand states and deflected from high-resistance states, resulting in greater overall opportunities for economic growth and human happiness.

Moreover, the adoption stages of DEBI would ensure continual, effective congressional oversight in which state plans would be subjected to a second level of scrutiny at the national level. State proposals would not only be looked at by members of Congress and their committee staff, but also by concerned citizens, interest groups, and the press. In time, interest groups concerned with the welfare of immigrants would likely develop expertise in the area, maintain lists of concerned members, and cultivate contacts with the press. Thus, should any state propose something egregious, it would be unlikely to pass unnoticed.

Additionally, the concentration of executive resources on areas like immigration enforcement and public benefits would also result in an increase in immigrant welfare. Inefficient enforcement actions undermine public confidence in the entire immigration system and do few favors for exploited workers and noncitizens of undetermined status, as they must wait for years for final resolution of their status. The inefficient security screening and processing of lawful immigrants inflicts incalculable costs on tens of thousands of people and diminishes American competitiveness in the global labor market. Finally, lax enforcement and inefficient processing may inflict dignitary harms on lawful immigrants, as they suffer from the conflation of lawful-unlawful status in the public’s perception and from the denigration of their patience and forbearance in going through official channels. Thus, a reorganized Department of Labor, unencumbered with labor certifications, could take on a law enforcement role, performing raids on workplace violators and responding to adequately passage of three anti-immigrant statutes in 1996, nor passage of other major restrictionist legislation in the last century.” (footnote omitted)).

201. See, e.g., Jerry Seper, Minuteman Border Patrol Raises Opposition in Texas, WASH. TIMES, Sept. 23, 2005, at A4 (quoting Texas Governor Rick Perry as saying that “[t]he federal government can and must do more to close the border to illegal immigration. Until that happens, these kinds of citizen-initiated efforts likely will be the result. If you want to send the Minutemen home, I urge you to make sure we have enough federal agents on the border to secure it.”).

202. See Associated Press, Decline in Foreign Grad Students Raises Alarms, MSNBC NEWS, Nov. 16, 2004, http://www.msnbc.msn.com/id/6462790/ (attributing the third straight year of decline in foreign graduate students to immigration policies and to increased competition from Europe, China, and India).
complaints from maltreated immigrant workers. In short, efficient immigration enforcement can be an immigrants’ rights issue.

The executive will also continue its quasi-adjudicatory review functions through the BIA. The BIA will ensure at the appellate level that states are treating admitted noncitizens according to the law in a fair manner. From the BIA, the federal courts will remain open to immigrants with constitutional and statutory claims. In conclusion, decentralization in decision-making need mean neither the forsaking of federal protection for noncitizens, nor that states will turn into “laboratories of bigotry.”

E. Discrimination

Discrimination is inseparable from any system of immigration control. Except in an open borders system, some will always be favored or disfavored for limited legal entry opportunities. Thus, the only federalism issue is how much authority to favor and to discriminate is appropriately handed to the states.

Consistent with the principles of decentralized EB immigration, the federal government could choose to respond to discrimination concerns either proactively or reactively. As a boundary, limit-setting matter, Congress could proactively pass legislation prohibiting states from using factors such as race, religion, national origin, or sexual orientation in employment-based admissions decisions. Or, Congress could simply disallow a state’s selection criteria at the adoption stage, should some aspect of that criteria be thought to violate national values.

The judiciary would have little role in this form of state discrimination. Recall that DEBI doesn’t involve the devolution of federal admission power but a system that would allow for greater institutionalized input from state governments in employment-based admissions decisions. Thus, any state admission criteria not proactively or reactively forbidden by Congress would have the explicit authorization of the federal government through adoption. As the Supreme Court has held that federal immigration and naturalization laws are subject only to rational basis review under the Fourteenth Amendment, federally authorized differential treatment of noncitizens by states is, as of yet, constitutional. Of course, parties with standing could appeal an adverse state

203. Only admitted noncitizens would have standing to raise a claim. Disgruntled applicants, without any legal claim to a visa or even access to the U.S. administrative or federal court system, would as now have no avenue for relief.

204. See Wishnie, supra note 84, at 493.

205. Examples abound throughout the history of American immigration. Prominent examples of favoritism and prejudice include, respectively, the treatment of Cuban refugees and the Chinese Exclusion Act.

decision from the BIA to the federal courts if that decision were thought contrary to the express commands of Congress. In conclusion, the overall structure of DEBI is flexible enough to accommodate a primarily proactive or reactive federal government—as long as decisions affecting the nation as a whole are eventually decided at the federal level.

CONCLUSION

Immigration need not remain an exclusively federal concern. Rather, it can be conceptually bifurcated into federal and local provinces. When it is important to speak with one national voice—on questions such as total immigration levels, family reunification, and refugee acceptance—decisions are better made at the federal level. For employment-based immigration, by contrast, there can be benefits to diversifying the centers of decision-making. When viewed as an economic matter, federal immigration exclusivity begins to appear more and more anomalous. In education, taxation, commerce, and public safety, among many other areas, the states have long been full partners with the federal government.

Indeed, as the states under our federalist system of government already function as centers of independent decision-making, and not mere administrative provinces of one unitary national government, they may readily take up additional responsibilities in the employment-based immigration sphere. It is thus the goal of DEBI to provide such a framework for the federal government to work in partnership with the states. However, in the end, this proposal is not so much about any one particular mechanism for power-sharing as much as furthering a debate regarding how we may, as a "nation of immigrants," best manage immigration in a manner that is more flexible and adaptive to local needs and concerns, while continuing to ensure national standards of dignity and fairness.