

9-1-2008

A Localist Reading of Local Immigration Regulations

Rick Su

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008).

Available at: <http://scholarship.law.unc.edu/nclr/vol86/iss6/5>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

A LOCALIST READING OF LOCAL IMMIGRATION REGULATIONS*

RICK SU**

The conventional account of immigration regulations at the local level often assumes that the “local” is simply a new battleground in the national immigration debates. This Article questions that assumption. Foregrounding the legal rules that organize local governments and channel local action, this Article argues that the local immigration “crisis” is much less a consequence of federal immigration policy than normally assumed. Rather, it can also be understood as a familiar byproduct of localism: the legal and cultural assumptions that shape how we structure and organize local communities, provide and allocate local services, and define the legal relationship of local, state, and federal governments. From this perspective, local immigration regulations are not unprecedented forays by local governments into uncharted and unfamiliar territory; instead, they reflect a natural extension of how the incentive structure of localism channels local action. Recognizing this not only allows us to develop a more accurate account of the framework within which localities act with respect to immigration, it also reveals the limitations of national or federal-oriented immigration proposals and highlights the possibilities of local legal reforms as an alternative.

INTRODUCTION	1620
I. LOCALISM AS AN ANALYTICAL FRAMEWORK	1625
A. Why Localism?	1625
B. What is Localism?	1628
C. Applying Localism to Local Immigration Regulations ...	1632

* Copyright © 2008 by Rick Su.

** Associate Professor of Law, State University of New York at Buffalo. Special thanks to Gerald Frug, David Barron, Jim Gardner, and Jessica Houston Su for their insightful comments on earlier drafts; Hiroshi Motomura for his reference and encouragement; and the editors of the North Carolina Law Review for their wonderful suggestions and editorial assistance.

- 1. Direct Regulations and the Vertical Structure of Localism.....1633
- 2. Indirect Regulations and the Horizontal Framework of Localism.....1642
- 3. Neutral Regulations and the Internal Aspects of Localism.....1649
- II. IMMIGRATION AND LOCALISM IN CONTEXT: THE COMMUNITIES OF NORTH CAROLINA1654
 - A. *A Conventional Account*1655
 - B. *A Contextual Account*1660
 - C. *A Structural Account*.....1664
 - 1. Legal Allocation of Costs and Responsibilities1665
 - 2. The Legal Allocation of Power and Initiative1668
 - 3. The Local Allocation of Resources and its Management1672
- III. NOTES TOWARD IMMIGRATION LOCALISM.....1677
 - A. *The Limits of Local Participation*.....1677
 - B. *The Limits of Comprehensive Federal Reform*1678
 - C. *The Promise of Local Legal Reforms*1681
- CONCLUSION1683

INTRODUCTION

At the Asheville City Council meeting on July 24, 2007, this western North Carolina community faced two contentious agenda items that drew an overflow crowd for a lively seven-hour meeting. The first item on the agenda was illegal immigration; the second, municipal annexation.¹ With regard to the former, the city council ultimately rejected a proposal to enter into a “memorandum of understanding” with the federal government that would have deputized certain local police officials as de facto immigration enforcement agents.² With regard to the latter, after hearing impassioned pleas from residents of Biltmore Lake, a suburban subdivision located on unincorporated county property just outside the city’s borders, the council decided to continue pursuing an involuntary annexation plan that would bring parts of Biltmore Lake

1. See Hal L. Millard, *A Problem That Doesn't Exist?*, MOUNTAIN XPRESS (Asheville, N.C.), Aug. 1, 2007, at 12.

2. *Id.* This proposal followed a much publicized billboard campaign against illegal immigration. See Danica Coto, *Towns Consider Requiring English*, CHARLOTTE OBSERVER, Aug. 23, 2006, at 1B; Hal L. Millard, *No Mas*, MOUNTAIN XPRESS (Asheville, N.C.), July 26, 2006, at 12.

and two other subdivisions into the city of Asheville, and thus into its taxing jurisdiction, by the end of the year.³

At first blush, the point of this juxtaposition seems to be in the dissimilarity of the two agenda items. Whereas the immigration enforcement proposal appears unconventional in a city council meeting, the equally controversial annexation plan seems appropriately local, almost quaint, in comparison. From this perspective, the local foray into immigration regulation represents a jarring deviation from local government's typical sphere of regulatory interest and control.

But upon closer inspection, it is not entirely clear that these two issues are distinct. When sorting through the various concerns—kinship and community interests,⁴ the standing of newcomers versus old timers,⁵ the decision of who bears the tax burden for local services⁶—it is actually quite difficult to determine which argument applies to the immigration issue and which applies to the annexation issue. With these various concerns in mind, it is not difficult to see why the issue of illegal immigration would share a spot on the agenda with more “local” matters like municipal annexation. Indeed, the similarities seem to raise questions about how much of the recent local activities targeting immigrants are really about immigration at all.

3. Millard, *supra* note 1.

4. Compare *id.* (describing one immigrant's concern that local anti-immigrant bias is making the city less welcoming), with *id.* (recounting one Biltmore Lake resident's complaint that though “Asheville is a great city, . . . it's not my home”). Interestingly, similar arguments have been raised against Biltmore Lake residents, many of whom are newcomers from out of state. See H. Byron Ballard, *The Farm at the Bottom of the Lake*, MOUNTAIN XPRESS (Asheville, N.C.), July 18, 2007, at 9.

5. Compare Millard, *supra* note 1 (describing one resident's frustration with “illegal immigrants coming here intent only on making money, with little interest in assimilating or becoming legal residents”), with Ballard, *supra* note 4 (referring to Biltmore Lake residents, who are now facing annexation, as “newcomers” and “usurpers” who overtook this community, renamed the area, and refuse to abide by “time-honored traditions in [this] bit of redneck America,” like letting kids trick-or-treat in better parts of town).

6. Compare Hal Millard, *Let My People Stay*, MOUNTAIN XPRESS (Asheville, N.C.), May 10, 2006, at 13 (“Arguments in favor of supporting illegal immigrants . . . ignore the realities of our overwhelmed social-service system, costs to our health-care delivery system, . . . the exhaustion of limited resources in our public schools, and a general erosion of our country's legal, cultural and economic foundations of success.” (quoting Asheville City Council member Carl Mumpower), with George Keller, *The Other Side of the Mountain*, MOUNTAIN XPRESS (Asheville, N.C.), Sept. 5, 2007, at 9 (describing annexation as a response to county residents living right outside of Asheville who receive the advantages of living so close (e.g. water and sewer services) while paying half the property tax of Asheville residents: “Some call them freeloaders; others think they're smart”).

In recent years, there has been growing awareness of the local impact of immigration and mounting interest in the response of local governments.⁷ Notwithstanding the conventional perception of immigration as a quintessential national issue, local communities around the country are taking the initiative on immigration matters, especially that of illegal immigration.⁸ Moreover, like the diverse reactions of the different communities across the country facing these issues, their responses have been similarly varied; whereas some communities have endeavored to limit the local role in federal immigration enforcement efforts,⁹ others have attempted to supplement those efforts by imposing additional sanctions, either directly or indirectly, on the basis of alienage and legal status.¹⁰ It is therefore no surprise that many now see these local communities as the new battleground of contemporary immigration debates.¹¹

But even as the “local” is increasingly invoked in the immigration discourse, there is a continuing sense that the local perspective is merely a narrative frame with which to recast the familiar fault lines of the national immigration controversy. In other words, notwithstanding the fact that these developments appear to bring local concerns to the forefront, the conventional reading of these events continues to maintain a solidly immigration-oriented

7. Accounts of “local” responses to immigration often refer to state and local action interchangeably. In contrast, not only is the focus here primarily on the response of local governments, but also state and local responses will not be treated as one and the same.

8. For an updated list of state and local activity related to immigration regulation or enforcement, see FAIR IMMIGRATION REFORM MOVEMENT, DATABASE OF LOCAL IMMIGRATION, <http://immigrationmovement.com/learn/immigration-reform-and-immigrants/local-level/> (last visited Aug. 24, 2008); Nat’l Immigration Law Ctr, Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities, www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2008-04-15.pdf (last visited Aug. 24, 2008).

9. See Matt Dees, *Durham Won't Change Policy on Immigrants*, THE NEWS & OBSERVER (West ed.) (Raleigh, N.C.), Sept. 21, 2007, at 1A (describing Durham’s conservative policy of checking immigrant status only in connection with a criminal investigation and prohibiting police from looking for illegal immigrants on their own).

10. See Fred Kelly, *How Many Is Too Many in a House?*, CHARLOTTE OBSERVER, Dec. 10, 2006, at 1B (describing a proposed local housing code that some believe is an indirect attempt to target Latino immigrant households); Amy Rainey & Franco Ordenez, *Gaston: No Funds for Illegal Residents*, CHARLOTTE OBSERVER, Nov. 11, 2006, at 1A (describing a series of measures passed by Gaston County to target illegal immigration).

11. See, e.g., Tara Malone & Larissa Chinwah, *Border Battle's Local Wars: Why National Issue Will Continue to be Debated, Acted Upon in Communities*, CHI. DAILY HERALD, Dec. 4, 2006, at 1 (“City and village halls became a battleground within the immigration debate.”); Jose Cardenas, *Strong Objections Voiced Over Illegal Immigration*, ST. PETERSBURG TIMES, Oct. 23, 2006, at 1B (“As immigration legislation has stalled in Congress, the battleground has shifted to city halls and state legislatures.”).

outlook. Seen as such, local efforts to address immigration are largely considered to be illegal, undesirable, or ineffective; if not denounced as an impermissible infringement on the federal government's broad plenary power over immigration,¹² or condemned as manifestations of parochial bias that frustrate national objectives,¹³ they are undermined or dismissed as vain attempts to address an issue that can only be resolved by comprehensive legislation at the federal level.¹⁴ Nor is this immigration-oriented outlook limited to those critical of local activism. Many who reject federal exclusivity in order to advance a more expansive vision of local participation have done so primarily with an eye toward federal immigration interests.¹⁵

Considering the national importance of the immigration debate, it makes sense that the conventional reading of local immigration regulations privileges the national component of the equation over the local. It is worth asking, however, whether this approach adequately captures the whole picture. The injection of cities and towns into the immigration debate has prompted many to ask whether local attempts to target immigrants or regulate immigration are in fact "local" matters. But in focusing on this question, we may have forgotten another question just as basic: whether these actions have that much to do with the federal immigration controversy at all. Are we too quick to read local actions directed toward immigrants as a subset of the national immigration controversy while ignoring the

12. See, e.g., Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 26 (2007) ("[T]he plenary powers doctrine should be applied to broadly preclude municipal [immigration] regulation.").

13. Cf. Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 382–86 (2002) (discussing examples of bigotry still existing in local and national immigration policies); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 553 (2001) ("[O]ne should reject a constitutional theory that endorses the creation of state and local laboratories of bigotry against immigrants.").

14. See, e.g., Editorial, *The Border Deal*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 3, 2006, at 8A ("The trouble is that neither local nor state leaders can resolve the problem of illegal immigration. It's a job for Congress, one that North Carolinians should be impatient to see national leaders tackle."); McKanders, *supra* note 12, at 39–48.

15. See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581 (2008) (arguing that the "primary function state and local governments play [with regard to migration management] is to facilitate the integration of immigrants into public life"); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 92 (2007) (advocating local involvement in immigration because "[i]n the administration and enforcement of immigration policy, the federal government needs all the help it can get"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630–31 (1997) (arguing that local participation serves as a "steam-valve" for federal immigration policy).

underlying local issues involved? Moreover, by perpetuating the belief that federal reform, and only federal reform, can resolve the perceived problems caused by legal and illegal immigration at the local level, have we inadvertently limited the state and local response to either inaction or paralysis on the one hand, and resistance to or replication of federal enforcement efforts on the other?

This Article is a reading of the local immigration regulations with an eye toward the legal rules that define local governments and the institutional structure within which they act. The main problem with the conventional account is that it doesn't take the local dimension seriously. Here, I argue that the local immigration "crisis" is much less the consequence of a failed or failing federal immigration policy than normally assumed, and more a familiar byproduct of localism—the legal and cultural assumptions that shape how we structure and organize local communities in American society, provide and allocate local services, and define the legal relationship of local, state, and federal governments. Federal immigration statuses, transnational ethnicities, and the perception of immigrants as hypothetical residents adds an immigration gloss to many traditional local controversies over community character, demographic and economic change, and the purpose and cost of local services such as education and crime control. But the immigration component is oftentimes nothing more than a convenient line—and indeed, just one among many—used to delineate old timers from newcomers, insiders from outsiders, neighbors from strangers. In short, this Article challenges the traditional top-down understanding of local immigration regulations. Instead of seeing such regulations primarily as a response to immigration or a consequence of existing federal immigration policy, I assert that they are products of, and complicated by, how localism organizes and defines the powers and interests of local governments.

The trajectory of this project begins in Part I with a broad outline of how localism informs the debate over local immigration regulations. It then crests in Part II with a ground-up reexamination of what this means for local communities in the State of North Carolina. Focusing on one jurisdiction offers the advantage of seeing how the insights offered by localism translate into tangible observations on the ground. It allows us to examine the rise of, and motivations behind, local immigration regulations with an eye toward the intersection of emerging local developments with existing legal structures. In addition, concentrating specifically on communities in North Carolina offers certain benefits that may not be available in other jurisdictions. It shows how local responses to immigration

unfold in communities with little-to-no experience with this type of demographic change. It also highlights the connection between local concerns associated with immigrant influxes and other anxieties produced by demographic and economic transformations unrelated to immigration. Ultimately, this analysis suggests that the particular legal structure of municipal and county governments in North Carolina has an influence on not only the type of communities that have relied on local immigration regulations, but also the type of regulations that have emerged.

The localist reading that I present here is foremost a descriptive reexamination of local immigration regulations. In Part III, however, I entertain some prescriptive insights that flow from this framework. One such insight is that we should be cognizant of the legal constraints on local action, and the manner in which those constraints guide local decision-making, when assessing the promise of immigration federalism or other efforts to increase the local role in immigration regulation or enforcement. Because localities are doubly constrained, to truly realize such promises may require us to address the law of localism as well as the law of federalism. The other insight is that we should also be aware of the limitations of comprehensive immigration reform. Though the benefits of such a reform are multiple, from a localist perspective it is not clear that it will address all, or even most, of the anxieties that underlie local immigration regulations. Given these limitations, then, as Part III concludes, it is worth considering whether focusing on reforms to local legal structure may offer an alternative, and possibly more productive, solution to many of the underlying issues.

I. LOCALISM AS AN ANALYTICAL FRAMEWORK

A. *Why Localism?*

Few issues in American law are considered as thoroughly committed to the federal government as that of immigration. As a formal matter, the principle of federal exclusivity, which ascribes to the belief that immigration should be entirely under federal control, is preserved by the long-established doctrine of “plenary power” in immigration law.¹⁶ But federal exclusivity is not simply a technical

16. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (“While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which

canon of an archaic tradition. Indeed, as a political and discursive matter, most people today still can't imagine immigration as anything other than a national issue—one that requires the uniformity, discretion, and expertise that only a central government can provide. This, of course, raises an important question: if federal exclusivity is the baseline, what purpose does a localist reading serve?

At the same time, the appeal of decentralization is also gaining favor in the immigration context. Touting the federalist virtues of experimentation, competition, tailored policymaking, and responsive politics, and proceeding under the banner of immigration federalism, scholars are increasingly employing the rich lens of federalism to examine the complexities of immigration and the multiple interests at play.¹⁷ Similarly, in connection with the recent move toward decentralizing governmental functions,¹⁸ efforts to delegate immigration-related policymaking and enforcement to state and local governments have accelerated in recent decades as well¹⁹—in part to encourage local discretion and innovation, and in part to shift the cost and burden of programs to states and localities that are willing, or compelled, to support it without federal assistance.²⁰ These

belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.”); Rodríguez, *supra* note 15, at 575–76. See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984) (giving a thorough description of the plenary power doctrine in immigration law).

17. See Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 844–49 (2008); see also Rodríguez, *supra* note 15, at 638 (arguing that integration policies in one community will produce externalities that affect surrounding communities).

18. See, e.g., JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* 63–69 (1996) (describing the trend of federal devolution that began with the Reagan Administration); PAMELA WINSTON, *WELFARE POLICYMAKING IN THE STATES: THE DEVIL IN DEVOLUTION* 1–19 (2002) (analyzing the devolution that accompanied welfare reform).

19. For example, in 1996, the federal government cut off immigrant access to many means-tested federal benefit programs as a part of a broader effort to reform welfare. States, however, were specifically “authorized” to provide similar benefits through the use of state funds. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act), Pub. L. No. 104-193 §§ 400–451, 110 Stat. 2105, 2260–76 (codified as amended at 8 U.S.C. §§ 1601–1645 (2000)); 8 U.S.C. § 1621(d) (2000) (authorizing states to provide benefits to immigrants “only through the enactment of a State law after [August 22, 1996], which affirmatively provides for such eligibility”); see also Wishnie, *supra* note 13, at 511–18 (detailing changes to immigration policy as a result of the passage of the PRA).

20. See WENDY ZIMMERMANN & KAREN C. TUMLIN, *PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM* 3 (1999), available at <http://www.urban.org/UploadedPDF/occ24.pdf> (“Despite fears of a race to the bottom with states providing as few benefits as possible, nearly every state has opted to maintain

developments raise a similar question: with federalism as the alternative, what need is there for localism?

These are difficult questions. They also lie at the heart of this project. The answers, however, depend in large part on how we define the relevance of the local in the immigration context. If “local” is understood simply as a measure of geographic or institutional scale, then it becomes hard to see why the prevailing frameworks of federal exclusivity or immigration federalism cannot accommodate a local orientation. Indeed, from this perspective, it appears that local awareness is hardly lacking in the immigration debates. Much has been made of the demographic, cultural, and economic impact of immigration on local communities.²¹ There have also been efforts to demonstrate how local institutions can aid federal immigration objectives like enforcement or integration by showcasing their resources and institutional advantage.²² In addition, this type of local awareness is increasingly reflected in both the national immigration debates and their policy initiatives.²³

But a local orientation that focuses on the local as a descriptive matter is not the same as one that foregrounds the underlying legal structure that defines and shapes what we understand to be local. And although significant steps have been taken to draw attention to

TANF [Temporary Assistance for Needy Families] and Medicaid eligibility for immigrants who were already in the United States when the federal welfare law passed”); *see also* Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1098 (N.Y. 2001) (holding that an attempt by New York to withhold Medicaid benefits for otherwise qualified residents violated state and federal constitutional provisions).

21. *See, e.g.,* Richard Sybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945 (1994) (drawing attention to the deleterious impact of immigration on California and arguing that federal immigration policies and the government’s unwillingness to compensate the state for these impacts are to blame).

22. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005) (enforcement); Rodriguez, *supra* note 15, at 581 (integration).

23. The national discourse over immigration is increasingly being dominated by local concerns such as education and public schools, crime and policing, and culture and community character, while federally-sponsored programs are being implemented to experiment with local participation in the areas of immigration enforcement and integration. *See* section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g) (authorizing the federal government to permit designated officers in state and local law enforcement agencies to perform immigration enforcement functions pursuant to a Memorandum of Understanding); BRIAN K. RAY, MIGRATION POL’Y INSTITUTE, BUILDING THE NEW AMERICAN COMMUNITY INITIATIVE: NEWCOMER INTEGRATION AND INCLUSION EXPERIENCES IN NON-TRADITIONAL GATEWAY CITIES (2004) *available at* http://www.migrationpolicy.org/news/BNAC_EXEC_SUM.pdf (describing a federal pilot initiative, deployed in three communities, implementing a community approach to immigrant integration).

the relevance of the local in the immigration discourse, by failing to emphasize local governments qua governments, or local communities qua communities, few of these efforts have called attention to the role that *localism* plays. Local impacts are represented as a consequence of federal immigration policy without acknowledging how the legal organization of localities influences what impacts the localities suffer and their ability to respond. Similarly, local participation is promoted with regard to federal immigration interests without recognizing the legal structure within which local communities operate, and the tendency of this structure to channel local action in certain directions as opposed to others. The result is that the role of the local tends to be distorted at the same time it is made relevant.

It is precisely for this reason that localism (and a localist orientation) is necessary. In contrast to conventional approaches, the value of localism lies in its ability to bring to light the legal structure within which localities operate when talking about immigration. For immigration observers, understanding this structure, especially the way in which it constrains and empowers localities, reveals that local involvement in immigration is much more complex than is usually understood. Moreover, emphasizing localism in this manner allows us to move beyond a superficial understanding of local interests and local institutions that fail to capture the contested role of local governments in our legal and political order. In short, if the frameworks of federal exclusivity and immigration federalism oversimplify local immigration regulations by representing them as components of the broader issue of immigration, foreground localism offers the possibility of reframing the issue of immigration altogether.

B. What is Localism?

Of course, understanding how localism reframes the issue of immigration requires us to first develop a working definition of what localism is. As the Section above noted, localism refers to the legal and structural aspects of the local dimension that are often ignored in discussions about the “local,” especially in the immigration context. This Section expands upon that description in more detail. Recognizing the difficulty of capturing all the nuances of localism, whether understood as a doctrinal or conceptual framework, I represent the following as no more than a functional overview that hints at some of the underlying complexities.

Localism is the legal, political, and ideological structure that organizes the institution of local governments under the state level. It is the structure that defines the legal power and incentives of local

institutions—from towns to counties, special districts to public authorities.²⁴ It is also the legal embodiment of our outlook on the role of decentralized power in our democratic system.²⁵

In this respect, localism can be understood as a reflection of federalism. Where federalism focuses primarily on the federal-state relationship, localism emphasizes the state-local relationship. Despite this similarity, it is important to recognize that “localism arguments are not federalism arguments.”²⁶ Unlike its treatment of federal and state governments, the U.S. Constitution does not define the legal or political role of localities. As a result, localism is at once more constrained and more expansive than federalism. Without such a baseline, appeals for local powers cannot rely on constitutional principles directly. At the same time, there are few constitutional limits on how local institutions can or should be structured.

To be sure, the jurisprudential development of localism has not been kind to local power as a formal matter. A fundamental tenet of localism is that localities are nothing more than “creatures of the state.”²⁷ Another is that localities have no power other than those expressly delegated at the state level.²⁸ As a result, state power reaches into the very core of a locality’s existence; as a political subdivision, it can be created or destroyed just as easily as its territorial or legal jurisdiction can be stripped or altered.²⁹ Moreover,

24. For a comparison of special districts and public authorities to more “traditional” municipal governments, see generally NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* (1994) (detailing the creation of many new local governments in recent years and the effect this has on local politics); KATHRYN FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* (1997) (assessing the benefits and costs of both general and specialized governmental structures).

25. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067–73 (1980) (advocating city power as a means for advancing public political participation).

26. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 460 (2001).

27. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the State.”); *United States v. R. R. Co.*, 84 U.S. 322, 329 (1872) (“A municipal corporation like the city of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State.”).

28. This belief is most closely associated with John Dillon’s treatise on municipal corporations and is often referred to as “Dillon’s Rule.” See 1 JOHN F. DILLON, *A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* §§ 237–239 (5th ed. 1911); see also Frug, *supra* note 25, at 1109–16 (describing Dillon’s Rule and its dominance in contemporary legal thought).

29. See *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit.”); *Hunter*, 207 U.S. at 178–79 (“The state, therefore, at its

local power is often constrained to those that the state has seen fit to delegate, and is always at risk of being taken away. To be sure, many states have enacted "home rule" provisions that delegate broad powers from the state to the local level, in part to limit the co-dependence of localities on the state.³⁰ Nevertheless, often as a consequence of the manner in which they are written or interpreted, most of these provisions provide localities with very little independent authority.³¹

But in practice, local governments are not simply powerless administrative bureaucracies. Imbued with the forceful sentiments of "community," localities are often given remarkable powers and accorded tremendous deference. For example, the Supreme Court has repeatedly protected local control over public education, even at the expense of perpetuating inequitable or segregated educational opportunities.³² Similarly, the Court has long sanctioned the ability of local governments to control for what, if anything, its lands can be used, even if this control perpetuates the socioeconomic and racial fragmentation of our metropolitan regions.³³ Noting that local power

pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the [municipal] corporation.".)

30. See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644-52 (1964).

31. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2362 (2003) (noting the limitations inherent in grants of home rule powers and arguing that "local governments do not enjoy home rule—in the simple sense of being free from state control—as a formal matter Home rule in its present form . . . is not local legal autonomy"); see also DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* 9 (2004), available at http://www.ksg.harvard.edu/rappaport/downloads/home_rule/home_rule.pdf (asserting that the mere threat of preemption discourages cities from relying on home rule authority).

32. See *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (refusing to uphold an inter-district desegregation decree in part because of the Court's refusal to treat school district lines as "a mere administrative convenience"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-55 (1973) (upholding an educational funding structure that produced inequitable results in part because of the need to protect local autonomy).

33. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268-71 (1977) (upholding a community's decision to maintain zoning designations that foreclosed the construction of racially integrated low- and moderate-income housing because of the lack of evidence supporting racially discriminatory intent rather than racially disproportionate impact); *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (finding no standing for nonresidents to challenge a community's exclusionary zoning laws); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-90 (1926) (finding the ability to zone, including the segregation of apartment housing from other residential areas, to be a legitimate exercise of local police powers); see also CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 204-53

over these two fields contributes to “territorial economic and social inequalities” by “reinforc[ing] them with political power,” Professor Briffault argues that “[m]ost local governments in this country are far from legally powerless.”³⁴ This is not to say that local governments can resist state efforts to change their legal authority, especially when many of these powers are specifically delegated by the state. But it does not make this power any less real.

What the analysis above shows is that it is often unhelpful to talk about local governments through the binary lens of power and powerlessness.³⁵ Localities are empowered in some respects and disempowered in others. This combination creates a localist structure in which certain kinds of local actions are possible and encouraged, while others are foreclosed. Moreover, this structure of empowerments and disempowerments produced by state (and sometimes federal) law, which underlie the “vertical” axis of localism, also has tremendous influence on the “horizontal” axis of localism: the relationship *between* local governments and communities. Inequitable distribution of social and economic resources, segregation along racial and class lines, and increasing disregard for those who lie outside the boundaries of one local community, are all consequences of what Briffault refers to as “our localism.”³⁶ And although this fragmentation is often accepted as a natural and inevitable organization of our social and physical environment—a product of economic forces or abstract local autonomy—scholars of localism have long pointed out the strong influence of the background legal rules that underlie both the ability and incentive for localities to act in furtherance of this arrangement while shunning alternatives.³⁷ As Professor Frug argues, the structure of local power that we have today is increasingly tailored toward a particular vision of a locality’s

(2005) (reviewing the attitudes of the federal courts toward practices of segregation inside cities).

34. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990).

35. See Barron, *supra* note 31, at 2334–36.

36. See generally Briffault, *supra* note 34 (pointing to zoning and school funding as two areas where communities try to insulate themselves); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (considering the differences between cities and their suburbs and taking a normative approach to analyze social costs of “our localism”).

37. See GERALD E. FRUG, CITYMAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 3 (1999) (arguing that the fragmentation of our “urban landscape is not simply the result of individual choices about where to live or create a business. It is the product of a multitude of governmental policies[,] . . . [one being] the way[] in which the American legal system has empowered—and failed to empower—cities.”).

"subjectivity" at the exclusion of others—one that is founded on the idea that "boundary lines separate one [locality] from another, each [locality] looks only within to determine its interests, and 'preservation of local interests' is a meaningful goal."³⁸ Denaturalized in this manner, however, localism also suggests that this organization is open to change and should not be seen as permanent, inherent, or inescapable.

Taken together, the vertical and horizontal aspects of localism show that many legal constructions of local power are possible, and that each corresponds with a different conceptualization of localities as communal or political institutions. Thus, it should come as no surprise that the literature surrounding localism often goes beyond the basic questions of what local governments can and cannot do, and toward the more substantive questions of what local governments are and how we should understand their purpose—are they public or private, administrative or political, convenient subdivisions or bonded communities? Drawing from both historical³⁹ and theoretical sources,⁴⁰ much of the study of localism has centered on how to understand the role of local institutions, especially in an ever-changing and ever-expanding world.⁴¹

C. *Applying Localism to Local Immigration Regulations*

When this account of localism is superimposed upon local responses to immigration, traditional frameworks of immigration analysis such as federal exclusivity and immigration federalism are

38. Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 263 (1993).

39. See Barron, *supra* note 31, at 2288–322 (describing the different historical conceptualization of the proper role of municipal government underlying the Home Rule movement); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 496–522 (1999) (contrasting different accounts of local constitutionalism from the late nineteenth century); Frug, *supra* note 25, at 1080–120 (exploring different historical accounts of the public and private aspects of the city); see also *Owen v. City of Independence*, 445 U.S. 622, 638–47 (1980) (describing the municipal corporation's historically hybrid status under the law as both public and private).

40. Frug, *supra* note 25, at 1141–48 (proposing different models of envisioning the local identity or "subjectivity"); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L. J. 145, 187–99 (1977) (comparing the public choice and "public-interest" model of local legal legitimacy); Schragger, *supra* note 26, at 403–16 (contrasting different accounts of "community").

41. Like most academic fields, the new frontier of local and urban scholarship is globalization. See generally MICHAEL PETER SMITH, *TRANSNATIONAL URBANISM: LOCATING GLOBALIZATION* (2001) (describing and critiquing various theories of globalization and urbanism).

seemingly incapable of capturing the nuances and complexities of the various responses. As the localism literature suggests, it is important that we recognize the unique legal posture of local governments and the background legal rules that constrain their conduct and define their identity.⁴² Understood from this perspective, it is possible to see local immigration regulations not simply as an attempt by localities to extend their regulatory reach beyond local affairs, but rather a natural extension of the many ways in which localities exercise, and are expected to exercise, power in service of local interests.

Just as it was important to set forth a working definition of localism, it is equally important to have a functional understanding of local immigration regulations in order to pinpoint the specific ways in which localism and immigration intersect with regard to these enactments. Accordingly, this Section is organized around a taxonomy of local immigration regulations, which teases out the different ways that localities have responded to immigration and their legal and practical consequences. Along with *direct* regulations, where localities are directly involved in the regulation of immigration, this Section also highlights *indirect* and *neutral* regulations of immigration, where localities employ aspects of federal immigration laws in traditional local government regulations or exercise traditional local government regulations in such a manner that the burden falls disproportionately on immigrants. Then, for each, I demonstrate how the various aspects of localism explored above complicate the conventional account of local immigration regulations and how they operate.

1. Direct Regulations and the Vertical Structure of Localism

Local regulatory responses to immigration can take a number of different forms. Probably the most quintessential example of a local immigration regulation today is when localities affirmatively decide to either participate in or spurn federal immigration enforcement efforts.⁴³ This is especially true in light of the dominance of the issue of illegal immigration in the contemporary immigration debates.⁴⁴ It is no wonder that the local regulations that openly try to address this question are the ones most likely to be understood as local immigration regulations. I refer to these collectively as local direct regulations of immigration.

42. See *supra* Part I.B.

43. See Rodríguez, *supra* note 15, at 591.

44. See *infra* notes 45–48.

The days when states and localities set their own de facto immigration policy⁴⁵ and were able to deport immigrants on their own⁴⁶ are long gone. It has also been several decades since cities or towns served as active participants in federal campaigns of immigrant removal—campaigns that, in retrospect, were often of questionable legal legitimacy.⁴⁷ Nevertheless, there is once again interest in the assistance that local officials can provide to federal enforcement efforts, along with growing concern over the impact of immigration enforcement on the provision of local goods and services, and the social fabric of affected communities. As a result, cities and towns across the country have begun considering what direct role, if any, they should assume in the federal government's immigration enforcement efforts.⁴⁸

From a legal perspective, a locality's role in our nation's immigration enforcement regime has long been a controversial subject. On the one hand, a vigorous debate rages over whether local police officials even have the power to enforce federal immigration laws,⁴⁹ with some asserting that such powers should be reserved exclusively for federal officials by nature of federal preemption.⁵⁰ On the other hand, among those who assume local enforcement is permitted, there is disagreement over whether federal immigration laws require local officials to cooperate with the federal

45. See generally, Gerald L. Neuman, *The Lost Century of American Immigration Law (177–875)*, 93 COLUM. L. REV. 1833 (1993) (reviewing state regulation of transborder movement of persons before federal immigration legislation in the 1870s and 1880s).

46. See BURNS, *supra* note 24, at 35–36; Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 LAW & HIST. REV. 583, 638–39 (2001) (detailing the case of the Massachusetts government's deportation of several indigent resident immigrants).

47. See FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 136–51 (2006) (describing local participation in Mexican Repatriation campaign); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 4–10 (2005) (same).

48. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1375 (2006) (describing the various local responses to federal immigration enforcement and exploring some of the underlying considerations); *supra*, note 8.

49. See Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 D.C. L. REV. 83, 84–96 (2004); Kobach, *supra* note 22, at 199–200.

50. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 976–87 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1091–95 (2004).

government,⁵¹ or whether cooperation is solely at the discretion of the local community.⁵² These conflicts are not isolated to the legal academic literature. Indeed, the federal government's own positions on these questions have been inconsistent.⁵³

Congress skirted many of these issues in 1996 when it passed a series of measures to enable and encourage more local participation in federal enforcement efforts. The most prominent of these is section 287(g) of the Immigration and Naturalization Act ("INA"), which specifically established a procedure by which state or local governments can enter into a "memorandum of understanding" ("MOU") with the Department of Homeland Security that sets forth the scope of their intent to assist in federal immigration efforts and the conditions that they must follow in order to receive this federal delegation of power.⁵⁴ It may be too quick for us to assume that a "delegation" of federal immigration enforcement powers in this manner is constitutional.⁵⁵ At the same time, its growing popularity is worth noting. Although section 287(g) was almost entirely ignored in the years after its passage, after the State of Florida reached an agreement in 2002, more than forty states and localities have entered into a MOU with the federal government.⁵⁶

Besides enabling cooperative arrangements, Congress also imposed a series of restrictions on the ability of state and local governments to expressly forbid any other government, agency, or official from cooperating with the federal immigration enforcement

51. See Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 316–20 (1989).

52. See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 61 (1994).

53. See Memorandum for the Attorney General, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002) (concluding that states and localities possess inherent authority to enforce that criminal and civil provisions of the Immigration and Naturalization Act, reversing an earlier opinion by the Office of Legal Counsel), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>; see also Huntington, *supra* note 17, at 801 & n.54 (describing the controversy surrounding the Office of Legal Counsel's opinion in the federal government); Wishnie, *supra* note 50, 1091–92 (assessing the differing views on inherent state and local immigration enforcement authority).

54. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2000).

55. Wishnie, *supra* note 13, at 529–30.

56. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, www.ice.gov/partners/287g/Section287_g.htm (last visited Aug. 24, 2008).

authorities.⁵⁷ The clear target of these provisions were non-enforcement efforts at the local level: so-called “sanctuary” provisions that limited when police or other government employees could inquire about, or act upon, legal immigrant status while serving in their capacity as a municipal employee.⁵⁸ Unlike section 287(g), Congress’s anti-sanctuary measures faced a constitutional challenge almost immediately after they were enacted, which the Second Circuit heard and dismissed in *City of New York v. United States*.⁵⁹ The court held that the provisions in question did not compel state or local governments to enact or administer any federal regulatory programs in violation of the Tenth Amendment or any other constitutional provision; they simply prohibited them from “restricting the *voluntary* exchange of immigration information with” federal immigration officials.⁶⁰ In the court’s eyes, to hold otherwise would be to allow state and local governments to “engage in passive resistance that frustrates federal programs.”⁶¹

Unsurprisingly, questions of formal power dominate the conventional analysis of direct regulations—not only the extent to which local action is preempted by the federal government’s extensive involvement in the field of immigration regulation and enforcement, but also the limits on the federal government’s authority to mandate local action or participation in federal programs. Indeed, the reasoning behind section 287(g) and the anti-sanctuary provisions seems to lie almost entirely in their ability to walk the fine line between these two aspects of federal power. But it would be wrong to assume that only issues of federal power or federalism are implicated with regard to direct regulations of immigration at the local level, or that power and authority in this context are easily mapped and understood. From a localist

57. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2105, 2275 (codified as amended at 8 U.S.C. § 1644 (2000)) (prohibiting state and local governments from restricting government employees from who wish to provide immigration information to federal authorities); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707 (codified as amended at 8 U.S.C. § 1373(2000)) (same).

58. For an overview of local sanctuary policies, see Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466-74 (2006); Pham, *supra* note 48, 1381-95. For an ethnographic history of the roots of the local sanctuary movement in religious activism and the Salvadoran and Guatemalan refugee crisis, see generally SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT* (1993).

59. 179 F.3d 29 (2d Cir. 1999).

60. *Id.* at 35 (emphasis added).

61. *Id.*

perspective, formal authority is complicated by the allocation of power between states and localities. Moreover, formal authority does not always translate into practical authority at the local level, and the context in which authority is exercised can have a tremendous influence on its effectiveness. In other words, when viewed through the vertical structure of localism—the legal relationship between local, state, and federal governments—the line between empowerment and disempowerment at the local level is not always so clear.

One reason for this is that, irrespective of questions of federal preemption or delegation, there is still no independent core of local power. Local power only exists in legal structures defined by state law.⁶² Thus, the ability of localities to engage in regulations of immigration is always open to challenge on these grounds. The absence of federal preemption only partially resolves the legal legitimacy of local action, just as the presence of a federal authorizing statute might not be enough to imbue localities with the power to act. The legitimacy of local direct regulations, like any other local act, must also be sanctioned by a specific delegation of state authority or broad authorizations of power that are liberally construed by the courts.

But this also means that federal intervention can produce counterintuitive results. Because localities are doubly limited by state and federal law, it means that in certain instances efforts to undermine state and local discretion at the federal level can have the opposite effect of actually bolstering local decision-making at the state level. Take, for instance, the federal anti-sanctuary measures described above, which limit the ability of state and local officials to prohibit state and local cooperation with federal immigration authorities. Normally these prohibitions are understood as limitations on local power. In situations where local and federal interests converge, however, they appear to effectuate a radical enlargement of local authority vis-à-vis the state. State and local interests regarding immigration and immigration enforcement often conflict. Thus, it is significant that both section 287(g) and the anti-sanctuary provisions treat states and localities as separate and independent entities. Not only does section 287(g) specifically permit local governments to independently negotiate and draft a MOU with

62. See *supra* notes 26–31 and accompanying text.

the federal government, with or without state authorization,⁶³ but it can be argued that the anti-sanctuary provisions empower localities with preemptive discretion against state interference by compelling the state to tolerate local participation in this program or cooperation with federal immigration officials in other ways.⁶⁴

At this point it is important to recognize that we have moved beyond the standard federal preemption analysis. And considering the well-established subordination of localities to state power, it may be that the legitimacy of section 287(g) and the anti-sanctuary provisions would be more suspect under these circumstances. It is not clear that the federal government, irrespective of its preemption powers, can independently extend or delegate powers to localities—mere “creatures of the state”—without any involvement by the state themselves, much less their opposition.⁶⁵ Nor is it clear that if the municipal non-enforcement decree in *City of New York* was replaced with a state non-enforcement decree depriving local subdivisions of the power to participate in the enforcement of federal immigration laws⁶⁶ that the court would have reached the same conclusion. It is

63. See 8 U.S.C. § 1357(g)(1) (2000) (“[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State.” (emphasis added)); 8 U.S.C. § 1644 (2000) (“[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.” (emphasis added)).

64. To be sure, section 287(g) only allows cooperation “to the extent consistent with State and local law.” 8 U.S.C. § 1357(g)(1) (2000). The question, however, is whether the anti-sanctuary provisions, which specifically void any state law that “prohibit[s], or in any way restrict[s], [local governments] from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status of an alien,” 8 U.S.C. § 1644, prevents states from taking any steps to restrict localities from doing just that through a 287(g) agreement; cf. *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 267–70 (1985) (holding that federal law preempted state effort to restrict how county spent federal funds, but noting that the federal law was based on the federal government’s power to condition receipt of federal funds).

65. See *Nixon v. Missouri Mun. League*, 541 U.S. 125, 135 (2004) (noting that preempting a delegation of power authorizing only certain conduct would free a municipality from that limitation, “but freedom is not authority, and in the absence of some further authorizing legislation the municipality would still be powerless”). The Court also noted a series of other paradoxes that arise when federal preemption affects state-local power relationships. See *id.* at 135–38. Of course, the decision ultimately came down to the statutory construction of a phrase, “all entities,” that is more vague than the legislature’s clear intentions in the anti-sanctuary provisions. See *id.* at 138 (“We think it farfetched that Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase “ability of any entity [was meant to refer to political subdivisions].”).

66. Although not well-publicized, this appears to be the case in some states, including Alaska. This list is constantly evolving, however. See NAT’L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING

one thing for the federal government to usurp the relationship between a locality and its employees,⁶⁷ but upsetting the long-established power of states over their local subdivisions seems to raise a stronger claim that “the structural framework of dual sovereignty” is compromised.⁶⁸ Notwithstanding plenary power or the perceived “exceptionalism” of immigration, it is not clear that courts would be keen to allow the federal government to reconfigure the political and power structure of states through this constitutional backdoor as a regulation of immigration, especially when the tie to immigration is indirect.⁶⁹ Of course, all of this only further emphasizes the difference between states and localities when they act in the realm of immigration, and how the complexities introduced by localism are not easily resolved through the existing debates about federal delegation versus inherent authority in the local immigration context.

When we move from formal to practical authority, the localist perspective reveals another set of nuances. Many commentators have noted the unique ways that local power manifests in practice. For example, stressing the lack of a neutral baseline for local authority, some scholars have observed that central lawmaking that preempts local discretion or usurps local power in the formal sense can actually have the opposite effect in a practical sense by unshackling localities from other legal or structural constraints.⁷⁰ Other commentators, noting that localities are formally separate and distinct from the hierarchy of federal power because they are subdivisions of the state and not the federal government, observe that even if this “formal separation of powers maintains the locality’s legal autonomy,” it also means that “local officials might have little influence over policy when central governments do intervene or in cases in which the city

ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES, http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2008-04-15.pdf (last visited Aug. 24, 2008).

67. *But see* Nat’l League of Cities v. Usery, 426 U.S. 833, 854–55 (1976) (holding that Congress cannot regulate the employer-employee relationship between a municipality and its employees by establishing a minimum wage without infringing upon a state’s constitutionally-protected and independent sovereignty), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

68. *Printz v. United States*, 521 U.S. 898, 942 (1997).

69. For an argument that the evolving jurisprudence of federalism suggest that there is a limit to federal power over immigration, much like the limits that have been established with regards to the federal government’s use of the Commerce Clause, see Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT’L L. 179, 187–91 (2008).

70. *See, e.g.*, David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 383 (2001).

would otherwise desire intervention.”⁷¹ Taken together, these views suggest that, from a localist perspective, the effect of assuming or disavowing federal immigration enforcement powers at the local level does not necessarily map easily upon the traditional federalist framework of centralized and decentralized power.

One way these observations come into play in the context of local immigration regulations is that, counter-intuitively, for communities concerned about the detrimental effects of immigration enforcement on their community, entering into enforcement MOUs with the federal government pursuant to section 287(g) may be a more effective tool than sanctuary provisions. This is because MOUs offer cities and towns a seat at a table that usually excludes their presence. The fact is that, irrespective of whether a locality voluntarily participates in federal enforcement activity or aggressively resists cooperation, the local field offices of the federal government’s enforcement apparatus will continue to carry out its assigned task—possibly in a manner that raises local concerns. To some, this supports the argument that sanctuary and other local noncooperation efforts should not be struck down for frustrating federal enforcement objectives.⁷² But it also suggests that, rather than disengagement, direct participation through cooperative arrangements—or even assuming primary immigration enforcement responsibilities altogether—might actually be a more effective tool for balancing the needs of the community and the enforcement interests of the federal government.⁷³

Another is to recognize that local involvement in immigration regulations is not always solely or even primarily concerned about

71. Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2563 (2006).

72. See Rodríguez, *supra* note 15, at 617–27.

73. For example, Miriam Wells describes how a series of federal arrests by federal immigration officials that angered local residents of California’s Salinas Valley ultimately led to an agreement with the local INS branch that “limited INS enforcement activity in the region to the deportation of aliens convicted of a felony,” which “sharply reduced INS raids and random apprehensions in the area.” Miriam J. Wells, *The Grassroots Reconfiguration of U.S. Immigration Policy*, 38 INT’L MIGRATION REV. 1308, 1327 (2004). When an incident involving the INS in 2001 angered residents, they acted through the city council by enacting a resolution challenging their conduct and reasserting the earlier agreement. *Id.* at 1330. As a result, INS administrators relented and agreed to return to its earlier practice. *Id.* at 1330–31.

To be sure, sanctuary policies are often thought to offer the symbolic value of distancing local officials from federal officials in an effort to build trust with local communities. It is not clear, however, whether the nuance of this message is widely conveyed, especially when federal agents are aggressively raiding homes and employers for immigration violators in a particular community.

immigration per se, but in an attempt to circumvent or negotiate obligations and constraints that have been imposed by state law. Thus, instead of being a sign of local power with regard to immigration, local immigration regulations may simply be a consequence of local powerlessness in another context. For example, many of the localities that have assumed federal immigration powers through section 287(g) have not done so with a desire to efface the federal-local line by enlisting with federal enforcement efforts. Rather, the intention is often to further reinforce the federal-local divide by trying to distinguish federal from local responsibilities in an attempt to save on local costs over which local governments have little control.⁷⁴ In this way, they have much in common with local sanctuary provisions. More than symbolic resistance to federal immigration policy, most local non-enforcement provisions are simply calculated attempts to avoid spending local funds on immigration enforcement, especially in a way that would make provision of other local services as required by state law less effective or efficient in the process.⁷⁵ Indeed, it is interesting to note that, notwithstanding the fact that these two local responses are portrayed as polar extremes, most local immigration policies exhibit features of both responses—cooperation and noncooperation—simultaneously.⁷⁶

74. For instance, the most common MOU between local and federal authorities involves instituting immigration screening of county jails. The underlying motivations, however, are commonly to save on county prison costs by transferring inmates with immigration violations to federal authorities before they serve out their full sentence, or invoking the MOU to receive federal funds for their incarceration in county facilities. See, e.g., Matthew DeFour, *Crackdown on Illegal Spurs Debate: Federal Governments Gets Varied Cooperation from State Law Enforcement Agencies*, WIS. ST. J., Feb. 16, 2008, at A1; see also *infra* text accompanying notes 133–56.

75. See, e.g., James Pinkerton, *Police Chief Defends His Immigration Law Stance: Hurt Says HPD Won't Train to Help ICE Enforce Federal Policy*, HOUSTON CHRON., Feb. 1, 2008, at 1A (describing Houston Police Chief's decisions not to participate in local immigration enforcement on the basis of costs and quality of local policing services); Karen E. Crummy, *A Reluctant Enforcer City Cites Fiscal, Social Costs of Policing Immigrants*, DENVER POST, May 31, 2005, at 1A (same); see also Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1477–78 (2006) (describing localities enacting sanctuary policies in order to encourage trust between police and immigrant communities, and because of concerns that local immigration enforcement is a drain on local resources); *Rodríguez*, *supra* note 15, at 604 (same).

76. For example, although New York is assumed to be the quintessential “sanctuary” city, the executive order which now promulgates this policy prohibits sharing of information in certain contexts, but does not prohibit cooperation in others, such as with regard to an individual suspected of committing illegal activity unrelated to federal immigration laws. See Exec. Order No. 41, The City of New York Office of the Mayor (Sept. 17, 2003), available at http://www.friendsfw.org/Immigrant/NYC/NYC_eo41_091703.pdf. In this regard, it is quite similar to communities that have embraced 287(g)

In short, the brief examination here shows that the binary structure of power and powerlessness, which dominates most conventional analyses of local immigration regulations, is inadequate as a model for understanding the vertical structure of power from a local perspective. The power to implement or reject immigration enforcement efforts at the local level, and what benefits may be derived or lost in doing so, cannot be understood apart from the existing local legal structure that defines local incentives and channels local action. As the next Section demonstrates, this is especially important when we move beyond the vertical power structure of localities and start considering how the horizontal relationship between localities affects our understanding of local immigration regulations.

2. Indirect Regulations and the Horizontal Framework of Localism

Direct enforcement at the local level may be the most straightforward way for a locality to get involved with the regulation of immigration, just as direct non-enforcement appears to be the most basic way for a community to resist. But these are not the only ways in which localities have sought to regulate immigration flows or control the impact of immigration on their community. Indeed, localities are also beginning to employ regulatory schemes that employ statuses defined by federal immigration laws but do not directly intersect with federal enforcement efforts. I refer to these as indirect regulations of immigration.⁷⁷

Indirect regulations rely on federal immigration laws to mark out the targeted group, but operate by redefining the immigrant's relationship with the local community. This could involve delineating

programs in their county jails, but have made no other effort to incorporate immigration enforcement into any other aspect of local governance. *See, e.g., Pinkerton, supra* note 75.

77. Some may argue that I have neglected another type of local engagement with immigration: indirect benefits to immigrants. To be sure, Section I specifically addressed instances where localities purposefully limited their cooperation with federal immigration authorities in certain contexts, which is often interpreted as favorable to illegal immigrants. There has also been recent controversy over policies that purportedly "give" privileges like driver's licenses to illegal immigrants by simply not checking for citizenship or legal status in the application process. I avoid this category for two reasons. First, like the vast majority of communities that have neither instituted a section 287(g) plan nor implemented a noncooperation decree, most of these cases often reflect the middle position where a locality has not taken any regulatory stance regarding the immigration issue. Moreover, this path is potentially endless—cities that have no explicit policies could presumably be characterized as affirmatively giving illegal immigrants the right to use their sidewalks, rely on police protection, patronize their stores, recreate in their parks, etc.

the ways in which residents and other private actors are permitted to interact with certain groups of immigrants in the community; or it might entail adjusting who is entitled to certain local government services and how those services are provided. In both cases, indirect regulations almost always invoke powers that are traditionally allocated to localities although they rely, at least facially, on classifications designated by federal law.⁷⁸

Though by no means the first, a pair of ordinances adopted by the Town of Hazleton in Eastern Pennsylvania is by far the most well-known indirect regulation effort at the local level. Not only have these ordinances received tremendous attention since they were passed in 2006, but they have also served as a prototype for communities across the country.⁷⁹ Hazleton's ordinances involved two major components. First, Hazleton made it illegal for any landlord to rent to illegal immigrants by requiring landlords to verify that all tenants possessed a municipal occupancy permit, which could only be obtained by showing evidence of legal residency or citizenship.⁸⁰ Second, Hazleton adopted an ordinance that allowed the town to suspend or revoke the license of any business that hired illegal immigrants—in essence attaching additional penalties to conduct that was already prohibited by federal law.⁸¹ Legal

78. In this regard, indirect immigration regulations can be said to more closely resemble alienage regulations in traditional immigration law, as opposed to more conventional immigration questions such as admission and removal. To be sure, the ability of states and localities to treat noncitizens differently from citizens, especially with regard to economic rights and benefits, has been severely curtailed in recent decades by the Supreme Court on equal protection and federal preemption grounds. See *Graham v. Richardson*, 403 U.S. 365, 377–78 (1971). Most indirect regulations today, however, target illegal immigrants, a subgroup of immigrants and noncitizens that has been accorded different treatment in Supreme Court jurisprudence. See *De Canas v. Bica*, 424 U.S. 351, 362–63 (1976) (upholding California statute that regulated the employment of illegal immigrants in part because such regulations accorded with federal law). These policies often have notable effects on legal residents and American citizens as well because of the prevalence of so-called “mixed status” families. See, e.g., Kelly Brewington, *Broken Families: Tough Enforcement of Immigration Law Has the Painful Side Effect of Deporting Parents of U.S.-Born Kids*, THE SUN (Baltimore, Md.), Jan. 26, 2008, at 1A.

79. See, e.g., Ray Quintanilla, *Towns' Melting Pots Boil Anxiety: Influx of Hispanic Immigrants Causes Tension for Some*, CHI. TRIB., May 29, 2007, at 1 (describing a proposed local immigration regulation in Carpentersville “modeled after” Hazleton's); *Immigration Battlefronts: Farmers Branch Should Sit Out Appeals Process*, DALLAS MORNING NEWS, Oct. 2, 2007, at 20A (same for the City of Farmer's Branch); Chris Echegaray & Yadira Caro, *Cities Propose Immigration Penalties*, TAMPA TRIB. (FLA.), July 9, 2006, at 1 (same for the City of Avon Park).

80. Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0020.pdf>.

81. Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0010.pdf>.

challenges were instituted against Hazleton and other copycat communities on federal preemption and other legal grounds immediately after they were enacted. Thus far, the district courts that have ruled on these claims have split on the results.⁸²

Indirect regulations do not give localities the type of immediate control (or sense of control) that direct enforcements offer. Nevertheless, they proffer certain advantages that make them popular options. First, they allow localities a means to enforce immigration laws “on the cheap.” Instead of working to expel illegal immigrants directly, indirect regulations promote self-removal by depriving access to valuable or necessary resources in the community. Moreover, front-line screening responsibilities are often delegated to private parties. Second, indirect regulations allow localities to tailor their regulatory controls such that, instead of excluding solely on the basis of federal immigration grounds, they can take additional local concerns into consideration. This means that they can exclude only those immigrants considered undesirable to the community, such as renters or common employees. This is particularly useful when local measures of desirability do not correspond perfectly with federal immigration statutes. In addition, instead of relying on federal deportation, a relatively inconvenient tool and one outside of their immediate control, local communities can address the perceived costs by targeting them directly. In short, through indirect regulations, a local community need not treat all illegal immigrants in the same way even if the federal government recognizes no distinctions—it can effectively set its own admissions criteria, even (or especially) if they differ from federal standards.

As an initial matter, it is worth noting that indirect regulations raise the same concerns about the vertical aspects of local power considered above. Indeed, in both *Lozano v. City of Hazleton* and *Gray v. City of Valley Park*, the two most recent federal cases to consider the legality of indirect regulations, the courts were also confronted with state claims that challenged the localities’ powers to enact such measures without specific delegations by the state. As a whole, the courts found that the state’s authorization was extensive enough to justify the city’s use of these powers to regulate

82. Compare *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 521–29 (M.D.Pa. 2007) (finding the indirect regulations to be violative of state law), with *Gray v. City of Valley Park*, No. 4:07-cv-00881, 2008 WL 294294 at *18–19 (E.D.Mo. Jan. 31, 2008) (upholding the validity of the local ordinance).

immigration.⁸³ Interestingly, however, both of the communities involved were in states that have either given their localities extensive delegations of power or have maintained a relatively strong tradition of deferring to local action.⁸⁴ Thus, in states where the scope of local power is interpreted more narrowly, it is possible that similar legal challenges may prove to be more effective than federal preemption for those seeking to strike down these local efforts. Not only will this likely be true in strong “Dillon’s Rule” states where all local activities require explicit and direct authorization by the state,⁸⁵ but it will also likely prove to be useful in many “home rule” states as well, especially those in which the delegation of “home rule” powers are accompanied by specific prohibitions against “enact[ing] private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power.”⁸⁶

83. See *Gray*, 2008 WL 294294, at *29–30; *Lozano*, 496 F. Supp. 2d, at 548–54. The *Lozano* court found the private cause of action that Hazleton’s ordinance created for employees fired from a workplace that was suspected of hiring illegal immigrants to be contrary to state law. *Id.* at 551–52. This was but a small part of the overall regulatory scheme.

84. See *County of Del. v. Twp. of Middletown*, 511 A.2d 811, 813 (Pa. 1986) (holding that grants of municipal power in Pennsylvania “shall be liberally construed in favor of the municipality” and “[i]n analyzing a home rule municipality’s exercise of power, [the court] begin[s] with the view that it is valid absent a limitation found in the Constitution, the acts of the General Assembly, or the charter itself, and we resolve ambiguities in favor of the municipality”). Chartered home rule cities in Missouri have extensive powers as well, but this does not apply to so-called statutory cities, of which Valley Park seems to be one. See *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 210–12 (Mo. 1986). Plaintiffs in *Gray* only raised the municipal power issue with respect to the City of Valley Park’s licensing restriction, which the court found to be within the general licensing powers delegated to the municipality from the state. See *Gray*, 2008 WL 294294, at *29–30. It is not clear if higher courts will reach the same result when considering a municipal power challenge directed at the city’s landlord-tenant provisions.

85. Cf. *Olesen v. Town of Hurley*, 691 N.W.2d 324, 328–29 (S.D. 2004) (holding that town was not permitted to serve food in a town-owned bar because the state had authorized the town to run a bar, but not a restaurant).

86. See, e.g., *Marshall House Inc. v. Rent Review & Grievance Bd.*, 260 N.E.2d 200, 206–08 (Mass. 1970) (striking down local rent control ordinance because it violated the “civil relationship” prohibition by regulating the landlord-tenant relationship); cf. *City of Atlanta v. McKinney*, 454 S.E.2d 517, 522 (Ga. 1995) (same with regard to local ordinance extending employee benefits for city employees to domestic partners). Judges in other states have reached similar interpretations with regard to local minimum wage ordinances on the grounds that it interfered with the “civil relationship” between employers and employees. See *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 S.2d 1098, 1108–11 (La. 2002) (Calogero, C.J., concurring in the result). Considering that Hazleton-type ordinances are aimed primarily at these two relationships, a strong argument can be made that home rule states with this or related prohibitions would not allow their localities to regulate in this manner.

Other than issues of formal power and the vertical relationship of localities vis-à-vis the state and federal government, indirect regulations also implicate another aspect of localism—the horizontal relationship between localities. For those interested in immigration federalism, the flexibility of indirect regulations raises the possibility that their extensive use will promote the laudable goals of local experimentation and innovation. Noting the complexities of the immigration issue, they are cautiously championing the emergence of indirect regulations as a means by which the promises of federalism can be realized in the immigration context;⁸⁷ and altering the draconian standards of federal exclusivity and preemption in this field, they contend, will allow us to further promote these types of regulatory experiments on the ground.⁸⁸

There is much to be gained from this insight. Yet, it is important that we embark on this path with a clear understanding of the institutional constraints that are unique to localities and recognize their effect on the manner in which localities exercise their power. In contrast to states, localities are not only bound to responsibilities defined by state law that are beyond their ability to disavow or modify, but they are also embedded in institutional arrangements with neighboring communities that greatly affect the reach of their formal power and the internal or external consequences of their actions. These structural constraints are not only limitations on the powers that local governments can exercise; oftentimes they are also constitutive determinants of the goals and desires—indeed, the very identity—of local institutional actors. In other words, even if expressly sanctioned, local experimentation may not necessarily generate an inventory of innovative responses to immigration and immigration enforcement from which policies for federal or widespread local adoption can be selected. Rather, it may simply produce a series of limited strategies for local advantage that are guided primarily by established background legal rules—strategies that may be little different than those already being employed, aside, of course, from their reliance on immigration-related openings that are or will be made available.

It is here that we have to recall that the vertical allocation of power is only one component of localism. The other is the horizontal aspect that emphasizes the relationship and competition between local institutions, and the legal structure that establishes both the

87. See, e.g., Huntington, *supra* note 17, at 845–46; Rodríguez, *supra* note 15, at 609.

88. See Huntington, *supra* note 17, at 845–46; Rodríguez, *supra* note 15, at 609.

terms and objectives of that contest. Localism defines the resources and services that are allocated in accordance with local boundaries, and it establishes the ways in which local communities are empowered to control who is entitled to these services and made to pay the costs. How a locality balances these two ultimately determines the character of a community.

Much of the geographic organization of American society can be attributed to the vertical and horizontal aspects of localism, and the manner in which they mutually relate.⁸⁹ Notwithstanding their apparent novelty, most local immigration regulations mirror this structure as well: prompted by concerns about community character, impact on local services, and socioeconomic redistribution, they seek no more than to exclude those deemed responsible from the arbitrary but meaningful confines of the community's local boundaries. In advocating for more decentralization of immigration responsibilities, some scholars have drawn attention to the risk of one community's conduct imposing externalities upon another.⁹⁰ Nevertheless, it is not clear that externalities are unintended byproducts of localism that can be avoided; at a certain level, imposing and managing externalities is precisely how local communities are made.⁹¹

Indeed, these were precisely the factors that were at the root of the Hazleton ordinances. The rationale that Hazleton articulated—financial burden on local services, diminishing quality of life, and nuisance⁹²—are not only concerns that are intimately local, but also ones that are not necessarily or immediately related to illegal or even foreign immigrants per se. Furthermore, although the court challenge against Hazleton revolved around a legal question, it is worth noting that much of the trial was dedicated to determining whether recent demographic changes led to higher crime rates, “subject[ed] . . . hospitals to fiscal hardship and legal residents to substandard quality

89. See generally Schragger, *supra* note 26; FRUG, *supra* note 37; Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (describing the ways that the horizontal and vertical aspects of localism relate to each other).

90. See Huntington, *supra* note 17, at 835; Rodríguez, *supra* note 15, at 638–40.

91. See Schragger, *supra* note 26, at 459 (arguing that “the definitional work of ‘community’ is accomplished interstitially—at the borders *between* places” and that “the choice for courts and policy-makers is not between respect for the local or the force of the universal, but between the competing force of alternative localisms”); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2011 (2000) (book review) (“Community building, sadly, might be critically related to the building of walls.”).

92. See Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), *available at* <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0010.pdf>.

of care, [or] contribute[d] to other burdens on public services” such as education.⁹³ As the district judge seemed to acknowledge, this case was as much about foreign immigration as it was about the transition of the old Hazleton of roughly 23,000 residents into the new Hazleton, fifty percent larger and composed of large numbers of “Latino families [that] moved from New York and New Jersey to Hazleton seeking a better life, employment and affordable housing.”⁹⁴

The problem that Hazleton poses for proponents of immigration federalism interested in local experimentation lies not in the fact that communities like Hazleton will seek to reject immigrants on the basis of community or local concerns as opposed to federal immigration-related considerations. Indeed, the purpose of promoting local experimentation is precisely so that local concerns can be quickly factored into the broader immigration discourse, and the consequences of their diverse actions (i.e., steps to exclude and steps to embrace) can be effectively assessed. The problem lies in the fact that communities like Hazleton are not isolated entities, and both their responses and the consequences of their responses are tied to broader structural arrangements that make certain actions more effective than others. Thus, certain communities may benefit from taking specific actions, and be incentivized to do so because of the particular significance that the current local legal structure places upon residency and municipal boundaries. Those that look like they are benefiting from their actions under the current local legal regime, however, may fare quite differently if particular background rules are changed—for example if local public goods like education, or local receipts through property or sales taxes, were not allocated according to municipal boundary lines. In light of this, what local activity or local “experimentalism” may tell us about immigration policy as a whole may be very limited. Indeed, at the most fundamental level, they will likely be simple reflections of the legal and incentive structure of localism and the horizontal relationship between neighboring communities.

Of course, all of this is not to say that indirect regulations of immigration are not, in a very real sense, local regulations of immigration. It is to point out, however, that local regulations of immigration cannot be easily separated from local regulations more generally. As such, we must be cognizant of the overarching, though

93. *Id.*; see also Transcript of Record at vol. 1, 8–17, 23–30, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 06-1586), available at <http://www.aclupa.org/downloads/lozano1.pdf>.

94. *Lozano*, 496 F. Supp. 2d at 484.

oft-ignored, influence that local background rules have in influencing local involvement in immigration.

3. Neutral Regulations and the Internal Aspects of Localism

Thus far, we have considered local regulations that rely in some way on federal immigration laws and the legal categories that they establish. Local responses to immigration, however, have not been limited to these types of regulations alone. Indeed, one of the most common local responses to immigration does not invoke federal immigration laws at all. I refer to these as neutral regulations of immigration.

In contrast to other local immigration regulations, the connection between neutral regulations and immigration is often not clear at first blush. This is because neutral regulations ordinarily involve exercises of power that are traditionally associated with local governments, such as land-use zoning, quality of life ordinances, or the allocation of local resources. Thus, on their face, neutral regulations generally do not differ much from any number of local ordinances or policymaking activities that localities undertake in furtherance of conventional local interests. What distinguishes neutral regulations, however, is that they tend to have a disproportionate effect on immigrants, and are often enacted and enforced precisely for this reason. Indeed, even though they do not invoke immigration or immigration laws directly, there is usually little doubt among the parties involved with neutral regulations that immigration and immigrant status play a significant role. In practice, neutral regulations share much in terms of motivations and consequences with more conventional local immigration regulations.

Notwithstanding the roundabout nature of neutral regulations, they represent some of the earliest attempts to address immigration at the local level. The particular way in which the City of San Francisco sought to enforce its laundry licensing requirements in *Yick Wo v. Hopkins*⁹⁵ against Chinese immigrants at the end of the nineteenth century is one example. Another is the widespread use of public health and safety regulations to either “quarantine” immigrants within specific neighborhoods,⁹⁶ or prevent their landing altogether.⁹⁷

95. 118 U.S. 356 (1886).

96. See HOWARD MARKEL, *QUARANTINE!: EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892*, at 187–89 (1997); SUSAN CRADDOCK, *CITY OF PLAGUES: DISEASE, POVERTY, AND DEVIANCE IN SAN FRANCISCO* 126–36 (2000).

Similar uses of neutral regulations are afoot today. Local governments all across the country have turned to housing and zoning code provisions governing residential overcrowding to address influxes of low-income, predominantly Hispanic immigrants who are more likely to share housing with extended family members.⁹⁸ Anti-loitering and other quality of life measures have been used to remove congregations of immigrant day-laborers in public spaces.⁹⁹ And although mostly symbolic, English-only ordinances have been used to further broadcast local resistance to immigrants.¹⁰⁰ None of these specifically target immigrants or rely on federal immigration laws. But at the same time it is clear that these regulations concern immigration in a very real way.

In addition, immigration is factoring into policymaking at the local level, which constitutes another aspect of neutral regulations. Localities are responsible for making a number of decisions that

97. See *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 380 (1902).

98. Thus, communities like Farmingville on Long Island, New York, and Dana Point in Southern California both stepped up housing code enforcement primarily in response to the large number of Hispanic immigrants who were living in crowded housing conditions. See DALE MAHARIDGE, *THE COMING WHITE MINORITY: CALIFORNIA'S ERUPTIONS AND AMERICA'S FUTURE* 56–58 (1996) (describing struggles over housing inspections in Dana Point, California); Paul Vitello, *Farmingville's Rock and Hard Place*, N.Y. TIMES (Long Island ed.), July 3, 2005, at 14LI (raids in town of Brookhaven in Farmingville). Similarly, the City of Santa Ana in California revised local standards over what constitutes overcrowding—a revision that would have instantly rendered more than half of the immigrant households in the community illegal—in response to the influx of immigrants residing in multi-family housing initially designed to attract young couples and “yuppies”; while others have considered redefining what constitutes a “family” for zoning purposes in order to exclude immigrant households, which often contain more extended family members than native households. See Stacy Harwood & Dowell Myers, *The Dynamics of Immigration and Local Governance in Santa Ana: Neighborhood Activism, Overcrowding, and Land-Use Policy*, 30 POL’Y STUD. J. 70, 75–77 (2002).

99. See, e.g., ROBIN TOMA & JILL ESBENSHADE, LOS ANGELES COUNTY HUMAN RELATIONS COMM., *DAY LABORER HIRING SITES: CONSTRUCTIVE APPROACHES TO COMMUNITY CONFLICT* 7, 23 (2001), available at www.ncjrs.gov/pdffiles1/bja/189914.pdf; Monica W. Varsanyi, *Immigration Policing Through the Backdoor: City Ordinances, the “Right to the City,” and the Exclusion of Undocumented Day Laborers*, 29 URBAN GEOGRAPHY 29, 35–36 (2008); see also Complaint for Injunctive and Declaratory Relief, Lopez v. Town of Cave Creek, No. 2:08-cv-00566-ROS (D. Ariz. Mar. 25, 2008), available at http://www.aclu.org/images/asset_upload_file766_34642.pdf (First and Fourteenth Amendment complaint against local anti-solicitation ordinance directed at immigrant day-laborers); Bill Turque, *Herndon to Shut Down Center for Day Laborers*, WASH. POST, Sept. 6, 2007, at 1A (describing the success of a similar legal challenge); Juan Xiloj-Itzep et al. v. City of Agoura Hills, 29 Cal. Rptr. 2d 879 (Cal. Ct. App. 1994) (rejecting a similar legal challenge).

100. See, e.g., Howard Witt, *It's Official: English-Only Movement Gains Traction: Hispanic Leaders Alarmed*, CHI. TRIB., Oct. 15, 2006, at 4.

affect the provision of services in that community. Although these decisions are ordinarily mundane in substance and narrow in scope, there are hints that more and more of them are being made with an eye toward their effect on immigrant newcomers. For example, there are accounts that communities have rejected bond issues to build new schools in part because residents perceived the benefits of new schools as going primarily to the immigrant children who represent a larger percentage of the school-age population than the general population.¹⁰¹ There are also concerns that certain services are being underfunded, or eliminated altogether, because the perception is that they are disproportionately used by “foreigners.”¹⁰²

Again, neutral regulations offer certain advantages. Like direct regulations, neutral regulations rely primarily on municipal action, and thus give local communities substantial control over when and how they are used. Like indirect regulations, they can be tailored to target activities and conduct that are not necessarily considered relevant under federal immigration laws. Because neutral regulations do not rely on federal immigration laws at all, however, they can go further than regulations that target individuals purely on the basis of their immigration status. Moreover, because they are based on neutral criteria, many of these measures are difficult to distinguish from local regulations that are within the purview of local governments to adopt.

Not unlike their direct and indirect counterparts, neutral regulations of immigration implicate both the vertical and horizontal aspects of localism. Even though neutral regulations tend to rely on more traditional local powers, questions about delegations of state power and state preemption are involved, and many neutral regulations have been struck down on these grounds.¹⁰³ Horizontal concerns are implicated as well. To the extent that neutral

101. Editorial, (*En*)forcing the Issue, NEWS & REC. (Greensboro, N.C.), Nov. 29, 2005, at A10.

102. For example, Maharidge notes that, in California, “[m]any people on the front lines of government and social services now view the passage of Proposition 13,” a radical property tax-cutting measure that greatly starved California schools and placed tremendous fiscal pressure on localities, “as a turning point in the disassociation of white society from the growing number of ‘strangers’ among them.” MAHARIDGE, *supra* note 98, at 4.

103. Indeed, there has been notable success against neutral regulations on these grounds. See *Valdez v. Town of Brookhaven*, No. 05-cv-4323JSARL, 2005 WL 3454708, at *14–16 (E.D.N.Y. Dec. 15, 2005) (enjoining manner in which raids in Brookhaven were conducted for violating state law process); *Briseno v. City of Santa Ana*, 8 Cal. Rptr. 2d 486, 488–90 (1992) (holding that Santa Ana’s occupancy limits were preempted by state law).

regulations are even more difficult to distinguish from more traditional efforts at communal self-definition or self-determination than indirect regulations, it is often the case that they tend to be more concerned about the local spatial residency of immigrants in their jurisdiction than their presence in the United States as a whole.

More importantly, the similarity between neutral regulations of immigration and more traditional regulations illustrates the thin line that separates what are considered local immigration regulations and what are simply consequences of how we organize and define local communities in American society. What is characterized by some as a novel attempt to regulate immigration at the local level may be understood by others as nothing more than a local effort at community self-definition and self-determination.¹⁰⁴ At first, we might feel there is a tangible difference between a community that wishes to, for example, define itself as family-friendly by imposing strict limitations on what kind of properties are developed and how those developments can be used, and another community that wishes to expel illegal immigrants or immigrant "foreigners" from its territorial jurisdiction. Indeed, whereas the Supreme Court has historically been quite sympathetic to local efforts to maintain a specific community character,¹⁰⁵ even going so far as to applaud local efforts to maintain a communal refuge "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people,"¹⁰⁶ it has often raised questions about state and local attempts to distinguish on the basis of alienage¹⁰⁷ or

104. See, e.g., Charisse Jones, *Crowded Houses Gaining Attention in Suburbs: As Population of Immigrants Rise, So Do Measures to Limit Occupancy*, USA TODAY, Jan. 31, 2006, at 5A (describing "anti-immigrant" raids on overcrowded single-family housing occupied by immigrants as being prompted in part "by complaints from neighbors that their property values are being jeopardized by multiple cars parked in front of houses, trash, unsanitary conditions and fire hazards," and noting that some feel " '[p]eople who are concerned about this are not necessarily motivated by racial or ethnic animus but a sense the place is going downhill' ").

105. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269 (1977) (finding that, even though zoning decisions "bear more heavily on racial minorities," the designation is legitimate in light of the fact that "[s]ingle-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (upholding municipal zoning in part due to deference for attempts by communities to preserve a certain character). But see *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447-50 (1985) (finding no rational basis for the community's decision to require and deny a special use permit for the building and operation of a group home for the mentally retarded).

106. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

107. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 378 (1971) (holding that states lacked the power to deny or limit state welfare benefits on the basis of alienage);

legal status.¹⁰⁸ But as the discussion of neutral regulations illustrates, what appears to be an easy distinction in theory does not always translate into one in practice.

This ambiguity does not disappear when we move away from the category of neutral regulations. It is true that neutral regulations stand out because they do not invoke or rely on federal immigration laws directly; and, admittedly, it is precisely this feature that makes neutral regulations such a convenient example with which to challenge the traditional immigration-oriented reading of local immigration regulations. But once this ambiguity is acknowledged in the neutral regulation context, more traditional forms of local immigration regulations can also be understood in the same light. Indeed, as the earlier accounts of direct and indirect regulations have shown, few have been enacted with federal enforcement efforts or even national immigration interests primarily in mind. In most cases, immigration law appears more like a tool in service of a local objective, rather than an objective in itself. This is further supported by the fact that at every step—the need to rely on immigration laws, the reason for seeking a certain objective, the means by which that objective would be served—some aspect of localism is at play.

* * *

The taxonomy above shows that local responses to immigration can take a number of regulatory forms. It also demonstrates that each of these forms not only involve different relationships with federal immigration laws, but because of this, each offer certain advantages at specific costs. Many of these nuances, however, are hidden in conventional studies of local immigration regulation. Neither federal exclusivity nor federalism offers a satisfactory account of the various aspects and permutations of local immigration regulations described above.

Parsed in this manner, it is possible to see how localism affects traditional understanding of local immigration regulations. This Part has used different stylized iterations of the local response to

Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948) (same with regard to fishing licenses). *But see, e.g.,* Clarke v. Deckebach, 274 U.S. 392, 396–97 (1927) (upholding local ordinance forbidding noncitizens from operating pool and billiard rooms).

108. *See Plyler v. Doe*, 457 U.S. 202, 228–30 (1982) (forbidding states from denying free public education to undocumented children). *But see* *De Canas v. Bica*, 424 U.S. 351, 354–56 (1976) (dismissing challenge against state law regulating the employment of illegal immigrants before federal prohibition of the same was enacted).

immigration to illustrate different aspects of localism that are implicated. Although I do so for demonstrative purposes, it is important to recognize that the actual role of localism is not so cabined. The relevance of the legal background rules that define both the power and the identity of local institutions is pervasive. And as the next Part demonstrates, this relevance is even more apparent when one focuses on the specific circumstances and local legal structure within which local immigration regulations are being enacted in certain jurisdictions.

II. IMMIGRATION AND LOCALISM IN CONTEXT: THE COMMUNITIES OF NORTH CAROLINA

We have now seen an initial account of how localism complicates the conventional understanding of local immigration regulations. To truly understand this relationship, however, it is also important to examine the legal contexts and factual circumstances from which local responses are emerging. This requires depth and detail that has been lacking thus far. Local legal structures vary from state to state, and communities around the country are facing dissimilar sets of pressures and issues. Of course, a comprehensive survey that examines these different permutations in all the jurisdictions that have enacted or are considering local immigration regulations would most likely suffer from diminishing returns. Thus, this Part compromises by focusing on communities in one jurisdiction—those in the State of North Carolina.

Focusing on communities in North Carolina offers three advantages. First, because these communities are just beginning to see immigration as a pressing local issue, it gives us a window into the early stages of this process when the state is still at a crucial crossroads. Second, because immigration is but one aspect of the monumental changes that North Carolina communities are experiencing, it allows us to look at how immigration pressures intersect with other transitional forces and external constraints. And third, city and county governments in North Carolina operate under a localist structure that varies in unique ways from those in other states. Through this we can further explore the impact of localism by examining how particular background legal rules influence community-level responses to immigration.

This Section does not set out to present a definitive account of the local response to immigration in North Carolina. Just as the conventional federal- and immigration-oriented frameworks fail to fully capture all the nuances and complexities of local immigration

regulations more generally, the localist account presented here is intended to be just one aspect of a larger picture. But seeing how a localist orientation plays out in a state like North Carolina reinforces the need for such an outlook in our conversation about the role of local institutions in our immigration regime. Moreover, as the next Part will explore in more detail, it suggests avenues apart from those involving immigration law or doctrine that might be promising for future consideration.

A. *A Conventional Account*

Not long ago, few residents in the communities of North Carolina would have considered immigration to be a local issue. This is no longer the case. For many, the massive influx of immigrant residents that took place in the last two decades has brought the issue to their doorsteps. Since 1990, the foreign-born population in North Carolina increased at a faster rate than any other state.¹⁰⁹ And considering that an estimated forty percent of the state's Latino residents, who make up the vast majority of its new foreign-born residents, are illegal immigrants,¹¹⁰ it is no wonder that immigration has become such a volatile issue in municipal and county politics.

But numbers only capture one aspect of this demographic trend. Another is the perceptible effect this has had on the social and physical landscape of the state's local communities. Immigrant neighborhoods are now becoming permanent features of North Carolina's rapidly expanding metropolitan regions, while many communities in its rural counties are undergoing wholesale transformations due to this influx. In Charlotte, signs of this can be seen in the Latino-oriented shops and storefronts that have sprung up

109. The 2000 census showed that North Carolina's foreign-born population grew by 274% since 1990. NOLEN MALONE ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION 2000, at 5 (Dec. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf>. The percentage increase of Latino residents, many of whom are part of the immigrant influx, are even more pronounced in the state's rural counties. About half of these counties experienced Latino population growth of more than 600%, with some exceeding 1000%. Rebecca M. Torres et al., *The South's Silent Bargain: Rural Restructuring, Latino Labor and the Ambiguities of Migrant Experience*, in *LATINOS IN THE NEW SOUTH: TRANSFORMATIONS OF PLACE* 37, 40 (Heath A. Smith & Owen J. Furuseth, eds., 2006). Of course, it should be noted that, although the percentage of foreign-born residents in North Carolina increased dramatically from 1.7% in 1990 to 5.3% in 2000, it is still far less than the national percentage of 11.1% (or California's 26.2%). See MALONE, *supra*, at 3.

110. RAKESH KOCHHAR ET AL., THE NEW LATINO SOUTH: THE CONTEXT AND CONSEQUENCES OF RAPID POPULATION GROWTH 14 (2005), available at <http://pewhispanic.org/files/reports/50.pdf>.

along Central Avenue in the city's Eastside, in large sections of South Boulevard running southwest from the urban core, and in its North Tryon neighborhood.¹¹¹ Whereas in rural towns like Warsaw and Siler City, the effect of immigration manifests in the ethnic revival of once moribund downtown districts,¹¹² and the increasing demand for language education specialists in its local schools. The binary black-white structure that has long defined the racial or ethnic identity of the state is no longer adequate. With the precipitous rise of Latino residents and an increasing number of refugees and economic migrants from Asia,¹¹³ communities in North Carolina are taking on a prismatic quality characteristic of more established gateway communities.¹¹⁴

Despite the cacophony of the loudest voices, the local reaction in North Carolina resists simple classification. Vitriolic rallies such as the one led by David Duke on the steps of town hall in Siler City¹¹⁵ are accompanied by voices of appreciation for the economic growth and revitalization that immigration has brought to certain communities.¹¹⁶ Proactive local efforts to establish programs that accommodate and serve the new immigrant populations¹¹⁷ are

111. See Heather A. Smith & Owen J. Furuseth, *Making Real the Mythical Latino Community in Charlotte, North Carolina*, in *LATINOS IN THE NEW SOUTH: TRANSFORMATIONS OF PLACE*, *supra* note 109, at 191, 202–08.

112. See, e.g., Jessica Rocha & Michael Easterbrook, *Illegal Immigration—Small Town*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 28, 2006, at 1A (describing the slow revitalization of the Town of Warsaw by the influx of immigrant residents, many of whom are illegal); Tom Steadman, *Immigration: A Small Town Struggles to Cope with Change*, NEWS & REC. (Greensboro, N.C.), Apr. 16, 2000, at A1 (same with regard to Siler City).

113. Jef Feeley, “A Better Life”: *Hmong, Laotian and Vietnamese Families Find New Hope in Catawaba Valley*, CHARLOTTE OBSERVER, Oct. 16, 1994, at 1V. See generally Sawa Kurotani, *The South Meets the East: Japanese Professionals in North Carolina’s Research Triangle*, in *THE AMERICAN SOUTH IN A GLOBAL WORLD* 175 (James L. Peacock et al. ed., 2005) (describing the influx of Japanese residents to the Raleigh area); Ajantha Subramanian, *North Carolina’s Indians; Erasing Race to Make the Citizen*, in *THE AMERICAN SOUTH IN A GLOBAL WORLD*, *supra*, at 192 (discussing the rise in Indian professionals relocating to North Carolina).

114. Cf. Camille L. Zubrinsky & Lawrence Bobo, *Prismatic Metropolis: Race and Residential Segregation in the City of the Angels*, 25 SOC. SCI. RES. 335, 336 (“Most major urban centers are neither simply black or white, but rather are now prismatic: reflecting a spectrum of colors.”).

115. See Steadman, *supra* note 112, at 1A. It appeared that, notwithstanding the media attention, this rally was not really that well attended. Nevertheless, other accounts suggest that concerns about illegal immigration are swelling the ranks of hate groups like the Ku Klux Klan. Franco Ordoñez, *More Joining Hate Groups*, NEWS AND OBSERVER (Raleigh, N.C.), Feb. 12, 2007, at 4B.

116. See Rocha & Easterbrook, *supra* note 112.

117. See, e.g., William A. Kandel & Emilio A. Parrado, *Hispanic Population Growth and Public School Response in Two New South Immigrant Destinations*, in *LATINOS IN*

tempered by the very real economic and social costs that their presence has incurred.¹¹⁸ It is therefore no surprise then that North Carolina is often referred to simultaneously as a model of immigrant accommodation and immigration exclusion,¹¹⁹ a paradox that Smith and Furuseth poignantly captured when they described the shifting terrain of the immigration debates in states like North Carolina as “the latest version of the ever changing New South mythic that seeks to paint the region in progressive, modern, and internationalizing terms while at the same time holding tight to a romanticized version of a polemic and isolationist history.”¹²⁰

At first blush, the complexity of responses in North Carolina may not be readily apparent when one considers the local regulatory response that communities have taken. Focusing, as commentators usually do, on specific laws or policies, one may assume that North Carolina communities are increasingly eager to jump on the federal enforcement bandwagon. While it is true that most immigration-related activity in the state has been along these lines, it is important not to overstate the number of these policies that have actually been adopted. As many, if not more, immigration-related proposals have been rejected as those that have been enacted. Moreover, the vast majority of communities in North Carolina have no policy regarding immigration whatsoever.¹²¹ It is important to keep this in mind when considering the more visible aspects of the local response to immigration in the state.

THE NEW SOUTH: TRANSFORMATIONS OF PLACE, *supra* note 109, at 111, 126–27; Kytja Weir, *Assistance to Latinos Could Expand*, CHARLOTTE OBSERVER, June 20, 2004, at L1 (discussing the development of Latino resource centers “offering assistance with legal issues, language skills, and navigating U.S. institutions”).

118. See Steadman, *supra* note 112, at 1A (“It’s costing us money, costing us jobs, degrading our schools and putting a burden on the . . . taxpayer.”).

119. Compare Rodríguez, *supra* note 15, at 584–88 (discussing integration programs in North Carolina), and Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L. J. 861, 892–98 (2002) (same), with Enrique G. Murillo, Jr., *How Does It Feel to Be a Problem?: “Disciplining” the Transnational Subject in the American South*, in STANTON WORTHAM ET AL., EDUCATION IN THE NEW LATINO DIASPORA: POLICY AND THE POLITICS OF IDENTITY 225–30 (2002) (describing the virulent response to Latino immigrants in North Carolina communities).

120. Smith & Furuseth, *supra* note 111, at 191.

121. Even a generous count of the communities that have responded in some way with regard to illegal immigration below, it appears that their numbers do not exceed twenty. See *infra* notes 122–130; see *supra* note 8. There are 100 county and at least 550 municipal governments in North Carolina. See P. WILLIAM TILLMAN, JR. & JENNIFER SONG, NORTH CAROLINA MUNICIPAL POPULATION: 2006, at 1 (2006), available at <http://www.osbm.state.nc.us/demog/munpub06.pdf>.

All three types of local immigration regulations outlined in Part I have been enacted or proposed in North Carolina. By far the most common and the most publicized are direct regulations involving section 287(g) agreements. After Mecklenburg County announced that it had identified more than 1,000 potential deportees as a result of employing this program in its local jails, five counties—Alamance, Gaston, Lincoln, Forsyth, Carrabbus—followed suit, with even more planning to do so.¹²² Thus far, these county enforcement efforts are limited to screening the legal status of those arrested on suspicion of a criminal offense not directly related to violations of immigration laws. The perceived success of these county programs, however, has spurred other localities to contemplate even more expansive enforcement efforts. For instance, in 2006, Charlotte briefly considered adopting a policy of investigating the immigration status of crime victims and witnesses rather than just criminal suspects or convicts.¹²³

Like direct regulations, indirect regulations have gained support at the county level but have yet to be adopted at the municipal level. Two towns, Landis and Mint Hill, considered following Hazleton in enacting an ordinance to prohibit landlords from renting to, and businesses from hiring, illegal immigrants.¹²⁴ Neither of these measures, however, was eventually passed. This is in contrast to the county level, where laws prohibiting any company that cannot guarantee the legal status of its workforce from bidding on or receiving county contracts, and denying illegal immigrants access to any public benefits that are not specifically required by state or

122. Jefferson George, *Lincoln Board Targets Illegal Immigration*, CHARLOTTE OBSERVER, June 21, 2007, at 1B (Lincoln County); Blair Goldstein, *Sheriff to Apply for U.S. Program*, WINSTON-SALEM J. (N.C.), Nov. 27, 2007, at A1 (Forsyth County). Lisa Zagaroli, *Focus on People Charged with Crimes: Dole, Sheriffs Talk Illegal Immigration*, U.S. Senator Continues Meetings with N.C. Law Enforcement, CHARLOTTE OBSERVER, Aug. 27, 2007, at 2B (Gaston, Cabarrus, and Alamance County); see also Eric Frazier & Emily S. Achenbaum, *Homeland Security: Sheriff Taking Skills to D.C.*, CHARLOTTE OBSERVER, Oct. 2, 2007, at 1A (quoting Mecklenburg Sheriff Jim Pendergraph as saying that “sheriffs in Gaston, Cabarrus, Union, and Iredell . . . counties are starting [287(g) programs] or have started similar programs”); Marcie Young, *Dole, Sheriffs Discuss Illegal Immigrants*, CHARLOTTE OBSERVER, Aug. 21, 2007, at 1B (describing planning for Catawba, Burke, Caldwell, and Alexander counties); Minutes of the Meeting of the Rowan County Board of Commissioners (Sept. 4, 2007), available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (noting the Rowan County sheriff’s intent to apply for the program).

123. Franco Ordoñez, *Legal Status Inquiries of Victims Not the Norm*, CHARLOTTE OBSERVER, May 26, 2006, at 1A.

124. Coto, *supra* note 2, at 1B.

federal law, were adopted in Gaston and Lincoln counties to complement their direct enforcement measures.¹²⁵

More varied and less visible, neutral regulations are increasingly being introduced in the state as well. Most famously, Charlotte considered a “quality of life” ordinance in 1996 that would have amended the city’s housing code to lower the maximum residents allowed in a 1,000 square-foot home, prompting some to complain that it “targets immigrants, particularly Hispanics who live together so they can afford rent.”¹²⁶ English-only ordinances have also been passed in several cities and counties, with some specifically mandating that no foreign language be used in any government notices or publications, or in conducting any official government business.¹²⁷ Additionally, zoning disputes have emerged from community opposition over the use of open space by Hispanic residents.¹²⁸ More interesting, however, is the extent to which the immigration discourse is starting to influence local policymaking. Some have noted that, increasingly, decisions about the need to issue municipal bonds for school construction to accommodate growth have been waylaid by discussions about “whether tougher immigration enforcement might help reduce school needs.”¹²⁹ For example, in Catawba County, anti-immigrant sentiment helped fuel an anti-bond movement that led to

125. George, *supra* note 122, at 1B (Lincoln County); Goldstein, *supra* note 122, at A1 (Forsyth County). Davidson County also considered, but ultimately rejected, a similar measure that would have compelled companies working on county projects to verify the immigration status of their workers. Michael Hewlett, *Commissioners in Davidson Say No to Worker-Status Idea*, WINSTON-SALEM J., Mar. 14, 2007, at B1. Of course, doubts have been raised about whether these indirect regulations, especially the extensive foreclosure of county “benefits” and “services,” can be enforced as a practical matter. See Jefferson George, *Illegal Resident Issue “Thorny,”* CHARLOTTE OBSERVER, Apr. 8, 2007, at 1L.

126. Kelly, *supra* note 10, at 1B. See Rick Martinez, Editorial, *Policies Bordering on Chaos*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 13, 2006, at 17A. Gaston County considered it as well; see also Jefferson George & Amy Rainey, *Gaston Cuts Could Cost*, CHARLOTTE OBSERVER, Nov. 18, 2006, at 1B (describing county “resolution” to “[u]pdate minimum housing requirements to limit the number of people who can live in rental homes” as a response to illegal immigration); see also George, *Illegal Resident Issue “Thorny,”* *supra* note 125 (describing local consideration of using septic tank regulations—“specifically the number of residents allowed in a house based on its tank”—as a way to address illegal immigration).

127. Coto, *supra* note 2, at 1B.

128. See *Torres v. Johnston County*, No. 06-1071, 2007 WL 1745894 (N.C. Ct. App. Jun. 19, 2007).

129. (En)forcing the Issue, *supra* note 101, at A10; cf. Elizabeth Leland, *Border Clash: Keep Out, Say Leaders of the Council of Conservative Citizens. We Deserve a Chance, Say the Latino Immigrants in Morganton*, CHARLOTTE OBSERVER, May 5, 2002, at 1G (quoting rally speech of A.J. Barker: “If they would ship all these people out that are criminals, that are here illegally, we wouldn’t have to build more schools”).

the defeat of an \$80 million school construction program in 1999, only to be followed by a protest blaming immigrants for crowded schools five months later.¹³⁰

B. *A Contextual Account*

Told in this manner, it is easy to see North Carolina's local response as primarily the result of immigration. Consider the components of the story so far: communities that have long been outside of the migratory patterns of foreign migrants are now inundated with immigrant residents, a large percentage of whom are illegally present in the United States. Whether we attribute the increasing reliance of local immigration regulations to nativism or cultural tensions, or whether we give credence to local claims of institutional strain and fiscal pressures, it appears that immigration and the failure of national immigration policy is primarily to blame.

The problem with the account thus far is that, because it hews too closely to the national discourse over immigration, it is an account that is at once too broad and too narrow. Channeled through the lens of the national narrative of transnational migration, it renders many of the specific and unique circumstances afflicting North Carolina indiscernible, or at times, irrelevant. At the same time, focusing primarily on immigration as an isolated phenomenon, it fails to situate this flow among other developments and recognize how they interrelate.

A contextual understanding of immigration's impact in North Carolina is required in order for us to fully grasp the role that the state's particular brand of localism has played in shaping varying local responses. To be sure, the relevant contexts are many. Here we situate the immigration flow among three others that have also been taking place in the state—rural-to-urban intrastate migration, domestic interstate migration, and capital and industrial flows. From this it is possible to see that the local anxiety over immigration, especially illegal immigration, in North Carolina is not solely the consequence of immigration policy or the limitations of federal enforcement. Rather, it is part and parcel of a specific North Carolina narrative involving broader demographic and economic change.

130. Lucy Hood, *N.C. Speaks Migrants' Language: State Tries to Keep Up with Surge in Bilingual Needs*, SAN ANTONIO EXPRESS-NEWS, Aug. 18, 2003, at 1A; Greg Lacour & Adam Bell, *Immigrant Fears Grip Some Residents*, CHARLOTTE OBSERVER, Apr. 8, 2001, at 1V.

Much has been made of the recent influx of migrant residents into the state. But the arrival of immigrants in North Carolina, especially those from Mexico and other Latin American countries, actually began long before the precipitous increase of recent years. Immigrant labor was already a critical aspect of the state's agricultural sectors in the 1980s, and by the mid-1990s, North Carolina's share of agricultural guest-workers under the federal government's H-2A visa program exceeded that of any other state.¹³¹ Their early presence, however, was largely seasonal: "[t]hey appeared from distant places, stayed for weeks or months at a time, laboring as needed, and then moved on when the work was done."¹³²

If North Carolina's experience with immigrants began with temporary workers under the H-2A program, their permanent settlement was spurred in large part by the transformation of the state's economic base.¹³³ As cities like Charlotte evolved from largely regional economic centers to competitive powerhouses on the national (and increasingly international) stage, they produced an incredible demand for skilled and semi-skilled employment which drained workers from labor-intensive industries, many of which were located in rural communities. In a tight labor market with unemployment well below the national average, employers began to seek workers to fill the emerging employment gaps, and the recruitment of immigrant workers became a popular option.¹³⁴ As a result, in the rural economies, sectors as diverse as agriculture, meat processing, manufacturing, and fishing and seafood processing became dominated by immigrant labor.¹³⁵ In urban and suburban areas, the exceptional growth of high-skilled residents produced

131. Sandy Smith-Nonini, *Federally Sponsored Mexican Migrants in the Transnational South*, in *THE AMERICAN SOUTH IN A GLOBAL WORLD*, *supra* note 113, at 59.

132. Owen J. Furuseth & Heather A. Smith, *From Winn-Dixie to Tiendas: The Remaking of the New South*, in *LATINOS IN THE NEW SOUTH: TRANSFORMATIONS OF PLACE*, *supra* note 109, at 1.

133. See, e.g., Karen D. Johnson-Webb, *Employer Recruitment and Hispanic Labor Migration: North Carolina Urban Areas at the End of the Millennium*, 54 *PROF. GEOGRAPHER* 406, 417 (2002).

134. See Meenu Tewari, *Nonlocal Forces in the Historical Evolution and Current Transformation of North Carolina's Furniture Industry*, in *THE AMERICAN SOUTH IN A GLOBAL WORLD*, *supra* note 113, at 113, 116 (describing the influx of skilled Mexican workers into the state's furniture manufacturing sector as a result of a tight labor market and the arrival of relatively better paying jobs).

135. See generally David C. Griffith, *Rural Industrial and Mexican Immigration and Settlement in North Carolina*, in *NEW DESTINATIONS: MEXICAN IMMIGRATION IN THE UNITED STATES* 50 (Victor Zuniga & Ruben Hernandez-Leon eds. 2005).

demand and opportunities for immigrants in service sectors such as construction, retail and food services, and landscaping.

But immigrant workers and mobile North Carolinians were not the only ones to heed the siren's call of employment opportunities. Indeed, notwithstanding the attention that foreign migration has received, it still contributed far less to the population increase of North Carolina than another important demographic phenomenon: domestic interstate migration.¹³⁶ As one newspaper colorfully put it: "Yankees and newcomers from other Southern states account for the bulk of North Carolina's population boom."¹³⁷ And the statistics bear this out. The immigrant influx in fast growing counties like Wake and Mecklenburg—where the famed "Research Triangle Park" and the City of Charlotte are located, respectively—accounts for less than half of the new residents. Rather, they are eclipsed by the arrival of transplants from distant states like New York and California, or closer southern neighbors such as Florida.¹³⁸ The social and cultural impact of this migration has not gone unnoticed; there are increasing accounts of the tensions that have arisen as local governments

136. North Carolina's population grew by 1.4 million people from 1990 to 2000, a 21.4% growth that made it one of the ten fastest-growing states in the nation. See MARC J. PERRY & PAUL J. MACKUN, U.S. CENSUS BUREAU, POPULATION CHANGE AND DISTRIBUTION: 1990 TO 2000 2 (Apr. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf> (showing growth of approximately 6.6 million to 8 million). Of that growth, approximately 315,000 were foreign-born, though many of those were naturalized American citizens or those who came from another state. See MALONE, THE FOREIGN-BORN POPULATION: 2000, *supra* note 109, at 3, 5. Available census reports on domestic state-to-state migration show that, during the five-year period between 1995 to 2000, North Carolina received approximately 919,000 residents from other states. See MARC J. PERRY, U.S. CENSUS BUREAU, STATE-TO-STATE MIGRATION FLOWS: 1995 TO 2000 3, 9 (Aug. 2003), available at <http://www.census.gov/prod/2003pubs/censr-8.pdf>.

137. Scott Dodd, *Charlotte Area Grows Torrid 29% in Decade*, CHARLOTTE OBSERVER, Mar. 22, 2001, at 1A. To be sure, immigrants who settled first in other states are a part of this flow as well.

138. See MARC J. PERRY, DOMESTIC NET MIGRATION IN THE UNITED STATES: 2000 TO 2004: POPULATION ESTIMATES AND PROJECTIONS 3-4 (Apr. 2006), available at www.census.gov/prod/2006pubs/p25-1135.pdf; see also KOCHHAR, *supra* note 110, at 5-6 (noting that the Hispanic population growth was accompanied by even larger increases among whites and blacks in North Carolina and the South); Wesley Young, *In-migration a Driving Force Behind Growth*, WINSTON-SALEM J., Apr. 5, 2007, at B1 (describing the recent spike in domestic migration, which accounted for half of the Piedmont Triad's population growth from 2005 to 2006, compared to the 24% attributed to foreign migration). This is in sharp contrast to traditional immigrant-receiving regions, like those surrounding the City of Los Angeles and New York, which have been losing population to domestic out-migration, but would have lost much more without foreign immigration. See, e.g., William H. Frey, *Immigration, Domestic Migration, and Demographic Balkanization in America: New Evidence for the 1990s*, 22 POPULATION & DEV. REV. 741, 745-46 (1996).

reorient their priorities to accommodate the unique demands of these domestic newcomers.¹³⁹

In addition to the flow of individuals, another flow is also worth mentioning: that of businesses and industries. Native businesses played a significant role in North Carolina's recent economic transformation.¹⁴⁰ Another large contributor, however, were those businesses that the state was able to attract from other states and jurisdictions.¹⁴¹ The ascendance of metropolitan regions like Charlotte and Raleigh rested heavily on their success in interregional competitions for economic development—a competition that tends to “favor low wages, low costs, low taxes, and a decline in human and municipal services in order to offer various subsidies for business development.”¹⁴² Even the rise of the state's rural economies can be traced to a time when meat processors, textile factories, and other light manufacturing shunned urban rustbelt locations in the Northeast and Midwest in search of cheap labor and a more favorable business environment in the rural landscape of North Carolina.¹⁴³

139. See Ballard, *supra* note 4, at 9; Jonathan Tilove, *Growth in the Sun: America Moves South and West in Search of the Suburb Perfected*, GRAND RAPIDS PRESS (Mich.), Feb. 22, 2004, at F1 (describing the effects of a drastic influx of migrants, mostly from the suburbs of New York City, Chicago, and Los Angeles into Holly Springs, N.C., making it the fastest-growing town in the state).

140. For example, Bank of America, the second largest bank in terms of assets in the United States and a critical player in growing the state's now formidable banking sector, was a native bank that started in North Carolina and is still headquartered in Charlotte. See Heather Smith & William Graves, *Gentrification as Corporate Growth Strategy: The Strange Case of Charlotte, North Carolina and the Bank of America*, 27 J. OF URBAN AFFAIRS 403, 407 (2005).

141. See Dennis A. Rondinelli & William J. Burpitt, *Do Government Incentives Attract and Retain International Investment? A Study of Foreign-Owned Firms in North Carolina*, 33 POL'Y SCI. 181, 183–85 (2000) (describing how “[t]he State of North Carolina has developed one of the most aggressive programs in the United States for attracting and retaining industry,” partially in response to similar efforts in neighboring states, and questioning the efficacy of state and local incentives).

142. Thaddeus Countway Guldbrandsen, *Entrepreneurial Governance in the Transnational South: The Case of Durham, North Carolina*, in THE AMERICAN SOUTH IN A GLOBAL WORLD, *supra* note 113, at 83, 91. Unlike in other states, localities in North Carolina are not permitted to offer tax abatements. That power is reserved to the state's General Assembly. See JONATHAN Q. MORGAN & DAVID M. LAWRENCE, COUNTY AND MUN. GOV'T IN NORTH CAROLINA, ECONOMIC DEVELOPMENT 8 (2007), available at <http://www.sog.unc.edu/pubs/cmg/cmg26.pdf>. “In recent years, however, a number of counties (and the cities in those counties) have developed a cash grant incentive policy that very much resembles tax abatements.” *Id.*; cf. *Maready v. City of Winston-Salem*, 342 N.C. 708, 712–13, 467 S.E.2d 615, 618–19 (1996).

143. LEON FINK, THE MAYA OF MORGANTON: WORK AND COMMUNITY IN THE NUEVO NEW SOUTH 12 (2003) (describing the “regional incentives” that led half of all poultry processing plants to be concentrated in “four low-wage, anti-union states: Alabama, Arkansas, Georgia, and North Carolina”).

The causes of these three flows—intrastate, interstate, and capital—are intricately interwoven. It should be no surprise then that their consequences are also mutually reinforcing. Consider how this account relates and interacts with the local backlash against illegal immigration. The state's population increase both contributes to and is a result of the fabulous success that many North Carolina communities enjoyed in attracting business and employment opportunities. Yet, not unlike communities suffering from decline in employment and residency, this tremendous growth puts immense strain on existing local services and infrastructure, which often require massive capital expenditures above and beyond the marginal cost of adding another individual to the collective service pool.¹⁴⁴ When the population increase consists of low-income workers, the ability of localities to cover the extra costs by relying on the additional tax revenues generated from these new residents is diminished. In addition, when the catalyst for the economic growth is founded in large part upon the ability to attract business through low taxes, economic incentives, and relatively cheap labor, it is difficult to see good ways for communities to unshackle themselves from their fiscal dilemmas. That social and cultural change is also inherently a part of this equation—a product of all the flows described here—only further increases the perception of the overall costs.

C. *A Structural Account*

Caught in the flow between economic development and population increase, tasked with the responsibility of navigating their sometimes competing demands, and left to negotiate the social and cultural changes that they produce, it is not surprising that local governments in North Carolina began to turn to local immigration regulations to target those perceived to be responsible, even if their role is only partial. But as the review of the localism literature above suggests,¹⁴⁵ local legal structures also play a role; the contextual account above would likely have appeared differently if the localist structure defined the significance of territoriality, residency, and municipal boundaries differently as well.¹⁴⁶ Thus, it is worth

144. See, e.g., JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 86–87 (1987).

145. See *supra* notes 24–41 and accompanying text.

146. One example would be if tax revenue or local obligations did not perfectly track local institutional borders. Another would be if local governments did not exist at all or were present only as public authorities administered by the state. Provisions for inter-local cooperation on economic development matters, which is available in North Carolina,

considering the degree to which legal background rules, and not simply spatial or geographic constraints, act in concert to produce many of these pressures. In other words, we need to examine these pressures not simply as consequences of institutional scale (i.e., localities are small), but also as products of institutional design.

This Section employs the lens of localism to examine the emergence of local immigration regulations in North Carolina. It considers three aspects of the local legal structure in the state to explore how, in light of the contextual reading above, local immigration regulation can be understood as an attempt, however limited, to manage some of the pressures that these recent economic and demographic changes have wrought. This analysis offers an explanation for why certain localities, namely county governments, have been increasingly willing to turn to immigration-related regulations. At the same time it also suggests why others, namely municipal governments such as cities and towns, have thus far largely refrained. I do not advance the influence of local legal structures as the only rationale for the ways that local responses to immigration have unfolded in North Carolina.¹⁴⁷ But considering the unique differences in county and municipal governments defined by the localist structure of North Carolina law, it should not be lightly dismissed. Local action does not take place in a vacuum. Here I suggest that the specific way that North Carolina law both empowers and disempowers its local institutions has a strong influence on whether localities turn to immigration-related regulations.

1. Legal Allocation of Costs and Responsibilities

One reason for local immigration regulations in North Carolina, especially at the county level, might be found in the way that the state allocates fiscal responsibilities among state and local governments, especially those costs that are most susceptible to the population growth of which immigration is a part. Recall that local fiscal concerns about immigration, especially illegal immigration, tend to revolve around four areas: education, crime control, social services,

change the balance as well without radically disturbing the underlying structure of localism. See MORGAN & LAWRENCE, *supra* note 142, at 10.

147. Admittedly, there are other reasons for the increased county role. For example, because most of the state is still unincorporated, county governments play a much larger role in North Carolina than many other states. In addition, because county governments represent many of the state's rural communities, where the influx of immigrants may be more pronounced, and whose residents may be less tolerant in their outlook, one can argue that aggressive action directed against immigrants at the county level garners more support than at the municipal level.

and health care. Indeed, not only do local communities commonly rely on these costs as justifications for local immigration regulations, but these regulations also tend to be structured to target these areas specifically. The local response in North Carolina is no exception. It is also worth noting that county governments are fiscally responsible in ways that are not shared by the state or even municipal governments.

Consider each of these areas in turn: under North Carolina law, education is primarily the responsibility of the state.¹⁴⁸ Indeed, the extent to which this system allows for statewide redistribution of funds is reflected in the state's relatively low degree of inter-district funding disparities.¹⁴⁹ Moreover, because North Carolina relies primarily on *county* school districts (as opposed to municipal school districts), school funding suffers less urban/suburban inequities than in other states.¹⁵⁰ But counties still bear a substantial part of the remaining educational burden. More importantly, counties are overwhelmingly tasked with the responsibility of paying for capital

148. See LAURIE L. MESIBOV & INGRID M. JOHANSEN, COUNTY AND MUN. GOV'T IN NORTH CAROLINA, ELEMENTARY AND SECONDARY EDUCATION 11 (2007), available at <http://www.sog.unc.edu/pubs/cmg/cmg45.pdf> (noting that the state is "responsible for current expenses necessary to maintain the minimum nine-month [school] term," although the county can supplement the funding).

149. See *id.* at 13 (noting that, "[a]lthough North Carolina's funding inequities are less severe than those in many states," there are still many concerned about their effects); John G. Augenblick et al., *Equity and Adequacy in School Funding*, 7 THE FUTURE OF CHILDREN 63, 73 & n.31 (1997) (finding North Carolina among seven states with high levels of funding equity, though relatively low funding in absolute numbers). Nevertheless, North Carolina does have an extensive history of educational funding litigation, often founded on the idea that the state's per capita support fails to take into account additional factors that affect costs. See generally George Lange & R. Craig Wood, *Education Finance Litigation in North Carolina: Distinguishing Leandro*, 32 J. OF EDUC. FIN. 36 (2006).

150. The unique manner in which North Carolina organizes its school districts also contributes to the fact that racial segregation between schools is relatively minor and is the reason why the schools are almost always less segregated than the residential segregation of its neighborhoods. See Charles T. Clotfelter et al., *Segregation and Resegregation in North Carolina's Public School Classrooms*, 81 N.C. L. REV. 1463, 1474, 1492 (2003) (finding "that public schools in North Carolina were, on average, not highly segregated in comparison to other districts in the United States" and usually "offer a more integrated experience than do the state's neighborhoods," but raising other disturbing trends and concerns, such as within-school segregation); see also GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, NEW FACES, OLD PATTERNS? SEGREGATION IN THE MULTIRACIAL SOUTH 13-16 (Sept. 2005) (showing some signs of increasing school segregation in North Carolina, but still less than most Southern states).

expenditures,¹⁵¹ which are costs tied most directly to population growth and can be a significant proportion of county expenditures.¹⁵²

Like education, counties do not bear all of the costs associated with crime control. But whereas county sheriffs and local police departments share the responsibility for law enforcement,¹⁵³ the cost of constructing and operating local jails is the responsibility of the county alone. County responsibility for social services and health care is more direct. In North Carolina, not only is the non-federal portion of means-tested federal programs like welfare and food stamps paid for almost entirely from county coffers, but county governments are also primarily responsible for other broad-based general social service programs.¹⁵⁴ Moreover, although cities and counties are both authorized to construct and operate hospitals and health clinics,¹⁵⁵ most of those that are publicly built or operated are financed at the county level.¹⁵⁶

It may be going too far to proclaim that the specific allocation of responsibilities among state, county, and local governments explains why counties have been more aggressive in pursuing anti-immigration measures than either state or municipal governments. Nevertheless, the circumstances from which many of the local immigration regulations at the county level arose are certainly suggestive. Concerns about criminality among illegal immigrants played a role in the wide adoption of direct regulation measures at the county level.¹⁵⁷

151. N.C. GEN. STAT. § 115C-408(b) (2007) (“[T]he facilities requirements for a public education system will be met by county governments.”).

152. For example, in the 2003–04 school year, county contributions to operating expenses was approximately \$2.25 billion, or 24.5% of the state total. See Mesibov & Johansen, *supra* note 148, at 13. County contributions to capital expenditures, however, were \$858 million, or 93% of the total. *Id.* According to recent studies, these expenditures pale in comparison to what they anticipate is needed to accommodate the fast-growing student-age population: \$9.7 billion for the next five years. Public Schools of North Carolina, *North Carolina Public School Facility Needs Survey, Preliminary Report* (Apr. 2006), available at <http://www.schoolclearinghouse.org/otherinf/FacilityNeedsSurvey/FacilityNeedsPreliminaryReport2006.pdf>.

153. N.C. GEN. STAT. § 162-22 (2007).

154. See JANET MASON, COUNTY AND MUN. GOV'T IN NORTH CAROLINA, SOCIAL SERVICES 1–4 (2007), available at <http://www.sog.unc.edu/pubs/cmfg/cmfg42.pdf>.

155. N.C. GEN. STAT. §§ 131E-5 to 14.1 (2007).

156. DAVID M. LAWRENCE, COUNTY AND MUN. GOV'T IN NORTH CAROLINA, OTHER SERVICES AND FUNCTIONS 4 (2007), available at <http://www.sog.unc.edu/pubs/cmfg/cmfg50.pdf>.

157. See George, *supra* note 122 (describing resolution that explained the need for the Sheriff to conduct status checks because “[i]llegal immigrants increase the crime rate due to their inability to speak or read English and understand laws”); Hannah Winkler, *Counties Differ on Immigration*, TIMES-NEWS (Burlington, N.C.), Feb. 5, 2007, at A1 (quoting local concern about immigrant illegality and the fact that larger Hispanic

But county responsibility over local jails, and the fact that jails are one of the few, if not the only, local crime control costs that the federal government is willing to reimburse, meant that enrolling county jails in section 287(g) programs would also be a potential cost-saving venture.¹⁵⁸

Similarly, though concerns about fairness and the rule of law may have been some inspiration for counties to adopt indirect regulations that limited the benefits that illegal immigrants can receive, they are often inseparable from broader efforts to save money more generally. For example, Gaston County's indirect regulation measure started out as simply one of ten proposals in an effort to cut \$5 million from the county's \$18 million projected shortfall without having to resort to raising property taxes.¹⁵⁹ Indeed, the benefit-restriction proposal, which was directed primarily at cutting costs in county social and health services, was joined by a list of others that included transferring county programs to faith-based organizations, asking the state to pay for certain state-mandated school needs, and cutting county employees.¹⁶⁰ Of course, the relatively paltry list of cost-saving proposals, with and against which the illegal immigration-related measure was considered, leads us to a different aspect of the state's localist structure.

2. The Legal Allocation of Power and Initiative

Another reason for the increasing local reliance on immigration-related regulations may be found in how the State of North Carolina delegates power to its local governments, and the manner in which state courts have interpreted that delegation. Indeed, while the state has authorized its local governments to "engage in a wide range of

populations "made the area more attractive to drug-dealing Hispanics 'cause they can blend in.").

158. Kristin Collins, *Sheriffs Help Feds Deport Illegal Aliens*, NEWS AND OBSERVER (Raleigh, N.C.), Apr. 22, 2007, at 1A. Alamance County Sheriff Johnson said:

[T]he [section 287(g)] program has dual benefits for Alamance County. It brings in money because the federal government pays about \$66 a night for every immigration detainee who stays in jail. And it rids the county of illegal immigrants, who he contends sponge public resources and are more prone to commit crimes than legal residents.

Id.

159. Danica Coto, *County Looks for \$5 million in Cuts*, CHARLOTTE OBSERVER, Oct. 5, 2005, at 1L.

160. *Id.*

activities to promote local economic development,”¹⁶¹ it has thus far given them little power to respond to the changes that such developments might bring. What this suggests is that, for many communities, participating in federal enforcement programs or enacting novel immigration-related regulatory schemes may actually be some of the few limited avenues that local governments feel they can pursue to respond to the pressures and consequences of demographic and economic growth.

One area where the state’s legal construction of local power affects the ability of local governments to respond to change is the imposition of impact fees. Impact fees are typically one-time charges levied against developers to compensate the community for the anticipated costs that a development would impose.¹⁶² For example, as a condition to building a residential subdivision, a community may wish to impose a fee for the anticipated cost that each unit would impose on the locality for the construction of new water lines, roads, or schools. Impact fees are not without their own problems. Nevertheless, they have become a popular option among communities trying to manage their expansion or reallocate the associated costs among the parties involved.

In North Carolina, the power to define and impose impact fees has been delegated unevenly across the state. Moreover, it has been distributed in such a way as to leave many counties out.¹⁶³ This, of course, is not simply the consequence of the state’s political process and its unwillingness to broadly distribute power. It is also the result of a local legal structure that has made local governments dependent on such delegations of power and reluctant to pursue other ways of responding to local conditions without receiving specific state authorization.

Indeed, the formal structure of power between localities and the state explains much of this result with respect to impact fees. North Carolina has not chosen to grant its cities or counties so-called “home rule” powers, which is to say that localities are assumed to have only the powers specifically delegated to it by the state.¹⁶⁴ Nevertheless, through a series of statutory delegations, powers as extensive as

161. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 2005–06 (2006).

162. See Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 417 (1981).

163. See *infra* text accompanying notes 174–175.

164. See Bluestein, *supra* note 161, at 1985–86.

typical home rule provisions have been given to the state's local governments. For example, North Carolina authorizes local governments to further broaden local goals such as the health, safety, and welfare of its residents, and the peace and dignity of the city or county.¹⁶⁵ In addition, the state passed a statute stating its intent that delegations of power such as this one be broadly construed by the courts.¹⁶⁶

But not unlike other states, the formal delegation of local power is complicated by conflicting interpretations of its courts. It is because of this that the issue of local power in North Carolina remains relatively unsettled. In *Homebuilder's Ass'n of Charlotte v. City of Charlotte* the state's Supreme Court appeared to have embraced the "broad construction" statute enacted by the General Assembly, but¹⁶⁷ its subsequent review and rejection of local authority in two cases, *Bowers v. City of High Point*¹⁶⁸ and *Smith Chapel Baptist Church v. City of Durham*,¹⁶⁹ suggested a return to a rule of statutory construction that is skeptical of local initiatives taken without specific state authorization. The North Carolina Court of Appeals attempted a reconciliation of these two approaches in a recent case,¹⁷⁰ but at least one commentator believes that the issue is still far from settled.¹⁷¹

With this uncertainty, it is no wonder that cash-strapped localities in North Carolina have been reluctant to explore options for addressing their fiscal and institutional concerns. Even if there is a chance that legal challenges will be resolved in their favor, the costs of defending these measures, and the chance of losing in the end, serve as strong impediments to local innovation.¹⁷² Thus, notwithstanding the broad delegation of power, most local governments are likely to seek specific state authorization, which may not be easy to get; proceed on powers already delegated, which incurs the risk of legal challenges and inhospitable precedent; or abandon

165. N.C. GEN. STAT. § 153A-121(a) (2007) (counties); § 160A-174(a) (cities).

166. § 153A-4 (counties); § 160A-4 (cities).

167. 336 N.C. 37, 442 S.E.2d 45 (1994).

168. 339 N.C. 413, 451 S.E.2d 284 (1994).

169. 350 N.C. 805, 517 S.E.2d 874 (1999).

170. See *Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 606 S.E.2d 721 (2005).

171. Bluestein, *supra* note 161, at 2014 ("While the first part of the [the *Bellsouth*] ruling provides a refreshingly honest look at the variable records of prior cases, it is uncertain how much predictability the newly enunciated standard will provide.").

172. See BARRON ET AL., *supra* note 31, at 9 (noting that uncertainties over home rule powers in Massachusetts have bred caution, permission-seeking, and inaction).

the proposed course of action entirely. As one commentator explained, depending on how it is interpreted by the courts, "a legal regime that is thought to confer a great deal of local power" can often lead to the opposite result of "encourag[ing] local governments to be cautious and unimaginative."¹⁷³

Indeed, this was precisely how the issue of impact fees unfolded in North Carolina. In the 1980s, before the current upsurge in development, Orange and Chatham County petitioned for and received specific authorizing legislation from the state to levy impact fees to pay for educational expenses.¹⁷⁴ Cities like Durham and Raleigh secured enabling legislation as well to support the construction and maintenance of roads, recreational facilities, and open space.¹⁷⁵ In contrast, efforts by other counties to secure these powers through state authorization in recent years have been repeatedly rebuffed, in large part because of the strong real estate lobby at the state level.¹⁷⁶

Durham County (not to be confused with the City of Durham) sought to break this stalemate in 2006 by enacting a school impact fee without specific authorization by invoking several existing and more general state authorizations in support of its power to do so.¹⁷⁷ The state's broad delegation of power and its generous construction statute, however, proved insufficient. Finding that the school impact fee was not a fee contemplated by the state when it delegated the power to impose "fees and commissions charged by county officers and employees for performing services or duties permitted or required by law,"¹⁷⁸ and rejecting the city's attempt to tie the impact

173. *Id.* at 2351.

174. *See* Act of Jun. 23, 1987, ch. 460, 1987 N.C. Sess. Laws 611–13 (Chatham), 616–22 (Orange).

175. *See* Act of Aug. 12, 1987, ch. 802, 1987 N.C. Sess. Laws 1689–93 (Durham); Act of Jun. 28, 1985, ch. 498, 1985 N.C. Sess. Laws 555–60 (Raleigh).

176. Kytja Weir & Ernest Winston, *North Carolina Counties Team Up to Seek Real-Estate Fee: 7 Area Counties Want Legislature to Allow 1% Levy on Sale of House*, CHARLOTTE OBSERVER, May 14, 2004, at 1B ("In the mid-1980s the Democrat-controlled legislature granted a handful of N.C. counties . . . permission to pay for school growth with impact fees or real estate transfer taxes More recently, though, development and real estate lobbies have blocked the measures for other counties."); Eric Ferreri, *East and West Await Fees Decision: A Durham Lawsuit Involving Development and Schools Draws Statewide Attention*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 4, 2006, at B1 (stating that Durham County officials have been unable to enact impact fees due to the "powerful lobbying efforts from developers and real estate agents who have said that the fees could discourage potential home buyers").

177. *See* *Durham Land Owners Ass'n v. County of Durham*, 177 N.C.App. 629, 631, 630 S.E.2d 200, 202 (2006).

178. *Id.* at 632, 630 S.E. 2d at 203 (quoting N.C. GEN. STAT. § 153A-102 (2005)).

fee to the broad authorization statute, the court of appeals struck down the ordinance as beyond the county's power to enact.¹⁷⁹

The local battle over impact fees in North Carolina illustrates two points. First, it demonstrates the limited power of localities in the state to manage the various pressures that growth and other types of demographic change have brought. Second, it shows how confusion over the construction of local power in the state limits the extent to which localities can, or are willing to, innovate or experiment with new regulatory tools. The lack of such options, especially when state authorization is less forthcoming, may be another factor driving counties to adopt local immigration regulations—relying on explicit federal programs or federal immigration laws as their authorization. Again, it is not clear that these measures are effective or efficient. Yet the lack of other viable options seems to be contributing to the popularity of these efforts in county after county.

3. The Local Allocation of Resources and its Management

A third way of understanding local immigration regulations in North Carolina is to consider the way that state law dictates the ability of local governments to manage their reliance on local tax revenues.

Local governments in North Carolina rely on a broad range of income sources, many of which are redistributed by the state irrespective of the jurisdiction in which they are collected.¹⁸⁰ As a result, there is less reliance on property tax, the most territorial-specific source of revenue, among communities in North Carolina relative to other states.¹⁸¹ Nevertheless, property tax is still one of the most important income sources for local, especially county, governments. Moreover, it is the only broad-based revenue source that affords local governments the discretion to raise and lower as necessary on a year to year basis.

179. *See id.* at 632–33, 630 S.E. 2d at 205–06.

180. *See generally* DAVID M. LAWRENCE & KARA A. MILLONZI, COUNTY AND MUN. GOV'T IN NORTH CAROLINA, REVENUES (2008), available at <http://www.sog.unc.edu/pubs/cmg/cmg1308.pdf> (listing various types of revenue sources, including property taxes, sales taxes, licensing taxes, utilities service charges, impact fees, investment earnings, and court filing fees).

181. *See, e.g.*, Nat'l Conference of State Legislatures, Ranking of State-Local Revenue and Expenditure Data: Total State-Local Property Tax per Capita and per \$100 of Personal Income, 2005, <http://www.ncsl.org/programs/fiscal/stlocprop.htm> (last visited Aug. 24, 2008) (ranking North Carolina 38 among states in terms of property tax collected per capita, and 39 in terms of property tax per personal income).

But changing the rate for property taxes is not the only way to control that particular revenue source. A locality can try to regulate who lives in its community or the purposes for which its land is used on the premise that richer individuals and businesses can be expected to pay more in property taxes than they use in local services. This strategy seeks to increase the amount of taxes that can be collected for the existing properties under its jurisdiction. Another strategy would be to seek out desirable property currently outside of its jurisdiction to add to its tax rolls through annexation. Instead of improving the taxable potential of existing land, this strategy seeks to add more land subject to its tax levy.

One unique aspect of North Carolina's legal structure is that both of these options are very much open to and extensively used by municipal governments. To be sure, it is not uncommon for localities to have power over land use decisions, and through that, some influence on the potential residents that it welcomes or excludes. The ability for local communities in North Carolina to incorporate new property, however, is distinctive. Whereas most states have made it difficult for existing cities to expand through the use of annexation,¹⁸² and easy to incorporate new cities outside of existing ones,¹⁸³ the opposite is true in North Carolina. "Not only does the state constitution restrict . . . [the] incorporat[ion] [of] new cities in the proximity of existing ones, but the state's annexation statutes facilitate the orderly expansion of the state's cities," without the need for state authorization or even participation.¹⁸⁴ In short, North

182. See Briffault, *supra* note 34, at 78 & n.333 ("Municipalities are generally protected from forcible annexation or consolidation. It is a nearly universal rule that an incorporated area may not be annexed without its consent and that a consolidation requires the separate consent of each unit proposed for merger.").

183. See *id.* at 74 & n.311 ("In most states, general enabling legislation places municipal incorporation in the hands of local residents or landowners Neighboring localities, regional entities and residents outside of the boundaries of the territory proposed to be incorporated generally have no role.").

184. DAVID M. LAWRENCE, COUNTY AND MUN. GOV'T IN NORTH CAROLINA, INCORPORATION, ABOLITION, AND ANNEXATION 3 (2007), available at <http://www.sog.unc.edu/pubs/cmgs/cmgs02.pdf>. For example, incorporation can only be achieved through legislation at the state level, and the state constitution specifically requires a three-fifths majority if the community seeking to incorporate lies within a given distance of an existing city, which is difficult if the existing city protests. Moreover, North Carolina cities can involuntarily annex contiguous territories through local ordinance simply by demonstrating that a number of statutory requirements—such as the "urban" character of the annexed territory and the city's ability to provide services—are met. *Id.* at 4.

Carolina “law favors expansion of existing cities over incorporation of new ones.”¹⁸⁵

Thus, as cities in North Carolina have undergone radical changes in recent years, they have been able to rely on annexation of taxable residential and commercial property outside of their jurisdiction to add to their revenue stream. The housing developments that would have most likely become suburban communities in other states, and thus fiscally distinct from the city, are more likely to be absorbed by growing cities and added to their tax rolls. To be sure, annexation is not without controversy in North Carolina. Moreover, the power can be abused: many rural communities have used their annexation powers to selectively expand, excluding minority-populated areas just outside the city boundaries and thus denying them access to basic municipal goods and services.¹⁸⁶ Nevertheless, annexation is an important power that localities possess to manage growth and respond to shifting land use patterns.

Considering the extent to which urban/suburban divisions have plagued regional politics in most states, it could be possible that preferring annexation over the incorporation of new communities has helped contain some anti-immigration backlashes by reducing the intense competition that typically characterizes the relationship between neighboring communities. For municipal governments in North Carolina, the pressure to compete for residents or exclude others may be less pronounced because territorial boundaries matter that much less as a result. Indeed, this pressure may be further lessened by the fact that other sources of revenue like sales and use taxes are distributed in part on a per capita basis irrespective of where they are collected, and traditional local expenditures like education are primarily the responsibility of the state and county governments.

Counties, however, lack the ability to annex. Unlike municipal governments in North Carolina, they collectively subdivide the entire territorial jurisdiction of the state and thus have neither the ability to

185. *Id.* at 3.

186. See generally James H. Johnson, Jr. et al., *Racial Apartheid in a Small North Carolina Town*, 31 REV. BLACK POL. ECON. 89 (2004) (describing how discriminatory zoning tactics can be used to deny African Americans access to basic services). The segregation is made worse by the fact that the municipal governments in North Carolina have “Extra-Territorial Jurisdiction” over the land-use of the minority neighborhoods outside of its official borders. *Id.* at 95; see also CEDAR GROVE INSTITUTE FOR SUSTAINABLE COMMUNITIES, INCORPORATION, ANNEXATION, AND EXTRA-TERRITORIAL JURISDICTION: A DOUBLE STANDARD?: PREDOMINANTLY-MINORITY TOWNS STRUGGLE (Oct. 28, 2004), available at http://www.mcmoss.org/CedarGrove/Docs/anns_10_24.pdf.

expand or shrink. Moreover, county governments have a heavier reliance on property taxes than municipal governments in part because municipal governments operate utilities, which generate a substantial amount of income.¹⁸⁷ Thus, county boundaries is of greater significance, and control over potential residents, rather than county territorial jurisdictions, are much more important to counties seeking to manage their costs and resources at a time of growth.

Again, it may be a stretch to argue that this particular difference explains why counties have been more aggressive than cities in seeking to deflect the residency of illegal immigrants. At the same time, regulatory patterns usually associated with inter-municipal conflict in other states without broad annexation rules are beginning to appear in the inter-county politics over illegal immigration. This is especially true for counties that are becoming oriented around an expanding metropolitan core. Consider, for example, the fact that all but one of the counties surrounding Mecklenburg County (where Charlotte is located)—Gaston, Lincoln, Carrabus, Catawaba, Union, and Rowan—are involved in the section 287(g) program or have enacted more extensive illegal immigration measures.¹⁸⁸ Indeed, as the commissioner for Lincoln County offered as explanation: illegal immigrants “move from area to area to avoid” communities that have enacted local regulations, and because Mecklenburg and Gaston had already done so, Lincoln needed to follow suit or risk “a lot of illegals . . . spill[ing] over into Lincoln County to get away from that.”¹⁸⁹

* * *

Told from this perspective, it is possible to see the emergence of local immigration regulations in North Carolina as being independent of immigration or federal immigration policy. If we credit the rationales put forward for their adoption, then local immigration regulations appear to be foremost an attempt to manage and negotiate the fiscal and cultural pressures faced by a certain number of the state’s local institutions. “Illegal immigrants” in this context serve as a proxy for these anxieties and not, as it is usually understood, the other way around. Indeed, these pressures do not appear to be primarily, much less entirely, the result of illegal immigration. Rather, broader economic and demographic changes appear to be playing an even larger role, and the pressures certain

187. See LAWRENCE & MILLONZI, *supra* note 180, at 2.

188. See *supra* note 122 and accompanying text.

189. George, *supra* note 122.

localities are facing seem to be largely the result of the state's local legal structure. Thus, more than a product of immigration, or a consequence of federalism, local immigration regulations in North Carolina can be said to be principally a byproduct of localism.

It is not my intention to efface the specter of immigration entirely from this reading. Nor do I believe that this is possible. It cannot be denied that, for many residents in North Carolina, illegal immigration is the frame through which they understand the changes currently taking place in the state.¹⁹⁰ It would be equally remiss to ignore the fact that local leaders who are currently involved with immigration regulations regularly invoke illegal immigration as the root of their communities' ills.¹⁹¹ But the tendency for communities to associate a particular population in their community with its perceived problems, and the impetus for them to seek territorial exclusion or further political marginalization as the solution, is as much a consequence of the incentive structure built into how we organize local communities as it is about individual bias or resistance to change.¹⁹² If individual preferences cannot be understood apart from the communities and societies in which individuals are embedded, then it makes sense that local legal structures do not simply affect what preferences can be actualized through local action, but often act to define those preferences in the first instance.

The critical point is that the seemingly natural baseline upon which local communities and their residents are crafting their response is itself the product of a legal structure that can be reformed. Thus, to the extent the backlash against illegal immigration is a consequence of the incentive structure that motivates certain communities to act and not others, it can be argued that addressing localist structures might be an effective alternative. Indeed, the account of local immigration regulations in North Carolina is as much a story about how various factors may have led some localities to respond with enforcement measures, while leading others to react in

190. See Steadman, *supra* note 112 (recounting local descriptions of recent changes told primarily through the lens of immigration).

191. See George, *supra* note 122 (noting that Lincoln and Gaston Counties' illegal immigration regulations both include "language blaming illegal immigrants for economic burdens and social ills"); see also Coto, *supra* note 2 (quoting illegal immigration proposal in Mint Hill that states, among other things, that "illegal immigration . . . destroys our neighborhoods").

192. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849-57 (1994) (modeling how local legal structures perpetuate or exacerbate racial segregation even in the absence of racism).

other, sometimes non-immigration-related, ways. The next Part will consider these arguments in more detail.

III. NOTES TOWARD IMMIGRATION LOCALISM

Localism both complicates and enhances our understanding of local immigration regulations. We have seen this unfold in two distinct but interrelated contexts—as a matter of theory and as applied to a specific jurisdiction. The consideration that remains is what consequences, if any, this has on how one should approach local immigration regulations as a matter of policy. Relying on the insights that localism provides, this Section highlights the limitations of two prevailing reform perspectives and suggests a third—local legal reform—as a possible counterpart to these efforts.

A. *The Limits of Local Participation*

First, for those concerned about or interested in local involvement in immigration, it is important to recognize the ways in which localism both constrains and channels local action.

Recall that most of the debates regarding the role of local institutions in the immigration context revolve around interpretations of federal preemption. On the one hand, those concerned about local discretion have argued strongly in favor of invoking federal exclusivity to preempt local involvement, which is motivated by concerns about local participation in federal enforcement efforts¹⁹³ as much as local resistance to these efforts.¹⁹⁴ On the other hand, fearful that a strict interpretation of federal exclusivity would foreclose too much, others are arguing that local immigration-related activity should be analyzed through the more conventional doctrine of federalism.¹⁹⁵ This does not mean that all local action would be permitted, but it does suggest that substantive examinations, and not categorical analysis, would be employed in such a way that the federalist benefits of decentralization can be realized.¹⁹⁶

This is an important debate with wide-ranging consequences for immigration law. What localism suggests, however, is that if we take localism seriously, this debate between federal exclusivity and

193. See, e.g., Wishnie, *supra* note 50, at 1102–15 (expressing concern about racial profiling and other abuses that local enforcement of immigration laws promotes).

194. See, e.g., Carro, *supra* note 51, at 316–20 (arguing that prohibiting states and localities from cooperating with federal immigration officials frustrates federal immigration enforcement efforts).

195. See *supra* note 17 and accompanying text.

196. See Huntington, *supra* note 17, at 833.

immigration federalism may only be of marginal significance, and probably only in the most extreme cases. Irrespective of whether localities are prohibited from acting with regard to immigration, the type of action that localities will take will likely be influenced more by the local legal structure within which they operate than any other legal or doctrinal framework. For example, assuming that a workable line can be drawn between regulations of immigration and exercises of local police powers, there is no guarantee that federal preemption will foreclose all, or even a significant number, of local regulations that target immigrant residents. Conversely, assuming that some niche can be carved out for local participation, there is no assurance that the experimentation will not simply reflect the way in which localism structures local incentives, rather than a true reflection of local interests or local potential.

The fact is that most local involvement in immigration will likely be superficially related to immigration. In most instances, they will only be attempts to negotiate local interests upon an established structure of legal background rules in which invoking "immigration" proves to be useful. In times when federal interests in enforcement or integration converge with local interests, local action may be helpful. Yet relying on this convergence will not likely produce the long term stability that both federal enforcement and integration efforts require. It is important to remember that localities are neither passive administrators nor autonomous entities. The fact that they are neither complicates expectations about how they will behave—with or without the risk of federal preemption or the imprimatur of federal sanction. As the last Section here demonstrates, however, this does not mean that those concerned about or interested in local participation cannot pursue a different, non-federal-oriented route.

B. The Limits of Comprehensive Federal Reform

Second, for those concerned about local immigration regulations from the perspective of the localities involved, it is important to recognize the limitations of federal intervention in the form of comprehensive immigration reform. The localist reading here suggests that, while such reform is necessary for many reasons, we should recognize the limited potential that it has for addressing many of the concerns that underlie local immigration regulations. Accordingly, state and local leaders should reconsider their assumption that federal reform is the best, or only, long-term solution to the so-called local immigration crisis.

Admittedly, this is not a widely-held view. The conventional account of the relationship between local immigration regulations and comprehensive immigration reform is that the former is caused by the absence of the latter.¹⁹⁷ It assumes that local immigration regulations are but imperfect substitutes for more comprehensive federal action on the matter, and that federal action will negate the need for the local response. As a result, it is widely believed that the controversy over local immigration regulations can only be resolved by enacting comprehensive immigration reform.¹⁹⁸

Again, there are strong arguments in favor of reforming our immigration laws, possibly in a comprehensive manner. What localism suggests, however, is that such a reform will likely only be able to address the symptoms of local immigration regulations, and not the cause of the underlying illness. This Article has attempted to illustrate the multiple reasons that localities turn to local immigration regulations, many of which have little to do with immigration or federal immigration policy per se, or which are related in only a tangential manner. Therefore, assuming that an immigration compromise can be reached, it is important to recognize what localities can expect from federal action. In other words, from an immigration-oriented perspective, critics may be right to argue that, "[t]he county-by-county approach [to immigration] just isn't working out."¹⁹⁹ But it does not necessarily mean that a federal approach to the immigration issue will be more successful in addressing many of the underlying local concerns at play.

Consider, for example, reforms that either legalize the status of those illegally present or provide more opportunities for immigrants to come to, or work in, the United States. To be sure, this may succeed in eliminating the legal foundation for many local immigration regulations. But it would likely have minimal effect on

197. See, e.g., Martinez, *supra* note 126 ("While Congress continues to turn its back on immigration control and reform, local governments are taking matters into their own hands."); Coto, *supra* note 2 ("As national immigration reform takes a back seat to conflict in the Middle East, a couple of N.C. towns are picking up where Congress left off.").

198. See, e.g., Stella M. Hopkins, *N.C., S.C. Targeting Illegal Workers*, CHARLOTTE OBSERVER, May 13, 2006, at 1A (paraphrasing remark from Michele Waslin, director of immigration policy research for the National Council of La Raza: "But states can't solve a national problem piecemeal. Immigration is a federal issue, and Congress needs to act, in part to provide illegal immigrants already here with a path to citizenship."); Editorial, *Toothless Talk*, CHARLOTTE OBSERVER, Nov. 30, 2005, at 16A ("What's needed is for Congress to enact consistent, realistic immigration policy and fund it adequately Those are the steps that Mecklenburg County's commissioners should be demanding.").

199. Martinez, *supra* note 126.

the local concerns that prompted many of those laws to be passed. Not only would the fiscal pressures remain,²⁰⁰ but so would the basis for the cultural tensions. Moreover, considering that local immigration regulations have historically relied on immigration laws just as easily as more traditional local regulatory measures, it can be expected that any reform that eliminates the salience of illegal status would only have a partial effect on the enactment of local immigration regulations, even if they were to arise in a different form.²⁰¹

It is also doubtful that taking a contrary approach to comprehensive reform—one that emphasizes enforcement above all else—would produce results that are all that different for the local communities involved. In a tight labor market like North Carolina's,²⁰² the elimination of all illegal workers would either drive businesses or industries out of a particular jurisdiction (or out of business entirely), or lead to illegal workers being replaced by similarly-situated legal or native employees. With respect to the former, relocations or closures would likely produce substantial costs and a host of other problems that rival those associated with the influx of illegal immigrant workers. With regard to the latter, as long as the industry continues to recruit low-paid employees of prime working, and thus child-bearing age, while providing little to no benefits, it is likely that the local fiscal strain would not only be just as high, but actually higher because of their eligibility for benefits and social services that are not available to illegal residents. It can be argued that the cultural difference may be less noticeable, though I suspect that similar concerns will still arise in many communities with regard to a surge of legal or native workers from other states or regions. It can also be argued that legal and native workers would

200. For those currently illegal, mass legalization could translate into higher wages. It could also move them into other, more profitable, sectors as it did in 1986. See Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 J. POPULATION ECON. 96 (1999). This may ultimately benefit localities through increased property and sales taxes, and indirectly through state payroll taxes. But I suspect that much of the underlying economic tensions between the goals of locality, residents, and employers (outlined above) would still remain unresolved.

201. Cf. Ford, *supra* note 192 (describing how local government rules perpetuate racial segregation and disadvantage racial minorities even in a post-racial world, politically or socially.).

202. This is especially true in low-skilled industries that employ immigrant labor. See, e.g., Rachel A. Willis, *Voices of Southern Mill Workers: Responses to Border Crossers in American Factories and Jobs Crossing Borders*, in *THE AMERICAN SOUTH IN A GLOBAL WORLD*, *supra* note 113, at 138, 142–43; Tewari, *supra* note 134, at 116.

demand higher wages, though, even assuming that such increases would make a difference from a local perspective, it is worth noting that this outcome is far from clear. More likely, continued local efforts at line-drawing—not unlike that which local immigration regulations sought to accomplish—would continue, albeit with a new target population.

The above is by no means an exhaustive survey of all the ways that comprehensive immigration reform would or would not affect the local communities using or tempted by local immigration regulations. There are no doubt many different ways of imagining federal reform that may offer consolation to local communities.²⁰³ Nevertheless, to the extent that the issues surrounding local immigration regulations are not synonymous with those surrounding the national immigration debates, we should be cautious of the promise and potential of comprehensive immigration reform in the local context. At best, comprehensive reform would translate the impulses behind local immigration regulations into more traditional local regulations. For some, this technical reclassification may be sufficient to declare an immigration crisis averted. But to the extent that the so-called crisis is not understood as local involvement in the federal arena of immigration, but substantively as a local attempt to respond to local pressures, it is not clear that comprehensive reform is the fabled silver bullet that so many seem to believe it to be.

C. The Promise of Local Legal Reforms

If local responses to immigration are due in large part to the influence of local legal structures, then it could be that focusing on these legal structures directly might be as effective a reform strategy as those that usually arise in the immigration discourse. For those interested in local involvement in immigration, it might be worthwhile to consider the ways in which local legal structures can be altered to enable and incentivize local communities to, for example, pursue inclusionary or integrationist approaches rather than exclusionary

203. The best balance that I can imagine from a local perspective is if strict enforcement is coupled with a multi-year temporary worker program that allows for the recruitment of foreign labor without incurring the corresponding costs associated with children or family. But even then it is important to acknowledge the negative consequences endemic to maintaining a large population of transient workers with no bonds or investment in the community within which they work. See Griffith, *supra* note 135, at 52 (noting that, while North Carolina uses H-2A to recruit legal guest-workers, it is the state's undocumented immigrants "that ha[ve] been more apt than the H-2 program to generate family ties to towns, neighborhoods, schools, and other social resources of North Carolina . . . that we normally associate with the development of community").

strategies. For those concerned about the impact of immigration on local communities, or the pressures that have led immigration to rely on local immigration regulations, then local legal reform might offer more possibilities for relief and avenues for proactive responses than adjustments to our immigration criteria or quotas.

Immigration commentators and reformers interested in exploring these possibilities should not feel that they would have to carve out this path themselves. Rather, they will likely find the prolific body of local government scholarship useful in this endeavor. Indeed, it is even possible that new cooperative opportunities might emerge as a result. For example, immigration reformers interested in addressing the plight of immigrant residents in American society may find their endeavors strengthened by alliances with anti-segregation activists or smart growth proponents.²⁰⁴ Similarly, immigration reformers concerned about the tremendous pressures that immigration often imposes on communities might find their options expanded by working with regionalists or proponents of inter-local revenue sharing.²⁰⁵

Although now uncommon, it is important to realize that approaching the issue of immigration with an eye toward local legal and political structures is not new. Indeed, it can be argued that it was only in the last couple of decades that immigration has come to stand as an issue apart from local or municipal affairs. At the turn of the twentieth century, before the dominance of comprehensive and all-pervasive immigration regimes, the conversation surrounding immigration was intimately connected and intertwined with those concerning municipal reform and the legal structure of localism.²⁰⁶ Because immigration was understood by many to be as much a local as a national problem, immigration restrictions were often understood to be but one of many options for dealing with immigration. We may question the substance of the proposals that

204. For an overview of the smart growth movement, see generally ANDRES DUANY ET AL., *SMART GROWTH: NEW URBANISM IN AMERICAN COMMUNITIES* (2003).

205. For descriptions and critiques of the regionalism movement, see generally Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993); Briffault, *supra* note 36.

206. Of course, most of these accounts took an unfavorable view of immigrants and municipal affairs. See, e.g., EDWARD C. BANFIELD & JAMES Q. WILSON, *CITY POLITICS* 141 (1963) (noting that, in cities like Boston, "many leaders of [municipal] reform were leaders of the Immigration Restriction League"); JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890-1920*, at 155 (2d ed. 2000).

were in vogue around that time. Nevertheless, it is an approach that may be worth resurrecting.

Admittedly, the localist approach has limitations. The immigration-related issues that it can address are partial, and there is no guarantee that local legal reforms will necessarily lead to the kind of local action that we wish to produce. But there is already some evidence that local legal structures make a difference. The way in which North Carolina relies on regional school districts funded in large part through state funds collected from across the state, or its decision to maintain a liberal annexation policy that reduces urban/suburban competition and encourages municipal/county cooperation,²⁰⁷ may seem at first to be of limited concern to those involved with the issue of immigration. But it can be argued that, by reducing inter-local competition and encouraging a more expansive regional outlook, this structure seems to have opened up a space where meaningful local approaches to immigration have an opportunity to develop.

It is too early to predict what a localist approach to immigration will offer. Nevertheless, whatever immigration localism is or comes to be, it is certainly an approach worth exploring.

CONCLUSION

Writing about Boston in the late nineteenth century, Frederick Bushée remarked: "The problem at the North End [the city's foreign district] is the problem of immigration, to be solved at the ports of the United States. The problem at the South End is the internal social problem."²⁰⁸ More than a century has passed since that comment was made. Nevertheless, its underlying assumption—that our local immigration problems and our local domestic problems are distinct and incomparable—has come to dominate the local and national discourse on immigration in this country.

It is time to reconsider this assumption. As this Article demonstrates, the issue of immigration and the consequences of localism are often intertwined. Focusing on the recent and varied local responses to immigration, we have seen how local immigration regulations cannot be understood entirely from the conventional federal- and immigration-oriented perspectives. Starting with the

207. See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 192, 234–36 (2001).

208. Frederick Bushée, *Population*, in *THE CITY WILDERNESS: A SETTLEMENT STUDY* 33, 39 (Robert A. Woods ed., 1898).

proposition that local immigration regulations may not have that much to do with immigration at all, this Article has sought to reveal how local responses can be understood to be a consequence of how local legal structures empower and disempower localities, and how localism creates incentives and disincentives for certain conduct. Localism as both a doctrinal and conceptual framework complicates how local immigration regulations, and the federal-local relationship, are understood. And as the close reexamination of the local response to immigration in North Carolina uncovered, local legal structures not only offer some explanation for why certain communities have relied on local immigration regulations, but also suggest possibilities for why others have not.

All this suggests that local immigration regulations cannot be understood from the perspective of immigration law alone; nor is federalism itself, despite its important insights, sufficient as an alternative. By establishing the rule and incentive structure within which local action is invariably situated, localism has a considerable influence as well. Of course, to the extent that the controversy surrounding local immigration regulations is increasingly becoming a popular framework for understanding the issue of immigration more generally, it may be that considerations of localism should be extended even more broadly than they are here. At the very least, we would do well not to overlook the legal consequence of the local in our assessment of local immigration regulations.