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Introduction

In December 2010, the U.S. Supreme Court heard oral arguments in *Chamber of Commerce of the United States v. Whiting*. At issue was an Arizona law allowing the state to revoke the business licenses of employers who knowingly hired unauthorized immigrants. *Whiting* was the first in a series of Supreme Court cases involving immigration-related laws at the state level, all of them passed by the state of Arizona.[1] The most prominent of these laws was SB 1070, a state enforcement law passed earlier that year, eliciting a lawsuit from the Obama administration and eventually leading to the *Arizona v. United States* decision. Although *Whiting* was less well-known, the stakes were nevertheless very high – not only for workers who might be affected by Arizona's law, but also for employers, labor unions, other states, and even the federal government.

Several disparate groups filed briefs in the Supreme Court supporting the Chamber of Commerce's campaign against the law. The Chamber represented the concerns of employers who were worried that, if Arizona's law were allowed to stand, they would need to contend with a proliferation of individual state and local laws on employer verification, each with its own set of requirements. In addition to the Chamber of Commerce as petitioner, other business organizations filed an amicus brief, arguing that a "patchwork of state and local laws undermines Congress's intent to establish a comprehensive and uniform national framework that limits the imposition of undue burdens on businesses."[2] The federal government also had a keen interest in the case and it, too, filed an amicus brief in support of the petitioner, arguing that federal law, especially the 1986 Immigration Reform and Control Act (IRCA), left no room for laws like Arizona's to take hold.[3] Indeed, another amicus brief by former members of Congress, including Romano Mazzoli who helped author the 1986 law, argued that Congress intended to expressly preempt the ability of states to impose employer sanctions, and that it intended any exception for state licensing laws to be interpreted narrowly.[4] Finally, labor groups and

immigrant advocacy organizations were also concerned about heightened employer verification requirements, arguing that Arizona's law threatened to upset the careful balance struck by federal law, between the goals of deterring unauthorized employment, on the one hand, and avoiding employee discrimination and national origin profiling, on the other.[5]

On the other side of the issue, proponents of Arizona's employer sanctions law also had enormous investment in the case, and they filed amici curiae briefs in support of the respondent, the state of Arizona. These included the bill's author, Arizona State Senator Russell Pearce, other states intending to follow Arizona's lead by passing similar legislation, and restrictionist groups such as the Immigration Reform Law Institute (IRLI). IRLI, which described its interest in the case as a group that "frequently assists State and local governments in the drafting of legislation to deter unlawful immigration," argued that the 1986 federal immigration law explicitly allowed states to issue and revoke business licenses in connection with the hiring of unauthorized immigrants.[6] The brief filed by the Attorneys General of various states advanced a broader and more fundamental federalism argument, contending not only that Congress had carved out an exception for states to impose penalties via business licenses, but that such powers were part of the State's traditional and sovereign power over the "formation, licensing, and regulation of business entities."[7]

Clearly, a lot was at stake in the Court's decision with respect to immigration federalism. The Supreme Court was ruling on the constitutionality of Arizona's particular law on employer verification, but the decision would affect plans for copycat legislation in other states that were following Arizona's lead. Even more intriguing, the Court was making its decision under the shadow of Arizona's other laws on immigration that were facing court challenges, including the widely publicized SB1070, an omnibus enforcement bill that thrust the state into the center of the national policy debate on unauthorized migration. Ultimately, the Court ruled in favor of Arizona's employee verification law, and this decision prompted a new round of speculation as to whether the United States was entering a new period of immigration regulation, one where states would play a more robust role in regulating the livelihoods of immigrant residents.[8] *Arizona v. United States*, which followed a year later, would curb some of the legislative zeal around state immigration enforcement laws, but viable avenues for immigration restriction still remained.

Indeed, over the past few years there have been many other developments – some involving the Courts, others involving the Executive Branch, and many involving state legislatures and local governments – that indicate a period of great ferment with respect to immigration and federalism. Which begs the

question: Have we entered a new period of immigration federalism? And if so, what are the main features of this new equilibrium, and what are its causes and consequences?

These are the central questions that motivate this book. To put the answers from our analysis most simply, we find that the post-2001 period is, indeed, a new phase in immigration federalism, with subfederal activities that have accelerated in the past decade. In trying to understand the factors that have contributed to this recent acceleration, we argue that the conventional account – of state and local governments being squeezed between demographic pressures from below and federal inaction from above – is flawed both theoretically and empirically. We argue instead for an account of immigration federalism that is fundamentally rooted in a particular political process that connects both federal and subfederal actors, which we term the Polarized Change model of immigration federalism. Importantly, our model helps account not only for the timing and spread of restrictionist legislation from 2004 through 2012; it also accounts for the subsequent shift in momentum toward pro-immigrant legislation at the state level. Finally, we assess the implications of this new federalism. We address questions of preemption and equal protection, particularly with respect to the divergent fates of integrationist and restrictionist legislation under judicial review. And, we suggest that the new immigration federalism is changing scholarly and public discourse – on immigration as well as on federalism – revealing the power of politics and the permanence of state and local regulation in the immigration landscape.

SETTING THE STAGE FOR IMMIGRATION FEDERALISM: CONGRESS AND THE COURTS

Since the 1870s and 1880s, the U.S. federal government has been preeminent in the area of immigration policy, and this primacy has been recognized in most studies of law, politics, and policy. About 140 years ago, Congress passed the first set of national laws restricting immigration. During that period, the U.S. Supreme Court had also issued a series of decisions that affirmed this exercise of national power and severely curtailed the ability of states to regulate immigration. In the subsequent century, the rise of the United States as a global power further reinforced the notion of immigration policy as intimately related to U.S. foreign policy. Thus, the story of immigration law and policy since the 1870s has largely been a story of federal action – by Congress and by the Executive branch – to control the entry and exit of foreign-born persons and to manage their conditions of residence and employment in the United States. These actions have included both restrictive laws such as the Chinese

Exclusion Act of 1882 and the Immigration Act of 1924, and expansive moves such as the initiation of the Bracero Program in 1942 and the passage of the 1965 Immigration and Nationality Act.

At the same time, Congress and the U.S. Supreme Court have also accorded limited room for states to regulate the lives and livelihoods of immigrants residing within their borders. These subfederal laws have ranged from establishing eligibility rules for some government jobs and positions, providing selective access to health and welfare benefits, easing or limiting access to public higher education, and tying the issuance of government contracts and business licenses to verifying an immigrant's work authorization. During the course of the twentieth century, a few states had passed various laws seeking to make life easier or more difficult for immigrant residents. However, this legislation was limited in scale and scope. Indeed, the federal government occasionally curtailed some of these efforts, such as in 1982 when the U.S. Supreme Court ruled in *Plyler v. Doe* that state and local governments could not deny public education to children who were unlawfully present in the United States, and in 1986 when Congress passed a provision in the *Immigration Reform and Control Act* that prevented states from imposing fines on employers who knowingly hired unauthorized immigrants.

Thus, while the first century of immigration law, from 1776 to 1875, was one in which the federal government was largely absent and state governments played a significant role,[9] the subsequent eras of immigration law found a new equilibrium where the federal government gained supremacy in many aspects of immigration law and immigration enforcement, while states played a far more limited role and only occasionally passed legislation with respect to immigrants. This division – between the federal government and states/localities over the proper allocation of regulatory authority over immigration and the lives of immigrants, especially undocumented immigrants – has spawned contentious debates in political and legal circles. In the scholarly literature, this tension has defined the contours of what many refer to as "immigration federalism."[10] In broad strokes, the debate over immigration federalism has pitted claims of the sovereign rights of states, within our federalist system, to control those within their borders against claims of federal primacy or exclusivity in immigration matters. More nuanced versions of the debate eschew robust claims of sovereignty and constitutional exclusivity for more intricate claims about federal statutory interpretation, and the leeway for state and local participation within that background federal statutory scheme. These constitutional, statutory, and political struggles over power allocation underlie an even more heated policy debate over the very essence of immigration

policy: Should our country be more welcoming or restrictionist when it comes to immigration?

Although the United States has wrestled with questions of federal power, states' rights, and political membership throughout its history, there have been some important developments since 1965 that suggest another evolution in the relationship between immigration and federalism. As we show in this book, congressional overhaul of immigration law in 1965 introduced new dimensions to immigration, including racial diversification and the growth of the unauthorized population, with a few states passing legislation in reaction to these changes. Subsequently, Congress began to take state action more explicitly into account in its subsequent attempts at major legislation, first in 1986 and then in 1996. However, these congressional provisions largely lay dormant through the end of the twentieth century. In recent years, however, state and local attempts to enter into the field of regulating immigration have become more far more frequent, more widespread, and broader in scope than anything else we have seen since the late 1800s. In short, a century and a half after the federal government shunted states aside and established preeminence in immigration law, these subfederal actors have once again grabbed national attention, inserting themselves into the central debates of the day with respect to immigration policy.

It may be too early to decipher the full meaning or delineate the full contours of this new era in immigration federalism, given that courts, Congress, and state legislatures are still playing an active role in shaping this new equilibrium. And yet, the roots of this evolutionary shift are by now fairly clear. As we show in this book, the seeds of this new era in immigration federalism were sown starting in 1965 with a retooling of immigration law and migration policy that lead to state actions and court decisions about those state actions. And, congressional legislation in 1986 and 1996 specifically addressed the role of states. These acts by Congress created opportunities for states – at first unintentionally, and then intentionally – to legislate on immigration, and on unauthorized immigrants in particular.

These judicial decisions and federal laws, however, only shaped the parameters of what was possible for states to do; it would still take significant state legislative action to capitalize on these opportunities. Indeed, for nearly a decade after the passage of the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), states were relatively dormant in their attempts to legislate on unauthorized immigrants, or to engage in the kinds of cooperative enforcement schemes envisioned by the law. In fact, as we see in Figure 1.1, immigration laws prior to 2005 were such a marginal and infrequent part of state legislation that groups such as the National Conference of

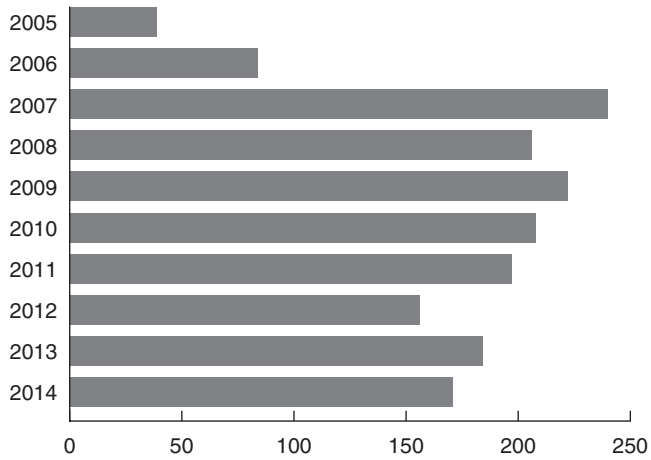

FIGURE 1.1. Number of enacted state laws on immigration, 2005–2014.[11]
Source: National Conference of State Legislatures.

State Legislatures did not even bother tracking them. Since that time, however, we have seen a flurry of state and local legislation related to immigrants and immigration. Until 2012, much of this legislation was restrictive in nature, making it more difficult for unauthorized immigrants to reside, work, and access certain benefits and services. Importantly, however, there was significant variation across states in terms of the kinds of legislation they passed, whether punitive or pro-integration.

This mostly restrictionist trend reached an important pivot in 2012. Three major developments prompted this change in direction and momentum. First, the U.S. Supreme Court issued its *Arizona v. United States* opinion, delivering its most consequential decision on the limits of state authority in immigration in three decades. Rejecting several provisions of Arizona's controversial omnibus immigration enforcement bill, SB 1070, the opinion nevertheless still left open possibilities for state and local involvement. Second, President Barack Obama, against the backdrop of a stalemate in comprehensive immigration reform (CIR) in Congress and contentious debates over the role of the federal executive in immigration enforcement, instituted the Deferred Action for Child Arrivals (DACA) program, providing administrative relief and a form of lawful presence to hundreds of thousands of undocumented youth. Finally, Mitt Romney, the Republican presidential candidate whose platform supported laws like Arizona's and called them a model for the rest of the country, lost his bid for the White House with especially steep losses among Latinos and immigrant voters. After these events in 2012, restrictive legislation at the

state level waned in frequency, and a growing number of states began to pass laws aimed at the integration of unauthorized immigrants. As this book goes to press, this integrationist trend is still continuing.

Before we proceed with an overview of the book, a few clarifications regarding our terminology are in order. First, although this book generally deals with the regulation of all immigrants, it is particularly concerned with state and local policy regarding undocumented immigrants. As such, we make a conscious choice here to refer to the population of persons who would be characterized in the Immigration and Nationality Act as "unlawfully present," "entrants without inspection," or "not authorized to be employed" as either undocumented immigrants or unauthorized immigrants. We do not use the term illegal alien or illegal immigrant, which others may use to describe this same population. In doing so we acknowledge that the choice of language is itself one that suggests a certain view of the conclusiveness and consequences of unlawful status.[12] Nevertheless, we believe our choice of description is descriptively, legally, and morally justifiable, and is coming into greater use in judicial and media terminology.[13]

Second, throughout the book we use the terms "restrictionist" and "integrationist" or "pro-immigrant" to refer to the types of laws enacted at the state and local level. We use the term "restrictive" or "restrictionist" to describe a range of policy positions, or persons advocating policy positions, geared toward greater immigration enforcement, increased state and local participation in that enforcement, decreased ability of unlawfully present persons to access public goods and benefits, and fewer discretionary possibilities to permit continued unlawful presence. In contrast, we use "integrationist" or sometimes "pro-immigrant" to refer to a range of policy positions, or persons advocating the same, aiming to provide fuller inclusion of immigrants, including undocumented immigrants, into American society and the polity, and favoring policies that would provide pathways to normalized legal status, access to public benefits, and the benefit of legal protections, such as anti-discrimination laws, at both the state and national level. And, as a general matter, we might expect integrationists to support more expansive national immigration policies, while restrictionists would generally favor limiting immigration or maintaining it at the status quo.

We should also clarify that it is not an aim of this book to present a judgment as to whether state and local participation in aspects of immigration policy is a good or bad development, or one that should be categorically heralded or decried. Instead we take subfederal presence in this regulatory field to be both a historical and practical reality. Starting from that point, we attempt to uncover the legal and political conditions that make such involvement

possible and likely, and the consequences of the quality and quantity of that involvement for the future of immigration jurisprudence, law, and policy. To be sure, we argue in Chapter 6 that equality and nondiscrimination norms should play a greater role in assessments of both federal and subfederal immigration law. As such, we view certain restrictionist laws with greater skepticism than integrationist efforts.

OVERVIEW OF THE BOOK

In this book, we seek answers to three central questions with respect to the recent flurry of state and local legislation on immigration. The first is a descriptive one: What are the kinds of laws that states have passed in this new period of immigration federalism? Next, what are the causes of this development, in terms of background factors and more proximate causes? And, finally, what are the consequences of these new developments in immigration federalism, particularly with respect to our understanding of the role of states and localities in our constitutional order? We seek answers to these questions by conducting a set of related inquiries, which we outline below.

In Chapter 2, we situate the current flurry of subfederal legislation in the larger historical context of immigration federalism in the United States, showing how Congress and the Supreme Court have played key roles in particular historical moments, to either permit or limit state involvement in regulating immigration. Thus, we take a step back to offer an abridged narrative of the political and legal development of immigration federalism in American history. The purpose of this review is to identify and describe the historical antecedents and doctrinal innovations in immigration federalism, and provide a basis against which we can evaluate the recent surge in subfederal involvement. This background seeks to clarify the constraints and possibilities – produced by an interplay of Congressional action and Court decisions – that were left open to states and localities as they embarked on a remarkable period of proliferation and variation, beginning around 2004.

Indeed, we make the case that this contemporary period represents a new, quickening phase in a larger period of immigration federalism, an era that is distinct from the first century of immigration law that was state-centric, and the second century of immigration law where the federal government became dominant. We argue that the era from 1965 onward constitutes a still-developing *third era of immigration federalism*, as courts began to grapple more seriously with questions of equal protection as it relates to immigration, and Congress waded more explicitly into defining what states can do with respect to regulating the welfare and livelihood of immigrants. We end this chapter with the

period immediately preceding the September 11 attacks, discussing in detail California's Proposition 187, the predecessor to the several state and local restrictive efforts that dominated headlines over the past ten years.

Having provided this context and background, we then explain the various types of laws that states and localities have passed during this new period of immigration federalism. We first turn our attention to restrictive legislation in Chapters 3 and 4. In Chapter 3, we provide a description and classification of key types of laws at the state and local level that were dominant from 2004 through 2012. After establishing a descriptive sense of this new flurry of legislative activity (in essence, answering the question of "what" we are trying to explain), we examine the causes for this remarkable spike in state and local legislation on immigration, and ask why it was occurring in some places but not in others. In answering these questions, we critically evaluate the "demographic necessity" argument that was dominant in explaining why states and localities passed restrictive laws starting in 2004: This argument held that the combination of demographic pressures from new patterns of unauthorized migration, combined with federal inaction, created irresistible pressure for states and localities to act. As we detail in Chapter 3, we find this explanation to be seriously flawed, both theoretically and empirically.

After providing a thorough critique of the "demographic necessity" explanation, Chapter 4 offers our alternative explanation for why we have seen a flurry of restrictive activity in the past decade. This explanation, which we ground in a political process model that we call the Polarized Change model of immigration federalism, offers several advantages. Not only does our model hold up better empirically than does the conventional model, using both statistical and historical methods, it has the added virtue of explaining not only the rise of state and local policies but also the generation of a federal legislative stalemate, which is often cited as a cause for local action.

Our explanations of immigration federalism centered on politics rather than demographic change gains further credence when we consider the shifting policy momentum after 2012, as restrictive efforts at the state level became more rare and pro-immigrant integration efforts became more common. Thus, while the fundamental demographic realities of immigration settlement did not change appreciably after 2012, the political landscape certainly did as presidential candidate Mitt Romney's embrace of immigration "attrition through enforcement" led to spectacularly sharp losses among Latino voters. There were other political factors at play in the shift to more pro-immigrant legislation, which we detail in Chapter 5.

More broadly, Chapter 5 seeks to situate this integrationist trend within the Polarized Change Model of immigration federalism described in Chapter 4.

Consistent with that model, the shift toward more integrationist laws is also heavily influenced by a political process, with Democratic-leaning cities and states much more likely to pass such legislation. In addition, our data indicate that the size of the Latino electorate, and the immigrant electorate more broadly, makes it more likely that a jurisdiction will pass certain types of integrationist policies. Beyond these factors, the chapter argues that immigrant advocacy groups have adopted the kind of networked strategy of subfederal legislation previously seen among restrictioinist issue entrepreneurs. In an important contrast, however, the networked actors working on state-level integration have not worked against comprehensive immigration reform at the federal level, even when it has contained many enforcement provisions that they find unpalatable. Finally, during a time of congressional stalemate, the federal executive's actions on immigration enforcement have also pushed states and localities to reexamine their policies on cooperating with federal enforcement efforts and grapple with the effects of policies like the Obama Administration's 2012 Deferred Action for Childhood Arrivals (or DACA).

In Chapter 6, we pivot from answering the "what" and "why" questions of this new immigration federalism, to more fully considering its theoretical and legal implications. In the emerging legal study of immigration federalism, scholars and courts have struggled to determine how these recent state and local enactments fit into the kinds of legal doctrines typically used to assess such laws. Mainly, these assessments have centered on the propriety of state and local involvement in the subject area, given federalism debates between the virtues of decentralized policy experimentation versus the general notion that immigration regulation and enforcement are best left to the federal government alone. Our Polarized Change Model, however, suggests that policy proliferation in the immigration sphere is the product of a coordinated, networked system that is highly dependent on political factors. Recognizing the political underpinnings of these developments in immigration federalism may not undermine their usefulness or constitutionally. However, an accurate assessment of the new immigration federalism certainly conveys an image that is at odds with the hallowed view of federalism, as organic responses to local needs that are self-evident and driven by objective conditions.

Furthermore, we argue against the false equivalency of viewing anti-immigrant and pro-integration laws in the same light: the former often play on misperception and group stereotypes and explicitly call out particular groups for differential treatment. By contrast, many of the integrationist measures passed by state legislatures have couched their policies in universalistic terms, and often do not make reference to particular classes of persons. Thus, we argue that a legal framework grounded in racial