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# IMMIGRATION AS URBAN POLICY

*Rick Su*\*

## ABSTRACT

Immigration has done more to shape the physical and social landscape of many of America's largest cities than almost any other economic or cultural force. Indeed, immigration is so central to urban development in the United States that it is a wonder why immigration is not explicitly discussed as an aspect of urban policy. Yet in the national conversation over immigration, one would strain to hear it described in this manner. This essay addresses this oversight by making the case for a reorientation of immigration toward urban policy; and it does so by advocating for an immigration regime that both explicitly recognizes the role of immigration as an instrument of urban development, and sees urban policy as a vital complement to our federal immigration regime. As this essay outlines, there are good reasons for such an urban policy reorientation from the perspective of both urban and immigration policymakers. At the same time, significant obstacles exist, not only in the structure of our immigration laws, but also the prevailing organization of our local governments. Thus, the essay concludes by proposing a reform to our immigration regime that advances the aims of reorienting immigration toward urban policy, addresses the structural obstacles that stand in the way, and suggests further avenues of reform going forward.

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## INTRODUCTION

Immigration has done more to shape the physical and social landscape of many of America's largest cities than almost any other economic or cultural force. Its effect on established immigration gateways is clear: New York City, a traditional reception area for newcomers to the United States, continues to be an ever-shifting palette of immigrant neighborhoods and cross-ethnic interactions;<sup>1</sup> Los Angeles, with an Anglo population of more than seventy percent in the 1970s,<sup>2</sup> is now both derisively and admiringly called the "Capital of the Third World";<sup>3</sup> Miami, with its large number of Latino residents and concentration of Cuban financiers, embraces its demographic makeup not only as a source of cultural pride, but also in its bid as the financial gateway to Latin America.<sup>4</sup> At the same time, interest in immigration is quickly spreading to other metropolitan regions as well. With the immigrant population soaring in "boomtown" cities like Las Vegas, Houston, Dallas, and others in the Sun Belt,<sup>5</sup> the impact of immigration on the newest wave of urban development seems to parallel the immigrant-driven urbanization of earlier eras. All the while, immigration is drawing attention in regions without significant immigration inflows at all; many Rust Belt cities like Cleveland, Pittsburgh, and Detroit have raised the prospect of immigration as an urban revitalization strategy.<sup>6</sup>

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1. See NANCY FONER, *NEW IMMIGRANTS IN NEW YORK* 16 (rev. ed. 2001).

2. See ERIC AVILA, *POPULAR CULTURE IN THE AGE OF WHITE FLIGHT: FEAR AND FANTASY IN SUBURBAN LOS ANGELES* 230 (Earl Lewis et al. eds., 2006).

3. See generally DAVID RIEFF, *LOS ANGELES: CAPITAL OF THE THIRD WORLD* (1991).

4. See ÅKE E. ANDERSSON & DAVID E. ANDERSSON, *GATEWAYS TO THE GLOBAL ECONOMY* 139-41 (2001).

5. See, e.g., D'Ann Petersen & Laila Assanie, *The Changing Face of Texas: Population Projections and Implications*, in *THE FACE OF TEXAS: JOBS, PEOPLE, BUSINESS, CHANGE* 37 (Fed. Reserve Bank of Dall. ed., 2005), available at [http://www.dallasfed.org/research/pubs/fotexas/fotexas\\_petersen.html](http://www.dallasfed.org/research/pubs/fotexas/fotexas_petersen.html); AUDREY SINGER, *THE BROOKINGS INST., THE RISE OF NEW IMMIGRANT GATEWAYS* (2004).

6. See ORG. FOR ECON. CO-OPERATION & DEV., *LOCAL ECONOMIC AND EMPLOYMENT DEVELOPMENT, FROM IMMIGRATION TO INTEGRATION: LOCAL SOLUTIONS TO A GLOBAL CHALLENGE* 87 (2006) [hereinafter *IMMIGRATION TO INTEGRATION*]; Barry Newman, *Feeling*

Indeed, immigration appears to be so central to urban development in the United States that it is a wonder why immigration is not explicitly discussed as an aspect of urban policy. Yet in the national conversation over immigration, one would strain to hear it described in this manner. Despite the significant impact of immigration on our metropolitan regions and the importance of urban development to this nation's social and economic prosperity, there is still a distinct sense that urban interests are one step below the "national" concerns that guide the development of immigration laws. If there is any room for a local role, it is often discussed as an extension of the federal government's existing enforcement efforts.<sup>7</sup> If there is any consideration of local concerns, it is usually in the context of how they conflict with national interests.<sup>8</sup>

This essay addresses this oversight by making the case for a reorientation of immigration toward urban policy.<sup>9</sup> It does so by advocating for an immigration regime that both explicitly recognizes the role of immigration as an instrument of urban development, and sees urban policy as a vital complement to our federal immigration regime. In Part III, I lay out a preliminary proposal along these lines by calling for the geographic allocation of certain immigration visas according to regional needs, interests, and federal-local negotiations. This, I argue, would be a modest yet significant step toward integrating our national immigration regime with urban development in this country.

The discussion preceding Part III establishes the groundwork for why such a proposal, and other efforts along the same lines, are sensible and feasible. In Part I, I set forth the reasons why an urban policy reorientation makes sense both from the perspective of urban policymakers, for whom immigration is an important issue and a useful tool, and immigration policymakers, given the influence of urban policies on our nation's capacity to

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*Snubbed by Immigrants, Pittsburgh Acts*, WALL ST. J., May 28, 2003, at B1; STEVE TOBOGMAN, GLOBAL DETROIT: SHORT REPORT (2010), available at <http://neweconomyinitiative.cfsem.org/resources/research-library/global-detroit-study>.

7. See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005).

8. See, e.g., Howard Fischer & Brady McCombs, *U.S. Suit Jacks Up Drama Over Immigration Law*, ARIZ. DAILY STAR, July 7, 2010, at A1.

9. One note on the use of the word "urban" in this essay might be useful. As a matter of geography, I use "urban" in a manner similar to its use in the Census to refer to geographic areas encompassing a distinct and interconnected economic and social network, which, when involving a metropolitan region, includes the central city, the suburbs, and even the exurban fringe. See *Census 2000 Urban and Rural Classification*, U.S. CENSUS BUREAU, [http://www.census.gov/geo/www/ua/ua\\_2k.html](http://www.census.gov/geo/www/ua/ua_2k.html) (last updated Dec. 3, 2009). As a matter of politics, I focus my attention primarily on metropolitan regions because they reflect the fundamental urban unit today and, as such, are in the best position to make urban policy decisions, including those involving immigration.

absorb immigrants and the long-term effect of immigration on our country. Part II then outlines two obstacles to treating immigration as urban policy under the existing legal structure: the absence of any direct means in existing immigration law to accommodate regional variations and interests, and the lack of any structure in current local government law to allow for urban policymaking at the regional level with respect to immigration. With this as background, the proposal in Part III aims to advance the goals set forth in Part I, while addressing the obstacles posed in Part II.

## I. THE REASONS FOR IMMIGRATION AS URBAN POLICY

### A. Why Immigration Should Matter to Urban Policymakers

Immigration matters to urban policymakers for the simple reason that immigration is, and has always been, a critical part of the growth and development of the American city.<sup>10</sup> This was true for the great cities of the nineteenth and early twentieth centuries, whose urbanization was disproportionately fueled by the first major waves of immigration. It is also true today, as cities and metropolitan regions work to manage the new immigrants they have received. Yet the significance of immigration to urban policy lies not only in its past and present impact, but also, more importantly, in how it affects a city's future prospects. Indeed, in an environment marked by increasing inter-local competition, it is worth noting that the ability to channel and manage immigration is central to many different urban development strategies.

As a historical matter, immigration has always been a particularly urban phenomenon. Immigrants to the United States have long been drawn to urban centers in higher proportions than the native populations, and periods of rapid urbanization in the United States have tended to coincide with periods of mass immigration.<sup>11</sup> During the rise of the great American cities in the late-nineteenth century, two-thirds of immigrants were residents of a city as compared to only one-third of all Americans.<sup>12</sup> In cities like Boston, Baltimore, and Chicago, immigrants constituted anywhere from one-

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10. See THOMAS MULLER, IMMIGRANTS AND THE AMERICAN CITY 69 (1993).

11. See, e.g., ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 185 (1990); MULLER, *supra* note 10, at 304; JAMES P. SMITH ET AL., THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 31 (1997).

12. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 70 (1985).

third to one-half of the total population.<sup>13</sup> Indeed, by the end of the nineteenth century, it is estimated that four out of five residents in the greater New York area were either foreign-born or had a foreign-born parent.<sup>14</sup> As laborers and entrepreneurs, immigrants have played a critical role in the development of the economic and physical infrastructure of the modern American city.<sup>15</sup> Moreover, as constituents and public servants, their involvement in local democracy has also shaped the political foundations of urban governance.<sup>16</sup> To be sure, this history is not one without controversy and conflict: tensions festered between unions and strikebreakers,<sup>17</sup> between “Yankee-controlled” state houses and immigrant-supported city halls,<sup>18</sup> and on the streets where the ills of urbanization and immigration were seen as mutually reinforcing and in need of reform.<sup>19</sup> Yet even this darker side reveals the deep historic interconnections between immigration and urbanization in the United States.

Suburbanization, deindustrialization, and political fragmentation have radically altered the urban landscape of the early twentieth century. But with nearly eighty percent of the United States population living in “urbanized areas” in or around a central city,<sup>20</sup> and with metropolitan economies constituting the bulk of our nation’s economic output,<sup>21</sup> urban development is arguably more important today than at any other time in American history. Since the liberalization of immigration in 1965,<sup>22</sup> immigration is also once again playing a role. Indeed, anecdotes abound of how immigration is fast-changing the physical and social fabric of the urban landscape.<sup>23</sup> As many cities began to emerge from decades of depopulation and decline in the 1990s, some began to attribute their near-miraculous recoveries to the

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13. See CAMPBELL GIBSON & KAY JUNG, *THE FOREIGN-BORN POPULATION OF THE UNITED STATES, 1850 TO 2000*, at 143-48 (2006); MALDWYN ALLEN JONES, *AMERICAN IMMIGRATION* 100 (1965).

14. ARTHUR SCHLESINGER, *THE RISE OF THE CITY 1878-1898*, at 73 (1933).

15. See, e.g., MULLER, *supra* note 10, at 74-76.

16. See JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA: 1870-1900*, at 6-7, 180-87 (1984).

17. See VERNON M. BRIGGS, JR., *IMMIGRATION AND AMERICAN UNIONISM* 24-25 (2001).

18. See, e.g., LAWRENCE W. KENNEDY, *PLANNING THE CITY UPON A HILL: BOSTON SINCE 1630*, at 121 (1994).

19. See, e.g., PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920*, at 169, 205 (1978).

20. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES 2007*, at 33 (2006).

21. See Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1107 (2008).

22. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

23. See, e.g., FONER, *supra* note 1, at 17.

massive growth of immigration taking place around the same time.<sup>24</sup> All the while, the immigrant population has been quickly increasing in almost all of America's fastest growing cities: the foreign-born population is almost 30% in Dallas and Houston, more than 25% in Phoenix, and 13% in Charlotte.<sup>25</sup> Indeed, population growth in the largest twenty-five cities has been disproportionately driven by foreign-born residents in recent years.<sup>26</sup>

With these demographic trends, it is not surprising that metropolitan regions today are facing similar sets of immigration-related issues as those of American cities at the turn of the twentieth century, from educating immigrant children, to the cultural and political struggle over community identity. Yet if immigration is of interest to urban policymakers, it is not simply because of the impact of immigration itself. The ongoing refinement of our national immigration laws is also having an effect. This is particularly true given that our immigration regime has steadily expanded beyond admission quotas and entry requirements at the border toward "soft controls" focused on a more subtle balancing of incentives and deterrents through various aspects of domestic policy as applied to immigrants. Examples include the adjustments to immigrant eligibility for social services in 1996,<sup>27</sup> which immediately made immigrants a more risky and costly population,<sup>28</sup> and the expansion of immigration consequences for criminal convictions,<sup>29</sup> which is starting to cast a long shadow over state interests in criminal proceedings.<sup>30</sup> It is also worth noting the local impacts associated with federal

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24. See RICHARD T. HERMAN & ROBERT L. SMITH, *IMMIGRANT, INC.: WHY IMMIGRANT ENTREPRENEURS ARE DRIVING THE NEW ECONOMY (AND HOW THEY WILL SAVE THE AMERICAN WORKER)* 118-21 (2009); MULLER, *supra* note 10, at 304; ORG. FOR ECON. CO-OPERATION & DEV., *IMMIGRANTS, INTEGRATION AND CITIES: EXPLORING THE LINKS* 19 (1998).

25. U.S. CENSUS BUREAU, *NATIVITY AND PLACE OF BIRTH OF RESIDENT POPULATION—25 LARGEST CITIES: 2007*, available at <http://www.census.gov/compendia/statab/2010/tables/10s0041.pdf>.

26. See *id.*

27. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400-451, 110 Stat. 2105, 2260-76 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.).

28. This is especially true given that almost all states reinstated benefits to immigrants by tapping into state and local coffers. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 515 (2001).

29. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381-85 (2006).

30. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 43-44 (2009), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/\\$FILE/problem-solvingreport\\_110409\\_629\(K+PMS3145\).pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/$FILE/problem-solvingreport_110409_629(K+PMS3145).pdf) (describ-

immigration enforcement efforts such as workplace raids<sup>31</sup> and neighborhood sweeps.<sup>32</sup>

With respect to why immigration matters to urban policymaking, however, even more important than the past and present impact of immigration is how it plays into the future trajectory of urban development. In other words, immigration is not just something that happens to cities or something to which cities must respond—each of which cast cities in a passive light. As the purpose of urban policy is increasingly being directed toward weighing and pursuing different urban development strategies, it is worth noting that the management and channeling of immigration at the local level plays a significant and useful role.

The importance of immigration in this regard is due in part to the changing role of urban policymaking. Instead of just focusing on present demands, urban policymakers are increasingly oriented toward future prospects. On the one hand, this is because of lingering uncertainties about traditional models of urban development. If the crisis of cities in the mid-twentieth century demonstrated anything, it was that the long-term health and viability of any city-region depends on its ability to adapt, reorient, and sometimes wholly reinvent itself.<sup>33</sup> On the other hand, the forward-looking orientation is the result of growing awareness about the vast potential of new urban forms. Indeed, even as the traditional industrial- and transportation-related rationales for urban agglomeration declined in relevance, the urban resurgence of the late twentieth century introduced a new set of models that emphasized different aspects of the modern city. As Gerald Frug and David Barron repurposed as “city futures,” urban commentators in recent decades have focused attention on the many different trajectories of urban development: the Global City,<sup>34</sup> the Creative City,<sup>35</sup> the Tourist City,<sup>36</sup> and the Regional City,<sup>37</sup> to name but a few.<sup>38</sup> To be sure, there is no

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ing how immigration consequences are affecting the operations of alternative rehabilitation programs now gaining favor at the state level).

31. See Yvonne Abraham, *Patrick Says Promises Broken on Raid: Access Disputed on Immigrants*, BOS. GLOBE, Mar. 15, 2007, at A1; Robin Shulman, *Immigration Raid Rips Families; Illegal Workers in Massachusetts Separated from Children*, WASH. POST, Mar. 18, 2007, at A6.

32. See Nina Bernstein, *Officials Protest Antigang Raids Focused on Immigrants*, N.Y. TIMES, Oct. 2, 2007, at B3; Milton J. Valencia, *Activists Protest Federal Gang Raids: Say Sweeps Are Too Broad and Heavy-Handed*, BOS. GLOBE, Aug. 9, 2008, at B2.

33. See Edward Glaeser, *Reinventing Boston: 1630-2003*, 5 J. ECON. GEOGRAPHY 119, 151 (2005).

34. See generally SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2001).

35. See generally RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (2002).

36. See generally *THE TOURIST CITY* (Dennis R. Judd & Susan S. Fainstein eds., 1999).



shortage of disagreement on the costs and benefits that come with pursuing any particular model or combination of models.<sup>39</sup> Yet in an increasingly mobile world, even the most successful cities seem to realize the importance of keeping an eye on alternative futures.

From this perspective, it is not surprising that immigration is starting to attract the attention of urban policymakers today. Immigration can not only be used to advance many of these different models of urban development, but can also affect the prospects of these futures in a variety of different ways. For example, the potential impact of immigration may be direct and focused on the contribution of the immigrants themselves. Whereas one city may be interested in immigration as a means of recruiting specific professionals to advance a Global City or Creative City agenda (geared towards international finance and high-tech innovation, respectively), another may be interested in immigration flows generally as a way to stabilize a population base or spur growth. Alternatively, the intended impact of an immigration strategy may be indirect—not necessarily focused on the immigrants themselves, but on how their presence may enhance the ability of the city to attract others. The diversity, vibrancy, and cosmopolitanism that comes with having an ever-changing set of immigrant communities may be an amenity sought out by individuals who can contribute to the city in other ways. Similarly, the ability of a city to manage immigration may serve as a signaling function of its tolerance to other groups it may wish to attract. Moreover, just like the models of city futures themselves, the impact of immigration may be complementary or at cross-purposes. A city promoting immigrant entrepreneurship in pursuit of a Middle Class City, may in turn spur a set of vibrant ethnic communities that both attract skilled co-ethnics in service of its Creative City ambitions and serve as an urban attraction to enhance its Tourist City<sup>40</sup> status. Contrast this with a city that relies on low-skilled immigrant labor to meet the service demands of a Global City, but in turn exacerbates income polarization to the frustration of Middle Class City advocates.

There is also another benefit to considering the role of immigration through these concrete sets of city futures: they give substance and meaning to what can sometimes be a vague and unmoored conversation about immigration policy. To be sure, the immigration debate is supposed to be a

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37. See generally PETER CALTHORPE & WILLIAM B. FULTON, *THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL* (2001).

38. See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND* 141-229 (2008).

39. See *id.* at 24-26.

40. See generally *THE TOURIST CITY*, *supra* note 36.

conversation about the identity of the nation and our vision of its future.<sup>41</sup> Yet, the vast size of our nation and the sheer diversity of our different regions combine to make this discussion nearly unmanageable. It is no wonder the immigration discourse at the national level is often simply reduced to two broad camps—one pro-immigration, one anti-immigration—from which important and detailed questions about legalization, immigration quotas, and visa categories are supposed to be answered. City futures, however, offer a different vocabulary for giving our preferences and ideas shape in the immigration conversation: What model of our community do we wish to pursue, and what role can or should immigration play?

### **B. Why Urban Development Should Matter to Immigration Policymakers**

The profound effect that immigration has had on the past, present, and future development of the American city is one reason why immigration should be recognized as an important part of urban policy in America. It explains why cities should care about immigration. But given that immigration is largely a national issue and a federal responsibility, why should federal immigration policymakers be concerned about urban policy? This section offers two reasons: first, immigration controversies are often local in scope and inextricably linked to the manner in which we have organized our cities and metropolitan regions; second, urban policy underlies two major considerations of immigration policymaking.

At the most basic level, urban policy is important because the immigration debates revolve around traditionally local issues. To be sure, I do not intend to dismiss the real consequences that immigration poses to quintessentially national matters such as foreign affairs, international trade, or, in extreme scenarios, national sovereignty.<sup>42</sup> The reality, however, is that in contrast to these internationally-oriented considerations, the motivations behind most immigration reform proposals are overwhelmingly local. Indeed, once one moves past the largely symbolic concerns about legality and the rule of law, the arguments surrounding immigration reform start to resemble those that might be raised to advocate for a new urban policy agenda. The issue of immigration today is too often reduced to a grand discus-

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41. See KEITH A. FITZGERALD, *THE FACE OF THE NATION: IMMIGRATION, THE STATE, AND THE NATIONAL IDENTITY* 23 (1996).

42. See Randall C. Archibold, *Law in Arizona Is Causing Split In Border Talks*, N.Y. TIMES, July 7, 2010, at A1; see also ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* 154-56 (1998) (describing the diplomatic controversies associated with immigration restrictions in California and the negotiations leading to the Chinese Exclusion Act).

sion of border fences and National Guard deployment when most people are mainly concerned about the permeability of their neighborhoods and the numbers and type of students enrolled at their children's school district. We parse endlessly the origins and characteristics of those involved in the "new" wave of immigration, when much of the actual reasons for doing so are familiar domestic issues connected to segregation and concentrated poverty—whether we refer to them as ghettos, slums, or *barrios*. The same goes for our tendency to talk about immigration and crime through the lens of international criminal syndicates when so often the actual concerns are policing, safe neighborhoods, and the wayward life trajectory of all-too-assimilated-youths. Additionally, as sentiments over immigration are increasingly tied to such issues as housing, traffic congestion, and neighborhood transitions,<sup>43</sup> it is sometimes hard to distinguish complaints about immigration from complaints about urban life. Indeed, that may be the point: the challenge of immigration policymaking today may be that we are increasingly turning to it to address urban policy issues to which it is not well-suited.

From this perspective, immigration policymakers should be concerned about urban development because it establishes the background context from which immigration controversies arise. But the argument that I wish to make here is not simply that all politics is local, including those involving immigration. Indeed, even from a purely national perspective, urban policies are still independently important to the issue of immigration. The reasons for this, I argue, can be drawn from the influence of urban policy on two basic aspects of how immigration policies are made. First, urban policy directly affects our nation's physical and, more importantly, cultural capacity to accept and integrate foreigners into American society.<sup>44</sup> Second, the consequences of urban policies have a strong influence on the long-term effect of immigration on our country.

In setting immigration policy, it is common to assume that our nation's capacity to absorb and integrate immigrants is relatively constant, and thus the goal of immigration policy is to discover that limit and set immigration rates accordingly. This capacity is sometimes talked about in terms of

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43. See Editorial, *Blaming Immigrants*, N.Y. TIMES, Oct. 14, 2000, at A18 (describing Federation Against Immigration Reform's media campaign linking immigration to sprawl); see also Carl F. Horowitz, *Housing "Shortages": The Immigration Dimension*, VDARE.COM (Dec. 4, 2004), [http://www.vdare.com/horowitz/041221\\_housing.htm](http://www.vdare.com/horowitz/041221_housing.htm); *Traffic Congestion*, FED'N FOR IMMIGR. REFORM, [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters64c1](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters64c1) (last updated Mar. 2003).

44. Cf. Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581 (2008) (arguing that integration should be the focus of the state and local role with respect to immigration).

physical infrastructure and economic demand. More important, however, seems to be our nation's capacity to integrate immigrants and our society's ability to tolerate them.<sup>45</sup> Not only is this so-called "cultural" capacity often at the center of political debates, but communitarian theorists like Walzer and liberal theorists like Ackerman, among others, emphasize it in their assessment of the principles of immigration control.<sup>46</sup>

As urban scholars suggest, however, not only may this cultural capacity be more malleable than commonly assumed, but it might also be a direct result of how urban policies have organized our communities and structured personal relations. It is not just how infrastructure decisions are made or how local economic politics are fashioned, as important as these are. It is also how urban policies shape our cultural attitudes about diversity and our ability to manage and resolve conflict as a community. In this regard, what is important is the extent to which the organization of our neighborhoods and the features of our local laws enhance or stifle our capacity to tolerate, accommodate, or even enjoy "otherness" in our daily lives—an attribute that Richard Sennett refers to as "ego strength" and Gerald Frug calls "community building."<sup>47</sup> In short, the types of urban policies that we adopt influence not only our physical capacity to absorb immigration, but also our cultural capacity to adapt and reach out.

From this perspective, it is worth noting then that even if ego strength and community building suit our ideals of America as an immigrant nation, urban policies in the twentieth century have been decidedly oriented in the opposite direction. Without going into all of the details, suffice it to say that legal structures and policy choices have had a role in shaping the contemporary metropolitan landscape, which for most Americans continues to be defined by persistent segregation, inequality of services, intra-regional conflict, and a clear spatial hierarchy.<sup>48</sup> Not only does this structure define our social relationships and daily routines, but it also affects how we approach issues of public policy. Our crime control strategy still largely focuses on the isolation of certain neighborhoods and the exclusion of certain individuals,<sup>49</sup> while conflict resolution is geared primarily towards avoidance and exit, rather than engagement and voice.<sup>50</sup> We closely guard our

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45. See SAMUEL P. HUNTINGTON, *WHO ARE WE?* 221-56 (2004) (discussing the dual importance of Mexican immigrants assimilating into American culture and America's ability to integrate immigrants).

46. See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 93-95 (1980); MICHAEL WALZER, *SPHERES OF JUSTICE* 38-39 (1983).

47. GERALD E. FRUG, *CITYMAKING* 115-22 (1999).

48. See *id.* at 3-4.

49. See *id.* at 196.

50. See M.P. BAUMGARTNER, *THE MORAL ORDER OF A SUBURB* 11 (1988).

communities and schools from the possibility of invasion and feel entitled, if not obligated, to assess potential newcomers with an eye toward their overall fiscal impact on the municipal treasury or our property values.<sup>51</sup> Considering that these are some of the cultural characteristics that urban policies have fostered in the past several decades, the fact that similar sentiments and strategies are echoed in the realm of immigration policymaking might not be coincidental.

Another aspect of immigration policymaking that is influenced by urban policy decisions is the question of immigrant effects. Immigration policies have long focused on immigrant characteristics such as their education, job skills, and origins as a way of predicting what effect their admission will have on American society. This is why our immigration regime is an alphabet soup of visa qualifications pegged to numerical quotas and detailed schedules.

But while the attention has been directed at the characteristics of the immigrants that we let in, far less consideration has been paid to the economic and social environment they face once they arrive. Indeed, we are often far more likely to attribute immigrant outcomes to individual characteristics than to structural factors, which then feeds back into demands for more refined quotas. Whether high-skilled immigrants find a way to contribute to the best of their abilities or low-skilled immigrants find a path of upward mobility, entrepreneurship depends as much on individual drive and broader economic forces as it does on community support, local economic integration, and the geography of opportunity.<sup>52</sup> Even more important are the prospects of the second generation, which sets the trajectory for immigration's long-term effects.<sup>53</sup> As sociologists have aptly pointed out, assimilation for immigrant newcomers can be upwards toward the middle class or downwards toward an underclass.<sup>54</sup> In measuring the long-term effects of immigration then, the segmented paths of assimilation that urban policy has thus far helped to create should be as much a consideration as national origin or parents' education level.

The point here is not to suggest that immigrant characteristics do not provide a rough proxy for immigrant effects—they do. Nor is it to suggest

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51. Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 378-83 (2010).

52. See generally Xavier N. de Souza Briggs, *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity*, in THE GEOGRAPHY OF OPPORTUNITY 17 (Xavier N. de Souza Briggs ed., 2005).

53. See PHILIP KASINITZ ET AL., *INHERITING THE CITY: THE CHILDREN OF IMMIGRANTS COME OF AGE 1-2* (2008).

54. See, e.g., Alejandro Portes & Min Zhou, *The New Second Generation: Segmented Assimilation and Its Variants*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74-76 (1993).

that an urban policy that maximizes the benefits of immigration while reducing its costs is easily designed or implemented; considering the history of initiatives addressing similar urban issues, such as the consequences of racial segregation and inequality, the answer is certainly no. Yet both are considerations that should properly be accounted for in policy choices and public discourse in the immigration and urban policy contexts. For immigrants (and others), cities can be and have been incredible engines for social and economic mobility. To the extent that this and other avenues for advancement are foreclosed, it may be in the national or urban interest to refine immigration quotas downward and step up enforcement. But in doing so, we should not be blind to the role of urban policies on the immigration effects that we calculated, or the potential upsides that may have been lost as a result.

## II. THE LEGAL LIMITS TO IMMIGRATION AS URBAN POLICY

As the foregoing shows, there are good reasons why urban policy should play a much larger role with respect to immigration. Immigration is too useful a tool for urban development to be ignored in urban policymaking. Moreover, because urban policy influences so much of our nation's perspective on immigration, it would be a shame not to foreground it in this manner. Notwithstanding these reasons, this Part argues that there are two major obstacles to employing immigration as urban policy in this manner. First, there is currently no legal avenue for regional variation or local control with respect to immigration. Second, as they are currently organized, there are legitimate concerns about whether metropolitan regions—the unit best suited to urban policymaking in America today—are capable of designing an urban immigration policy, even with strictly their own interests in mind. Both of these will be outlined in more detail below. Before that, however, it is worth explaining why none of these obstacles are constitutional in nature.

### A. Why Federal Preemption is No Obstacle

There are significant obstacles to the integration of immigration into urban policy, but the federal government's exclusive jurisdiction over immigration and the doctrine of federal preemption are not among them. Given the myriad legal challenges against state and local efforts to regulate immigration, such as the ones in Arizona,<sup>55</sup> this position might seem surprising.

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55. See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009) (challenging Legal Arizona Workers Act), *cert. granted sub nom. Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010); *United States v. Arizona*, 703 F. Supp. 980 (D. Ariz.

Indeed, considering how easily all of the current legal controversies map onto the familiar conflict between federal power and state rights, one may suppose that the prospects of steering immigration toward an explicit recognition of urban policy would depend foremost on how the scope of federal and state power are defined through the preemption doctrine, and what that says about the relative balance of federal and state interests with respect to immigration.

Yet, despite the enormous attention on the immigration front, these legal issues actually matter a lot less to an urban policy reorientation than one might think. The reason for this is twofold. First, there is no inconsistency between federal control and urban policy, just as there is no necessary connection between state rights and urban interests. Second, any initial baseline allocation of power does not preclude subsequent delegation or cooperation. It is worth noting then that urban issues—particularly those involving housing and economic development—have long been areas of federal involvement, and the federal government has at times aggressively sought to influence the development of urban policies as a matter of national interest.<sup>56</sup> In this light, to say that immigration is an exclusive federal issue does not necessarily mean that immigration policy cannot be fashioned with an explicit urban policy component or implemented without a local role. At the same time, although state governments are often well positioned to effectuate urban policy, they have not always considered it a matter of priority or approached it with urban interests in mind.<sup>57</sup> Thus, a narrow reading of the federal government's occupation of the immigration field under preemption may reflect a state victory over federal control, but may itself mean very little for an urban policy agenda.

With respect to the prospects of immigration as urban policy then, what is important is not the constitutional question of which branch of government has exclusive or complementary jurisdiction over immigration; rather, it is how the federal government and the states have exercised their respective powers and the specific legal and political structures that they have created in the process. This will be the focus of the next two sections.

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2010) (granting in part and denying in part United States' motion for preliminary injunction).

56. See generally THE FUTURE OF NATIONAL URBAN POLICY (Marshall Kaplan & Franklin J. James eds., 1990).

57. See generally FRUG & BARRON, *supra* note 38 (arguing that state laws have stifled urban interests).

## B. The Legal Limits of Regional Considerations in Immigration Law

Enacted in 1990, the EB-5 immigrant investor visa grants legal permanent residency to an individual who invests and creates jobs in the United States.<sup>58</sup> The statute requires applicants to make a \$1 million capital investment. Soon after it was enacted, the Attorney General exercised its statutory discretion to designate “regional centers” of high unemployment and economic needs where the investment requirement is lowered to \$500,000.<sup>59</sup> Although passed with bipartisan support and high hopes in Congress,<sup>60</sup> the EB-5 program initially lagged expectations.<sup>61</sup> A recent expansion of the number of regional centers to seventy-four, along with growing interest by many struggling communities, has led to a spike in EB-5 applicants in recent years.<sup>62</sup> Yet, for the most part, the EB-5 program is a small part of our nation’s immigration regime.

The reason I start with this relatively obscure visa program is simple: it represents the only aspect of our immigration system that explicitly allows for regional variations and provides for some degree of local input. To be sure, there are other areas where geography is taken into account. For example, both the local resettlement of refugees<sup>63</sup> and the labor certification required for many employment-based immigration categories<sup>64</sup> involve some consideration of regional conditions. Neither of these, however, allows much room for urban policymakers to influence the process. Thus, for all the different immigration categories that we have and all the different petitioners that can sponsor immigrants, the federal immigration regime allows almost no room for regional variations, much less a metropolitan role.

It is no wonder then that urban development strategies centered on immigration have not received more serious consideration. As the law now stands, such strategies are notoriously hard to implement. Take, for example, the preliminary report recently issued by the New Economic Initiative’s Global Detroit Study. After convincingly laying out all the ways

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58. 8 U.S.C. § 1153(b)(5) (2006); *see also* 8 C.F.R. § 204.6 (2010).

59. *See* 8 C.F.R. § 204.6(f)(2).

60. *See* Al Kamen, *An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In*, WASH. POST, Sept. 29, 1991, at A1.

61. *See* Ronald R. Rose, *Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa*, 29 SAN DIEGO L. REV. 615, 615-16 (1992).

62. *See* N.C. Aizenman, *Immigrants Invest up to \$1 Million in U.S. Visa Program; Creating or Preserving 10 Jobs is Way to Gain Permanent Legal Status*, WASH. POST, Jan. 10, 2010, at A6.

63. The federal government, with the cooperation of religious and other charity organizations, decides where to locate immigrants admitted through the overseas refugee system.

64. *See, e.g.*, 8 U.S.C. § 1182(a)(5) (2006).



immigration can help metropolitan Detroit in terms of economic growth and neighborhood revitalization, the report was left with the following as the first three recommendations: making the region more “welcoming” to immigrants; petitioning the federal government for an EB-5 regional center designation; and, taking advantage of Canada’s immigration laws to convince American businesses to invest in the nearby Canadian city of Windsor.<sup>65</sup> To be sure, some regions have been able to exert more influence than others. For example, through the strength of its businesses, Silicon Valley has been influential with respect to visa allocations for skilled workers.<sup>66</sup> Yet, even with these advantages, it faces an uphill battle: in order to advocate for Silicon Valley and its unique strengths and needs, the immigration system leaves the region and its businesses no option but to lobby for a nation-wide change for everyone.

Of course, the thought of the city of Pittsburgh, the greater Los Angeles metropolitan area, or the state of Iowa setting different immigration requirements or quotas on account of their different needs and interests likely seems downright unworkable to many, if not outright preposterous. But for decades, the regional distribution of immigrants occupied federal policy-makers more than almost any other issue surrounding immigration.<sup>67</sup> Moreover, other countries have started moving in this direction. Canada is a perfect example. In recent years, it has substantially expanded the involvement and role of provincial government with respect to immigration. This has included the use of federal-provincial agreements, like the Canada-Ontario Immigration Agreement, which specifically outlined a role for municipal involvement in immigration issues.<sup>68</sup> In 1996, Canada introduced the Provincial Nominee Program, in which provinces can negotiate specific accords with the federal government over the type and number of immigrants they should receive.<sup>69</sup> It is worth noting that among the provinces that are participating, there are already notable differences: whereas the Quebec Accord highlights French language skills and is starting to look into technical workers, Manitoba has used the program to select immigrants with particular skills to complement its rural economy and is prioritizing those that it believes are most likely to stay loyal to the region.<sup>70</sup> Indeed,

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65. TOBOCMAN, *supra* note 6, at 18-19.

66. See Evelyn Iritani, *U.S. Tech Firms, Citing ‘Brain Drain,’ Push to Hire More Skilled Foreigners; As More Workers Go to China and India, Silicon Valley Seeks a Bigger Quota on H-1B Visas*, L.A. TIMES, Feb. 12, 2006, at C1.

67. See Su, *supra* note 51, at 375-77.

68. See ORG. FOR ECON. CO-OPERATION & DEV., *OECD TERRITORIAL REVIEWS: TORONTO, CANADA 2009*, at 119-20 (2009).

69. IMMIGRATION TO INTEGRATION, *supra* note 6, at 83, 127-28.

70. See *id.*

one of the most interesting trends in Canadian immigration law is how provincial criteria are starting to dilute the role of the federal point system as a means of selecting immigrants.<sup>71</sup>

### C. Deficiencies in the Structure of Regional Decision-making

As outlined above, the lack of any avenue for geographic variation and regional control under the current immigration regime is one problem facing an urban policy reorientation of immigration. Even if immigration laws were altered to account for regional interests and allow for a regional role, there are still reasons to doubt that metropolitan regions as they are currently constituted will be good at policymaking with respect to immigration even with their own urban development interests in mind. As should be clear from Part I, I do not believe this to be a problem inherent in local governments or urban policymaking. Rather, I consider the problem to be a consequence of how America's local government laws currently structure our metropolitan regions.

The reason for my concern over regional decision-making is simple: in the vast majority of metropolitan regions, there is simply no regional decision-maker. To be sure, most of us live as "citizens of a region."<sup>72</sup> Yet when we talk about a metropolitan region, we are almost invariably looking at several political subdivisions: a central city, several different types of suburbs,<sup>73</sup> and increasingly new communities on the exurban fringe. In this case, who speaks for the region? It is important to note that this fragmentation is no accident; laws in many states were specifically designed to achieve this end.<sup>74</sup> Because of this, it might be supposed that states would be an ideal urban policymaker for regional interests. In most cases, however, the regional context and particular local interests are still too remote for direct state control. The public authorities that are created by the state to handle regional issues (power, transportation, water, etc.) are often, by design, created to be politically unaccountable and operate in a largely administrative manner.<sup>75</sup> This regional structure is not just unwieldy; it also has consequences for regional development. It is no wonder then that re-

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71. Jason DeParle, *Defying Trend, Canada Lures More Migrants*, N.Y. TIMES, Nov. 12, 2010, at A1.

72. CALTHORPE & FULTON, *supra* note 37, at 15.

73. See generally ALAN BERUBE & ELIZABETH KNEEBONE, BROOKINGS INST., TWO STEPS BACK: CITY AND SUBURBAN POVERTY TRENDS 1999–2005 (2006) (noting and describing suburban diversity, particularly the increase of poor suburbs).

74. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government*, 90 COLUM. L. REV. 1, 78 (1990).

75. See generally NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS (1994).

gionalism advocates have been so interested in reforming this structure as a means of addressing segregation, sprawl, and uneven economic development.<sup>76</sup> Yet with limited political success thus far on this front, regional policymaking continues to be difficult, and as such, not always aligned with the region's interests as a whole.

When this is combined with the controversial issue of immigration, it is not uncommon to see political fragmentation and the structure of local government law stifle regional interactions. The integration of a metropolitan region often means that the benefits of immigration may be enjoyed in one community, while the costs are incurred in another.<sup>77</sup> Yet, with the lack of coordination between local government units, each of which has some influence on the fortunes of their neighbors, there is rarely a proper accounting or even dialogue over regional interests or goals. This dilemma is especially evident with respect to local immigration responses to undocumented immigration. As I observed in North Carolina, many enforcement efforts were defensive reactions to similar actions taken in neighboring jurisdictions, fueling a race-to-the-bottom.<sup>78</sup>

Developments in Arizona offer further illustration. Arizona has recently drawn national attention with the passage of S.B. 1070, the state's controversial immigration enforcement measure.<sup>79</sup> The situation on the ground, however, is even more complex. For example, with respect to the metropolitan region such as that surrounding Phoenix, it is worth noting that the state of Arizona, Maricopa county, and the city of Phoenix all have different interests with respect to immigration and enforcement. The local government structure in the state, however, has discouraged meaningful discussions between these different entities. To prioritize immigration enforcement, the state passed a bill undermining local control and targeting localities with different views about the efficacy of enforcement,<sup>80</sup> many parts of which survived the preliminary injunction issued by the federal courts against the state.<sup>81</sup> The county sheriff's department, which has con-

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76. See, e.g., COLIN E. GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* 227 (2008).

77. See Laura Koss-Feder, *A Slice of Prices*, *NEWSDAY*, July 14, 2000, at C6.

78. See Rick Su, Commentary, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1675 (2008).

79. See Rick Su, Commentary, *The Overlooked Significance of Arizona's New Immigration Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 76, 76-77 (2010), <http://www.michiganlawreview.org/assets/fi/108/su.pdf>.

80. See *id.*

81. Indeed, although the mandatory enforcement provision of S.B. 1070 was enjoined, many provisions involving state-local relations were left intact because they were outside the scope of the federal government preemption challenge. Localities are still prohibited under the law to deprioritize immigration enforcement in any way. Moreover, a locality can

current jurisdiction with city police departments, has drawn protests and complaints from city officials for conducting sensational immigration sweeps in cities like Phoenix and Mesa,<sup>82</sup> including a spectacular pre-dawn armed raid on Mesa's City Hall.<sup>83</sup> All the while, without much influence over state or county actions in their own jurisdiction, cities in Arizona are turning to the federal government. After the passage of S.B. 1070, Tucson and Flagstaff made their opposition known by joining a federal lawsuit challenging the bill.<sup>84</sup> Moreover, in response to the manner in which the county was conducting its raids in city neighborhoods, the Mayor of Phoenix famously wrote a letter to the Department of Justice asking the federal government to investigate the county sheriff for civil rights violations committed in the city's own jurisdiction.<sup>85</sup>

In short, if an urban policy reorientation of immigration law ideally strives to promote regional decision-making initiated by a robust discourse and meaningful negotiations, and implemented through thoughtful experimentation and forward-looking flexibility, it is a goal that the current local government law is ill-structured to promote.

### III. EMPOWERING IMMIGRATION AS URBAN POLICY: A MODEST PROPOSAL

The obstacles outlined above do not negate the reasons that exist for reorienting immigration toward urban policy. It does show that any effort to do so, however, will need to address the lack of any avenue for regional variation and local control in our immigration regime, and the limitations of metropolitan policymaking under the existing local government structure. Here, I offer a modest proposal that advances immigration as urban policy with those obstacles in mind. After setting out the proposal in detail

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still be sued for damages by any resident of the state if it does so. As a result, cities have at best achieved a legal limbo: they are not required to enforce federal immigration laws, but they are prohibited from taking any steps not to enforce them. *See United States v. Arizona*, 703 F. Supp. 980 (D. Ariz. 2010) (granting in part and denying in part United States' motion for preliminary injunction).

82. *See, e.g., Randal C. Archibold, Challenges to a Sheriff Both Popular and Reviled*, N.Y. TIMES, Sept. 28, 2008, at A20.

83. *See Paul Giblin, Arizona Sheriff Conducts Immigration Raid at City Hall, Angering Officials*, N.Y. TIMES, Oct. 17, 2008, at A10.

84. *See Joe Ferguson, SB1070 Lawsuit to Cost Flagstaff at Least \$25,000*, ARIZ. DAILY SUN (June 2, 2010, 5:00 AM), [http://azdailysun.com/news/local/govt-and-politics/article\\_f9403b9f-2525-5efa-b023-cdd16823116b.html](http://azdailysun.com/news/local/govt-and-politics/article_f9403b9f-2525-5efa-b023-cdd16823116b.html).

85. *See Casey Newton & J.J. Hensley, Phoenix Mayor Gordon Calls for FBI Investigation of Arpaio*, ARIZ. REPUBLIC (Apr. 13, 2008, 12:00 AM), <http://www.azcentral.com/arizonarepublic/news/articles/0413gordonarpaio0413.html>. A copy of the letter is available at <http://www.azcentral.com/ic/pdf/arpaio-gordon-2008-investigation-letter.pdf>.

in the first section, I outline some ways in which this proposal can be expanded down the road, and conclude by addressing some of the concerns that this proposal might raise.

### A. The Proposal

As mentioned earlier, even if cities were inclined to embrace immigration as an urban development strategy, there is still the issue of whether they have the ability to do so. Of course, there are political and operational considerations to be taken into account. Yet the basic question is still one of legal power: how can the law enable metropolitan regions, if they so wish, to reliably and effectively direct immigration flows into their region? The manner in which “regional centers” are designated for the purpose of EB-5 visas can serve as a model. The proposal here, however, recognizes that the interest in many areas is not merely investment capital, but also the human capital that immigrants might bring.

A powerful first step would be to allocate H-1B visas according to regional need. H-1Bs are “non-immigrant” visas used by employers to recruit foreign skilled labor that does not put them on a path to citizenship.<sup>86</sup> Because an H-1B visa requires an employer application, is granted with assurances about local labor conditions, and valid only while the visa recipient is employed, there is already a *de facto* regional component at play.<sup>87</sup> Rather than relying on employers, however, I propose factoring regional needs and interests explicitly into its allocation. In other words, the federal government should allocate these visas geographically in consultation with the different metropolitan regions. High-immigrant regions fearful of oversupply may request fewer visa allocations going forward, while others like Silicon Valley (which already receives a large number of such visa holders), may actually lobby for more visas in keeping with their economic development strategy. Similarly, low-immigrant regions with high infrastructural capacity, like Pittsburgh and Cleveland, may seek out large H-1B allocations not only to attract immigrants and retain more of the international students that pass through their colleges and universities, but also as a means of enticing employers interested in capitalizing on their visa allocations.

As I have proposed, there are advantages to starting with a non-immigrant employment-based visa. First, because H-1B visa recipients are already geographically bound with respect to their place of occupation, no

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86. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006).

87. See 8 U.S.C. § 1182(t)(1) (2006) (describing labor attestation requirement); see also 8 C.F.R. 214.2(h) (2010).

additional geographic restrictions are necessary. Of course, since H-1B recipients are allowed under current law to change jobs to another employer willing to sponsor him or her as an H-1B employee,<sup>88</sup> the initial geographic restriction might not prove to be a total constraint. Yet rather than changing this aspect of H-1Bs to the detriment of the visa holder, this issue can be rectified by charging relocations to the visa quota of the receiving region going forward. This brings us to the second advantage of starting with H-1Bs: by focusing on temporary “non-immigrants” and by placing limited geographic constraints on their ability to move, this proposal largely avoids constitutional concerns with respect to an immigrant’s right to travel to the extent that this right is constitutional rather than statutory.<sup>89</sup>

Yet, even if the proposal can be thought of as “safe” in the manners described above, it is important not to overlook its impact on immigrant settlement for the purposes of urban policy. H-1Bs are one of the largest admission categories; 65,000 visas are allocated each year, and the annual cap has been set as high as 195,000.<sup>90</sup> More importantly, many H-1B visa holders eventually acquire legal permanent residency. Indeed, it is one of a few non-immigrant visas where the recipient can admit to having the “dual intent” of wanting to be a temporary worker and interested in seeking permanent residency.<sup>91</sup> To be sure, my proposal thus far envisions no geographic restrictions on permanent residents, which means that the H-1B visa holders that manage to acquire legal permanent residency would be free to relocate as they see fit. As the experience of the refugee resettlement program has shown, however, an initial “nudge” can go a long way with respect to more enduring settlement patterns.<sup>92</sup> People sink roots, stable communities form, and investments are made. Moreover, once a critical mass of a particular immigrant group settles, even if some members eventually leave, others will move in. In this respect, a small change to the allocation of a limited number of visas may change the geography of immi-

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88. See 8 C.F.R. 214.2(h)(2)(i)(D).

89. See *Graham v. Richardson*, 403 U.S. 365, 377-78 (1971) (suggesting that any restriction on the right to travel by a state is suspect, including those based on immigrant status). It is not clear from *Graham*, however, whether the same limitations would necessarily apply to restrictions placed by the federal government, given its plenary power over immigration.

90. See 8 U.S.C. § 1184(g)(1)(A)(iv) (2006).

91. See 8 C.F.R. § 214.2(h)(16)(i).

92. For example, while an estimated 6590 Bosnian refugees were settled in St. Louis from 1993 to 2003, secondary immigration to the St. Louis area has swelled that population to an estimated 35,000 to 40,000. See Doug Moore, *Refugees Increasingly Find a Home in St. Louis*, ST. LOUIS POST-DISPATCH, May 31, 2010, at A1; Michele Munz, *Festival is a Sharing of Culture: Area’s Large Bosnian Population Celebrates its Heritage*, ST. LOUIS POST-DISPATCH, Sept. 28, 2009, at A3.

gration settlement and the trajectory of urban development in much larger ways.

This proposal can be implemented entirely with federal officials making all the allocation decisions. But to truly integrate immigration into urban policy agendas, I believe more control should be devolved. A moderate position would be to set a national cap and an initial regional allocation, while allowing regions to trade their allocations amongst one another. A more significant move would be to let metropolitan regions set whatever allocation they would like and have the national quota reflect the agglomeration of regional quotas. Either way, the reason for stressing a regional role is to encourage a new approach to how immigration is regulated and discussed. Local actors have the kind of ground-level awareness that the federal government lacks; they also have a better sense of the future they wish to pursue and what role, if any, immigration should play. Moreover, only with such devolution can we spur the kind of community-by-community dialogue regarding the kind of urban policies that will need to be implemented to complement any given regional immigration strategy.

It is here that my proposal addresses the current limitations of regional policymaking. More than just devolving discretionary power, the federal government should also take an active part in structuring the regional body that will make these decisions. No state or region should be required to change their governmental structure. There is no need for the federal government to run afoul of the constitutional prohibition against commandeering the legislative process of the states.<sup>93</sup> Yet the federal government can condition regions that would like to exercise direct control to create or designate a regional entity tasked with this responsibility.<sup>94</sup> A good model would be a type of regional council in which all localities are represented as localities, but membership is apportioned according to a locality's share

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93. See *United States v. New York*, 505 U.S. 144, 161, 175-76 (1992).

94. To be sure, all of this raises concerns about whether the federal government can empower regions or localities specifically without the approval of the state—bypassing the states, in a sense, by devolving the power directly to metropolitan regions. On the one hand, the Supreme Court has recognized such devolution as part of the federal government's preemption powers. See *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270 (1985). On the other hand, the Court has also expressed doubts about whether, under prevailing local government laws in the United States, the federal government can empower local governments with authority that the state has never directly delegated or explicitly withdrawn. See *Nixon v. Mo. Mun. League*, 541 U.S. 125, 135-38 (2004). Either way, because my proposal as it now stands is entirely voluntary, states are free to assess whether they wish to reform their regional structure in order to take advantage of the added control over immigration. Although I envision regions exercising primary control under my proposal, it is also clear that under our constitutional framework any meaningful local government restructuring, like the creation of regional councils, will almost certainly require state action.

of the metropolitan population.<sup>95</sup> Why I propose this rather than a regional council of at-large representatives or a state appointed commission is two-fold. First, regardless of the “accident” of municipal boundaries, people have strong attachments and identification with their local communities, which is important to consider in reaching a region-wide policy on immigration.

Second, such a structure will promote manageable conversations at the local level within a representative structure with which people are already familiar. On one level, the role of the regional council can be imagined as simply a mechanism for aggregating all the disparate local preferences. On another level, however, the regional council may also influence the frame of the local conversation while making more options available. Knowing that the final decision will be made on the regional level, residents may adopt a more regional outlook in expressing their local preferences. Moreover, considering the disparate impacts of immigration on different communities, the regional council may encourage more broad-based inter-local arrangements. To address concerns in bedroom suburbs about increased educational and residential service costs, for example, central cities and business-oriented communities interested in immigration may offer to share a portion of the growth in their economic tax base. In other regions, it may be the other way around. Either way, the point is that by devolving limited but tangible power over immigration, while promoting a more regional-oriented process, the possibilities for urban policy in general are greatly expanded. Indeed, the immigration incentives might also encourage the creation of a regional council with an even broader set of responsibilities than immigration, especially over those aspects of urban policy that are of importance to a regional (or even national) immigration strategy.

As novel as this aspect of the proposal may sound, it will not be the first time that the federal government has used legislation and federal incentives to promote particular local government structures. Indeed, worried about similar deficiencies in regional decision-making with respect to the administration of federal funding, Congress has in the past mandated and encouraged the creation of regional planning bodies.<sup>96</sup> This included Section 701 of the Housing Act of 1954, which gave federal funding directly to official regional or metropolitan planning agencies that had to be created to receive it, and the Federal-Aid Highway Act of 1962, which required a “cooperative, comprehensive, and continuous” planning process for metropolitan

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95. See Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1791-92 (2002) (proposing a regional legislature structured in a similar manner, but with a much broader scope).

96. See FRUG, *supra* note 47, at 86.



regions to receive federal funding.<sup>97</sup> Moreover, regional “councils of government”—voluntary alliances of local governments in a region—proliferated in the 1960s and 1970s as a result of a wave of federal legislation.<sup>98</sup> A shift in federal policy with respect to regional planning and urban development in the 1980s saw many of these measures repealed.<sup>99</sup> Yet they suggest that federal involvement in the manner proposed is not entirely novel and provide a model for how our immigration regime can be similarly reoriented in this manner.

The purpose of introducing a regional body is not simply to designate a decision-maker or to assure a particular outcome; it is also to rethink the process through which immigration decisions can be made. In this respect, even if limited in choices and constrained in scope, the devolution of real and substantial policymaking may encourage the kind of grounded and forward-thinking conversations about immigration that the national debates currently lack. Rather than trying to wrestle with the future of the United States as a nation, the question can be easily broken down, region by region, to one more manageable: what is the future of a given community and what role should immigration play? Mistakes will be made, yet the consequences and stakes will also be clear in this ongoing process. Grounded in the context of specific regional futures and with an opportunity to make a real difference, I suspect the choices that are made will ultimately reflect a now rare mix of cautious pragmatism, moderation, and hopeful aspirations.

### B. Room for Expansion

To recap, I have proposed allocating H-1B visas on a region-by-region level with the allocation decision to be made by regional councils consisting of the localities in a given metropolitan region. There are good reasons for starting here. At the same time, there is also no reason to believe that this is where it needs to end.

Logical next steps may be to look at other employment-based “non-immigrant” visas. The L visa used for intercompany transfers may be a good start.<sup>100</sup> An even more significant step, however, may be to expand regional visa allocation beyond skilled immigrants to include low- and unskilled immigrants as well, such as those covered by H-2B visas.<sup>101</sup> On the

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97. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 2002 EDITION, at 6-9 (2002), available at <http://www.planning.org/growingsmart/guidebook/print/pdf/chapter6.pdf>.

98. See *id.* at 6-10 to -11.

99. See *id.* at 6-15 to -16.

100. See 8 U.S.C. § 1101(a)(15)(L) (2006).

101. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

one hand, this expansion would reflect the fact that the diversity of most metropolitan economies means that any urban development strategy would likely involve assessments of labor demands in the low- and unskilled sectors as well as the highly-skilled. On the other hand, it allows metropolitan regions that wish to avoid the economic distortions of a shadow economy of undocumented immigrants, and the disruptions of more intrusive immigration enforcement, the option to expand the legal avenues for unskilled migrants as an alternative. Considering the critical role that low-skilled immigrants have played in urbanization in the past, it may be worth allowing such immigrants the possibility of petitioning for legal permanent residency like their H-1B counterparts.

Other than expanding into other visa categories, another direction may be to expand the role of regional policymaking into other realms of immigration regulation. A good candidate would be interior enforcement. There is much controversy over the role of local law enforcement officials with respect to undocumented immigrants. Many fear that local immigration enforcement without federal oversight will lead to abuses.<sup>102</sup> At the same time, federal immigration enforcement has also been criticized by state and local officials for being overly aggressive, sensational, and without enough concern for the local communities that are affected.<sup>103</sup> To enable federal supervision while also giving local communities a voice, another step may be to mandate regional enforcement agreements to be negotiated between the federal government and the regional council.<sup>104</sup> Certain communities may decide that the benefits of immigration enforcement simply do not outweigh the costs of a particular enforcement strategy. Others may feel that more aggressive enforcement is necessary, but rather than focusing on large-scale raids and sweeps, suggest a less disruptive means toward those ends.

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102. See, e.g., Editorial, *Showdown in Arizona*, N.Y. TIMES, July 29, 2010, at A28.

103. See Abraham, *supra* note 31; Bernstein, *supra* note 32; Shulman, *supra* note 31; Valencia, *supra* note 32.

104. In contrast to the federal 287(g) program, which allows local law enforcement to be deputized as federal immigration agents, this proposal is as interested in how regional considerations temper federal enforcement strategies as it is concerned about local assistance to federal authorities. See Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006). To be sure, I have defended the 287(g) program before as a means for localities to influence federal immigration enforcement strategies. See Su, *supra* note 78, at 1635-36, 1640-41. Moreover, there are signs of flexibility; just as many cities are signing up to be deputized as immigration officials under the federal government's 287(g) program, others are dropping out due to concerns that federal demands endangered rather than enhanced local safety. See Maria Sacchetti, *Agencies Halt Their Immigrant Scrutiny Barnstable Sheriff, Framingham Police Say No*, BOS. GLOBE, Oct. 2, 2009, at A1. Yet in the end, the 287(g) program still does not allow much local influence to be exercised on the manner in which federal officials carry out their enforcement responsibilities.

Finally, an even more flexible and tailored approach to regional immigration policies may be worth considering. Not unlike the provincial accords negotiated between the federal and provincial governments in Canada, a similar set of accords between the federal government and certain metropolitan regions or states may be worthwhile here. The diversity of our regions, and their different interests and needs are no less than those of the Canadian provinces. Rather than being preoccupied with the legality of immigrants in their community under federal law, states and regions can take a more active role in deciding what kind of immigrants they would like to see legally admitted to fill a regional need. It is likely that many states and regions will express interest in the same kind of immigrants that currently resort to undocumented entry because no legal option exists. In addition, emphasizing regional accords will also allow more immigration-related issues—from admission categories and enforcement strategies, to social service responsibilities and education priorities—to be put on the table. Not only would regions and states benefit from this process, but it may also advance national interests in the long term by allowing the federal government to develop a network of local partners. Of course, recent events have conditioned everyone to think of the federal, state, and local relationship over immigration to be one of inevitable conflict. There is no reason to believe that a broader cooperative arrangement that gives all the parties a more active role with respect to their interests will not produce arrangements that advance the interests of all the parties involved.

### C. Addressing Potential Concerns

Of course, while some might be interested in how the initial proposal can be expanded, others are more likely to raise concerns. Here, I outline a few possible objections along with a preliminary response.

One concern may be that regional variations will raise the risk of geographic balkanization. The fear would be that some regions will staunchly oppose all immigration, while other would be eagerly open their doors. To allow regional control then, would essentially promote a dangerous polarization. This, of course, is of particular concern given America's long tradition of instilling a strong sense of national identity in our immigrant newcomers. Yet, not only is immigrant distribution already unevenly concentrated, but I also suspect that few metropolitan regions will be entirely welcoming or entirely exclusive. If anything, the regional control proposed will likely lead to a more even distribution by giving low-immigrant regions a way to directly recruit immigrants. Moreover, because of strong competition over residents and capital among the major metropolitan regions in the United States, it is likely that regional immigration poli-

cies around the country will always be converging on what is perceived to be the most successful model. Of course, with many metropolitan regions focusing their urban development strategy on particular areas of the world economy—be it Miami and Latin America or Los Angeles and Asia<sup>105</sup>—it can also be argued that some degree of “specialization” might be worth promoting.

A second concern may be how devolution affects the balance of interests and power between the federal government, states, and localities. For some, it may be that national interests concerning immigration will be undermined under this proposal. For others, the concern might be that even under the proposed structure, metropolitan policymaking will simply be poor, especially without substantial federal oversight. With respect to the first, it is worth noting that incorporating regional variations into our immigration regime may actually increase federal power and control in ways not possible under the current regime. It is worth recalling that the federal government has long been interested in the distribution of immigrants and their settlement, but has had no real avenue to influence that distribution except through nationwide quotas and restrictions. Moving to federal-regional accords can allow the federal government to influence and direct regional policymaking through the negotiations, especially in ways that are not currently permitted. With respect to the second concern, it is worth remembering that the proposal envisions a substantial role for federal oversight, both with regard to the type of decisions that regions can make and the processes through which they do so. Moreover, because the proposal is based on federal policymaking and not on state rights or local autonomy, there is always the assurance that truly worrisome developments can be rectified with further legal refinement at the federal level.

If the first two concerns are that the proposal may be too radical, another complaint may be that it actually does too little. Some may feel that it does not do enough to address truly pressing immigration issues, such as undocumented immigration. On the one hand, this is absolutely correct. The proposal seeks to address what I perceive to be a significant limitation in our current approach to immigration, but it does not claim to be able to resolve all the immigration controversies, even those that currently dominate the national discourse, like undocumented immigration. On the other hand, the potential of an urban policy reorientation of immigration to alter the entire landscape of immigration as an issue of public interest should not be underestimated. Regional variations in our immigration regime may make

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105. See ANDERSSON & ANDERSSON, *supra* note 4; Franklin J. James et al., *The Effect of Immigration on Urban Communities*, 3 CITYSCAPE 171, 182-83 (1998).

what now seem like national emergencies into a question of what is the optimal geographic distribution and allocation. Indeed, structuring immigration discussions around the concrete models of “city futures” set forth in Part I may inject much needed substance and meaning into what can sometimes be a vague and unmoored national conversation over immigration policy. Similarly, regional policymaking may redirect some of the fervor at the national level towards different forums and discussions framed with a different set of options and responses. It is too easy today for local leaders to throw their hands up in frustration and blame the federal government for failing to fulfill their responsibility. There are concrete actions that urban policymakers can take to tackle local immigration conflicts and address immigration-related issues. In this respect, reorienting immigration in this way and giving regional policymakers some control may also encourage regional policymakers to play a more active role with respect to immigration in all aspects of urban policy by exercising the power that they already have. In many of these cases, the reorientation of immigration proposed in this paper may be the reconceptualization that is needed to finally see many of immigration’s most intractable issues through.

#### CONCLUSION

Immigration is a national issue and a federal responsibility. Yet, even as such, there is no reason why it cannot be regulated and discussed with urban policy interests in mind. As this essay has argued, there are good reasons for reorienting a part of our immigration regime towards urban policymaking. To this end, we have looked at the importance of immigration to urban development in the United States and its usefulness in the pursuit of various “city futures.” We have also examined the local context from which many immigration controversies spring, the influence of urban policy on our nation’s capacity to absorb immigrants, and immigrants’ long-term effects on American society. Along with the importance of urban development to our nation’s prosperity and the need in our immigration regime for a better means to balance competing demands and varying interests, there are strong reasons for a legal regime that explicitly recognizes immigration as urban policy.

There are noteworthy obstacles to such a reorientation of our immigration regime, many of which are embedded in the legal structures of immigration and local government law. But as the proposal outlined in Part III demonstrates, subtle legal reforms, such as how we allocate a particular visa and the process through which that decision is made, can produce significant and meaningful changes in this direction. Though modest, the proposal outlined in this essay may be just the right first step toward a more

broad-based renegotiation of how regional needs, urban development interests, and local responsibilities can be made a more concrete part of our immigration regime. At the very least, it should offer a new and more tangible perspective from which the seemingly intractable controversies over immigration can be reexamined and approached.