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## Welcome to Amerizona - Immigrants Out: Assessing Dystopian Dreams and Usable Futures of Immigration Reform, and Considering Whether Immigration Regionalism is an Idea Whose Time Has Come

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**WELCOME TO AMERIZONA—IMMIGRANTS  
OUT!: ASSESSING “DYSTOPIAN DREAMS” AND  
“USABLE FUTURES” OF IMMIGRATION  
REFORM, AND CONSIDERING WHETHER  
“IMMIGRATION REGIONALISM” IS AN IDEA  
WHOSE TIME HAS COME**

*Keith Aoki\* & John Shuford\*\**

**ABSTRACT**

In this essay, we introduce the heuristics of “dystopian dream” and “usable future” to assess competing visions for immigration reform. We apply these heuristics to potential changes to the U.S. immigration system and immigration federalism as reflected in legislative and law enforcement activities, policy proposals, speeches, and scholarship. We consider President Obama’s recent revival of Emma Lazarus’s “The New Colossus” and aspects of the Schumer/Graham blueprint for comprehensive reform alongside the dystopian dream of immigration reform reflected in Arizona’s S.B. 1070 and other state- and local-level efforts to regulate both immigrants and immigration. We also consider side-by-side recent work on immigration and localism and comprehensive immigration reform by urban futurist Joel Kotkin and immigration law professor Dean Kevin Johnson, respectively. In addition to providing valuable insights on the relationship between immigration and economic, social, and cultural dynamism and the prospective parameters of much-needed “truly comprehensive” reform,

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\* Professor, King Hall School of Law, University of California at Davis. My deepest thanks go to Dean Kevin R. Johnson, Bill Ong Hing, Jennifer Chacon, Michael Olivas, Raquel Aldana, Hari Osofsky, and Steven W. Bender for their contributions to my thinking about this topic. Many thanks are also due to Emilio Camacho and Esmeralda Soria for their research assistance on this project. All remaining errors are the authors’ own.

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their work illustrates the ambivalent attitudes about localism within contemporary immigration policy debates, even amongst those who emphasize the fundamentally economic and labor-driven forces behind immigration today.

Our bottom line recommendation is that immigration policy formulation and implementation occur on a regional basis, federally created with strong federal oversight and without constitutional disruption of immigration federalism. What we call “immigration regionalism” would move debate beyond the state versus federal power question that has taken center stage with the Rehnquist Court’s so-called “New Federalism.” Acting pursuant to the Commerce Clause, the Supremacy Clause, and foreign policy objectives, the federal government would create immigration regions and a governance structure that incorporates representatives of state and local governments, as well as private sector and civil society groups. The regional units would gather and assess data and formulate policy recommendations. In this way, immigration regionalism would split the difference between a purely federal approach and a subnational one as exemplified by states like Arizona and municipalities like Hazleton, Pennsylvania, wherein legislators take dangerous, overreaching self-help measures. An “immigration regionalism” would also feature core commitments and principles and promote salutary outcomes that bring together what is best in Kotkin’s and Johnson’s respective “usable futures” and that resonates with recent important work on equitable regionalism and rethinking immigration federalism.

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## INTRODUCTION

“Welcome to Amerizona—Immigrants Out!”<sup>1</sup> We use the phrase “Amerizona” to describe a state of internal disorder represented by Arizona’s recently passed S.B. 1070, as well as the flurry of state and local law-making pertaining to undocumented immigrants and immigration reform. We also use it to illustrate one of many possible futures for states, municipalities, and the entire nation so that we may ask the question: *is this the future of immigration reform and of American society in this century?*

In this essay, we introduce the heuristics of “dystopian dream” and “usable future” to assess multiple, competing and contradictory visions of our “immigration future” that are colliding in our lawmaking bodies and in the popular imagination. We recommend applying these heuristics to visions for immigration reform, efforts to change the U.S. immigration system, and specific possible changes to immigration federalism as reflected in legislative and law enforcement activities, policy proposals, speeches, and scholarship.

The dystopian dream of immigration reform, of which Amerizona is just one version, is often strongly anti-immigrant, exclusionary, nativist, and even racist. Unfortunately, this response to immigrants and immigration is nothing new; rather, it has occurred frequently throughout American history. The dystopian dream typically takes shape in laws, policies, enforcement practices, and popular attitudes that are hostile toward undocumented immigrants, unfriendly and unwelcoming toward noncitizens, threatening or even dangerous to people of color and linguistic minorities, and punishing of those who employ or assist “illegals.” It is also reliant on racial profiling and technologies (such as biometric identification and surveillance) that are overreaching in application and arguably in nature, as well. These laws have taken on an even more ominous and absolutist cast with the close identification of immigration control and national concerns in the wake of the attacks of September 11, 2001.

Yet prominent supporters of comprehensive federal immigration reform and dystopian dreamers may share a mutual concern and similar approach to the “immigration problem.” Specifically, on whom to attract, recruit, and admit; whom to deport, deny admission, and discourage from coming to America; the dimensions and causes of “illegal immigration”; and the use of overreaching technologies. There has also been a conflation—a bridge between state and local law and federal law—as criminal law and immigration law have been confused with criminalization of federal immi-

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1. IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997).

gration law.<sup>2</sup> Here we consider President Obama's recent revival of Emma Lazarus's "The New Colossus" and aspects of the Schumer/Graham "blue-print" for comprehensive reform alongside the dystopian dream of immigration reform reflected in Arizona's S.B. 1070 and other state- and local-level efforts to regulate both immigrants and immigration.

Unlike the dystopian dream, a "usable future" of immigration reform recognizes that immigrants and their U.S.-born family members "will help to define the future 'us'" and acknowledges that our immigration system needs comprehensive reform.<sup>3</sup> Through the lens of a "usable future" heuristic,<sup>4</sup> we consider side-by-side recent work on immigration and immigration reform by urban futurist Joel Kotkin and immigration law professor Dean Kevin Johnson. In addition to providing valuable insights on the relationship between immigration and economic, social, and cultural dynamism and the prospective parameters of much-needed "truly comprehensive" reform, their work illustrates the ambivalent attitudes about localism within contemporary immigration policy debates, even amongst those who emphasize the fundamentally economic and labor-driven forces behind immigration today.

Political and cultural values such as optimism, ingenuity, localism, diversity, integration, and democratic participation helped to build America and reform it, however gradually, to keep the nation powerful and vibrant. To a futurist such as Joel Kotkin, localism is of particular importance, as it reflects "a historic American tradition that sees society's smaller units as vital and the proper focus of most people's lives"<sup>5</sup> and undergirds what he calls "the new localism" which "changing demographics, new technologies

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2. See *Immigration-Related Bills and Resolutions in the States (January-March 2010)*, NAT'L CONF. OF STATE LEGS. (2010), <http://www.ncsl.org/default.aspx?tabid=20244> ("With federal immigration reform stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate.").

3. See Hiroshi Motomura, *What is "Comprehensive Immigration Reform"?* *Taking the Long View*, 63 ARK. L. REV. 225, 225, 238-39 (2010) (defining "legalization" as the retroactive application of durable changes to immigration law, not a one-time scheme for conferring lawful status). See generally Richard Boswell, *Crafting an Amnesty With Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175 (2010); Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291 (2008).

4. For a useful analysis of possible futures of U.S. cities, including a "Tourist City," a "Middle Class City," a "Global City," and a "Sustainable City," see generally GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE LOCAL INNOVATION* (2008). In the fifth edition of their local government casebook, Frug and Barron, drawing on the work of Rick Su and Cristina Rodríguez, further imagine an "Immigrant City." See GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* (5th ed. 2010).

5. Joel Kotkin, *Turns out There is Good News on Main St.*, NEWGEOGRAPHY (Oct. 19, 2008), <http://www.newgeography.com/content/00344-turns-out-theres-good-news-main-st> (describing "the New Localism" and noting that the financial crisis may actually bring positive change).

and rising energy prices”<sup>6</sup> have helped to propel. Kotkin’s progressive localist vision, which is conscientiously optimistic and opportunistic, emphasizes the importance of immigrants and immigration in America’s economic, social, and cultural dynamism, especially in reviving cities, regions, and industries.

However, what is one to make of, and do about, the fact that much of the most virulent anti-immigrant activity and sentiment seems to originate on the local level? Johnson’s vision, which is skeptical of localism particularly in the immigration area, offers insight into the systemic causes and conditions that give rise to undocumented immigration and proposes specific measures to fix the broken, misaligned, and misconceived aspects of our immigration regulatory system.<sup>7</sup> Professor Johnson provides some basics of comprehensive reform to address the fundamentally economic and labor-market forces behind immigration today, which uphold and advance specific principles of law and justice.

Our bottom line recommendation is that immigration policy formulation and implementation occur on a regional basis, as federally created with strong federal oversight and without constitutional disruption of immigration federalism. What we call “immigration regionalism” would move debate beyond the state power versus federal power question that has taken center stage with the Rehnquist Court’s so-called “New Federalism.” Acting pursuant to the Commerce Clause, the Supremacy Clause, and foreign policy objectives, the federal government would create immigration regions and a governance structure that incorporates representatives of state and local governments, as well as private sector and civil society groups. The regional units would gather and assess data and formulate policy recommendations. In this way, immigration regionalism would split the difference between a purely federal approach and a subnational one as exemplified by states like Arizona and municipalities like Hazleton, Pennsylvania, wherein legislators take dangerous, overreaching self-help measures regarding “illegal immigration.”<sup>8</sup> An “immigration regionalism” would also feature

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6. *Id.*

7. See generally Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2010) (discussing principles for reforming our current immigration system to ensure it is lasting).

8. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008) [hereinafter Motomura, *Outside*] discusses the spate of local ordinances, such as Hazleton, Pennsylvania’s, noting that they raise an important question: when localities enact these types of ordinances, are they simply implementing the underlying policies of federal immigration law? If so, there is not a preemption problem; in fact, they are usefully “amplifying” the reach of federal immigration law by multiplying the number of law enforcement persons working on immigration issues. However, this is only the case *if* federal immigration law is simple, easily implemented by localities, and non-discretionary, and if localities use and ap-

core commitments and principles and promote salutary outcomes that bring together what is best in Kotkin's and Johnson's respective "usable futures" and that resonate with recent important work on equitable regionalism and rethinking immigration federalism.

### I. "DYSTOPIAN DREAMS"—"AMERIZONA" AND REVIVING "THE NEW COLOSSUS"?

When it comes to visioning immigration reform and the consequences of specific courses of action, some perspectives are fearful of change while others are hopeful, and some wish for a return to an idealized past while others seek a different tomorrow. Competing visions for immigration reform thus reflect drastically contrasting values and commitments. Some

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ply standards and rules taken directly from federal immigration law. On the other hand, *if* federal immigration law is a complex mix of highly contextual and discretionary decisions (as to which particular cases to pursue or not pursue, about how to prioritize and allocate scarce resources, etc.), and *if* federal immigration law involves a dense mix of underlying policies and federal cases, as well as particular rules, then localities which purport to merely help carry out federal immigration law may be preempted from doing so. Professor Motomura discusses two types of cases that have arisen in this context. The first type is exemplified by *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757 (N.D. Tex. 2007) (granting a preliminary injunction against a city ordinance requiring lessors of rental housing to have "evidence of citizenship or eligible immigration status for each tenant family"). *See also Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880 (N.D. Tex. 2008) (granting permanent injunction); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004). In the *Farmers Branch* and *Equal Access* cases, Motomura argues that the courts "assumed that states may not burden noncitizens who are lawfully present under federal immigration law," but also assumed that "full reliance on federal immigration law standards eliminates any conflict between federal and subfederal law, thus avoiding preemption." Motomura, *Outside, supra* at 2061. In this type of case, the court seemed to assume that federal immigration law was self-executing, and thus if federal standards were tracked completely by subfederal local law, there was no conflict. In the second type of case, courts seem to assume that federal immigration law is complex and discretionary in application by federal immigration officials, and, therefore, federal law preempts subfederal enforcement. This second type of case is exemplified by cases like *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). *See also Lozano v. City of Hazleton*, No. 07-3531, 2010 U.S. App. LEXIS 18835, at \*153 (3d Cir. Sept. 9, 2010) (affirming in part and reversing the district court but holding that Hazleton's housing ordinances were preempted regulation of immigration; "[i]t is this power to effectively prohibit residency based on immigration status that is so clearly within the domain of the federal government."); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006). In *Lozano*, the court found that Hazleton's ordinances were preempted because federal immigration law struck a different "balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on employers and workers." 496 F. Supp. 2d at 527-33. In *City of Escondido*, the court blocked enforcement of a city ordinance that could "stand as a burden or obstacle to federal . . . law." 465 F. Supp. 2d at 1057. Professor Motomura observes that *City of Escondido* "reflected concern that a city might impede federal enforcement," but in *Lozano*, an opposite concern was reflected "that a city might assist federal enforcement too much." Motomura, *Outside, supra* at 2062.

visions may be romantic and nostalgic or pessimistic and extremist; others may be optimistic and opportunist or principle-focused and justice-driven. All of these, in some way, are future-looking visions, and most of them clash with each other over which goals and standards should drive immigration reform.<sup>9</sup>

Yet in the tumult over what to do about present circumstances and the past conditions that gave rise to them, future-looking questions often are lost or overlooked. These are typically important questions: *What kind of future would we want to leave to the next generation and those not yet here? What steps are likely to contribute to its realization, and which ones are likely to prevent it? What kind of future is being created by, or is likely to result from, steps that are taken (or contemplated) right now? Whose future matters for what, and why?*

During a July 2010 address at American University, President Obama renewed the call for comprehensive immigration reform.<sup>10</sup> Late in his re-

9. There is an identifiably broad spectrum of views regarding immigration law and policy, from most to least restrictionist. The spectrum arguably runs from: (1) impermeable totally defended borders, total enforcement and mass governmental deportations; (2) totally defended borders, total enforcement and laws criminalizing “aiding and abetting” illegals (including renting shelter to them, employing them, allowing their children to attend schools, denying access to medical care—in other words, starve them out, etc.); (3) stronger border enforcement, i.e., enforcement now, enforcement forever; no plausible pathway to citizenship; (4) strengthened border, employer sanctions, “touch-back/go-to-the-end-of-the-line” citizenship applications; (5) visiting worker visas, no citizenship; (6) open borders for labor migration with security checks for criminals; and (7) immigration policy premised on the U.S. being able to exclude persons from countries where the U.S. has not been extracting resources or disrupting economies and cultures by military or economic means (probably only a very few countries as the United States extracts and uses between 17-20% of the world’s resources, yet has only about 4-5% of the world population). Each of these has drawbacks and attractions, and each may have dystopian (or utopian) ambitions and implications. In terms of implementation, clearly some are more plausible than others. Of course, their administrability should not have much bearing on their desirability; however, pragmatic considerations often weigh on (or outweigh) normative considerations.

10. President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform> (quoting Emma Lazarus, *The New Colossus* (1883)); see Kevin R. Johnson, *Obama on Immigration: Enforcement Now, Enforcement Forever?*, IMMIGRATIONPROF BLOG (Aug. 2, 2009), <http://lawprofessors.typepad.com/immigration/2009/08/obama-on-immigration-enforcement-now-enforcement-forever.html>; see also JOSEPH NEVINS, SECURITY FIRST: THE OBAMA ADMINISTRATION AND IMMIGRATION ‘REFORM,’ N. AM. CONG. LATIN AMERS. 32 (Jan. 2010); Gary Martin, *Obama Makes His Case for Immigration Reform*, HOUS. CHRON. (July 2, 2010), <http://chron.com/dispatch/story.mpl/special/immigration/7090825.html>. But cf. Tyche Hendricks, *McCain, Obama Avoiding Fray on Immigration*, S.F. CHRON. (Oct. 13, 2010), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/13MN2D12UG16.DTL> (stating Obama supported the DREAM Act); Patricia Smith, *Who’s Side Are You on? Here’s Where John McCain and Barack Obama Stand on 10 Key Issues. Who Would You Vote For?*, N.Y. TIMES, Nov. 3, 2008, at 8 (stating that Obama supported drivers’ licenses for undocumented immigrants).



marks, President Obama retold the early history of the Statue of Liberty, emphasizing its symbolic greeting to European immigrants who had traversed the North Atlantic in search of freedom from persecution and want, economic opportunity, and prosperity.<sup>11</sup> The President closed by reciting Emma Lazarus's sonnet "The New Colossus."<sup>12</sup> Although its text has accompanied Lady Liberty for more than a century, the President's recent recitation provided a remarkable moment in the tortuous immigration debate. Remarkable, that is, because it opposed a "dystopian dream" of immigration reform—one that we call "Amerizona"—that has swept up much popular opinion and become woven into a good deal of state and local government legislation both proposed and enacted.<sup>13</sup>

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11. Note that we are not overlooking the major contribution of RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1998), in which Takaki described immigrants to U.S. from Asian countries that passed through Angel Island in San Francisco, which presents a complementary and contrasting narrative and more complex and complicated picture of America's immigration history. See also JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (1955) (analyzing the political history surrounding Congress' national-origins quotas system in 1924, a policy integral to U.S. immigration until 1965); BILL ONG HING, *MAKING & REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993) [hereinafter HING, *MAKING*] (documenting history of Chinese exclusion and similar laws and their impacts on the emergence of Asian American communities in the United States); KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004) (analyzing the historical exclusion and removal of the poor, political minorities, racial minorities, disabled, gays and lesbians, and other groups in U.S. immigration laws); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (analyzing history of the Chinese exclusion laws and their progeny); PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA* (2010).

12. President Barack Obama, *supra* note 10 ("Here at our sea-washed, sunset gates shall stand / A mighty woman with a torch . . . / From her beacon-hand / Glows world-wide welcome . . . / Keep, ancient lands, your storied pomp!" . . . "Give me your tired, your poor, / Your huddled masses yearning to breathe free . . . / Send these, the homeless, tempest-tossed to me, / I lift my lamp beside the golden door!") (quoting EMMA LAZARUS, *THE NEW COLOSSUS* (1883)). But see Michael D. Shear, *National Guard Will Bolster Mexico Border: Obama to Deploy 1,200 Troops in Volatile Area*, BOS. GLOBE, May 26, 2010, at 11, available at [http://www.boston.com/news/nation/washington/articles/2010/05/26/national\\_guard\\_will\\_bolster\\_mexico\\_border?mode=pf](http://www.boston.com/news/nation/washington/articles/2010/05/26/national_guard_will_bolster_mexico_border?mode=pf).

13. President Obama's speech was also interesting because it marked a moment for his administration when it began turning its attention towards immigration reform, which had been one of his planks as a candidate. For example, on July 6, 2010, Attorney General Eric Holder filed a lawsuit for the Obama Department of Justice in *United States v. Arizona*, No. 2:10-CV-01413, 2010 WL 2926157 (D. Ariz. July 28, 2010) seeking to enjoin Arizona's S.B. 1070 on grounds that certain of its elements were preempted by federal immigration law. On July 28, 2010, Judge Susan Bolton issued an opinion that in essence agreed with the Department of Justice lawsuit and enjoined enforcement of some of S.B. 1070's provisions, which had been set to go into effect on July 29, 2010. However, note that a comprehensive immigration reform bill was introduced in the U.S. House of Representatives in December 2009. See Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, H.R. 4321, 111th Cong. (1st Sess. 2009). Note that the Obama ad-

Before we turn to discussion of Amerizona and “The New Colossus,” let us say a few words about dystopia and dystopian dreams. The notion of *dystopia* (“bad place”) is both recent and familiar. J. Max Patrick meant to coin the phrase “dystopia” in 1952 as the opposite of *eutopia* (which plays on a translational ambiguity of “good place” and “no place”).<sup>14</sup> However, the first known recorded use of the word comes from John Stuart Mill in an 1868 speech before the British House of Commons, to characterize supporters of the government’s Irish land policy (“dys-topians”),<sup>15</sup> and proto-dystopian visions arguably appear in the fictional writings of Jules Verne,<sup>16</sup> Aldous Huxley,<sup>17</sup> George Orwell,<sup>18</sup> H.G. Wells,<sup>19</sup> Edward Bellamy,<sup>20</sup> and others.

Both *dystopia* and *eutopia* derive from *utopia* (“no place”) which Saint Sir Thomas More is believed to have coined.<sup>21</sup> Utopian visions (without accompanying use of the word) may be found at least as early as Plato’s *Republic*<sup>22</sup> and *Laws*,<sup>23</sup> Aristotle’s *Politics*,<sup>24</sup> and Saint Augustine’s *City of*

ministration and Congress have not yet moved ahead with comprehensive immigration reform this year. However, note that a comprehensive immigration reform bill was introduced in the U.S. House of Representatives in December 2009. *Id.*

14. ERIKA GOTTLIEB, *DYSTOPIAN FICTION EAST AND WEST: UNIVERSE OF TERROR AND TRIAL* (2001).

15. OXFORD ENGLISH DICTIONARY (2d ed. 1989); *see also* John Stuart Mill, Address at the British House of Commons: The State Of Ireland (Mar. 12, 1868).

16. *See generally* JULES VERNE, *THE BEGUM’S FORTUNE* (Bernard Hansion Ltd. 1958) (1879).

17. *See generally* ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

18. *See generally* GEORGE ORWELL, 1984 (1948).

19. *See generally* H.G. Wells, *A Story of the Days to Come*, in *TALES OF SPACE AND TIME* (Nabu Press 2010) (1899); H.G. WELLS, *THE SLEEPER AWAKES* (1910).

20. *See generally* EDWARD BELLAMY, *LOOKING BACKWARD* (Buccaneer Books 1994) (1888).

21. *See generally* SIR THOMAS MORE, *UTOPIA* (Edward Surtz ed., Yale Univ. Press 1964) (1516).

22. PLATO, *THE REPUBLIC* (Allan Bloom trans., BasicBooks 2d ed. 1991) (C. 340 B.C.E.). One can argue that among its many contributions, the “Just City” thought-experiment provides early glimpses into political science, speculative urban planning, and policymaking. Plato’s metaphor of city-as-soul provides a heuristic device for assessing the relationship among and between the parts of the person and the parts of the body politic. As combined with his speculative theories of specialization, correspondence, harmonization, and balance, Plato’s formulations of the basic city (sustainable/ethical living), the feverish city (excessive/unethical living), and the just city (the feverish city brought closer to the “health” of the basic city through specific policies and reforms) can be thought of as proto-imaginings of utopia, dystopia, and usable future.

23. PLATO, *THE LAWS OF PLATO* (Thomas L. Pangle trans., Univ. of Chicago Press 1980) (C. 340 B.C.E.).

24. ARISTOTLE, *POLITICS AND POETICS* (Benjamin Jowett trans.), *available at* [http://www.constitution.org/ari/polit\\_00.htm](http://www.constitution.org/ari/polit_00.htm)

*God*.<sup>25</sup> Utopian thought is concerned with the “theoretical possibility to design a commonwealth that would always act morally if when acting morally it was always practical.”<sup>26</sup>

By contrast, dystopia is a social commentary device used to provide a setting for a cautionary tale, to illustrate a warning about the direction of society, or to offer reflection on current conditions. Dystopia is typically an imaginary, dark vision of another time (or place), one that is wretched for most people in many respects, where life is spent in constant fear due to the omnipresence of violence, terror, and dehumanization. The late Erika Gottlieb noted that dystopian fiction

... looks at totalitarian dictatorship as its prototype, a society that puts its whole population continuously on trial, a society that finds its essence in concentration camps, that is, in disenfranchising and enslaving entire classes of its own citizens, a society that, by glorifying and justifying violence by law, preys upon itself.<sup>27</sup>

Such an imaginary society is “dysfunctional” because it “reveals the lack of the very qualities that traditionally justify or set the *raison d’être* for a community.”<sup>28</sup> Yet as Huxley, Orwell, and storytellers in literature and film<sup>29</sup> have shown us, dystopia started from and still pretends to utopianism, if only in myth and rhetoric. In reality, it confers great material benefit on a privileged few while it habitually neglects or even brutally oppresses most others.

When it comes to current debates over immigration reform, there are multiple versions of the dystopian dream. The one that President Obama sought to combat in his July 2010 speech, which we call Amerizona, is alarmingly mainstreamed.<sup>30</sup> That dystopian dream is isolationist and reac-

25. ST. AUGUSTINE, *THE CITY OF GOD*, reprinted in AUGUSTINE 129 (Robert Maynard Hutchins ed., Marcus Dods trans., William Benton 1952).

26. See *Early Utopianism and the American Republic*, HARMONICS LIVING, <http://www.nexusgrid.net/harmony-utopias.htm> (last visited Nov. 9, 2010); see also CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004).

27. GOTTLIEB, *supra* note 14, at 40-41.

28. *Id.* at 41.

29. Some dystopian films focus on societal anxieties about immigrants and immigration. See, e.g., *BLADE RUNNER* (Warner Bros. 1982) (depicting anxieties about racial, ethnic, and linguistic hybridization; lethal border control against dangerous illegal aliens); *CHILDREN OF MEN* (Universal Pictures 2006) (depicting total immigration restriction within a closed, dying society and its anxieties about refugees and illegal aliens); *PLANET OF THE APES* (20th Century Fox 1968) (depicting human time travelers as illegal aliens who threaten to reveal the lies and expose the truth of the simian social order); *SLEEP DEALER* (Maya Entertainment 2008) (depicting globalization of virtual labor within a global system of militarized closed borders).

30. This is particularly true if one listens to conservative talk show radio hosts such as Michael Savage, Lars Larsen, and Rush Limbaugh, or Fox television hosts such as Sean

tionary in its basic politics, nationalist and nativist in its values, often racist and extremist in its orientations, and fueled by anxiety over social change and resentment over loss of power.<sup>31</sup> Unfortunately, in this way, it presents nothing new; such regard for immigrants and immigration has occurred frequently throughout American history.<sup>32</sup> What is newer yet also characteristic of dystopian thought is the reliance on racial profiling<sup>33</sup> and tech-

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Hannity and Glenn Beck, as well as the commentators and scholars referenced in note 34, *infra*.

31. See generally Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002) (noting that the de-Americanization of people of color such as Asian Americans and Latinos finds its roots in the historical immigration exclusionary and enforcement policies directed at Asian and Latin immigrants); Ediberto Roman, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008) (critically analyzing the use of the term “alien invasion” as deployed by immigration restrictionists).

32. See HIGHAM, *supra* note 11; HING, MAKING, *supra* note 11; JOHNSON, *supra* note 11; SALYER, *supra* note 11; SCHRAG, *supra* note 11 (analyzing the modern immigration controversy within the context of three centuries of debate over the same questions about who exactly is fit for citizenship); TAKAKI, *supra* note 11; Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the continuing vitality and modern significance of plenary power doctrine); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (detailing exclusionary policies enacted in U.S. immigration laws as well as the national-origins quotas system that reflects this nation’s preoccupation with its ethnic balance).

33. See generally *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (effectively sanctioning racial profiling by stating that “Mexican appearance” may be used as one of many factors to justify immigration stops without violating the Fourth Amendment’s prohibition on warrantless searches and seizures); Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) [hereinafter Johnson, *How Racial Profiling Became the Law of the Land*] (arguing that to truly root out racial profiling from modern law enforcement, the law must impose limits on the consideration of race in law enforcement, restrict law enforcement discretion in making stops, and afford a meaningful remedy for impermissible stops and arrests); see also Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 698-702 (2000) (criticizing claims of unlawful racial profiling in immigration enforcement); Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants and the Rule of Law*, 47 VILL. L. REV. 897 (2002) (analyzing the disparate racial impact resulting from the placement of undue discretion in the hands of law enforcement officers, which invites excessive reliance on race). On racial profiling and anti-terrorism initiatives, see R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004) (arguing that the nature of the terrorist threat dramatizes the indeterminate boundary of each component of racial profiling); Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9 (2003) (arguing that neither law enforcement bureaucracies nor the public at large have the information necessary to precisely assess the benefits and costs of profiling and, as a result, the utility of profiling is assumed, rather than defended, and that the context-dependence point is largely an appeal to intuition); Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003) (critiquing the post-September 11 arguments offered by a number of criminal justice scholars in favor of proposals that would subject Arabs and Muslims to some degree of ethnic-profiling); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human*

nologies (such as biometric identification and surveillance) that are over-reaching in application and arguably in nature, as well.<sup>34</sup> These laws have taken on an even more ominous and absolutist cast through the close identification of immigration control with national security concerns in the wake of the attacks of September 11, 2001.<sup>35</sup> There has also been a conflation—

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*Rights*, 25 B.C. THIRD WORLD L.J. 161 (2005) (arguing that no profiling practice is justified unless it satisfies certain minimum requirements of rationality and weighted cost effectiveness, and that some of the national security-related profiling practices raise serious issues of U.S. compliance with its obligations under the Convention on the Elimination of All Forms of Racial Discrimination); Andrew E. Taslitz, *Racial Profiling, Terrorism and Time*, 109 PENN ST. L. REV. 1181 (2005) (“Two Star Trek episodes have profound lessons to teach about the nature of the experience of time, lessons with critical importance to critically examining the United States Supreme Court’s jurisprudence on racial profiling.”).

34. See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995); PATRICK J. BUCHANAN, *THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* (2002); PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006); VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003); SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICAN NATIONAL IDENTITY* (2004); MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* (2002); JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC* (1998); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (rev. ed. 1998). It is worth comparing this relatively recent spate of books advocating immigration restrictions with the immigration restrictionists of the early twentieth century, who premised their call for restrictions on an uneasy combination of white racial superiority and “scientific” arguments on the inferiority and undesirability of nonwhite immigrants. See, e.g., MADISON GRANT, *THE PASSING OF THE GREAT RACE* (1916); LOTHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* (1920); see also Raquel Aldana, *Of Katz and Aliens: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008) (warning about the “trade-off” between solving the immigration problem and respect for individual privacy and security vis-à-vis “bio-metric” identity cards); Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 160 (2008) (claiming that if a strategy of attrition through enforcement were implemented nationwide, it would gradually, but inexorably, reduce the number of illegal aliens in the United States); Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008) (arguing that, today, the fiscal burdens imposed by illegal immigration are acute throughout the United States and, as a result, many cities and states are, for the first time, exercising their authority to act); Kris W. Kobach, *Defending Arizona*, NAT. REV., June 7, 2010, at 31, available at <http://article.nationalreview.com/437656/defending-arizona/kris-w-kobach>; Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 21, 2010, at A31; Julia Preston, *Lawyer Leads an Immigration Fight*, N.Y. TIMES, July 21, 2010, at A10.

35. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 298 (2002) (“Federal government’s response to September 11 demonstrates the close relationship between immigration law and civil rights in the United States.”); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002) (sketching the broader implications of the post-9/11 enforcement-detention regime); David Cole, *Enemy Aliens*, 54 STAN. L. REV.

a bridge between state and local law and federal law—as criminal law and immigration law have been confused with criminalization of federal immigration law.<sup>36</sup>

The dystopian dream of Amerizona envisions “illegal” immigration and, at least to some extent, lawful immigration as degrading communities, destroying the social fabric, devastating natural and regional environs, and debasing America’s economic and political institutions. While it is tempting to blame Amerizona, as *Harper’s Magazine* recently did, on the workings of “today’s Arizona legislature, which is composed almost entirely of dimwits, racists, and cranks,”<sup>37</sup> in a way Arizona has done nothing new. Rhetoric characterizing immigrants as natural disasters or environmental catastrophes (waves, diseases, plagues, hordes, alien invaders, etc.) has been part of this country’s popular and legal discourse since even before its founding.<sup>38</sup> Furthermore, even prominent supporters of comprehensive

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953 (2002) (“Since September 11, immigrants have been the targets of a massive preventive detention campaign conducted under unprecedented secrecy.”); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550 (2004) (discussing the use of immigration law as part of the war on terror); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003) (focusing on concrete immigration law and policies affected by the events of September 11); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (suggesting that September 11 facilitated the consolidation of a new identity category that groups together persons who appear “Middle Eastern, Arab, or Muslim” and that this consolidation reflects a racialization wherein members of this group are identified as terrorists, and are dis-identified as citizens).

36. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827 (2007) (exploring the origins and consequences of the blurred boundaries between immigration control, crime control and national security, specifically as related to the removal of non-citizens); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 500 (2007) (“Much of the recent immigration enforcement-related activity at the federal, state, and local levels reflects . . . perceived associations of immigrants with criminals.”); Teresa A. Miller, *Citizenship & Security: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 614 (2003) (explaining the “relationship between recent, harsh immigration reforms adopted both pre- and post-9/11 and the severity revolution within crime control that has been documented by crime scholars”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (“Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct.”).

37. Ken Silverstein, *Tea Party in the Sonora: For the Future of G.O.P. Governance, Look to Arizona*, HARPER’S MAGAZINE, July 2010, available at <http://harpers.org/archive/2010/07/0083023>.

38. See SCHRAG, *supra* note 11, at 3 (quoting Benjamin Franklin in 1751 decrying German immigrants to Pennsylvania, “who will shortly be so numerous as to Germanize us instead of our Anglifying them and will never adopt our language or customs any more than they can acquire our complexion”). For an example of depictions of Japanese immigrants as tidal waves, embodied in state legislation, see California Alien Land Law Act of 1913, Law of May 15, 1913, ch. 113 (repealed 1948). Traces of this characterization could be seen in

federal immigration reform may share mutual concern and thus approach the “immigration problem” as dystopian dreamers; specifically, on whom to attract, recruit, and admit, whom to deport from, deny admission to, and discourage from coming to America,<sup>39</sup> on the dimensions and causes of “illegal immigration,” and on the use of overreaching technologies.

Although for many of us dystopian dreams are nightmarish, it is important to recognize that they are indeed *dreams*. A dystopian dream is not something that happens to us, beyond or almost beyond control, too horrible to be true. Rather, it is a vision that can be brought to life by those who want or are willing to make it so. In extreme versions like Amerizona, the dystopian dream envisions pitched battles—nationally, regionally, and locally—between patriots and invaders.

*Endless hordes of “illegals” continue sneaking or being smuggled across the southern border. They bring crime, gangs, poverty, drugs, disease, and large families. They take away (our) jobs, soak up (our) public benefits, overcrowd (our) schools and (our) prisons, drive down (our) property values, blight (our) towns and communities, erase (our) American culture, and wipe out English (our language). As Americans, we must stand our ground, cast out and repel these invaders, and protect what is ours—our homes, our jobs, our families, our communities, our culture, and our way of life. Our government has failed us; We the People owe these duties patriotically and to posterity.*

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the Democratic National Committee fundraising scandals of 1996 when commentators decried the corrupting influence of Malaysian money channeled via John Huang, Charlie Trie and Maria Hsia as “polluting” the American political process. See FRANK H. WU & FRANCY LIM YOUNGBERG, *PEOPLE FROM CHINA CROSSING THE RIVER: ASIAN AMERICANS & FOREIGN INFLUENCE, ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS* (2001); Keith Aoki, *No Right to Own?: The Early Twentieth Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37, 66 (1998); see also *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding Washington’s 1921 Alien Land Law); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010) (criticizing judicial decisions overturning parts of the California Alien Land Law).

39. See Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (imposing mandatory detention on noncitizens facing removal on criminal grounds, as well as limiting judicial review of removal orders for “criminal aliens”). For commentary on these laws, see Nora M. Demleitner, *The Fallacy of Social “Citizenship” or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35 (1997); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Peter H. Shuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL’Y 367 (1999).

This dream emanates from within academia,<sup>40</sup> popular media,<sup>41</sup> non-profit organizations,<sup>42</sup> activist groups,<sup>43</sup> and, increasingly, the halls of state and local government in the form of anti-immigrant legislation.<sup>44</sup>

The most prominent example of anti-immigrant legislation is Arizona's highly controversial S.B. 1070,<sup>45</sup> which both proponents and opponents call the most stringent and sweeping set of immigration laws and reforms in decades.<sup>46</sup> S.B. 1070 enjoys substantial popular support nationwide and especially among Arizonans.<sup>47</sup> S.B. 1070 attempts to create a state-level

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40. See, e.g., HANSON, *supra* note 34; HUNTINGTON, *supra* note 34.

41. To illustrate this point, listen to American conservative radio and television hosts and political commentators such as Lou Dobbs, Glenn Beck, Patrick Buchanan, and Lars Larsen. See also STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* (2003) [hereinafter BENDER, *GREASERS AND GRINGOS*] (sketching the overwhelmingly hostile and negative portrayals of Mexicans and other Latinos in the history of U.S. popular media).

42. See, e.g., CENTER FOR IMMIGRATION STUDIES, <http://www.cis.org>; FEDERATION FOR AMERICAN IMMIGRATION REFORM, <http://www.fairus.org>; NUMBERSUSA, <http://www.numbersusa.com>.

43. See, e.g., THE COUNCIL OF CONSERVATIVE CITIZENS, <http://cofcc.org>; THE MINUTEMEN CIVIL DEFENSE CORPS, <http://www.minutemanhq.com/hq>; THE MINUTEMAN PROJECT, <http://www.minutemanproject.com>.

44. E.g., ARIZ. LAWS 2010, ch. 113 (2010). Laws similar to S.B. 1070 have already been passed in Colorado, Florida, Oklahoma, Missouri, South Carolina, and Utah. See COLO. REV. STAT. § 18-13-128 (2006); FLA. STAT. ANN. § 787.07 (West 2009); MO. ANN. STAT. § 577.675 (West 2010); OKLA. STAT. ANN. tit. 21, § 446 (West 2010); S.C. CODE ANN. § 16-9-460 (1976); UTAH CODE ANN. § 76-10-2901 (West 2008).

45. Ariz. S.B. 1070, Ariz. Sen. 47th Legis., 2d Sess. Section 1 et seq. (2010) (as amended); ARIZ. LAWS 2010, ch. 113 (2010).

46. See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010 (noting that Mexico's Foreign Ministry said in a statement that it was worried about the rights of its citizens and relations with Arizona, and that Cardinal Roger Mahony of Los Angeles said the authorities' ability to demand documents was like "Nazism"). See also Brian Montopoli, *Obama Criticizes "Misguided" Arizona Immigration Bill*, CBS NEWS, Apr. 23, 2010 (reporting that the President assailed S.B. 1070 as an "overreaching, 'misguided' effort that 'threatened to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and their communities that is so crucial to keeping us safe'"), available at [http://www.cbsnews.com/8301-503544\\_162-20003274-503544.html](http://www.cbsnews.com/8301-503544_162-20003274-503544.html); Roger Mahony, *Arizona's Dreadful Anti-Immigrant Law*, CARDINAL ROGER MAHONY BLOGS L.A. (Apr. 18, 2010), <http://cardinalrogermahonyblogs.blogspot.com/2010/04/arizonas-new-anti-immigrant-law.html> (criticizing S.B. 1070 as "the most retrogressive, mean-spirited, and useless anti-immigrant law" and as "fraught with the totally flawed reasoning: that immigrants come to our country to rob, plunder, and consume public resources").

47. See Kris W. Kobach, *Why Arizona Drew the Line*, N.Y. TIMES, Apr. 28, 2010 (noting that approximately 70% of Arizonans support S.B. 1070); Press Release, Quinnipiac Univ. Polling Inst., More U.S. Voters Want Arizona-Like Immigration Law, Quinnipiac University National Poll Finds (June 1, 2010), available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1460> (stating that more Americans want their state to pass an immigration law similar to Arizona's S.B. 1070 than not).



immigration regulatory scheme, premised on theories of states' rights, concurrent jurisdiction, and concurrent enforcement.<sup>48</sup> It includes a large number of new laws and amendments of existing laws.<sup>49</sup> In brief, S.B. 1070 adds state penalties related to federal immigration law enforcement, including alien registration documents, employer sanctions, harboring and transporting "illegal immigrants," and human smuggling.<sup>50</sup> Perhaps most importantly, it also creates a state trespassing violation for unlawful presence.<sup>51</sup> In *United States v. Arizona*, the U.S. Department of Justice was granted its request for a temporary injunction to prevent implementation of the most controversial aspects of S.B. 1070.<sup>52</sup> The Justice Department alleged that many of S.B. 1070's provisions violate the Commerce Clause and the Supremacy Clause, conflict with U.S. foreign policy and are preempted due to implied conflict with a federal regulatory scheme.<sup>53</sup>

The contrast in visions and proposed solutions between President Obama's recapitulation of "The New Colossus" and the Amerizona-style dystopian dream could scarcely be more dramatic. The former recalls the beacon of hope and promise of freedom held out to the Old World, and seeks to revive that sense of optimism and obligation for today's world. The latter imagines thousands of miles of razor wire and 15-foot-high fences stretched across arid landscape of "Amerizona" to keep out the "Third World."

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48. Kobach, *supra* note 47.

49. See Gabriel J. Chin et al., *A Legal Labrynth: Issues Raised by Arizona Senate Bill 1070* (Ariz. Legal Studies, Discussion Paper No. 10-24, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1617440](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440).

50. Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONF. OF STATE LEGS. (2010), <http://www.ncsl.org/?tabid=20263> (last visited Nov. 10, 2010).

51. This appears to be the first state-level immigrant-trespassing provision enacted in the U.S. Previous efforts to do so (Arizona, 2008 and 2009; California, 2007; Colorado, 2008; Texas, 2009) have all failed to become law. *Id.* However, numerous states have laws pending that are modeled on Arizona's S.B. 1070. See Ala. S.B. 256, 2010 Sess. (2010); 2010 Fla. H.B. No. 1, 125th Sp. Sess. C (2010); 1010 Id. S.B. 1303, 60th Legis. 2d Sess. (2010); 2009 Minn. H File No. 330, 86th Legis. 2d Sess. (2010); 2009 Pa. H.B. 2479, 194th G.A. (2010); 2009 R.I. H.B. 8142, 2010 Sess. (2010); 2009 Ark. H.B. 1093 86th G.A. (2009); see also Anna Gorman, *Arizona's Immigration Law Isn't the Only One*, L.A. TIMES, July 16, 2010, available at <http://articles.latimes.com/2010/jul/16/nation/la-na-immigration-states-20100717>.

52. Judge Susan Bolton for the United States District Court for the District of Arizona preliminarily enjoined six portions of S.B. 1070. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010); see also Randall C. Archibold, *Pre-emption, Not Profiling in Challenge to Arizona*, N.Y. TIMES, July 8, 2010 at A15. But see Carey Newton, *Critics Denounce 'Activist Judge'; State Appeals Injunction*, ARIZ. REP., July 30, 2010, at A1.

53. See Complaint at 2, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413) ("S.B. 1070's mandatory enforcement scheme will conflict with and undermine the federal government's careful balance of immigration enforcement priorities and objectives.").

What future does Amerizona offer Arizona, other states, the entire nation, specific populations, and other countries? *Surveillance cameras, armed soldiers, snipers, vigilante-militias, tanks, and Blackhawk helicopters safeguard the perimeter; should these measures prove insufficient, add landmines, electrified fences, moats, and strip-mined chasms on land, silent-running nuclear subs at sea, and missile defense systems too. Detention facilities filled to capacity, not just with suspected “illegals” but also with their American-born children, so-called “anchor babies,” and other American citizens. Deportation buses run southbound on desolate highways all day and night. Law enforcement officials use scanable biometric identification (retina patterns, saliva DNA, barcode tattoos, ID chips), along with racial profiling and harassment techniques, as authorized to enforce draconian state and local laws. Deportation and admissions hearings take place en masse, if at all, and without pretense of equal treatment for all persons under the law. “Illegal immigrant” anonymous tip lines and punishments for those who provide any measure of help, employment, benefit or service to “illegals” complete the culture of intimidation and suspicion, dissuading immigrants (regardless of documentation status) and those who might “pass” for immigrants from settling or even visiting. Boarded up housing and commercial properties sit vacant as no one replaced the local businesses that folded and the tenants who abandoned or were removed from their residences.*

If the future vision described above sounds too far-fetched, too preposterous, too *dystopian*, recall just how many of its basic elements either already occur or exist, or have been proposed seriously in recent times. For example:

- (1) As of June 30, 2010, copycat legislation of S.B. 1070 had been introduced in five state legislatures (Michigan, Minnesota, Pennsylvania, Rhode Island, and South Carolina).<sup>54</sup> Michigan, Pennsylvania, and South Carolina also joined Alabama, Florida, Nebraska, South Dakota, Texas,

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54. See Gorman, *supra* note 51 (noting that a handful of states—South Carolina, Pennsylvania, Minnesota, Rhode Island and Michigan—have introduced resolutions on S.B. 1070 [most in opposition but some in support]). Several states also filed amici briefs in support of Arizona’s S.B. 1070. See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (discussing Proposed Brief of Amici Curiae, Michigan, Florida, Alabama, Nebraska, Northern Marianas Islands, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia); see also Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: State Regulation of Immigration Through Criminal Law* (Ariz. Legal Studies, Discussion Paper No. 10-26, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685). For a list detailing pending bills modeled on S.B. 1070, see *supra* note 51.

Virginia, and the Northern Mariana Islands in an *amicus* brief filed in support of Arizona in *United States v. State of Arizona*.<sup>55</sup>

(2) In the first quarter of 2010 alone, legislators in forty-five states introduced nearly 1200 bills and resolutions that focus directly on immigrants and immigration.<sup>56</sup> In 2009, more than 1500 bills were considered by all fifty state legislatures, with over 350 adopted as laws or resolutions in forty-eight states.<sup>57</sup> By comparison, 570 state bills were introduced and eighty-four laws enacted in 2006, and only 300 state bills were introduced and thirty-eight laws enacted in 2005.<sup>58</sup> Even greater numbers of local ordinances have been introduced, some of which have tacked toward international human rights law while others have taken hard lines against noncitizens.<sup>59</sup>

(3) The scope of subnational legislation and law enforcement measures has been wide-ranging: non-citizen voting,<sup>60</sup> sanctuary and anti-sanctuary

55. Hillary Stemple, *Nine States File Amicus Brief Supporting Arizona Immigration Law*, JURIST (July 15, 2010), <http://jurist.org/paperchase/2010/07/nine-states-file-amicus-brief-supporting-arizona-immigration-law.php>.

56. Kevin R. Johnson, *Arizona is Not the First State to Take Immigration Matters Into Their Own Hands: Local Measures on the Rise with Twelve States Considering Similar Laws*, IMMIGRATIONPROF BLOG (May 6, 2010), <http://lawprofessors.typepad.com/immigration/2010/05/arizona-is-not-the-first-state-to-take-immigration-matters-into-their-own-hands-local-measures-on-th.html> (noting that legislators in forty-five states introduced 1180 bills and resolutions in the first quarter of 2010 alone, as compared to 570 in all of 2006. While some of the state laws are beneficial to immigrants, others, including Arizona S.B. 1070, are overreaching and misguided; twelve states—Arkansas, Maryland, Minnesota, Missouri, Nevada, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas and Utah—have introduced or are considering introducing similar legislation).

57. *Arizona is Not the First State to Take Immigration Matters into Their Own Hands: Local Measures on the Rise with Twelve States Considering Similar Laws*, IMMIGR. POL'Y CTR., AM. IMMIGR. COUNCIL (May 26, 2010), <http://www.immigrationpolicy.org/just-facts/arizona-not-first-state-take-immigration-matters-their-own-hands> [hereinafter IMMIGR. POL'Y CTR.]; see also *Immigr. Pol'y Project: 2010 Immigration-Related Bills and Resolutions in the States*, NAT'L CONF. OF STATE LEGS. (2010), [http://www.ncsl.org/portals/1/documents/immig/immigration\\_report\\_april2010.pdf](http://www.ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf).

58. IMMIGR. POL'Y CTR., *supra* note 57.

59. *Id.*

60. See Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 503 (2008) (noting that an increasing number of municipalities now grant noncitizens the right to vote on local issues, particularly in matters regarding education); see also Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000) (analyzing the expansion and decline of noncitizen voting and exploring the legal issues implicated in current efforts to reintroduce it in many cities across the country); Gerald L. Neuman, "We Are the People": *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259 (1992) (exploring the constitutional debate over alien suffrage in the Federal Republic of Germany, both for its own interest and in order to compare it with understandings of alien suffrage in the United States); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993) (arguing that the current blanket exclusion of noncitizens from the ballot is neither

ordinances,<sup>61</sup> family law,<sup>62</sup> identification/driver's licensing,<sup>63</sup> employment and employment discrimination,<sup>64</sup> immigration and customs en-

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constitutionally required nor historically normal and that the disenfranchisement of aliens at the local level is vulnerable to deep theoretical objections since resident aliens—who are governed, taxed, and often drafted just like citizens—have a strong democratic claim to being considered members, indeed citizens, of their local communities).

61. HILARY CUNNINGHAM, *GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION* (1995); Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right, or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747 (1986) (analyzing the sanctuary movement within its past historical and legal context and the constitutional implications of the government's response to church 'sanctuary'); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008) (analyzing how on June 6, 2003, Michael Bloomberg, under pressure from interest groups and facing potential litigation, repealed the City's sanctuary policy, which had been in effect since then-mayor Ed Koch introduced the measure in 1989); Rose Cuizon Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573 (2010) (illustrating the tensions between national and local citizenship and how "sanctuary cities" have arguably constructed membership for undocumented immigrants located within their jurisdictions); Rose Cuizon Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing the definition of "sanctuary," particularly in the context of today's immigration issues).

62. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007) (providing a taxonomy of reasons why Congress regulates marriage through immigration law and suggesting how courts and scholars might determine the legitimacy of congressional action in this area); Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009) (arguing for statutory reform incorporating a "best interests of the child" approach into immigration law and procedure); Maria Pabon Lopez, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 HARV. LATINO L. REV. 229 (2008) (comparing and contrasting the experiences of noncitizen families in the United States under two systems that affect their lives daily: the immigration law system at the federal level and the state family law court systems); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008) (suggesting that the role of child welfare and family courts in assisting children left behind by raids forces evaluation of the treatment of immigrant families when immigration law alters the ability of some family members to live in the United States); David B. Thronson, *Custody and Contradiction: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008) (offering family law and immigration law analyses by exploring the notion of immigration law as family law and family law as immigration law).

63. Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004) (analyzing the controversy over undocumented immigrants' ability to obtain driver's licenses and the expanding frontier of "civil rights" for immigrant communities); Maria Pabon Lopez, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2005) (noting how heightened scrutiny of all matters regarding noncitizens has become a commonplace occurrence and that, prior to 9/11, what would appear to be the most mundane of matters, the obtaining of a driver's license, has now become a battleground in our country's debate regarding immigration policy).

64. Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (looking at the way law has rendered immigrant identity invisible by ignoring immigrant status, history, and identity in the so-called "pri-

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vate” realms of work, housing, and public interaction, and analyzing how immigrants have constructed their own identities individually and collectively even in the absence of any legal recognition, primarily in the context of labor organization); Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 103 (arguing that government lawsuits can help protect the civil rights of low-wage workers by creating a coherent legal theory defending the civil rights of low-wage workers and by creating an identifiable change agent to work on that defense); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008) (proposing a framework that views segregation as an expression of subordinated work conditions and offers courts the opportunity to craft broader remedies, both to eliminate segregation and improve the working conditions of segregated workers); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006) (arguing that today’s legal frameworks do not adequately capture the form of discrimination lurking in the interplay between brown collar workers accepting jobs no one else will take and employers seeking subservient workers; that inadequacy is a direct consequence of the law and economics assumptions reflected in anti-discrimination decisions that prevent protection through Title VII enforcement); Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 1 U. CHI. LEGAL F. 345 (2009) (aiming to expand the limited concepts of discrimination to include the remediation of bad working conditions, especially when they exist in segregated workplaces). On judicial interpretations of federal labor laws, see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented immigrants were not entitled to backpay as a remedy for violation of their rights under Title VII); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003) (identifying the implications of permitting the Supreme Court to assume Congress’s role in setting federal labor policy); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 LA RAZA L.J. 103 (2003) (exploring the meaning of the Hoffman decision and its potential impact); *Developments in the Law – Jobs and Borders*, 118 HARV. L. REV. 2171, 2224-41 (2005) (discussing developments in areas of the law that relate either to efforts by the United States to exert control beyond its borders or to the nation’s treatment of foreigners within its borders). On guest worker programs, see Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 45-51 (2006) (viewing guestworker programs as leading to the commoditization of labor and a widening of the democracy deficit); Maria Ontiveros, *Non-citizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007) (focusing on so-called guest worker programs and arguing that poorly crafted guest worker programs violate the Thirteenth Amendment when they provide for deportation of workers upon termination of employment, limit the societal participation rights of a worker’s family members, and do not allow workers to apply for citizenship); Arthur N. Read, *Learning From the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423 (2007) (emphasizing the importance of learning from experience with existing H-2A and H-2B temporary worker programs and the history of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, which offers important lessons for crafting effective worker protections); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (arguing that a vision of who qualifies as a citizen must take into account the social and market forces that produce migration, both legal and illegal); Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush’s Proposed Reform*, 56 HASTINGS L.J. 1095 (2005) (tracing the historical roots of guest worker programs in the United States and analyzing the strengths and shortcomings of President Bush’s proposal; proposing that the

forcement workplace raids,<sup>65</sup> housing and housing discrimination,<sup>66</sup> education,<sup>67</sup> immigrant integration and support,<sup>68</sup> human trafficking,<sup>69</sup> gang

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Bush administration should have adopted a long-sighted approach to temporary agricultural workers addressing the reality that no temporary work program is truly temporary). On the ill-fated Bracero Program undertaken by the United States for guest workers in the United States for almost twenty years following the end of World War II, see KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY, AN ACCOUNT OF THE MANAGED MIGRATION OF MEXICAN FARM WORKERS IN CALIFORNIA, 1942-1960* (1964); JUAN RAMON GARCIA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980).

65. Bill Ong Hing, *Institutional Racism: ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009) (arguing that the structure of immigration laws has institutionalized a set of values that dehumanize, demonize, and criminalize immigrants of color and the result is that these victims stop being Mexicans, Latinos, or Chinese and become “illegal immigrants”); Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 (2009) (claiming that mistaken applications of federal law are prone to repetition and arguing that rectifications of these misinterpretations are likely to diminish the feasibility of future raids followed by imprisonment); Anna Williams Shavers, *Welcome to the Jungle: New Immigrants in the Meatpacking and Poultry Processing Industry*, 5 J.L. ECON. & POL’Y 31, 54 (2009) (noting how the INS abused the legal process, wasted taxpayer money, and humiliated over 1900 workers during a raid by 200 armed agents from all over the United States, which included a helicopter and eighty vehicles); Abby Sullivan, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101 (2009) (providing statistics showing “notable leap” in immigrants serving federal prison terms); Cassie L. Peterson, Note, *An Iowa Immigration Raid Leads to Unprecedented Criminal Consequences: Why ICE Should Rethink the Postville Model*, 95 IOWA L. REV. 323 (2009); see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1035 (1985); *INS v. Delgado*, 466 U.S. 210, 211-12 (1984); *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007); *Int’l Molders v. Nelson*, 799 F.2d 547, 550 (9th Cir. 1986).

66. Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (arguing that it is difficult, if not impossible, for landlords to verify the immigration status of every potential tenant they encounter in order to comply with provisions targeted at private rental housing, which typically sanction landlords who rent to unauthorized immigrants—landlords are, therefore, likely to resort to shortcuts, such as discriminating based on accent, surname, appearance, or other ethnic markers and, as a result, these restrictions will: (1) cause landlords to violate the federal Fair Housing Act, which prohibits discrimination on the basis of national origin; and, (2) lead to discrimination against all ethnic minority groups whose members look or sound “foreign,” regardless of immigration or citizenship status).

67. Michael A. Olivas, *“Breaking the Law” on Principle: An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815 (1991) (expanding on the thesis that most legal education neither equips students to think strategically or ethically about enduring inequities in society, nor provides problem-solving experiences so that students can undertake social reform in life after law school); Michael A. Olivas, *IIRIRA, the DREAM Act and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004) (summarizing the developments, reviewing the research issues that have arisen, and noting the current developments at the state and federal levels of the population of undocumented college students); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 56 WAYNE L. REV. (forthcoming 2010) (updating and amplifying upon several earlier studies of the

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DREAM Act, the general topic of undocumented college residency, and revealing the difficulty inherent in conducting research on pending legislation, especially one that is so fluid and so imbedded in a larger, systemic regime); Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990) (proposing a series of due process guidelines, a radically revised INS policy for adjudicating asylum claims for minors, and a requirement that all unaccompanied minors be represented by guardians *ad litem*); Gloria M. Rodriguez & Lisceth Cruz, *The Transition to College of English Learner and Undocumented Immigrant Students: Resource and Policy Implications*, 111 TCHRS. C. REC. 2385 (concluding that there is continued growth in the presence of English learners and undocumented students and that this growth affects states with longstanding histories of immigrant presence, as well as states that have only recently had notable increases in these populations); see also Plyler v. Doe, 457 U.S. 202 (1982) (holding that: (1) the illegal alien-plaintiffs could claim the benefit of the equal protection clause, which provides that no state shall deny to any person the benefit of jurisdiction in the equal protection of the laws; (2) the discrimination contained in the Texas statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States and authorized local school districts to deny enrollment to such children could not be considered rational unless it furthered some substantial goal of the state; (3) the undocumented status of the children did not establish a sufficient rational basis for denying benefits that the state afforded other residents; (4) there is no national policy that might justify the state in denying the children an elementary education; and (5) the Texas statute could not be sustained as furthering its interest in the preservation of the state's limited resources for the education of its lawful residents); Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in IMMIGRATION STORIES 197 (David A. Martin & Peter H. Schuck eds., 2005); Michael A. Olivas, *Storytelling out of School: Undocumented College Residency, Race and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995) (concluding that the higher education enterprise is enriched and strengthened by the admission of alien college students); Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 407 (2002) (arguing that a federal law such as the Student Adjustment Act would be a practical and fair solution to the problem of access to higher education, as it is wholly consistent with much of current immigration policy).

68. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS, 189-93 (2007); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (aiming to characterize the conflicting normative commitments the law brings to bear in its treatment of discrimination on account of alienage and contending that the law has constructed alienage as a hybrid legal status category that lies at the nexus of two legal—and moral—worlds); Bill Ong Hing, *Answering the Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L.J. 861, 888-98 (2002) (arguing that we must continue today, as we have in the past, to be engaged in a constant redefinition of who is an American).

69. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006) (arguing that current labor and immigration law enforcement actually creates incentives for trafficking and other forms of migrant exploitation in the United States); Jennifer M. Chacon, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 15 U. PA. L. REV. 1609 (2010) (discussing legal remedies for victims of trafficking in an era of increasing immigration enforcement); Jayrashi Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007) (exploring the limitations of federal agency anti-trafficking efforts from available empirical evidence, criminal law, immigration legal history, domestic violence law, and trauma psychology).

activity,<sup>70</sup> and English language measures.<sup>71</sup> Some of these efforts are clearly pro-immigration; others, including those focused on so-called “illegal immigration,” communicate anti-immigrant intent or messages.

(4) In mid-July 2010, Arizona’s northern neighbor, Utah, made news when two female employees of the Utah Department of Workforce Services distributed an anonymous “illegal immigrant” list to state officials and media outlets.<sup>72</sup> The list included the names (most of which are of Hispanic origin), addresses, social security numbers, phone numbers, dates of birth, workplaces, and other personal information for some 1300 Utah residents whom state employees suspected of being undocumented immigrants.<sup>73</sup> The names of the residents’ children were also included, as were the due dates for those pregnant women whose names appeared on the list.<sup>74</sup> Accompanying the list was a letter that demanded immediate deportation of those named.<sup>75</sup>

(5) Legal residents and undocumented immigrants alike fled Arizona in the days leading up to July 29, 2010, when S.B. 1070’s provisions would go into effect. News stories reported people leaving Arizona for other states or leaving the country altogether, selling off what they could before going or simply abandoning their housing and private possessions. Many of those interviewed expressed fear of being subject to suspicion, harassment, and arrest by law enforcement officials.<sup>76</sup>

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70. Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandito to Gang Member*, 78 DENV. U. L. REV. 1081 (2001) (broadening the scope of legal analysis and scholarship to reflect the experiences of police misconduct and racial profiling in Latina/o communities); Mary Romero & Marneh Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005) (analyzing law enforcement practices including the planning, staging, and procedures employed in removing undocumented immigrants from a specific urban space).

71. See BENDER, GREASERS AND GRINGOS, *supra* note 41.

72. See Kirk Johnson, ‘Immigrant’ List Sets Off Fears, N.Y. TIMES, July 14, 2010, available at <http://www.nytimes.com/2010/07/15/us/15utah.html>; Brock Vergakis, *Utah Illegal Immigrants List Leakers Identified*, HUFFINGTON POST (July 16, 2010), [http://www.huffingtonpost.com/2010/07/16/utah-illegal-immigrants-l\\_n\\_649625.html](http://www.huffingtonpost.com/2010/07/16/utah-illegal-immigrants-l_n_649625.html); David Wright et al., *Leaking of List of Illegal Immigrant in Utah Terrifies Latino Community*, ABC WORLD NEWS (July 15, 2010), <http://abcnews.go.com/WN/leaking-list-1300-purported-illegal-immigrants-living-utah/story?id=11166203>.

73. See Johnson, *supra* note 72; Vergakis, *supra* note 72; Wright et al., *supra* note 72.

74. See Johnson, *supra* note 72; Vergakis, *supra* note 72; Wright et al., *supra* note 72.

75. See Johnson, *supra* note 72; Vergakis, *supra* note 72; Wright et al., *supra* note 72.

76. See Steven Benen, *Political Animal*, WASH. MONTHLY, July 2, 2010, available at [http://www.washingtonmonthly.com/archives/individual/2010\\_07/024552.php](http://www.washingtonmonthly.com/archives/individual/2010_07/024552.php); Alan Gomez, *Hispanics Flee Arizona Ahead of Immigration Law*, USA TODAY, June 6, 2010, available at [http://www.usatoday.com/news/nation/2010-06-08-immigration\\_N.htm](http://www.usatoday.com/news/nation/2010-06-08-immigration_N.htm); Nick Wing, *Hispanic Immigrants Continue to Flee Arizona Ahead of Crackdown*, HUFFINGTON POST, (July 26, 2010), [http://www.huffingtonpost.com/2010/07/26/hispanic-immigrants-conti\\_n\\_659345.html](http://www.huffingtonpost.com/2010/07/26/hispanic-immigrants-conti_n_659345.html); Jack Cafferty, *What if Arizona’s New Law Causing Illegal Immigrants to*



(6) Since U.S. District Court Judge Susan Bolton issued preliminary injunctions to block many of S.B. 1070's more controversial yet popular provisions,<sup>77</sup> a deeper fear is that all hell might break loose in Arizona or elsewhere. There is potential for hate crimes against immigrants and people of color, as well as law enforcement harassment, committed by those who resent the Justice Department's intervention and who seek to take out frustrations or enact vigilante justice.<sup>78</sup>

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*Leave the State?*, CNN CAFFERTY FILE (June 10, 2010), <http://caffertyfile.blogs.cnn.com/2010/06/10/what-if-arizona%E2%80%99s-new-law-causing-illegal-immigrants-to-leave-the-state/>.

77. Judge Bolton blocked the following sections, pending review by the courts: (1) Section 2 of S.B. 1070; (2) A.R.S. § 11-1051(B): requiring that an officer make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requiring verification of the immigration status of any person arrested prior to releasing that person; (3) Section 3 of S.B. 1070; (4) A.R.S. § 13-1509: criminalizing the failure to apply for or carry alien registration papers; (5) portion of Section 5 of S.B. 1070; (6) A.R.S. § 13-2928(C): making it a crime for an unauthorized alien to solicit, apply for, or perform work; (7) Section 6 of S.B. 1070; and (8) A.R.S. § 13-3883(A)(5): authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. See David Dayen, *Judge Blocks Portion of Arizona Immigration Law*, FDL NEWSDESK (July 28, 2010), <http://news.firedoglake.com/2010/07/28/judge-blocks-portion-of-arizona-immigration-law/>; see also *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010). Other sections of the law, such as criminalizing the transporting or harboring an "unlawfully present alien," and the controversial portion "allowing legal residents to sue any state official, agency, or political subdivision for adopting a policy of restricting enforcement of federal immigration laws to less than the full extent permitted by federal law," were allowed to stand. *Id.* Judge Bolton also wrote in her opinion:

There is a substantial likelihood that officers will wrongfully arrest legal resident aliens under the new [law] . . . [and by enforcing this statute, Arizona would impose a] 'distinct, unusual and extraordinary' burden on legal resident aliens that only the federal government has the authority to impose.

*Id.* at 1006.

78. Governor Jan Brewer's references to "beheadings" in the Arizona desert stoked anti-immigrant sentiment and xenophobia, though the FBI made no reports of such incidents. Senator Jon Kyl dissembled on *HARDBALL WITH CHRIS MATTHEWS* when confronted with the fact that crime in Arizona had gone down over the past two years, despite claims by Kyl and other Arizona politicians. See Dana Milbank, *Headless Bodies and Other Immigration Tall Tales in Arizona*, WASH. POST, July 11, 2010, at A15. Note that after "her disastrous" and "stammering" performance during a televised gubernatorial debate on September 2, 2010, in which she received but could not answer multiple questions about the "beheadings" comments, Governor Brewer eventually recanted. Paul Davenport & Amanda Lee Myers, *Ariz. Governor Says She Was Wrong About Beheadings*, ASSOCIATED PRESS, Sept. 3, 2010, available at [http://www.google.com/hostednews/ap/article/ALeqM5jbj\\_bdPgBEDCnKsgEE-5MCRWC68gD9I0VUB80](http://www.google.com/hostednews/ap/article/ALeqM5jbj_bdPgBEDCnKsgEE-5MCRWC68gD9I0VUB80) ("That was an error, if I said that . . . I misspoke, but you know, let me be clear, I am concerned about the border region because it continues to be reported in Mexico that there's a lot of violence going on and we don't want that going into Arizona."). But note on the same day as the gubernatorial debate that Arizona State Senator Russell Pearce, architect of S.B. 1070, re-asserted the "beheadings" canard—"I can tell you there's been 300 to 500 beheadings and dismemberments along that border." *Id.*

(7) On the eve before S.B. 1070 would go into effect, Maricopa County Sheriff Joe Arpaio discussed plans to launch his seventeenth “crime and immigration sweep,” regardless of any particular outcome in *United States v. Arizona*.<sup>79</sup> Arpaio planned to send out some 200 deputies and volunteers in search of “illegal immigrants.”<sup>80</sup> Arpaio erected a make-shift immigrant detention camp of military surplus tents and enough cots to handle 100 people; he said he would make room for more as necessary.<sup>81</sup> Arpaio also threatened to jail any persons who protested against these activities out in front of his office.<sup>82</sup> The Maricopa County Sheriff’s Office has been responsible for the forced departure or deportation of 26,146 immigrants—regardless of their legal status—since 2007.<sup>83</sup> To put that total in perspective, that is roughly twice the number of deportations or forcible departures of immigrants (13,784) for which the Los Angeles County Sheriff’s Office has been responsible over the same time.<sup>84</sup> It is also nearly one fourth of the nationwide total (115,841) of immigrant deportations or forcible departures brought about by the officers of sixty-four law enforcement agencies deputized to help enforce immigration laws.<sup>85</sup>

(8) The Schumer/Graham Bill of 2010,<sup>86</sup> the most prominent, current, comprehensive immigration reform proposal, includes provisions that

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79. See *Arizona Police Launch First Immigration Crackdown After Law’s Passage*, HUFFINGTON POST (Apr. 30, 2010), [http://www.huffingtonpost.com/2010/04/30/arizona-police-launch-fir\\_n\\_558448.html](http://www.huffingtonpost.com/2010/04/30/arizona-police-launch-fir_n_558448.html); see also William Finnegan, *Sheriff Joe*, NEW YORKER, July 20, 2010, at 42.

80. Jonathan J. Cooper & Michelle Price, *Police, Activists Prepare Ahead for SB 1070*, EAST VALLEY TRIB., July 27, 2010, available at [http://www.eastvalleytribune.com/arizona/immigration/article\\_3d44bcc4-99d2-11df-8079-001cc4c03286.html](http://www.eastvalleytribune.com/arizona/immigration/article_3d44bcc4-99d2-11df-8079-001cc4c03286.html).

81. *Id.*

82. *Target: IMMIGRANTS, How Will The New Law Be Enforced?*, ABC Interview with Joe Arpaio, Maricopa County Sherriff (July 28, 2010).

83. Suzanne Gamboa, *Arizona Helps U.S. Deport Thousands, Even Without New Law*, ASSOCIATED PRESS, July 28, 2010, available at [http://www.cleveland.com/nation/index.ssf/2010/07/arizona\\_helps\\_deport\\_thousands.html](http://www.cleveland.com/nation/index.ssf/2010/07/arizona_helps_deport_thousands.html) (reporting the numbers of individuals deported under a federal-local partnership program).

84. *Id.*

85. *Id.*; see also Johnson, *How Racial Profiling Became the Law of the Land*, *supra*, note 33, at 1030; Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (contending that the Supreme Court should prohibit the federal government from using racial profiling in immigration enforcement); Gabriel J. Chin & Kevin R. Johnson, *Profiling’s Enabler: High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html>.

86. See H.R. 6080, 111th Cong. (2010) (enacted), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-6080>; see also Charles E. Schumer & Lindsey O. Graham, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703115.html>.

move in the direction of the Arizona-style dystopian dream. In addition to enhanced border security (increased personnel and surveillance technology), the Schumer/Graham “blueprint”<sup>87</sup> proposes a “high-tech, fraud-proof Social Security card” (with a unique biometric identifier in the card) as required for all U.S. citizens and legal immigrants who seek employment.<sup>88</sup> Schumer/Graham also proposes stiff penalties for employers who refuse to “swipe” the card or otherwise knowingly hire undocumented workers and a “zero-tolerance” policy for undocumented immigrants who commit felonies.<sup>89</sup>

(9) In late July 2010, Senator Lindsay Graham (of the Schumer/Graham Bill) broke ranks with most proponents of comprehensive immigration reform when he suggested introducing a constitutional amendment to deny birthright citizenship to the U.S. born children of undocumented immigrants.<sup>90</sup> Birthright citizenship has been a settled constitutional principle for more than 110 years.<sup>91</sup> Critics contend that the “birthright

87. See Schumer & Graham, *supra* note 86.

88. See *id.* (highlighting efforts to allay anticipated privacy, confidentiality, and civil liberties concerns including: biometric identifier as stored only on the card; no private information, medical information or tracking devices stored on the card; and no government database would house everyone’s information).

89. *Id.*

90. Julia Preston, *Senator Picks Up the Fight Against Citizenship at Birth*, INT’L HERALD TRIB., Aug. 9, 2010, at 4; Andy Barr, *Graham Eyes Birthright Citizenship*, POLITICO (July 29, 2010), available at <http://www.politico.com/news/stories/0710/40395.html>.

91. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (declaring birthright citizenship for all U.S.-born children of noncitizens except for children of diplomats as immune from U.S. law and children of a hostile occupying force in the United States); see also Linda S. Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT’L J. CONST. L. 9 (2010) (defining personhood as standing for the “universal,” contrasted with citizenship as “ultimately exclusionary”); offering directions for a critical reading of “constitutional personhood”); John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?*, 94 GEO. L.J. 1475, 1485-86 (2006) (arguing that because of a similarity in sentence structure, and in the face of a difference in language, the 1866 CRA should be dispositive in interpreting the 14th Amendment’s Citizenship Clause in light of the 1866 Act “and not subject to any foreign power,” even though the 14th Amendment’s Citizenship Clause language refers to persons born or naturalized within the U.S. and “subject to the jurisdiction thereof”); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L & POL. 1 (2010) (arguing that the first sentence of the 14th Amendment does not apply to the children of undocumented persons because in 1868 there were no immigration restrictions and undocumented immigrants enter the United States without consent and thus neither owe allegiance to the United States nor can be considered “subject to the jurisdiction thereof”); Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 86 n.52 (2009) (“Opponents of birthright citizenship use the term ‘anchor babies’ to refer to the U.S.-born U.S. citizen children of undocumented parents.”); William Ty Mayton, *Birthright Citizenship and the Civil Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Charles Wood, *Losing Control of America’s Future: The Census, Birthright Citizenship and Illegal Aliens*, 22 HARV. J. L. & PUB. POL’Y. 465 (1999) (arguing that undocumented immigrants should not be counted for purposes of the Census and that there should be congressional ac-

citizenship” issue is an anti-immigrant political strategy to strip the rights of those U.S. citizen children born to noncitizen parents to attend public schools, receive public benefits, and enjoy the rights and privileges of citizenship.<sup>92</sup>

We reject the dystopian dream of Amerizona that Arizona, several other states, many locales, policymakers, and wider populations have embraced. We also note that even amongst avowed proponents of comprehensive immigration reform (e.g., Schumer/Graham), the emphasis is on enhanced border and workplace enforcement through biometric identification, surveillance, and criminal sanctions. Although the idea of “comprehensive immigration reform”<sup>93</sup> means to include new processes and mechanisms through which the roughly twelve million undocumented or unauthorized immigrants already within the United States have the opportunity to “get right with the law” and obtain legal status, the Schumer/Graham Bill remains limited on these details and on momentum toward a workable solution.

We encourage our readers to ask themselves: *What kind of future would we want to leave to the next generation and to those not yet here? What kind of future is being created by, or is likely to result from, steps that are taken (or contemplated) right now? Who’s future matters for what, and why?* From a policy-making perspective, when the dystopian dream of Amerizona is held up to the scrutiny of these questions, we conclude that its brand of immigration reform suffers from several obvious defects: resignation, despair, cynicism, alienation, discrimination, brutality, extremism, reactionary politics, and abandonment of higher principles.

The current climate of immigration debate, and where Amerizona seems to lead us, provides temptations to reach for the past. This is what Presi-

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tion declaring that children of immigrants here illegally should not be allowed to be citizens). *But cf.* PETER SCHUCK & ROGERS H. SMITH, *CITIZENSHIP WITHOUT CONSENT* (1985) (interpreting the first sentence of the 14th Amendment to mean that the children of undocumented persons are not U.S. citizens because though born or naturalized in the U.S. they are not “persons subject to the jurisdiction thereof”); Garrett Epps, *The Citizenship Clause: A ‘Legislative History,’* (forthcoming 2011), *draft available at* <http://ssrn.com/abstract=1627665> (arguing that from Shuck and Smith on, the denial of birthright citizenship is not justified by either statutory interpretation, legislative and legal history, or the decisions of federal courts from the Supreme Court on down); Nicole Newman, Note, *Birthright Citizenship: The Fourteenth Amendment’s Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 441 (2008) (“[T]hreat of chain migration, pejoratively called the ‘anchor baby’ phenomenon, is the most inflammatory rhetoric that opponents of birthright citizenship employ.”).

92. *Supra* note 91.

93. AUDREY SINGER, *REFORMING U.S. IMMIGRATION POLICY: OPEN NEW PATHWAYS TO INTEGRATION*, BROOKINGS (2007), *available at* [http://www.brookings.edu/papers/2007/0228demographics\\_singer\\_Opp08.aspx](http://www.brookings.edu/papers/2007/0228demographics_singer_Opp08.aspx).

dent Obama did in attempting to revive “The New Colossus” for current and future times. Yet, for many reasons, we are ambivalent about the President’s reliance on “The New Colossus” and his invocation of what has come to be known as the “‘huddled masses’ myth.”<sup>94</sup> On one hand, we applaud the President’s appeal to our better selves, his reminder that higher ideals can be found in America’s immigration lore, even in a larger context of American exceptionalism, and his effort to redeem the promise to newcomers conveyed in word and symbol through Lazarus’s sonnet and the Statue of Liberty. On the other hand, we cannot ignore the enduring ambiguity of America’s immigration law and policy, overlook the wide disparity of immigrant experiences (both past and present),<sup>95</sup> or set aside the stigmatization of immigrants in our lore and current debate.

The imagery of immigrants contained in “The New Colossus” harkens to a particularly rough period in American history: Lazarus’s sonnet refers to immigrants as the “homeless” and “wretched refuse” from the “teeming shore” of other nations.<sup>96</sup> Surely Lazarus sought to kindle pity and sympa-

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94. KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS I* (2003).

95. Note that the Obama administration has come under significant criticism from Latinos and grassroots immigrant rights and labor groups as well. See David Bacon, *Another Immigration Policy is Possible*, STOP THE CHECKPOINTS (July 3, 2010), <http://www.stopthecheckpoints.com/2010/07/another-immigration-policy-is-possible/> (noting that many Latinos and grassroots immigrant labor groups are angry with the Obama administration’s “enforcement now, enforcement forever” approach of increasing militarization and get-tough policies that force hundreds of thousands of undocumented workers either to pay fines and work low-wage jobs or to leave altogether; criticizing expanded guest worker programs as exploiting the conditions of population displacement and economic chaos created by U.S. trade policies); Carrie Budoff Brown, *Hispanic Media Turn on President Obama*, POLITICO (Aug. 11, 2010), <http://www.politico.com/news/stories/0810/40927.html> (writing that President Obama broke his promise to produce an immigration reform bill within a year of taking office and Latinos are tired of the speeches, disillusioned by the lack of White House leadership, and distrustful of the president); Sally Kim, *No More Empty Promises, Say Immigration Activists Descending on D.C.*, LABOR NOTES (Mar. 19, 2010), <http://labornotes.org/2010/03/no-more-empty-promises-say-immigration-activists-descending-dc> (noting that “anger is aimed at the Obama administration for its legislative inaction”); Prerna Lal, *Does Obama Have a Latino Problem?*, RACE IN AMERICA (Aug. 16, 2010), [http://race.change.org/blog/view/does\\_obama\\_have\\_a\\_latino\\_problem](http://race.change.org/blog/view/does_obama_have_a_latino_problem) (stating that Latino support for Obama has dropped from 69% to 48% in less than two years); Manu Raju, *Immigration Promise Hard to Keep*, POLITICO (June 21, 2010), <http://www.politico.com/news/stories/0610/38776.html> (stating that President Obama, Senator Harry Reid, and Democrats generally have already nationally disappointed many in the Hispanic community by failing to make immigration reform a higher priority in 2009); Jorge Ramos, *Obama: Late, but Still Welcome*, JORGE RAMOS (July 5, 2010), [http://www.jorgeramos.com/english\\_art\\_78.html](http://www.jorgeramos.com/english_art_78.html) (noting that Obama’s popularity among Hispanics dropped from 69% in January to 57% in May and stating that the community is witnessing how a lack of action by the White House and Congress allows states like Arizona to take the immigration issue into their own hands).

96. See NAT’L PARK SERV., *STATUE OF LIBERTY, CELEBRATING THE IMMIGRANT: AN ADMINISTRATIVE HISTORY* (2001) (discussing the way in which Lazarus was moved by the

thy for the plight of those less fortunate,<sup>97</sup> and to envision a sovereign people (much as Walt Whitman had)<sup>98</sup> whose greatness lay in their ability as a nation to receive, embrace, and be transformed by multitudes.<sup>99</sup>

However, when brought into contemporary focus, Lazarus's language is strikingly similar to the rhetoric of "illegal immigration" in today's dystopian dreams. As such, it fails to provide a helpful, non-stigmatizing alternative vision. Imagine that a ship filled with hundred of immigrants arrived at Ellis Island today, with passengers thought of as "wretched refuse" from a "teeming shore." How welcome would these newcomers be?<sup>100</sup> We can imagine angry demonstrations, with nasty epithets and inflammatory signs against "illegal immigrants" filling the air, and protesters blocking the way so that these newcomers would be met with hate-filled efforts to prevent them from disembarking. Indeed, would this ship be allowed landing at all?

These problems and others dog efforts to revive "The New Colossus." It is debatable whether America has ever been so simply welcoming of newcomers in general, let alone specific populations deemed undesirable. In *The Huddled Masses Myth*,<sup>101</sup> Kevin Johnson points out "[a]t times, the nation has acted with incredible generosity toward immigrants, in a manner entirely consistent with the laudable ideal expressed by Lazarus,"<sup>102</sup> and that "the U.S. embrace of the 'huddled masses' model of immigration has

plight Jewish immigrants from Czarist Russia arriving in the United States), available at [http://www.nps.gov/history/history/online\\_books/stli/adhi1.htm](http://www.nps.gov/history/history/online_books/stli/adhi1.htm); PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA (2010) (analyzing three centuries of immigration debate over the same questions about who exactly is fit for citizenship).

97. NAT'L PARK SERV., STATUE OF LIBERTY, *supra* note 96.

98. WALT WHITMAN, LEAVES OF GRASS (Penguin Classics 1939) (1855).

99. NAT'L PARK SERV., STATUE OF LIBERTY, *supra* note 96; Steve Guilbert, *Obama Tackles Immigration Reform*, SWEETNESS & LIGHT, July 1, 2010, available at <http://sweetness-light.com/archive/obamacpusa-and-the-statue-of-liberty> (noting that Lazarus agreed to donate the proceeds from selling *The New Colossus* at an auction to raise money for the Statue's pedestal, and that works from Whitman and Mark Twain were also donated and auctioned); Diane Lichtenstein, *Emma Lazarus*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/biography/lazarus.html> ("Lazarus wrote *The New Colossus* in 1883 for the occasion of an auction to raise money for the Statue of Liberty's pedestal.").

100. See Emma Lazarus, *The New Colossus* (1883), available at <http://www.libertystatepark.com/emma.htm>. Yet, the actual shakeout of anti-immigrant agitation and hysteria was the Immigration Act of 1924, a draconian federal immigration law that impacted federal immigration law, beginning with the Page Act of 1875 (placing limits on Chinese women entering the country by creating a hard to rebut (though rebuttable) presumption that they were entering for purposes of prostitution), followed by the Chinese Exclusion Act of 1882, that was renewed for another ten years in 1892, and then renewed indefinitely until World War II. See RICHARD SCHAEFER, ENCYCLOPEDIA OF RACE ETHNICITY AND SOCIETY (2008).

101. See Johnson, *supra* note 94.

102. *Id.*

influenced the nation's immigration law and policy."<sup>103</sup> At other times, "the U.S. immigration laws have also occasioned a darker history, one that is painful to recall and thus frequently forgotten."<sup>104</sup> It is a history filled with discrimination (against women, in particular),<sup>105</sup> with immigration laws and enforcement practices that "barred racial minorities, political dissidents, the poor, actual and alleged criminals, and homosexuals from our shores,"<sup>106</sup> or left them almost defenseless against deportation proceedings. Indeed, the federally established criteria for non-citizen admission and deportation still rely on some of these categorizations, while others carry disparate racial and national origin impact that is otherwise inconsistent with American law.

Attempts to revive "The New Colossus" are thus of little help, and of counterproductive impact, in the effort to envision alternatives to the dystopian dream of immigration reform. The "huddled masses" model stands on a narrow, romanticized pedestal of immigrant experience and overlooks much of the rest. It is neither helpful for understanding and fixing what is wrong with American immigration law today nor for developing useful future-looking immigration policy. Furthermore, it fails to speak to the current climate of heightened anxiety over "illegal immigration."

## II. WHAT IS A "USABLE FUTURE" AND HOW IS IT RELEVANT TO IMMIGRATION REFORM?

In the remainder of this article, we pursue a modest though substantial task of introducing and applying a second heuristic for immigration reform, what we shall call a "usable future" approach. We apply the "usable future" heuristic to assess two future-looking visions of immigration and immigration reform. These visions come from recent work by urban futurist Joel Kotkin and immigration law expert Professor Kevin Johnson, respectively. Before we turn to these tasks, however, let us offer a few words on what we mean by "usable future," so that we may give meaning to that phrase as a heuristic for immigration reform.

The phrase "usable future" has been popular since at least the 1960s.<sup>107</sup> Like dystopia, a "usable future" imaginatively evokes another time and

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103. *Id.*

104. *Id.*

105. *Id.* at 124.

106. *Id.* at 2.

107. See e.g., YONN DIERWECHTER, *URBAN GROWTH MANAGEMENT AND ITS DISCONTENTS: PROMISES, PRACTICES, AND GEOPOLITICS IN U.S. CITY-REGIONS* (2008) (applying the concept in urban planning and environmental studies); MARTIN E. MARTY, *THE SEARCH FOR A USABLE FUTURE* (1969) (applying the concept in religious and divinity studies); Hanna Stenström, *Feminists in Search for a Usable Future: Feminist Reception of the Book of Re-*

place. And, like dystopian dreams, some “usable future” discourse focuses on material and social conditions (e.g., environmental degradation, resource scarcity, overpopulation, contamination, and human suffering) that triggers anxieties and, if left unaddressed, may give rise to dystopia. Indeed, some expressions of “usable future” discourse assert that the basic conditions and early warning signs of dystopia are already present and that without corrective intervention, dystopia will likely result.<sup>108</sup>

Yet, a “usable future” evokes concerns of function, not works of fiction, with visions of a time and place somewhere *between* utopia and dystopia, in which at least some inhabitants look to the future with reasoned hope for something better, if just the melioration of the present. Whereas resignation, despair, cynicism, alienation, discrimination, brutality, extremism, reactionary politics, and abandonment of higher principles characterize

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*velation*, in *THE WAY THE WORLD ENDS? THE APOCALYPSE OF JOHN IN CULTURE AND IDEOLOGY* (William John Lyons & Jorunn Økland eds. 2009) (applying the concept in feminist philosophy of religion); ALMA S. WITTLIN, *MUSEUMS: IN SEARCH OF A USABLE FUTURE* (1970) (applying the concept in history of museum architecture); Paul Tiyambe Zeleza, *What Happened to the African Renaissance? The Challenges of Development in the 21st Century*, *ZELEZA POST* (Nov. 20, 2008), available at <http://www.zeleza.com/blogging/african-affairs/what-happened-african-renaissance-challenges-development-21st-century-0> (regarding economic and human development in Africa). Other specific contexts of usage for the concept (including heuristic uses) include proposals for high-density urban living, energy efficient transportation and spaces, and sustainable practices and stewardship policies (in agriculture and food production, land and natural resource management, energy development, and consumption and waste management). These and other meanings drawn from “usable future” discourse (e.g., concern with experiences of disaster and human suffering and the meanings that cultures and populations give them) give the concept depth, breadth, versatility, and analytic utility.

108. See e.g., Amy Hecker & Howard Decker, *Shaping a Usable Future, A Town Square* (Aug. 31, 2010), <http://heckeranddecker.wordpress.com/2008/08/04/some-aims-for-shaping-a-useable-future/>.

[O]ur cities, where more than half the world’s population now lives, (80% of all Americans live in cities) are obsolete, and are failing and will more acutely fail to operate as usable human communities in the years ahead. This obsolescence and failure is no longer subject to debate. We face increasingly serious shortages of water, energy, and food. We face changing climates coupled with rampant pollution. And in the US, these facts are combined with unacceptably high levels of resource consumption. All these certainties suggest that we urgently rethink and reimagine our cities. The way we live in our cities must change, we must make these changes now, and at the speed of light.

What revisions do we need to consider as we imagine the next city? If we can talk about what needs to be done, perhaps it will be easier to envision some of the changes we must make in order to shape a usable urban future. Maybe some kind of plan or approach can begin to emerge, with lists of options and sequences . . . .

These goals require a fundamental rethinking of our national infrastructure, our industry, our economy, what we spend and how we tax, and how we live and work.

*Id.*



dystopia, “usable future” rejects determinism, holds fast to the idea that the future remains to-be-envisioned-and-fashioned, and embraces the importance of foresight and wise planning blended with good fortune. In other words, “usable future” offers course correction that seeks to steer the community conscientiously (if sometimes in countermajoritarian fashion) away from the horrors of dystopia (and what may lead to it) toward what is realistic and achievable of utopia.

“Usable future” offers the alarmist, pessimist, realist, and optimist responses to the basic question: “For what may we reasonably hope?” The alarmist sees severe uncertainty and likelihood of dystopia without urgent thought and planning. The pessimist believes all that can be hoped for is better-than-dystopia. The optimist weaves a vision of hope and prosperity amidst confusion and uncertainty, one that contains a promise of a future at least as bright – perhaps significantly brighter – than the present. The realist aims for melioration and gradual improvement, calls for a kind of pragmatism, and warns of dependence on the very practices and values (e.g., exclusion, excessiveness) that destroy hope and bring about suffering for many.

More significantly, “usable future” finds common ground amongst alarmism, pessimism, realism, and optimism that distinguishes it from dystopian dreams. Each outlook, in its own way, offers reasoned hope. Each identifies certain known or predictable material conditions and trends. Each looks to learn from, draw upon, and improve from what it finds “usable” in the past and present as providing guidance and parameters on what is possible, what is likely, what is good (and bad), and why, toward what it sees as the best potential outcomes (or, at least, better ones amongst known or likely alternatives). Each conscientiously selects what appear to be the appropriate paths to those desired outcomes. Each urgently calls upon us to carefully rethink and adjust how we live, including our values, our spaces, our relationships to other humans and to natural environs, and so on, in sincere belief that purpose and benefit lies in doing so.

Of course, the very notion of a “usable future” raises questions like: *Usable by whom and for what?; Who decides which future is ‘usable’?; Whose future counts and for how much?; and, Who gets to use what and why?* Such questions become very important when a “usable future” is applied to immigration reform. Those who seek to apply this heuristic to immigration reform should ask other questions too, such as: *Which immigrants, or potential immigrants, does this ‘usable future’ seek to admit, engage, include, and integrate, and which ones does it not?; and, On what grounds are those decisions made, and are the reasons behind them ones of principle (legal, moral, or both), pragmatics, expedience, bias, or prejudice?*

Given the rise of state and local government activism in the immigration context, the estimated number of undocumented immigrants within the United States, the widespread economic hardships for many in the public and private sectors, and the persistence of conflict amongst competing interests and goals, a “usable future” heuristic must be nuanced rather than simplistic in construction and application. For example, interests in promoting entrepreneurial and other economic dynamism<sup>109</sup> through immigration reform may either compete with or advance other concerns (e.g., localism, community stability, civic participation, integration, human rights, social justice, and cultural diversity).<sup>110</sup> These interests and concerns may be of varying weight and significance amongst policymakers and within public constituencies and private circles.

With the foregoing discussion in mind, we turn now to how a “usable future” heuristic contributes to assessing immigration reform proposals. A “usable future” approach considers policies, legislation, regulatory schemes, enforcement actions, and presumptions, as well as social values and attitudes, for whether they:

Uphold our most important legal values and principles as guideposts for immigration reform and determination of appropriate roles for state and local government amidst ongoing debates (e.g., concurrent jurisdiction v. patchwork legislation);

Work to identify and eradicate barriers and structural inequalities (e.g., disparate racial and national origin impacts) within our immigration regulatory system;

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109. Economic dynamism typically refers to the ability of private sector firms and industries to innovate, get to market faster, grow more rapidly, adjust or maneuver more nimbly, and otherwise exemplify entrepreneurial traits (as connected to corporate IPO). Because municipalities, states, regions and nations play many vital roles in facilitating economic dynamism, this metric is used unofficially by popular media (*Newsweek* uses it as one of five criteria for ranking the world’s “Best Countries”; despite finishing second in economic dynamism, the United States ranked as this year’s eleventh best country overall). See Graham Griffith, ‘Economic Dynamism’ Pushes US to #11 in *Newsweek’s Best Countries Rankings*, NEWSWEEK, Aug. 20, 2010, available at [http://community.cengage.com/GECResource/blogs/gec\\_blog/archive/2010/08/20/economic-dynamism-pushes-us-to-11-in-newsweek-s-best-countries-rankings.aspx](http://community.cengage.com/GECResource/blogs/gec_blog/archive/2010/08/20/economic-dynamism-pushes-us-to-11-in-newsweek-s-best-countries-rankings.aspx).

110. See generally IRENE BLOEMRAAD, BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA (2006) (providing comparative analysis of Canadian and American governmental efforts, as receiving nations, to encourage newcomer incorporation and citizenship acquisition; emphasizing the beneficial role of official multiculturalism and governmental settlement and integration programs and other resources in the Canadian context toward civic and political participation, and noting the lack of similar resources and programs in the American context, and popular resistances to these kinds of measures, as contributing to difficulties in immigrant integration and social cohesion).

Seriously rethink how, and on what rational basis, to allocate scarce public goods like work visas, permanent residence, and citizenship.<sup>111</sup>

Regard immigrants, and potential immigrants, as *prima facie* valuable contributors to America's economic vitality and success, our civic and political values, the character of our cities and communities, and other aspects of the nation's strength and prosperity;

Recognize the importance of newcomers and their U.S.-born family members in shaping the United States into an increasingly multi-racial society;

Communicate values of welcome, hospitality, and compassion to newcomers as part of "us," and promote newcomer well-being as part of community-building;

Anticipate and plan for needs, challenges, and opportunities, short- and long-term, in areas of national, state, local, regional, and private concern.

A "usable future" approach to immigration reform departs from romanticized lore of immigration as a past that likely never existed, at least not so simply and smoothly as envisioned. It acknowledges that our immigration system contains serious flaws that create urgent problems which must be addressed. However, it also departs from reactive attempts, often advanced in the name of "security" or state and/or local interests, to preserve a status quo that is long gone and, perhaps, never existed. It departs from cynical policy orientations that envision immigrants as a "problem" and immigration as a dynamic to mitigate, solve, or otherwise navigate. It acknowledges that undocumented immigration is a pressing problem, but it places different weight on the problem and different focus on the range of policy solutions from what one typically finds within dystopian orientations. Finally, it operates from the belief that the future remains to be made and the reasoned hope that foresight, wise planning, and good fortune can make today and tomorrow better for newcomers and established populations. In sum, when we face the present and contemplate the future, we need not devolve into dystopian dreams.

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111. See e.g., Howard F. Chang, *The Immigration Paradox: Alien Workers and Distributive Justice*, in CITIZENSHIP, BORDERS, AND HUMAN NEEDS (Rogers M. Smith, ed.) (2010). But see *The Price of Entry*, ECONOMIST, June 24, 2010, available at [http://www.economist.com/node/16424085?story\\_id=16424085](http://www.economist.com/node/16424085?story_id=16424085) (discussing Nobel Laureate Gary Becker's citizenship-to-the-highest-bidder proposal). Naturalized citizenship can be thought of from various distributive orientations, including market (let the scarce resource go to the highest bidder, on the assumption that such competition helps set its economic value and attract newcomers with resources), random (e.g., through a weighted or unweighted lottery system), and desert or merit (e.g., demonstration of civic virtue, accretion of meaningful ties, flight from persecution). Each of these distributive orientations currently operates within the U.S. Immigration and Naturalization system.

### III. ENVISIONING “USABLE FUTURES”—KOTKIN’S IMMIGRATION-FRIENDLY “NEW LOCALISM” AND JOHNSON’S “BLUEPRINT” FOR COMPREHENSIVE IMMIGRATION REFORM

Having framed a “usable future” heuristic and its relevance to the immigration reform context, and having populated initial lists of important questions and characteristics for this approach, we now consider recent visions for immigration reform found in the work of urban futurist Joel Kotkin and of immigration law expert Professor Kevin Johnson. In addition to providing valuable insights on the relationship between immigration and economic, social, and cultural dynamism and the prospective parameters of much-needed “truly comprehensive” reform, their work illustrates the ambivalent attitudes about localism within contemporary immigration policy debates<sup>112</sup> even amongst those who emphasize the fundamentally economic and labor-driven forces behind immigration today.

Before we turn to this task, a few words about how to read Kotkin and Johnson side-by-side are in order. Ideologically speaking, Kotkin and Johnson share significant common ground on the importance of immigration and immigrant integration—economically, socially, culturally, politically, and morally. Yet, the two come to these issues from different philosophical orientations, as well as crucially different commitments to democracy and human nature.

In Kotkin’s work, one finds frequent references to, and influences from, Alexis de Tocqueville.<sup>113</sup> Like Tocqueville, Kotkin regards localist values

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112. See TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES (Monica W. Varsanyi ed., 2010) (seeking to explain the explosion in state and local immigration policy activism, account for policies that have been considered and passed, and explore tensions that have emerged within communities and between different levels of government); see also Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 368 (2010) (arguing that the legal structure responsible for the fragmentation of our lived environment into segregated neighborhoods and differentiated communities can be understood as a second-order immigration regulation); Rick Su, *The Immigrant City* (Beppress Legal Series, Working Paper No. 1688, 2006), available at <http://law.bepress.com/expresso/eps/1688> (arguing that the intersection between immigration and local government law has largely been neglected in legal academic literature and that by changing the incentive structure created by the legal rules governing local governments, we can begin to reimagine our immigrant cities as being a contribution rather than an obstacle to the substantive goals of our immigration project). One must note that residence and citizenship often are conflated but should be kept distinct, even though they are related. It is also important to note the emergence of varied political valences of localism in contemporary U.S. legal thought from progressives such as Barron, Frug, Ford and Su (and perhaps Rodriguez) to Kobach.

113. In certain ways, Kotkin’s vision of localism is consistent with Alexis de Tocqueville’s vision of decentralized power in creating a vibrant society. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 265-75 (Philips Bradley & Francis Bowen eds., Henry Reeve trans., Knopf 1945) (1835). Of course, the America that Tocqueville visited in

and preferences to be part of the national character, and decentralized government to be essential to the solution of the problem of the “tyranny of the majority.”<sup>114</sup> Although Tocqueville coined that phrase, its incipient concern is rooted in Madisonian thought. Specifically, James Madison raises and addresses the problem of the “violence of factions,”<sup>115</sup> both majorities and minorities, in *Federalist No. 10*. Whereas Tocqueville propounded democracy—localism and decentralization of political power—as the solution to violent factions, Madison propounded republicanism—a large republic over smaller ones, a Union over states. Johnson is somewhat more

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1831 was a very different country than the America of 2010. For one, the so-called “slavery question” had yet to be resolved. For another, the United States of the early nineteenth century was engaged in what scholars such as Professor Rennard Strickland have called “Genocide at Law,” the dispossession, removal and elimination of the Indian tribes—from an estimated population of six million as of 1500 to less than 200,000 at the turn of the twentieth century. In the vibrant entrepreneurial society that Tocqueville celebrated, women were not allowed to vote and the century of “Manifest Destiny,” see REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONS* (1981), had yet to culminate in events such as the cession of the northern territories of Mexico in the 1848 Treaty of Guadalupe Hidalgo, *id.*, and the end of the century territorial domination of Puerto Rico, the Philippines and Hawaii. See Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998). From the first naturalization statute in 1790, “free white persons” were allowed to become naturalized citizens after two years. The Act of 1790 was superseded by the Naturalization Act of 1795, which extended the residence requirement to five years, and excluded the mid-nineteenth century influx of Chinese immigrants to west coast states, as well as the later influx of Japanese agriculturalists. Thus, Tocqueville’s portrait of a vibrant young nation may have been accurate, but troublingly incomplete. Nonetheless, immigration from Europe was vital to the expansion and rise of the United States in the nineteenth century. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 5 (2009). As Gerald Neumann has pointed out, the federal government stayed out of immigration for the first three quarters of the nineteenth century. See Gerald L. Neuman, *A Lost Century of U.S. Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). It wasn’t until 1875 that Congress enacted the Page Act, restricting the immigration of Chinese women, and the 1882 Chinese Exclusion Act that a federal legislative presence was felt in the immigration area. Also late nineteenth century cases such as *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), *Nishimura Eiku v. United States*, 142 U.S. 651 (1892), *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and *Chy Lung v. Freeman*, 92 U.S. 275 (1875), represented the Supreme Court constructing the congressional “plenary power” over immigration. See Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (concluding that the plenary power doctrine is not just old, it is anachronistic); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (claiming that immigration law, as it has developed over the past one hundred years under the domination of the plenary power doctrine, represents an aberrational form of the typical relationship between statutory interpretation and constitutional law).

114. See TOCQUEVILLE, *supra* note 113, at 265-72.

115. See THE FEDERALIST NO. 10 (James Madison) (“Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”).

Madisonian in his concerns,<sup>116</sup> specifically regarding the need for strong immigration federalism to deal with the problem of the “violence of factions” against minorities by race, ethnicity, language, and national origin.

Kotkin and Johnson also differ in their respective emphases, or lack thereof, on specific policy reform recommendations. The urban futurist Kotkin emphasizes the importance of immigration to America’s economic, social, and cultural dynamism but offers little in the way of direct policy recommendations regarding immigration reform. This is perhaps a continuation of Tocqueville’s influence in Kotkin’s thought. It is certainly in keeping with Kotkin’s notions of specialization and compartmentalization; although his work bears relevance in many areas of law and policy, Kotkin typically shies away from making specialized technical recommendations.

Johnson, on the other hand, is expressly concerned to provide a blueprint of “guiding principles for truly comprehensive immigration reform.”<sup>117</sup> Though Johnson’s work is also concerned with the role of immigration in America’s economic, social, and cultural dynamism, his purpose is to address the present and plan for both the short- and long-term future through comprehensive reform of federal immigration law and policy and through reinforcement of our system of immigration federalism.<sup>118</sup> Johnson’s interpretation of immigration federalism is strongly in favor of existing constitutional limits on state and local government activity in the areas of immigration and alienage law.<sup>119</sup> He regards proposals to delegate (or leave) immigration- and immigrant-regulation powers to subnational government with measured skepticism.<sup>120</sup>

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116. Johnson’s skepticism to localism in the immigration area is related, with due qualifications, to James Madison’s worries about the “tyranny of the majority” that he voiced in *The Federalist No. 10*. Madison was concerned with protecting a rich “minority” from tyranny by the majority (the landless or otherwise poor mob), and sought to do so by locating power in a central government with a system of checks and balances so as to distribute power throughout the system but keep it from tyrannical uses in the hands of the majority. Tocqueville is decidedly more Jeffersonian in his esteem for self-representation and decentralization (as conducive to building civic virtue and checking bureaucratic excesses) as the most important values in the American political system. However, to say that Johnson is “somewhat more Madisonian in his concerns” is to emphasize the prevalence of majority-population anxieties and “tyrannical” animus toward noncitizens—specifically toward Latina/o and Asian noncitizens—as originating from local power in such examples as Maricopa County Sheriff Joe Arpaio’s attitude toward immigrants, Arizona’s S.B. 1070, and the plethora of local ordinances from Virginia to Oklahoma which single out undocumented immigrants. See Kevin R. Johnson, *supra* note 7, at 1599 (discussing ten guiding principles for comprehensively reforming our current immigration system to ensure it is lasting); see also THE FEDERALIST NO. 10 (James Madison).

117. See Johnson, *supra* note 7, at 1609.

118. *Id.* at 1639.

119. *Id.* at 1604.

120. *Id.* at 1605.

Furthermore, for Johnson, immigration reform must begin with recognition of the fundamentally economic and labor-market forces behind immigration today.<sup>121</sup> It should also be concerned with addressing the disparate impacts from and systemic problems in current immigration law and policy, and with reforming immigration law so that it coheres with the justice standards and legal protections contained in other bodies of substantive and procedural law.<sup>122</sup> Johnson is deeply concerned with discrimination against immigrants and prospective immigrants through substantive and procedural law, law enforcement power and activity, adjudication of admission and deportation, and the creation of a new “Jim Crow” and a patchwork of state- and local-level laws on immigration and alienage.<sup>123</sup>

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121. *Id.* at 1619.

122. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 18-26 (2007); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 13-15 (2009) (noting that one of the reasons the population of unauthorized immigrants exists is that the immigration laws are out of step with the demand for labor); see also SUSAN MARTIN & B. LINDSAY LOWELL, COMPETING FOR SKILLS: U.S. IMMIGRATION POLICY SINCE 1990 (2004) (arguing that immigration can be more effectively seen as a series of trade-offs between competing goods); Richard A. Boswell, *Immigration Law: Crafting True Immigration Reform*, 35 WM. MITCHELL L. REV. 7 (2008) (arguing that immigration reform has not occurred because there has been insufficient pressure brought to bear on decision-makers for making the necessary serious changes and because, as a nation, we have grown accustomed to living with a substantial undocumented population); Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006) (analyzing increased competition for skilled labor among different nations); Jonathan Weinberg, *The End of Citizenship?*, 107 MICH. L. REV. 931 (2009) (discussing the meaning of citizenship and the basis for citizenship and immigration exclusions); Mitchell L. Wexler, *Policy Goal of Immigration Reform—Our Nation’s Best Interest*, 13 NEXUS 45 (2007/08) (arguing that if our immigration policies impede access to the global talent pool, it will lead to significant financial losses, delays or cancellations of key projects, and ultimately to an adverse impact upon the millions of U.S. workers that U.S. companies employ); Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446 (2008) (analyzing labor and employment law after an immigration reform is enacted); Katie E. Chachere, Comment, *Keeping America Competitive: A Multilateral Approach to Illegal Immigration Reform*, 49 S. TEX. L. REV. 659 (2008) (analyzing the importance of immigrant workers to the U.S. economy, especially those crossing the Mexican border); Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL’Y REV. 349 (2007) (proposing that Congress should affirmatively decentralize to the states administrative control over employment-based immigration and allow states to exercise greater control over the admission of employment-based immigrants); Jonathan G. Goodrich, Comment, *Help Wanted: Looking for a Visa System That Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975 (2008) (illustrating ways in which today’s visa system fails to promote American interests, including labor).

123. See JOHNSON, *supra* note 7, at 1608.

### A. Kotkin's Immigration-Friendly "New Localism"

In recent essays and major works like *The Next Hundred Million: America in 2050*, urban futurist Joel Kotkin offers his audience a vision for a "usable future."<sup>124</sup> Kotkin's purpose is avowedly optimistic (some might conclude overly so) and intentionally leans on pragmatics. He identifies several traits and major trends that, he argues, support a reasoned confidence in America's abilities to meet changes and challenges head on—be they global, national, regional, or local—and come out the better for it.<sup>125</sup> Globally speaking, the United States possesses several strategic advantages, such as "human and material resources, entrepreneurship, and stable political institutions,"<sup>126</sup> as well as "its deep-seated spirit of ingenuity, its ro-

124. JOEL KOTKIN, *THE NEXT HUNDRED MILLION: AMERICA IN 2050*, at 4 (2010).

125. *See id.* at 11.

126. *Id.*; *c.f.* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (Basic Books 1993) (1992) (presenting a more pessimistic view on the persistence of racism in America, illustrating how racism is an "integral, permanent, and indestructible component" of American society, and contending that civil rights "advances" (e.g., Thurgood Marshall's appointment to the U.S. Supreme Court, desegregation of schools) mask the fundamental racial inequality of the system); Chin, *supra* note 113, at 10-11 (suggesting that the current immigration laws and the way immigrants are being treated are analogous to the Jim Crow laws and the treatment of African Americans before the civil rights movement); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (detailing how exclusionary policies enacted in U.S. immigration laws would affect U.S. citizen minorities if legal constraints would be abrogated (e.g., the Chinese Exclusion Act and deportations of Mexican Americans in the 1930s)); *see generally* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, *supra* note 1 (identifying the parallels that exist between the nativism of the past and present); *see also* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULTS ON OUR CIVIL RIGHTS* (2006) (arguing that everyone "covers," in other words downplays or masks disfavored social identity traits to blend into mainstream); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (arguing for an intersectional understanding of race, gender, class, sexuality, and other social constructs in social oppression, identity formation, and identity politics); Uma Narayan, *Undoing the 'Package Picture' of Cultures*, 25 SIGNS 1083 (2000) (outlining postcolonial feminist intersectional critiques of "cultural" homogeneity and pointing toward women's shared experiences and concerns with other women, especially sexual and gender harms to women). There are other countervailing forces to the "post-racialism" of "the New Localism." *See generally* GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). One way to understand the contemporary mainstreaming of white nativism is as an outlet for anger and frustration, specifically over perceived socioeconomic power and cultural "control" (e.g., cultural homogeneity and cultural sovereignty) on the national level and local and regional levels where many whites live and work. Yet the problem of immigrant-othering cannot be understood without attention to the sources of friction between multiple social groups over real economic stressors and changes in "their" communities and "their" ways of life. Municipalities and local communities provide the front lines of social change, and many established populations simply do not welcome or want to accept as trade-offs for the economic, social, and cultural benefits of immigration and immigrant pop-



bust demographics (including a resourceful stream of ever-assimilating immigrants), and the world's largest, most productive expanse of arable land."<sup>127</sup> These are "the country's unique and fundamental assets,"<sup>128</sup> which other nations lack either in whole or in part. Though the changes and challenges this society faces are enormous indeed, he admits, if we remain adaptable and engage in wise planning to maximize our best traits and emerging trends, America will remain great well into this century and Americans will continue to enjoy a very high quality of life. In looking to the past as fodder for a "usable future," Kotkin draws lessons from the ways that many Americans have lived during periods of economic, political, and cultural progress, with attention to who and what specifically contributed to progress and reform.<sup>129</sup>

Tocqueville's influence on Kotkin's thinking is readily apparent and Kotkin references a wide range of locales and regions, with far-flung places like Ames, Casper, and Wenatchee receiving similar attention as Austin, Chicago, and Washington.<sup>130</sup> Central to Kotkin's vision for a "usable future" are values and people. Political and cultural values such as optimism, ingenuity, localism, diversity, integration, and democratic participation helped to build America and reform it, however gradually, to keep the nation powerful and vibrant. Localism is of particular importance in Kotkin's list, as it reflects "a historic American tradition that sees society's smaller units as vital and the proper focus of most people's lives"<sup>131</sup> and undergirds what he calls "the New Localism,"<sup>132</sup> which "changing demographics, new technologies and rising energy prices" have helped to propel.<sup>133</sup>

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ulations to regions and locales, or perhaps even see those benefits; they just see friction. In this way, mainstreamed white nativist backlash is a particularly strong manifestation of friction between multiple social groups. Like crabs in a barrel, the mainstreaming of white nativism is also a particularly aggressive way of trying to "climb out" by pushing or pulling others down.

127. See KOTKIN, *supra* note 124, at 7.

128. *Id.*

129. *See id.*

130. *See id.* at 112-22.

131. *See* KOTKIN, *supra* note 5.

132. *See* KOTKIN, *supra* note 124, at 194.

133. *See* KOTKIN, *supra* note 5. Note also several legal scholars that have advocated a greater degree of state and local involvement in immigration regulation. *See, e.g.,* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (establishing a new approach to immigration federalism and demonstrating that a federalism lens is being used to determine authority to regulate immigration); Rodriguez, *supra* note 61 (arguing that federal, state, and local governments are all part of one structure that provides for the absorption of immigrants and integration); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (asking for a more "robust" role of states on immigration policy). However, note that many legal scholars remain skeptical of the ability of state and local governments to regulate immigration without bias, rac-

Of course, people are the ones who generate values, and people ultimately drive a society's economic, cultural, and political dynamism,<sup>134</sup> but America's dynamism is greater than the sum of its parts. What Kotkin calls "America's *sokojikara*,"<sup>135</sup> is 'a reserve power that allows it to overcome both the inadequacies of its leaders and the foibles of its citizens.'<sup>136</sup> Immigration contributes directly and powerfully to our *sokojikara*. The United States population is expected to grow by 100 million or more by mid-century, with estimates ranging from 404 (the U.N.)<sup>137</sup> to 439 million (the US Census Bureau).<sup>138</sup> As the nation grows, the pace and shape of demographic change will accelerate our transformation to a younger, "multiracial society."<sup>139</sup> All demographic projections indicate significant increases in people of color, Hispanics (both white and non-white), and multiracial and multiethnic persons.<sup>140</sup> Most significantly, foreign-born persons and their U.S.-born children and grandchildren will comprise the vast majority of the "next hundred million."<sup>141</sup> Indeed, the U.S. is on its

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ism, and nativism tainting their attitudes and ensuing regulations towards immigrants. See Orde F. Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006) (suggesting that the current federalism jurisprudence on immigration creates conflicts of power between federal and local governments); Karla M. McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007) (recommending that Congress and the judiciary address the constitutionality of local ordinances attempting to regulate immigration); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (concluding the argument that state and local governments have sovereignty in enforcing immigration laws is problematic); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008) (critiquing the growing trend of local government regulating immigration through the criminal system); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (suggesting there are sound policy reasons for federal immigration power not to be devolved).

134. See KOTKIN, *supra* note 124, at 7-8.

135. See *id.* at 8.

136. See *id.*; see also Reihan Salam, *The Next America*, NEW AM. FOUND., (Apr. 19, 2010), available at [http://www.newamerica.net/publications/articles/2010/the\\_next\\_america\\_30204](http://www.newamerica.net/publications/articles/2010/the_next_america_30204).

137. Population Div., Dep't of Econ. and Soc. Affairs of the U.N. Secretariat, *World Population Prospects: The 2008 Revision*, available at [http://www.un.org/esa/population/publications/wpp2008/wpp2008\\_text\\_tables.pdf](http://www.un.org/esa/population/publications/wpp2008/wpp2008_text_tables.pdf).

138. U.S. CENSUS BUREAU, U.S. POPULATION PROJECTIONS (2008), available at <http://www.census.gov/population/www/projections/summarytables.html>.

139. See KOTKIN, *supra* note 124, at 22.

140. See U.S. CENSUS BUREAU, *supra* note 138; see also JEFFREY S. PASSEL & D'VERA COHN, PEW RES. CTR., U.S. POPULATION PROJECTIONS: 2005-2050, at 9-10 (2008).

141. See PASSEL & COHN, *supra* note 140, at 1.

way to becoming a nation without a racial majority, one whose “racial and ethnic dye is already cast, and permanently shaped, by immigration.”<sup>142</sup>

For Kotkin, unfolding demographic shifts and ongoing economic and cultural changes in many cities and regions contradict the firm conclusion, asserted by John Hope Franklin,<sup>143</sup> that America’s major social problem in the twenty-first century will carry forward from the twentieth century—what W.E.B. Du Bois presciently identified as the “problem of the color line.”<sup>144</sup> Instead, Kotkin points to what he takes as mounting evidence that America is rapidly becoming “post-ethnic.” Yet, how can America be both a “post-ethnic” nation and a “multiracial society,” one in which the “racial and ethnic dye is already cast, and permanently shaped, by immigration”?<sup>145</sup>

By “post-ethnic America,” Kotkin invokes a description of a society that “as it becomes more diverse, is actually becoming more adept at integrating its diverse populations,”<sup>146</sup> rather than denying its diversity or assimilating it into one big melting pot. That our “racial and ethnic dye is already cast” arguably eases integration because there is some existing framework of institutional and social conditions for diversity. In turn, this propels America in the direction of a “multiracial society,” because “[r]ace is likely to decline as the primary source of American social ills.”<sup>147</sup>

Though Kotkin is not an economic determinist, many of his insights and arguments about race, immigration, and social change strongly foreground economic factors. For example, even among the most persistent divides in American race relations, Kotkin argues that much of whatever progress has been made “takes place not on campuses, in newspapers, or at conferences but in the everyday realm of neighborhoods, parks, schools, churches, and perhaps most important, commerce.”<sup>148</sup> Why is commerce of paramount importance as an engine of change in race relations? Because “preserving institutionalized racism [is] bad for business.”<sup>149</sup> These are insights straight out of the civil rights movement and subsequent developments

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142. See Joel Kotkin, *Immigration is U.S.*, FORBES, May 21, 2010, available at <http://www.joelkotkin.com/content/00231-immigration-us> (describing how vital immigrants are to the U.S.’s ability to remain a leader among other nations).

143. See KOTKIN, *supra* note 124, at 146.

144. See *id.*; see also W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 1 (Henry L. Gates, Jr. & Terri Hume Oliver eds., W.W. Norton & Co. 1999) (1903).

145. KOTKIN, *supra* note 124, at 141.

146. *Id.* at 146; see Kotkin, *supra* note 142.

147. KOTKIN, *supra* note 124, at 146.

148. *Id.* at 147.

149. *Id.*

such as the movement of racial and ethnic minorities and settlement of newcomer populations in suburbs and exurbs.

Beyond demographic shifts, immigration will also supply much of the labor, entrepreneurship, and innovation that, with recalibration of immigration policy priorities, may allow America to weather the adversities and crises other wealthy nations face. Indeed, immigration may contribute to continued economic growth and prosperity through the next half-century. Immigrants are twice as likely as U.S.-born persons to launch new businesses, and in 2005 immigrant-founded companies produced more than \$50 billion in sales and employed 450,000 workers.<sup>150</sup> However, at present the United States grants only fifteen percent of its visas to highly educated, skilled, and specifically talented workers (in the sciences, arts, business, education, health care, athletics, etc.).<sup>151</sup> By comparison, sixty-four percent of visas are granted for purposes of family unification (including extended family members).<sup>152</sup>

“Immigrants no doubt will play a leading role in the next economic transition,”<sup>153</sup> Kotkin notes, because “[o]nly immigration can provide the labor force, the expanding domestic markets and, perhaps most important, the youthful energy to keep our society vital and growing.”<sup>154</sup> Newcomer migration to and from urban centers, rural areas, suburbs, and exurbs as well as settlement patterns will play a leading role in shaping the emerging “multiracial society.” Indeed, this has happened in recent decades in many regions and locales, with a wide range of immigrant populations fanning out from traditional gateway cities to settle in small towns, rural communities, and other non-traditional areas, bringing overwhelmingly beneficial impacts to specific municipalities and regions.<sup>155</sup>

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150. See DARRELL WEST, *BRAIN GAIN: RETHINKING U.S. IMMIGRATION POLICY* (2010) (calling for automatic granting of green cards to foreign graduates of American colleges and universities to promote “brain gain” and recoup expenses of educational resources spent on foreign-born persons, refocusing visa priorities from family unification to labor demands for highly skilled and seasonal workers); see also Vivek Wadhwa et al., *The American Brain Drain and Asia*, 14 *ASIA-PAC. J.* (2009), available at <http://japanfocus.org/-Alex-Salkever/3112> (assessing the critical role that immigrants played in the economic boom and creation of jobs in the Silicon Valley).

151. See Bill O. Hing, *Brookings Book on Immigration Reform*, IMMIGRATIONPROF BLOG (July 3, 2010), <http://lawprofessors.typepad.com/immigration/2010/07/brookings-book-on-immigration-reform.html>.

152. See *id.*

153. KOTKIN, *supra* note 124, at 14.

154. *Id.* at 141; see also BILL O. HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION AND MEXICAN MIGRATION* (2010).

155. Studies demonstrate that immigrants, including unauthorized and undocumented persons, contribute positively to state and local treasuries. See IMMIGR. POL’Y CTR., *ASSESSING THE ECONOMIC IMPACT OF IMMIGRATION AT THE STATE AND LOCAL LEVEL* (2010); Court-

Kotkin rightly emphasizes immigration as a social, cultural, and political boon. He also rightly emphasizes the role of immigrants and immigration in creating prosperity and growth, even amidst intergroup tension and anti-immigrant sentiment.<sup>156</sup> Kotkin tempers his acknowledgment that “class differences may grow” in the United States over the next forty years with his aforementioned faith that bottom-line concerns gradually win out over prejudice.<sup>157</sup> If “preserving institutionalized racism [is] bad for business,” then arguably so too is private racism.<sup>158</sup> Those regions, locales, and industries that attract sufficient levels of highly skilled, entrepreneurial, educated, and trade-skilled newcomers will do well. Those that do not—including those that engage in institutionalized racism or tolerate racial extremism—will suffer, not just economically but culturally and civically as well. This may be one of the enduring lessons of “Amerizona” for Arizona

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ney Schlisserman, *Immigrants Don't Take Jobs From Americans, Fed Study Says*, BLOOMBERG (Aug. 30, 2010), available at <http://www.bloomberg.com/news/2010-08-30/immigrants-don-t-take-jobs-away-from-americans-fed-study-finds.html> (“Data show that, on net, immigrants expand the U.S. economy’s productive capacity, stimulate investment, and promote specialization that in the long run boosts productivity.”); see also CAL. IMMIGR. POL’Y CTR., *LOOKING FORWARD: IMMIGRANT CONTRIBUTIONS TO THE GOLDEN STATE* (2008), available at <http://www.immigrationpolicy.org/just-facts/assessing-economic-impact-immigration-state-and-local-level> (“Immigrants pay into the system—and use less services the longer they live in California.”); Robert Ginsburg, *The Demographic and Economic Facts About Hispanic Immigrants in Nevada*, VITAL BEYOND BELIEF (2007); Daria Arao & Darren Ressler, *Working for a Better Life: A profile of Immigrants in the New York State Economy*, FISCAL POL’Y INST. (2007), available at [http://www.fiscalpolicy.org/publications2007/FPI\\_ImmReport\\_WorkingforaBetterLife.pdf](http://www.fiscalpolicy.org/publications2007/FPI_ImmReport_WorkingforaBetterLife.pdf) (noting that immigrants contribute broadly to the state of New York and over time they become part of the community); see also JUSTIN HEET, *THE IMPACT OF IMMIGRATION ON INDIANA*, SAGAMORE INST. POL’Y RES., at ES-3 (2009) (“The net direct state and local cost of immigration [in Indiana] is overwhelmingly positive.”); DORIS P. SLESINGER & STEVEN DELLER, *ECONOMIC IMPACT OF MIGRANT WORKERS ON WISCONSIN’S ECONOMY*, CTR. FOR DEMOGRAPHY & ECOLOGY 26-28 (2003), available at <http://www.ssc.wisc.edu/cde/cdewp/2002-06.pdf#page=33> (describing the positive impacts that immigrants have on the economy of the state of Wisconsin).

156. See KOTKIN, *supra* note 124, at 127.

From an economic point of view, immigrants have transformed dying places into enlivened ones. Where small stores had once been languishing, there are now Latino markets and restaurants. Rural WalMarts offer yucca roots, tomatillos, and tripe. Communities like Lexington, Nebraska that were otherwise losing families, jobs, and workers now feel tensions but also a sense of a future. I can remember when every house on the street was for sale except ours and our neighbors, recalls Barry McFarland, a local resident, reflecting on how much has changed due to newcomers.

*Id.*

157. See *id.* at 221.

158. Joel Kotkin, *Minority America*, NEW GEOGRAPHY (Aug. 20, 2008), <http://www.newgeography.com/content/00175-minority-america> (describing the emergent minority “majority,” which will become a reality sooner than expected, pushing the nation to critically think about the vast diversity in the American population).

and other states, with economic boycotts and condemnation coming from the U.S. federal and foreign governments, and governments of neighboring states and large U.S. cities, as well as public figures, celebrities, major corporations and industries, religious organizations, human rights activists, and others.<sup>159</sup>

By choosing to emphasize immigration and localism in propelling America's economic dynamism and long-term cycles of transformation from exclusion to integration, Kotkin seeks to soften the sharp edges of the contemporary immigration debate. When he notes that immigrants and their U.S.-born family members "will help to define the future 'us'," his focus remains on large trends, not legislative or policy reforms to manage those trends.<sup>160</sup> One reason why is that change is inevitable and already underway. Another is that Kotkin regards the working-out and navigating or managing of trends as properly left in the hands of the people and those entrusted with decision-making responsibilities. In Kotkin's work, one senses that for communities in the midst of change, populations who renew contact must largely work out their interactions for themselves.<sup>161</sup> These contact points of clash or understanding occur in private settings and through commerce more so than in public settings, and through legislation and intervention. There is only so much that government *can* do to work out social change. This is both a caution about the countermajoritarian problem and a belief that as we move toward a multiracial society, the

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159. Randal C. Archibold, *Arizona Law Causes Split for Border Governors*, N.Y. TIMES, July 6, 2010, at A1, available at <http://www.nytimes.com/2010/07/07/us/07governors.html> (reporting that six Mexican border governors wrote to Arizona's governor to inform her of their boycott due to the passage of S.B. 1070); Liz Goodwin, *Seattle Becomes the 11<sup>th</sup> City to Boycott Arizona*, CHI. PRESS RELEASE SERVS., May 18, 2010, available at <http://chicagopressrelease.com/politics/seattle-becomes-11th-city-to-boycott-arizona-the-newsroom> (outlining the local governments that have declared a boycott against the state of Arizona); Jim Kelley, *The President of Mexico Reacts to SB 1070*, TUCSON CITIZEN, Apr. 27, 2010, available at <http://tucsoncitizen.com/the-cholla-jumps/2010/04/27/president-of-mexico-reacts-to-sb1070-pots-call-kettles-black/> (noting that Mexico's President warned that trade and political ties with the state would be strained by the crackdown, also that the Mexican government issued travel warnings to those traveling to the state); Phil Willon, *L.A. Council Bans Most Official Travel to Arizona*, L.A. TIMES, May 13, 2010, available at <http://articles.latimes.com/2010/may/13/local/la-me-0513-arizona-boycott-20100513> (noting that the city council voted 13-1 in support of a boycott); Susan Ferriss, *Forty-four California Lawmakers Back Arizona Boycott Resolution*, SACRAMENTO BEE (June 23, 2010), <http://blogs.sacbee.com/capitolalert/latest/2010/06/forty-four-calif-lawmakers-co-.html> (reporting on a California Senate Resolution that supports the boycott of Arizona).

160. Joel Kotkin, *Immigrants Key to Economy's Revival*, POLITICO (Mar. 24, 2010), <http://www.politico.com/news/stories/0310/34882.html> (noting immigrants are critical to the revival of the U.S. economy and the children of immigrants are the future of America who will define the politics and economy of the country).

161. See KOTKIN, *supra* note 124, at 169.

problem of the “tyranny of the majority” lessens or changes when a racial majority no longer exists.

We surmise, however, that Kotkin endorses policies and reforms that promote economic growth, innovation, integration, social cohesion, political participation, and cultural diversity on the national, regional, and local levels. We also posit that concerns for dynamism rather than doctrine drive Kotkin’s interests in immigration and immigration policy; thus, he focuses his discussion on identifying and engaging opportunity rather than on identifying and adhering to principle. Finally, we presume that his choice to go light on recommendations reflects his commitment to localism and his belief that private actors in private settings have as much or more to do with social change as do legislators, policymakers, educators and other actors in the public sector.

For Kotkin, immigration and America are inseparable, and this is good news. A Kotkin-styled “usable future” is strongly pro-American and immigration-friendly: “[I]t’s immigration that provides America’s basic rhythm. . . . We are truly a nation of immigrants. . . .”<sup>162</sup> “By embracing, and being embraced by, immigrants,” Kotkin contends, “America follows the path of history’s most successful civilizations,”<sup>163</sup> and by “continu[ing] to build on its diversity” as driven by immigration, America may “retain its youthfulness, tap the global market and provide critical new spurs to innovation.”<sup>164</sup> Furthermore, “immigrants and their children—are the people who will help define the future ‘us’.”<sup>165</sup> By reminding us of how immigration and immigrants contribute to America’s strength and prosperity, Kotkin selects certain useful elements of the past and present without romanticizing and reviving “The New Colossus.” This is a strongly optimistic “usable future,” one that may feel too rosy to many of us today, but is conscientious and reasoned, not naïve or simplistic. Wise, forward-looking policymaking and policy reforms on immigration, which maximize our best traits and adapt to emerging trends, may give present and future generations alike the gift of a “usable future.”

We should also note that constitutional limits bound Kotkin’s embrace of localism: local experimentation in Brandeisian “laboratories of democ-

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162. See KOTKIN, *supra* note 142 (alteration in original).

163. See KOTKIN, *supra* note 124, at 169 (alteration in original).

164. See Joel Kotkin, *Immigrants Key to Economy’s Revival*, POLITICO (Mar. 24, 2010), <http://www.joelkotkin.com/content/00194-immigrants-key-economys-revival> (discussing the importance of immigrants’ contributions and revival of the current economy) (alteration in original); see also CONG. BUDGET OFFICE, *THE ROLE OF IMMIGRANTS IN THE U.S. LABOR MARKET: AN UPDATE*, (July 2010), available at [http://www.cbo.gov/ftpdocs/116xx/doc11691/07-23-Immigrants\\_in\\_Labor\\_Force.pdf](http://www.cbo.gov/ftpdocs/116xx/doc11691/07-23-Immigrants_in_Labor_Force.pdf).

165. See Kotkin, *supra* note 164.

racy” is good, while racial discrimination driven by ideologues is not. Kotkin provides brief yet clearly disapproving glosses on the twentieth century history of immigration restriction and animus toward Latinos and Asians, and for the “bleaker global vision” and regional and national anxieties of anti-immigration ideologues like Samuel Huntington, Victor Davis Hanson, and Pat Buchanan.<sup>166</sup> Though it is not his purpose to make policy recommendation per se, Kotkin encourages those of us concerned with immigration reform to rise above reactionary measures and transcend the immigrant-‘othering’<sup>167</sup> (that “both their advocates and nativists do”)<sup>168</sup> that characterizes much of the immigration debate. Besides the constitutional and other legal questions that arise from reactionary and xenophobic policies, these orientations are misguided in their failure to think of immigrants as “us.” This failure to recognize and indeed value the future roles that foreign-born persons and their U.S.-born family members will play is a failure to understand who and what we are as a society.

It is thus disappointing that Kotkin pays no specific attention to the “illegal immigration” debate, even as he expresses optimism that Asian and Latino immigrants will integrate in large numbers as eventually happened for immigrants from eastern, central, and southern Europe in generations past. While he provides tale after tale of how immigrants bring innovation, transform industries, and revitalize neighborhoods, cities, and even entire regions,<sup>169</sup> his focus remains largely on those immigrants who are highly

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166. See *supra* note 34.

167. Discourse on the purposes and processes of “othering” lay deep in the history of Western thought, as covered by post-colonial theorists, critical theorists, critical race theorists, critical feminists, and others. Here we mean, “othering” in the popular sense of defining, affirming, and securing identity by excluding, marginalizing, stigmatizing, or denigrating another group and negating its self-definition and experience. See Bill Ashcroft et al., *POST-COLONIAL STUDIES: THE KEY CONCEPTS* 169-73 (Routledge 2000) (1998) (outlining the origins of the term “othering,” as coined by Gayatri Chakravorty Spivak, along with defining it further as “a process by which the empire can define itself against those it colonizes, excludes and marginalizes. . . . The business of creating the enemy . . . in order that the empire might define itself by its geographical and racial others”); see also FRANTZ FANON, *BLACK SKINS WHITE MASKS* (Grove Press 2008) (1952) (analyzing the black psyche in the midst of a white dominated culture); Julian Abagond, *Fanon: The Lived Experience of the Black Man*, ABAGOND (Mar. 5, 2010), <http://abagond.wordpress.com/2010/03/05/fanon-the-lived-experience-of-the-black-man/> (analyzing chapter 5 of Frantz Fanon’s book, *supra*, discussing the life of a black man’s experience).

168. See Kotkin, *supra* note 164 (alteration in original).

169. See KOTKIN, *supra* note 124, at 145; see also BILL ONG HING, *ETHICAL BORDERS, NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* (2010); BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* (2006); Bill Ong Hing & Kevin R. Johnson, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (outlining the context of the 2006 immigrant rights marches, identifying the absence of the African American community, and describing the potential for immigration rights to spark a new civil rights movement); Sylvia



skilled, well educated, entrepreneurial, or able to make significant financial investments. Unfortunately, Kotkin does not delve into such thorny issues as disparate racial and national origin impacts of immigration policy, the root causes of undocumented immigration, or rationalizing immigrant recruitment and admissions according to economic and labor-market forces.

Even if one is similarly sanguine as Kotkin is about immigration, “the New Localism,” and America’s future, one should not overlook how dangerously fragmented immigration policy has become over the past quarter-century. This is especially so in recent years, as evinced by the dystopian dream of “Amerizona” and the subnational activism of exceptionally hard lines, arguably unconstitutional stances, and outright animus toward noncitizens. Undocumented immigrants—the majority of whom are low-skilled and come from Latin America, southeast Asia, and the Indian subcontinent<sup>170</sup>—have become scapegoats for anger and blame over outsized public- and private-sector deficits. In turn, these deficits and an assortment of alleged public health and safety concerns have been used to justify sweeping efforts to deny work, housing, and services to undocumented immigrants and to communicate suspicion of “illegal” status to many others, both citizen and noncitizen. These dynamics reflect the racialization of class differences and the political influence of ideological factions, yet Kotkin gives them scant attention. Even so-called progressive reform efforts that would focus admissions and recruitment on more high-skill, high-education, entrepreneurial, and investor-class immigrants and that express concern over what to do about issues facing low-skilled immigrants, reflect the racialization of class differences and the political influence of ideological factions.

More problematic are the persistent, pernicious practices of exclusion, hostility, and stigmatization born of ideologically driven desires for cultural isolation, homogeneity, and social control.<sup>171</sup> What we have seen in recent

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R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the “Gigante” (Giant) Wake up or Does it Still Sleep Tonight*, 7 NEV. L.J. 780 (2007) (describing and assessing the success and impact of the 2006 immigrant rights marches that occurred around the nation).

170. See MICHAEL HOFER ET AL., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 4 (2010) (reporting on the number of unauthorized immigrants by period of entry, region and country of origin, state of residence, age and gender).

171. See MARY MCTHOMAS, THE EFFECT OF CONCEPTIONS OF JUSTICE ON ATTITUDES TOWARDS IMMIGRATION POLICY, AM. POL. SCI. ASS’N (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1449784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449784) (exploring both sides of the immigration debate and how arguments are framed in order to understand the consequences of each side’s view; attitudinal preferences for homogeneity and isolation are advanced through assertions of authority and sovereignty).

years is a form of the problem of the “tyranny of the majority,” enacted on state and local levels and largely backed by those who are losing their racial or ethnic majority and perhaps political and economic power as well. Thus, an even deeper criticism of Kotkin’s sanguine views of the marriage of immigration and localism is that American history in general, and regional histories in particular, illustrate the contentiousness of immigration, as well as nationalist anxieties and nativist hostilities toward specific immigrant groups. Since at least the 1860s forward, the only real exceptions to these histories are found in the period between the 1960s (including the Immigration and Nationality Act of 1965)<sup>172</sup> and the 1980s<sup>173</sup> as well as in specific cosmopolitan cities.

In and of itself, localism makes no differentiation between progressive and forward-looking orientations and those exclusionary and reactionary ones found in “Amerizona” and in many states and municipalities in recent years.<sup>174</sup> These are the very kinds of problems that Kotkin believes are

172. Immigration Nationality Act of 1965 (Hart-Cellar Act), Pub. L. No. 89-236, 79 Stat. 911.

173. See SCHRAG, *supra* note 11, at 160-62 (“The Hart-Cellar Act of 1965 (aka the Immigration and Nationality Act of 1965) came in the same wave of optimism and liberalism that drove the Great Society programs in the same years—the Civil Rights Act of 1964, the Voting Rights Act, the Elementary and Secondary Education Act, both passed in 1965, and Johnson’s ambitious poverty program. . . . After the whitening that took place during the Depression, the war, and the brief euphoria of the early Johnson years, immigration problems had nearly vanished as a national issue. . . . [F]or a brief moment in the nation’s history, the prior century, or even the one and a half prior centuries . . . nativism and xenophobia ceased to be a major force in the nation’s policies. But it was destined to be a brief hiatus.”).

174. See MONICA VARSANVI, *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM*, in *U.S. CITIES AND STATES* (2010); Susan Ferriss, *Towns Targeting Illegal Immigrants: Failed Congressional Bid Spurs Crackdowns—and Legal Fights*, SACRAMENTO BEE, July 29, 2007, at A1 (discussing how cities in Virginia, California, and Arizona proposed local ordinances that indirectly target “illegal” immigrants); David Fried, *Local Illegal Immigration Laws Draw a Diverse Group of Cities*, NORTH COUNTY TIMES, Sept. 2, 2006, available at [http://www.nctimes.com/articles/2006/09/03/news/top\\_stories/21\\_40\\_499\\_2\\_06.txt](http://www.nctimes.com/articles/2006/09/03/news/top_stories/21_40_499_2_06.txt) (describing how Escondido was one of thirty local governments to draft an ordinance that targets “illegal” immigrants, banning undocumented individuals from renting in the city); Michael Powell & Michelle García, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3 (reporting on the passage of an act that imposes a \$1000-per-day fine on any landlord who rents to an illegal immigrant, and it revokes for five years the business license of any employer who hires one); see also, e.g., Farmers Branch, Tex., Ordinance 2892 (2006) (fining landlords that rent to undocumented immigrants); Hazleton, PA., City of Hazleton Illegal Immigration Relief Act Ordinance, Ordinance 2006-18, available at <http://www.smalltowndefenders.com/public/node/6> (denying business permits to any company hiring illegal immigrants and imposing fines against landlords who rented to them); see also Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT’L. L. 453, 496-99 (2009) (discussing cities and towns that have proposed or even adopted ordinances that target “illegal immigration”); McKanders, *supra* note 133.

shrinking away in our society and draining out of regions and municipalities. We can only hope that he is right about this and that “the New Localism” will significantly depart from the old. For now, we reserve our optimism.

### B. Johnson’s “Blueprint” for Comprehensive Immigration Reform

Joel Kotkin presents an optimistic, immigrant-friendly, and localist “usable future” for immigration reform discussion, but recent events and American history show that, without more, localism and race are an extremely combustible mixture. Throw nativism and xenophobia into the mix and you have the making of an explosive conflagration. Is there a way to retain some of the salutary aspects of localism and decentralization, including faith in “laboratories of democracy” and ordinary people acting in the private sphere, while jettisoning (or at least cabining) their more noxious aspects?

As with all solutions to complex problems, a careful blending of realism and idealism is important. Professor Kevin Johnson’s recent *Ten Binding Principles for Truly Comprehensive Immigration Reform: A Blueprint* presents a realistic, principle-focused “usable future” that, while inflected with measured skepticism toward localism, also gives guidance for immigration law and policy reforms that might harness the dynamism that immigration provides in ways that uplift all. Johnson’s blueprint focuses on efforts to eradicate discrimination, promote justice, address the root causes of undocumented immigration that lie in economic and labor-market forces,<sup>175</sup> and fix the broken, misaligned, and misconceived aspects of our immigration regulatory system.<sup>176</sup>

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175. See Johnson, *supra* note 7, at 1608-09; see also HING, *ETHICAL BORDERS*, *supra* note 154.

176. See Johnson, *supra* note 7, at 1633; see also Donald J. Boudreaux, *Some Basic Economics of Immigration*, 5 J.L. ECON. & POL’Y 199 (2009) (“Properly understood economics of immigration create a presumption in favor of opening the United States’ borders much more widely to immigrants.”); Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment and the Sequencing of Reform*, 5 GEO. J.L. & PUB. POL’Y 341 (2007) (“[C]onceptualizing the border as part of a larger failure of the market to respond to the mass scale of human dislocation.”); Howard F. Chang, *Migration as International Trade: The Economic Gains From the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371 (1998) (proposing the liberalization of U.S. immigration laws in order to maximize national economic welfare); Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J.L. ECON. & POL’Y 87 (2009) (analyzing the impact of globalization on migration patterns and arguing for more progressive solutions in order to address the border situation fairly); Hiroshi Motomura, *Immigrants Outside the Law*, 108 COLUM. L. REV. 2037 (2008) (arguing one must examine the issues of unlawful presence, the role of states and cities, and the integration of immigrants as a whole, not in isolation); Max J. Pfeffer, *The Underpinnings of Immigration and Limits of Immigration Policy*, 41 CORNELL INT’L L.J. 83

The deep significance of Johnson's "ten guiding principles" is that they engage an "unquestionable truth": that "immigration—undocumented and not—is largely labor-driven."<sup>177</sup> This is a very important point, one that Kotkin also makes more softly and with less attention to how racialization, the influence of ideological factions, and localist desires for cultural homogeneity and isolation shape the terrain of immigration, labor, and economics. Goals such as family unification, refugee protection, public safety, and national security, though important, cannot be allowed to overshadow the "unquestionable truth" or unbalance immigration reform efforts.<sup>178</sup> If it is to be "meaningful, comprehensive, and long-lasting," Johnson contends, immigration reform "must address what is at the core of immigration, that is, the increasing movement of labor across borders in an era of globalization and a rapidly integrating world economy."<sup>179</sup> It is "[o]nly by addressing that unquestionable truth reasonably and responsibly" that we will "be able to reform the nation's immigration laws so that they are enforceable, effective, efficient, and respected."<sup>180</sup>

In addition, comprehensive immigration reform must "effectively address the true reasons for undocumented migration"<sup>181</sup> as a function of economics, labor supply and demand, overly restrictive immigration laws, and misaligned immigration policy. It is an open secret that the American economy and its many businesses and industries rely on the ubiquity of undocumented immigrants and thereby maintain a highly stratified, two-tiered labor market. "[T]he current immigration system has helped create dual labor markets with a racial caste quality to them," Johnson notes, "one might even call the current labor market structure the 'new' Jim Crow."<sup>182</sup>

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(2008) ("We currently find ourselves in the midst of a controversy about the effective regulation of immigration. The failure of past immigration policy is most apparent in the fact that an estimated [eleven] to [twelve] million unauthorized immigrants reside in the United States . . .").

177. See Johnson, *supra* note 7, at 1610.

178. See *id.*

179. *Id.* at 1604; see also HING, ETHICAL BORDERS, *supra* note 154.

180. See Johnson, *supra* note 7, at 1610 (alteration in original).

181. See *id.* at 1603 (alteration in original).

182. See *id.* at 1608; see also Robert Lovato, *Juan Crow in Georgia*, NATION, May 26, 2008, available at <http://www.thenation.com/article/juan-crow-georgia> ("[S]urge in Latino migration . . . is moving many of the institutions and actors responsible for enforcing Jim Crow to resurrect and reconfigure themselves in line with new demographics. Along with the almost daily arrests, raids and home invasions by federal, state and other authorities, newly resurgent civilian groups like the Ku Klux Klan, in addition to more than 144 new 'nativist extremist' groups and 300 anti-immigrant organizations born in the past three years, mostly based in the South, are harassing immigrants as a way to grow their ranks."); see also Karla Mari McKanders, *Identification of Race in the Law: Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. BLACKLETTER L.J. 163 (2010) (arguing that local immigration laws affect Latina/os in a similar way that Jim Crow laws af-

U.S. citizens and lawful immigrants, who comprise the first-tier labor market, receive the full protections of the law. Undocumented workers and unauthorized residents, most of whom hail from Asian and Latin American nations, comprise the second-tier labor market. They are “often paid less than the minimum wage and [enjoy] few health and safety protections.”<sup>183</sup> They also typically face unwelcoming and even discriminatory state laws and local ordinances, law enforcement practices, and private actions that affect daily life.

In other words, the failures of our immigration system “to provide adequate legal avenues for migration of workers creates huge incentives for undocumented migration that some of the most draconian enforcement schemes – including those that increase the likelihood of migrant deaths – have failed to deter.”<sup>184</sup> More generally, America’s economy propels the demand for noncitizen labor of all skill levels, which gives rise to contemporary conditions for immigration. There is plenty of demand and supply, but also a regulatory system that is fraught with inefficiency, irrationality, inconsistency, and other disparities and dangers for noncitizens.

It is within this context that our system of immigration federalism—“the relative allocation of authority to regulate immigration between federal, state, and local governments”<sup>185</sup>—has become so volatile and so contested in recent years. State and local governments, as the levels of government “most directly affected” by immigration and newcomer settlement, actively and increasingly seek to regulate the conduct, legal relationships, and access to public and private services of people within their jurisdiction, both citizen and noncitizen. While “Congress has repeatedly failed to pass immigration reform,” Johnson notes, “states and cities across the country have sought to fill in the gap by enacting measures that attempt to directly

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affected African Americans). On the lack of basic legal protections for undocumented immigrants in the workplace, see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (holding that undocumented workers were not entitled to backpay as a remedy for a violation of their rights under federal labor laws); see also Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 LA RAZA L.J. 103 (2003); *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2240-41 (2005); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003).

183. Johnson, *supra* note 7, at 1603.

184. *Id.* at 1609.

185. *Id.* at 1604.

and indirectly address some of the problems associated with—some might say unfairly blamed on—immigration and immigrants.”<sup>186</sup>

As noted earlier in this article, this is no ordinary struggle between the levels of government over states’ rights, local interests, and federal preemption.<sup>187</sup> Rather, as Johnson points out, “[t]he debate over the role of state and local governments in regulating immigration in certain respects is eerily reminiscent of the “states rights”-based resistance to the civil rights movement.”<sup>188</sup> As in the days of original Jim Crow, state and local governments, private individuals, and private organizations are pushing back against federal law and law enforcement—here, via “anti-immigrant measures . . . English-only laws, hate crimes, and segregated labor markets.”<sup>189</sup> Anti-Latina/o and anti-immigrant animus often lies just beneath the surface of the material and social conditions, and specific law and policy actions, if it remains sublimated at all. “Many observers would also note with evidence supporting the case that the state and local immigration ordinances have been motivated in no small part by racism and nativism.”<sup>190</sup>

Professor Johnson thus offers his “Blueprint” of “ten guiding principles” as correctives to an unjust and irrational system, with concern for melioration in the present and realistic improvement in the future. To paraphrase, these principles include constitutionality, rule of law, fairness, nondiscrimination, simplicity, clarity, functionality, practicality, pragmatism, adaptability, and responsibility.<sup>191</sup> These principles cohere with our systems of substantive and procedural laws, and reflect its political values and conceptual commitments. We reproduce Johnson’s principles, analyses, and recommendations in some detail below, and augment these with our own analyses and insights:

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186. *Id.*; see also IMMIGR. POL’Y CTR., *supra* note 57 (noting that there are other states that have passed local ordinances in efforts to control undocumented immigration; [l]egislators in 45 states introduced 1180 bills and resolutions in the first quarter of 2010 alone, compared to 570 in all of 2006).

187. Further questions arise around whether the federal power is express or implied and, if it is merely an implied power, whether it applies to the entire field of immigration regulation or only to specific conflicts of laws. See Complaint at 12-19, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010); see also GABRIEL J. CHIN ET AL., ARIZONA SENATE BILL 1070: A PRELIMINARY REPORT ON LEGAL ISSUES RAISED BY ARIZONA’S NEW STATUTE REGULATING IMMIGRATION 35 (June 2010) (identifying the central legal issues raised by S.B. 1070).

188. Johnson, *supra* note 7, at 1606 (alteration in original).

189. *Id.* at 1606, 1609 (alteration in original).

190. *Id.* at 1606. See generally IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, *supra* note 1; IMMIGR. POL’Y CTR., *supra* note 57.

191. See Johnson, *supra* note 7, at 1610-40.

I. *“U.S. Immigration Laws Must Recognize that Migration Between Nations is Primarily Driven by Economic Opportunity and Labor Supply and Demand in the United States.”*<sup>192</sup> “The INA, its enforcement, and the various congressional amendments have forgotten, lost, or minimized” the nation’s employment needs and labor demands, which are the primary driving forces behind immigration today, including undocumented immigration.<sup>193</sup> Due to the insufficient number of work visas available annually, as well as other admissions constraints, it is very difficult for moderately skilled workers, and almost impossible for unskilled ones, to obtain lawful admission to the United States, and very difficult for many American employers to meet their medium- and low-skill labor demands.<sup>194</sup> As a result, many immigrants must enter and remain without authorization, which drives up the numbers of undocumented immigrants and leaves them vulnerable to discrimination, exploitation, and other harms in the workplace, housing, and other areas of life.<sup>195</sup> Expanded temporary worker programs are necessary but insufficient to address these conditions.

II. *“U.S. Immigration Laws Must Be Enforceable.”*<sup>196</sup> Overly restrictive laws, laws that produce bad outcomes, or otherwise unenforceable laws are laws that tend to be ignored. On the flipside, laws that are consistent with needs and demands are more likely to be enforced. Labor needs and other economic factors drive immigration today. “Rather than attempt to make it difficult for employers and immigrant labor to come together, U.S. immigration law should facilitate the matching of workers and jobs,”<sup>197</sup> yet it has done just the opposite. Employer sanctions are “a critical part of the U.S. immigration laws,” but they have proven extremely difficult to enforce at all, let alone “effectively and fairly.”<sup>198</sup> Residential and workplace raids have resulted in significant human and economic costs but have done little else.<sup>199</sup> Meanwhile, “border fences, record numbers of deportations year after year, dramatically increased use of detention, greatly expanded removal provisions, the criminalization, along with heightened prosecution, of immigration offenses, and vastly expanded enforcement efforts”<sup>200</sup> have done little more than force “migrants to journey to the United States through dangerous routes through deserts

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192. *See id.* at 1610.

193. *Id.* at 1610-11.

194. *See id.* at 1613.

195. *See id.* at 1614-15.

196. *Id.* at 1617.

197. *Id.* at 1619.

198. *Id.* at 1617-18; *see also* HING, *supra* note 154.

199. *See* Johnson, *supra* note 7, at 1618.

200. *Id.* at 1619.

and mountains resulting in deaths<sup>201</sup> or to rely on human traffickers to enter the country. The United States lacks the political will and the billions of dollars necessary to remove all the undocumented workers, and efforts to do so would severely damage the economy and specific industries by removing millions of workers and consumers who, in the vast majority of cases, are also renters and taxpayers.<sup>202</sup>

*III. "Immigration Law Must Fairly Treat Immigrants."*<sup>203</sup> Here fairness means not only fairness to individuals who are subject to our immigration laws but also to all those whom these laws affect.<sup>204</sup> Under the Fifth and Fourteenth Amendments, several basic constitutional protections extend to all persons within the territorial jurisdiction of the United States. However, certain aspects of immigration enforcement activity, and many state and local government measures attempt to regulate both immigrants and immigration. These arguably violate the Constitution (as the Justice Department argued in *United States v. Arizona*),<sup>205</sup> repudiate "territorial personhood,"<sup>206</sup> and deny basic procedural fairness and equal justice to non-citizens and those suspected of being noncitizens—especially, but not only, those who are suspected of being "illegals." Beyond these problems, it seems unfair and unjust to deny legal status to—let alone remove—*all* who have overstayed or exceeded their visas or entered without authorization but otherwise obeyed the law, fulfilled our labor needs, paid into our tax systems, and contributed to our economy in other ways simply because they committed a *civil infraction*.<sup>207</sup> Mass deportation would be cost-prohibitive and deeply divisive politically, as many undo-

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201. *Id.*

202. *See id.*

203. *Id.*

204. *See id.* at 1620.

205. 703 F. Supp. 2d 980 (D. Ariz. 2010).

206. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 10 (2006).

207. *See* Alien and Registration Act of 1940, 8 U.S.C. §§ 1304, 1306, (2006) (designating unauthorized presence without documentation of immigration status as federal civil infraction; § 1304 (e) requires individuals who have been issued an immigration document to carry it, making failure to comply a misdemeanor punishable by jail, fine, or both; § 1306 (a) makes individuals who fail to register also guilty of a misdemeanor); *see also* *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (striking down the Pennsylvania Alien Registration Act of 1939 as preempted by the Alien and Registration Act of 1940 "where the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations"). The *United States v. Arizona* Court relied on *Hines* to invalidate the Arizona law that is duplicative of federal law. *See* AM. CTR. FOR LAW & SUST., *Summary of United States v. Arizona*, available at [www.aclj.org/media/pdf/ACLJ\\_Summary\\_USvArizonaOpinion\\_20100729.pdf](http://www.aclj.org/media/pdf/ACLJ_Summary_USvArizonaOpinion_20100729.pdf); Richard Epstein, *United States v. Arizona*, RICOCHET (July 28, 2010), <http://ricochet.com/conversations/United-States-v.-Arizona/%28comment%29/12780>.



cumented immigrants have significant U.S. ties through family (including family members who are citizens or permanent residents), business or employment relationships, church membership, community participation, and children in schools.

*IV. "Immigration Law Must Be Consistent with Other Bodies of Law."*<sup>208</sup> Immigration law—in legislation, enforcement, and adjudication—deviates significantly from, and is “wildly inconsistent” with, other bodies of administrative law and American jurisprudence.<sup>209</sup> Under the plenary power doctrine created by the Supreme Court, the judiciary gives “extreme deference” to Congress and the executive branch on all immigration matters.<sup>210</sup> This includes vast and effectively unreviewable discretion in immigration enforcement and adjudication. Thus, the federal government is immune from constitutional scrutiny on most immigration matters.<sup>211</sup> Moreover, Congress and the executive branch may make laws and enforce them in ways that discriminate against noncitizens on “race, class, political opinion, gender, sexual orientation, and disability” and other constitutionally impermissible bases.<sup>212</sup> Furthermore, over the past two decades Congress has acted to limit judicial review of immigration laws and enforcement of those laws.<sup>213</sup> Also troubling is the inconsistency of decisions coming from the Board of Immigration Appeals (BIA) and the immigration courts. The problems include “poor quality rulings, . . . bias against noncitizens, . . . simple incompetence, ineptitude, and sloppiness,” as well as “widely disparate results depending on the immigration judge,” all of which “create a lack of confidence in the decisions of the immigration bureaucracy, as well as the firm sense that they are not legitimate.”<sup>214</sup> Meaningful judicial review is needed to ensure consistency in immigration laws and decisions, as well as in administration of the laws, and agencies’ obedience to the rule of law.<sup>215</sup> Concern for consistency may also increase the sense that our system of immigration law is legitimate and fair, thus encouraging and increasing respect for immigration law.<sup>216</sup>

*V. "U.S. Immigration Laws Should Treat Similarly-Situated Noncitizens in a Similar Manner."*<sup>217</sup> “[T]he U.S. immigration laws currently include a variety of provisions that in operation amount to not-so-subtle national

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208. Johnson, *supra* note 7, at 1622.

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at 1623.

214. *Id.* at 1627-28.

215. *See id.* at 1628.

216. *See id.* at 1620.

217. *Id.* at 1628.

origin and racial discrimination.”<sup>218</sup> These provisions include the diversity lottery, the per-country ceilings (which wield disparate impact on potential immigrants from countries with large populations and high visa-application rates, and those from nearby nations that comprise most of our foreign labor force), economic-status and skill-preferences in admissions criteria, and the “public charge” grounds for exclusion (which is rigidly enforced).<sup>219</sup> The existing tracks and criteria for admissibility and inadmissibility mean that, at least in some instances, “the law treats similarly situated noncitizens differently depending on nothing other than their country of origin, something that other bodies of American law do not generally tolerate.”<sup>220</sup>

*VI. “Immigration Law Must Be Enforced in a System Governed by Rules and Regulations—and Law:”*<sup>221</sup> “[M]any of the goals of immigration reform—such as legitimacy, fairness, respect, obedience to the rule of law, and consistency—cannot be realized”<sup>222</sup> without administrative reform that tackles problems and perceptions of arbitrariness and noncitizen bias in decision-making and enforcement. For example, there appears to be the ongoing problem that “some important aspects of the INS’ administrative performance are deeply and systematically flawed.”<sup>223</sup> Furthermore, as mentioned above, the decision-making quality of the immigration courts and the BIA must be improved, and the power of judicial review over immigration decisions should be increased.<sup>224</sup> Related to this is a need for more immigration adjudicators to handle the workflow, as well as for reform of the process of adjudicator appointment.<sup>225</sup> Administrative improvement will require taking identified concrete steps, allocating accompanying resources (such as increases and improvements in staffing and funding), and imposing checks and limits on the relevant agencies and their discretionary powers.

*VII. “Immigration Law Must Be Practical and Pragmatic, Not Dogmatic, Designed to Meet Domestic Needs and Respond to the Demands of the Global Economy:”*<sup>226</sup> Public debate over immigration reform—in Congress, state legislatures, city councils, and in popular fora—tends toward

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218. *Id.*; see also Johnson, *supra* note 32 (detailing exclusionary policies enacted in U.S. immigration laws as well as the national-origins quotas system that reflects the United States’ preoccupation with its ethnic balance).

219. See Johnson, *supra* note 7, at 1628-29.

220. *Id.* at 1628.

221. *Id.* at 1630.

222. *Id.*

223. *Id.* at 1631.

224. See *id.*

225. See *id.*

226. *Id.* at 1633.

dogmatism rather than pragmatism.<sup>227</sup> For example, concern is over “illegals” not respecting our borders and our laws, rather than over understanding and addressing the fundamentally economic character of contemporary immigration.<sup>228</sup> Much of the debate, which focuses on closing our borders and rounding up and deporting all the “illegals” in order to quell drug trafficking, human trafficking, gang activity, and other criminal activity, is steered by inflammatory rhetoric, off-the-mark rationales, and practically impossible aims.<sup>229</sup> Furthermore, policy measures that fail to focus on the primarily economic motives and dynamics behind immigration are of little help and, in many cases, are misguided. Family unification, education, armed conflict, and natural disaster are influential factors behind immigration and thus important considerations for immigration policy reform. Jobs, industry, labor, and business opportunity are what ultimately drive immigration today. “[O]nce one admits that many undocumented immigrants are here to stay, the integration of immigrants into the mainstream also is something that is very practical, very important, and unfortunately very much ignored in the United States.”<sup>230</sup> Though integration as a policy aim (as involves citizens and noncitizens alike) is too often ignored, it is essential to the strength of local communities, industries, the economy, and civic and political institutions.<sup>231</sup>

VIII. *“The Nation Must Recognize that the Operation and the Enforcement of the Current Immigration Laws (and Proposed Reforms) Have Disparate Racial and National Origin Impacts.”*<sup>232</sup> While goals such as “securing the nation’s borders” or “enforcing the law,” and calls for “more restrictive immigration laws and increased enforcement” might be—or appear to be—free of racial animus, Johnson asserts that “in formulating the laws the nation should be aware of the racial and national origins consequences of its immigration laws and reforms.”<sup>233</sup> This is “not to suggest that the current laws . . . which have disparate racial and national origin consequences, are per se racist.”<sup>234</sup> Our immigration laws do in fact carry disparate racial and national origin impacts, especially for Asians and Latina/os.<sup>235</sup> “U.S. immigrations laws affect more people from Mexico than Denmark, from China than Iceland, from India than New Zealand . . . . Importantly[,] . . . many people of color from the developing world find it much more difficult than noncitizens from the

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227. *See id.*

228. *See id.*

229. *See id.*

230. *Id.* at 1634.

231. *See id.*

232. *Id.* at 1635.

233. *Id.*

234. *Id.*

235. *See id.*

western world to come (temporarily or indefinitely) to the United States.”<sup>236</sup> A related problem is that immigration enforcement routinely utilizes racial profiling and otherwise involves “disparate treatment” that “severely undermines the perceived legitimacy of U.S. immigration laws and has certain communities convinced that the enforcement is arbitrary, unfair, and downright racist.”<sup>237</sup> State and local law enforcement officers and private individuals (“like the Minutemen”) acting as self-appointed border enforcement militia, also engage in racially- and ethnically-discriminatory conduct against “immigrants and U.S. citizens of particular national origin ancestries.”<sup>238</sup> “To help U.S. immigration laws and their enforcement attain some degree of legitimacy among the public and non-citizens, as well as in the eyes of the world, efforts . . . to remove the taint” of racial discrimination and disparate impact are necessary.<sup>239</sup> This

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236. HOEFER ET AL., *supra* note 170. Indeed, among the top ten nations of origin for unauthorized residents in the U.S., six are Latin American countries (Mexico, El Salvador, Guatemala, Honduras, Ecuador, and Brazil); the four remaining countries are on the Pacific Rim or Indian subcontinent (Philippines, India, Korea, China). *See id.*

237. Johnson, *supra* note 7, at 1635-36.

238. *Id.* at 1636; *see also* Amy Argetsinger, *In Ariz., ‘Minutemen’ Start Border Patrols: Volunteers Crusade to Stop Illegal Crossings*, WASH. POST, Apr. 5, 2005, at A03, available at <http://www.washingtonpost.com/wp-dyn/articles/A26339-2005Apr4.html> (describing the Minutemen project that attracted hundreds of volunteers to patrol the border in efforts to stop immigrants from coming in); Dan Baum, *Patriots on the Borderline: Toting Guns, Cameras and Mighty Convictions. Small Bands of Americans are Patrolling the Southwest in Search of Illegal Immigrants*, L.A. TIMES MAG., Mar. 16, 2003, available at <http://www.latinamericanstudies.org/immigration/borderline.htm> (“Simcox speaks of sovereignty, the Pledge of Allegiance and the rule of law, but his body language is all about the gun. Sooner or later he’s going to use it, he wants everybody to know, in a showdown with the illegal immigrants and Mexican drug dealers he believes are ruining the United States.”); *Border Activist Vows to Start Work on the Fence*, L.A. TIMES, Apr. 21, 2006, available at <http://articles.latimes.com/2006/apr/21/nation/na-minute21> (reporting on Chris Simcox’s ultimatum to President Bush that Minutemen volunteers would break ground on building the fence if the federal government does not take action); Timothy Egan, *Wanted: Border Hoppers. And Some Excitement, Too.*, N.Y. TIMES, Apr. 1, 2005, available at <http://www.nytimes.com/2005/04/01/national/01border.html> (“Led by Chris Simcox, a 44-year-old former kindergarten teacher from Los Angeles who accuses the federal government of turning a blind eye to the flow of illegal immigrants, the Minuteman Project is an effort to post 1,000 volunteers across 23 miles of border.”); Michael Leahy, *Crossing the Line*, WASH. POST, Mar. 19, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031501766.html> (“Minuteman chapters were forming in every region of the country by then—from California to Connecticut, with many men like George Taplin eager to take the helm.”); Robert Lovato, *Far From Fringe: Minutemen Mobilizes Whites Left Behind by Globalization*, PUB. EYE MAG., Winter 2005, available at [http://www.publiceye.org/magazine/v19n3/lovato\\_fringe.html](http://www.publiceye.org/magazine/v19n3/lovato_fringe.html) (describing white nativism and the role of the Minutemen: “the primary political objectives of the Minutemen have more to do with protecting the borders of white privilege and notions of citizenship being transcended by the global economic—and political—capital”); Robert Lovato, *Fear of a Brown Planet*, NATION, June 11, 2004, available at <http://www.agenceglobal.com/article.asp?id=159> (describing white anxiety in California about becoming a political minority).

239. *See* Johnson, *supra* note 7, at 1636.

would include vetting immigration reform proposals for their racial and national origin impacts before adopting the reforms, and trying to document and address such problems and adverse affects after the reforms' enactment.<sup>240</sup>

*IX. "Immigration Laws, Infamous for Their Byzantine Complexity, Must Be Simplified:"*<sup>241</sup> "The nation needs laws that can be explained to the public and are understandable to those beyond simply the experts."<sup>242</sup> When it comes to matters as important is eligibility to enter, reside, and/or work lawfully in the United States, our laws should provide as much clarity, simplicity, certainty, consistency, and ease to follow as possible. The Immigration and Nationality Act of 1952,<sup>243</sup> frequently reformed over the past six decades, provides the backbone of contemporary immigration law. Unfortunately, "piecemeal reform has left the law overly complex and overwritten, pulling it in many different directions, often with little overall cohesion and coherence" and leading to "accretion of complex provisions upon complex provisions making the laws complex, obtuse, and, at times, unintelligible."<sup>244</sup> In many instances, noncitizens and citizens alike (e.g. employers and business owners, law enforcement officials and other public servants, landlords, and laypeople) lack the technical knowledge, skills, and expertise to make sense of ambiguous laws, let alone comply with them.<sup>245</sup> In order to simplify and clarify our immigration regulatory system, sooner rather than later "it might be necessary to start from scratch" and create a new Immigration and Nationality Act.<sup>246</sup> Meanwhile, the responsibilities to interpret, apply, and enforce the laws of our current immigration regulatory system should not be placed in the hands of those who lack the skill, let alone the authority, to do so—namely, private individuals (in professional and non-professional capacities) and state and local government employees.

*X. "The Immigration Laws Should Be Reformed to Ensure That Their Purposes are Clear and That the Purposes are Furthered by the Provisions of the Law:"*<sup>247</sup> "Accretion of reforms upon reforms has made the immigration laws pull in dramatically different directions, lack any modicum of consistency, and become unwieldy, cumbersome, and excessively

240. *See id.* at 1636-37.

241. *Id.* at 1637.

242. *Id.*

243. The Immigration and Nationality Act of 1952, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextoid=f3829c7755cb9010VgnVCM1000045f3d6a1RCRD>.

244. Johnson *supra* note 7, at 1637.

245. *See id.*

246. *See id.*

247. *Id.* at 1638.

complex.”<sup>248</sup> Though immigration reform is a fundamentally political activity and a contentious topic, the only hope for “meaningful, comprehensive, and long-lasting” reform lies in developing “a clear statement of goals, and a carefully crafted bill that includes provisions directed at achieving these goals in a fair and balanced fashion.”<sup>249</sup>

Johnson’s tenth and last principle is distinctly Madisonian circa *Federalist No. 10*, insofar as “meaningful, comprehensive, and long-lasting” immigration reform involves a balancing act whereby the federal government takes increased steps to ensure that constitutional and other rights (here, of both undocumented immigrants and legal permanent residents) are respected, while at the same time giving local and state governments a clear and rational role in immigration policy and in issues of subnational concern. A federal regional immigration council—an administrative framework for what we call an “immigration regionalism”—is one possible step toward such a balancing of what at present might appear to be competing roles, interests, and powers. A federal regional immigration council could provide crucially important oversight and support to the development and implementation of regionally sensitive yet nationally replicable solutions to industry-specific labor and employment needs. We discuss this topic and other ideas for “immigration regionalism” in the concluding section. Thus, while Professor Johnson’s “blueprint” may serve to caution against uncritical embraces of localism, it may also help to move toward envisioning practical institutional solutions that retain federal oversight but also create a constitutionally permissible—and useful—space for local and state governments to have some say in shaping immigration policy.

#### IV. TOWARD AN “IMMIGRATION REGIONALISM”

In this essay, we introduced and applied “dystopian dream” and “usable future” heuristics to visions for immigration reform. We hope (and believe) that these efforts provide valuable contributions and beneficial conceptual frameworks. We join Joel Kotkin in the view of immigration as an engine of economic, social, and cultural dynamism on the national and local levels; we also acknowledge Kotkin’s previous work on immigration

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248. *Id.* at 1638-39 (noting that one of the fundamental reasons we have a sizeable undocumented immigrant population in the United States is that the nation’s immigration laws are dramatically out of line with the nation’s demand for labor; illustrating the complexity of enforcement by analyzing how the United States has not had great success with computerized systems of tracking immigrants; pointing out that influential scholars recently acknowledged that the United States “is years away from creating some kind of computerized system that can reliably identify undocumented workers”).

249. *Id.* at 1639.

and regionalism,<sup>250</sup> his more recent attention to the significance of regions in American life on economic, cultural, and environmental as well as geographic levels,<sup>251</sup> and his observance that Americans generally believe in localism—that is, the power to craft appropriate solutions to local problems. As we have seen too often in American history and in recent years, many Americans' sense of what is a local problem and what is an appropriate exercise of localist control is inconsistent with the scope of federal regulatory power over the field of immigration. We agree with Professor Johnson in calling for comprehensive immigration reform that attends to the fundamentally economic and labor-driven character of immigration today without losing sight of other vitally important matters such as housing, access to public and private services, and immigrant integration.

Yet, neither have we made our ultimate recommendation nor have we addressed the second half of this article's title: *whether "immigration regionalism" is an idea whose time has come*. Though this question is larger than can be settled here, its answer lies partially in whether "immigration regionalism" capitalizes on the dynamism fueled by what is best in the relationship of immigration and localism, upholds and advances specific principles of law and justice as Professor Johnson's "blueprint" articulates, and meets other basic "usable future" criteria as identified in Section III. One approach to answering the question is to take stock of crucial factors in favor of the idea's ripeness – or, at least, the timeliness of introducing the idea into the immigration reform debate. Such factors include the political fractiousness of the immigration debate, the unfolding demographic changes as driven by immigration, the fundamentally economic and labor-market character of immigration today, the as-yet unresolved legal battles over S.B. 1070 and emerging potential fights (e.g. over birthright citizenship), and the likelihood that state and local governments will continue to try to regulate immigration. Given the obvious need for immigration reform and America's continuing economic and business sector struggles, now is a very good time to put "immigration regionalism" on the table as

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250. See, e.g., JOEL KOTKIN, TRIBES: HOW RACE, RELIGION, AND IDENTITY DETERMINE SUCCESS IN THE NEW GLOBAL ECONOMY (1993) (offering a broader discussion of immigration in the context of regional states).

251. See, e.g., KOTKIN, *supra* note 124, at 217 (acknowledging the prominence of three "megaregions" in Boston-Washington, San Diego-San Francisco, and Chicago-Pittsburgh, but also the unexpected emergence of other metropolitan regions like Atlanta, Dallas, Houston, Miami, Phoenix, and Seattle in the late twentieth century and projecting other "emerging powerhouse regions, including perhaps Charlotte, Austin, Tucson, and San Antonio"). *But see id.* at 218-19 ("Perhaps more important, even within regions there has been a growing shift toward local concerns, down to the neighborhood and even block level" and "for the most part, Americans generally tend to believe that local communities, neighborhoods, and parents should possess the power to craft appropriate solutions to local problems.").

part of the comprehensive reform discussion; indeed, “immigration regionalism” could be tailored to handle many important roles and responsibilities within a larger framework of comprehensive reform.

In light of the foregoing, our bottom-line suggestion (and, we believe, the first word on the topic) is this: *that Congress, acting pursuant to the Commerce Clause, the Supremacy Clause, and foreign policy interests, should encourage immigration policy formulation and implementation on a regional basis, albeit with very strong federal oversight<sup>252</sup> and without constitutional disruption of immigration federalism.* Here, we are concerned with finding solutions to manifold subnational and national concerns through implementation of a principled, forward-looking approach to comprehensive immigration reform. We are also concerned with balancing multiple and competing interests, such as promoting and harnessing the dynamism that immigration and localism afford while safeguarding against the sharp political edges of immigration reform debate and overreaching subnational activism. We believe that the creation of a participatory administrative structure for rational reforms and solutions to temporary regional and national concerns through regional experimentation and national replication of good practices, safeguarded within a federal oversight framework, may be a particularly effective, principled, and forward-looking innovation in comprehensive reform.

The idea of “immigration regionalism” builds in part from the work of Professor David Dante Troutt who has articulated a case for “Equitable Regionalism” to remedy an insular localism that took root during the Burger Court and shows no sign of abating.<sup>253</sup> Our proposal builds on Troutt’s by

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252. See PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* (2001); ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); PETER DRIER ET AL., *PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY* (Univ. Press of Kansas 2d ed. 2001); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997); H.V. SAVITCH & RONALD VOGEL, *REGIONAL POLITICS: AMERICA IN A POST-CITY AGE* (1996); G. ROSS STEPHENS & NELSON WIKSTROM, *METROPOLITAN GOVERNMENT AND GOVERNANCE: THEORETICAL PERSPECTIVE, EMPIRICAL ANALYSIS AND THE FUTURE* (2000); Nestor M. Davidson, *Leaps and Bounds*, 108 MICH. L. REV. 957 (2010) (exploring the ways in which local governments act as active agents within the framework of their authority and the laws that bind them); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002) (proposing the creation of “a regional institution consisting of democratically elected representatives of the region’s cities that would put *cities* in control of their collective agenda rather than establishing a centralized government”); Todd Swannstrom, *Regionalism, Equality and Democracy*, 42 URB. AFF. REV. 249 (2006) (noting that “regionalism and localism are not inherently contradictory; they can be complementary”); Edward Zelinsky, *Metropolitanism, Progressivism and Race*, 98 COLUM L. REV. 665 (1998).

253. See David Dante Troutt, *Katrina’s Window: Localism, Re-segregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109 (2008) (discussing how cases like *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Milliken v. Bradley*, 418



sharing his skepticism of local solutions when race and inequality are at issue,<sup>254</sup> and by suggesting that part of a solution may lie in creating regional solutions to regional problems.<sup>255</sup> Specifically, with attention to housing segregation, school funding, and interdistrict funding, Troutt argues that the “New Federalism” and its support of localism effectively ignores and permits the re-segregation of racial minorities and the poor.<sup>256</sup> Troutt calls for regionalism as a remedy, as grounded in federal constitutional guarantees of rights.<sup>257</sup>

In the briefest terms, under the move toward an “immigration regionalism,” the federal government would create federal immigration regions and a governance structure of regional immigration councils. The councils would incorporate representatives of federal, state, and local governments, as well as private sector interests from affected industries and civil society groups (e.g., regional economic councils, labor organizations, etc.), legal permanent residents, and perhaps even elected representatives of the other NAFTA nations. The councils would provide: a political forum for participatory input; a clearinghouse for gathering, assessing, and disseminating information (with appropriate safeguards to protect individual rights and protect privacy) about regional migration trends, labor patterns, immigrant crime statistics, etc.; and, a blue-ribbon think-tank for policy recommendations on labor and jobs as well as other subnational and national immigration-related matters. Council appointments would come from the Executive, with input from the heads of the executive departments. Stakeholders might be allocated a seat or single vote, or a mix of appointed and elected representatives might be appropriate so long as the structure provides a public forum for input of information and views as well as federal oversight to ensure even-handedness. In order to protect individual rights and

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U.S. 717 (1974), effectively foreclosed federal courts from approaching and remedying racial segregation in housing via exclusionary local zoning ordinances, dramatically unequal funding between public school districts based on the presence or absence of good tax rate; and, addressing school re-segregation by foreclosing interdistrict busing remedies). While state courts have risen to the occasion to implement schemes such as District Power Equalization in cases such as *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), arguably Congress might act to create or make available to courts an “Equitable Regionalism” to find solutions to these problems on a regional, rather than local basis.

254. See Troutt, *supra* note 253, at 1110-17 (suggesting that the Katrina disaster and aftermath exposed the almost complete inability of localism to respond to racial inequality; and, arguing that a regional approach would have also been desirable and preferable to the inadequate federal response, but that no regional infrastructure/coordination then existed).

255. *But see* Wishnie, *supra* note 133, at 552-58 (finding states and localities both unsatisfactory in terms of protecting federal civil rights of undocumented immigrants).

256. See Troutt, *supra* note 253, at 1145.

257. See *id.* at 1171.

privacy, the immigration regional offices would need to be completely separate from ICE, but could connect with other executive departments and offices. To the extent that such regional immigration councils would have “power,” it would come from voluntary compliance and their ability to make grants.

There are not many precedents for such regional bodies, but there are some: the Tahoe Regional Planning Agency,<sup>258</sup> the Bonneville Power Administration,<sup>259</sup> the Tennessee Valley Authority,<sup>260</sup> and the Port Authority of New York-New Jersey<sup>261</sup> are all interjurisdictional bodies tasked with finding solutions to power, environmental, and transportation problems.<sup>262</sup> Other examples of relatively successful regional planning include Portland

258. *See People ex. rel. Younger v. County of El Dorado*, 487 P.2d 1193 (Cal. 1971) (upholding the Tahoe Regional Planning Compact against claims that it violated the California Constitution) (“Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development. In an imaginative and commendable effort to avert this imminent threat, California and Nevada, with the approval of Congress . . . entered into the Tahoe Regional Planning Compact (Compact) . . . . The basic concept of the Compact is a simple one—to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population . . . without destroying the environment. To achieve this purpose, the Compact establishes the Tahoe Regional Planning Agency with jurisdiction over the entire region . . . [which] has been given broad powers to make and enforce a regional plan of an unusually comprehensive scope. . . . The agency is given the power to ‘adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional’ . . . plan. While ordinances so enacted establish minimum standards applicable throughout the region, local political subdivisions may enact and enforce equal or higher standards.”).

259. The Bonneville Power Administration was created in 1937 by Congress to generate power from the Columbia River and to transmit and market that power. *See* Bonneville Power Administration Website, <http://www.bpa.gov/corporate/> (last visited Sept. 30, 2010).

260. Congress created the Tennessee Valley Authority (TVA) to provide environmental and economic development in the Tennessee Valley. *See generally* RICHARD A. COLIGNON, *POWER PLAYS: CRITICAL EVENTS IN THE INSTITUTION OF THE TENNESSEE VALLEY AUTHORITY* (1997); WALTER L. CREESE, *TVA’S PUBLIC PLANNING: THE VISION, THE REALITY* (1990) (stressing TVA’s utopian goals); ERWIN C. HARGROVE, *PRISONER OF MYTH: THE LEADERSHIP OF THE TENNESSEE VALLEY AUTHORITY, 1933-1990* (1994); PRESTON J. HUBBARD, *ORIGINS OF THE TVA: THE MUSCLE SHOALS CONTROVERSY, 1920-1932* (1961); *TVA FIFTY YEARS OF GRASS-ROOTS BUREAUCRACY* (Erwin C. Hargrove & Paul K. Conkin eds., 1983).

261. The Port Authority of New York and New Jersey is a bi-state port, established in 1921 through interstate compact to operate most of the regional transportation infrastructure within the two states. *See* Port Authority of New Jersey Website, <http://www.panynj.gov> (last visited Sept. 30, 2010).

262. *See generally* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 184-85 (1991) (“These shadow governments have powers far beyond those ever granted rulers in this country before. . . . [and] the general public almost never gets the opportunity to vote its leaders out of office . . . .”). Granted the question is whether the creation of interjurisdictional regional bodies would be just another “shadow government” with little accountability and lots of mission drift. This is clearly a concern that must be addressed in terms of administrative transparency and clear communication of objectives and implementation.

Metro,<sup>263</sup> the Georgia Regional Planning Authority,<sup>264</sup> and the K-12 education revenue sharing model amongst the seven counties in the Minneapolis-St. Paul area.<sup>265</sup> On the federal level, the Environmental Protection Agency (EPA) has various field offices that monitor environmental conditions and issues within and across different regions.<sup>266</sup> In addition, many have suggested forms of regionalism to address region-wide funding related to affordable housing, school financing and racial segregation. Regions and regionalism may well be implicated in the immigration context too, and may

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263. But note that Portland Metro is less a planning agency than a home rule chartered local government covering four counties and over twenty cities. See GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* (1992); Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, 8 HOUSING POL'Y DEBATE 11 (1997). But see Gregg Easterbrook, *Comment on Karen A. Danielsen, Robert E. Lang, & William Fulton's "Retracting Suburbia: Smart Growth and the Future of Housing,"* 10 HOUSING POL'Y DEBATE 541 (1999) (taking issue with Portland's limits on growth). See generally AM. PLANNING ASS'N, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, PHASES I AND II*, at vii-ix, xii-xiii, xxx-xxxii (Interim ed. 1998) ("Many people sense that we are caught in a race against time. We must regain control over the impact of growth, decline and change on our quality of life. We must give people new choices concerning housing, employment, transportation and the environment. The stakes in this quest are high . . . . The future is closing in . . . . We must grow in a smarter way.").

264. The population in Atlanta has doubled since 1970 and Gwinnett County, north of Atlanta had the top population growth of any county in the U.S. in the 1980s. Increased road congestion and related airshed deterioration led to establishment of the Georgia Regional Transportation Authority by Governor Roy Barnes and the Georgia legislature. Georgia Regional Transportation Authority Act, S.B. 57, 145th Gen. Assem. Sess., 1999 Ga. Laws 112; see also Arthur Nelson, *New Kid in Town: The Georgia Regional Transportation Authority and Its Role in Managing Growth in Metropolitan Georgia*, 35 WAKE FOREST L. REV. 625 (2000); Orlyn Lockard, Note, *Solving the "Tragedy": Transportation, Pollution and Regionalism in Atlanta*, 19 VA. ENV'T'L L.J. 161 (2000).

265. MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 189-96 (2002) (describing how the Minnesota legislature abolished several special authorities and vested the Metropolitan Regional Council for Minneapolis-St. Paul—comprising more than 159 municipalities and seven counties—with direct operational control over certain regional matters). The Minnesota legislature also passed a state fiscal disparities law in 1971 that required all taxing jurisdictions in the Minneapolis-St. Paul region to contribute forty percent of their post-1971 increases in assessed value of commercial and industrial property into a regional fund, with distributions made to local governments based on their population and tax capacity. See generally DAVID RUSK, *INSIDE GAME/OUTSIDE GAME* 222-48 (1999); MARGARET WEIR, *COALITION BUILDING FOR REGIONALISM*, in *REFLECTIONS ON REGIONALISM* 127 (Bruce Katz ed., 2000). But see Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000).

266. The EPA, for example, has ten regions, each of which is responsible for several states and areas within those states. See generally *EPA Regional Environmental Information Website*, ENV'T'L PROTECTION AGENCY, [www.epa.gov/ow/region.html](http://www.epa.gov/ow/region.html) (last visited Sept. 30, 2010).

create opportunities for political and institution building between different communities facing these issues.<sup>267</sup>

“Immigration regionalism” would feature several important commitments and aims toward specific salutary consequences. Let us highlight just a few here. First, “immigration regionalism” would seek to move the immigration reform debate beyond the question of state power versus federal power that has taken center stage with the Rehnquist’s Court’s so-called “New Federalism.”<sup>268</sup> The structural innovation of federal immigra-

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267. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A LOOK TO THE NORTH: CANADIAN REGIONAL, SUBSTATE REGIONALISM AND THE FEDERAL SYSTEM (1974); METROPOLITAN GOVERNANCE: AMERICAN-CANADIAN INTERGOVERNMENTAL (Donald N. Rothblatt & Andrew Sancton eds., 1994); ORFIELD, *supra* note 265; C. JAMES OWEN & YORK WILBURN, GOVERNING METROPOLITAN INDIANAPOLIS: THE POLITICS OF UNIGOV 22-23 (1985); PERSPECTIVES (Institute of Governmental Studies Press 1993); REFLECTIONS ON REGIONALISM (Bruce Katz ed., 2000); REGIONAL POLITICS: AMERICA IN A POST-CITY AGE (H.V. Ravitch & Donald Vogel eds., 1996); Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL’Y 505, n.292 (2002); Richard Gustely, *The Allocational and Distributional Impacts of Governmental Consolidation: The Dade County Experience*, 14 URB. AFF. Q. 349 (1977); Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483 (2007); Kenneth A. Brunetti, Note, *It’s Time to Create a Bay Area Regional Government*, 42 HASTINGS L.J. 1103 (1991). See generally GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 97-109 (1999) (“The purpose of establishing such a regional legislature would not be to enable it to act as a regional government. The purpose instead would be to create a democratic version of the idea of regional planning embodied in federal legislation of the 1960s and 1970s. These federal statutes sought to inject a regional voice into local decision making by requiring local decisions to be consistent with a regional plan. Congress hoped that such a requirement would overcome the selfish pursuit of local self-interest by forcing each locality to consider the impact of its actions on the region as a whole. . . . The object was not to have regional bodies replace local decision making but to require localities, when making their decisions, to take the interests of other localities within the region into account.”).

268. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that an individual may not sue the state in federal court under the ADA of 1990 because it would mean that states’ immunity would invalidly abrogate their immunity under the Eleventh Amendment); *United States v. Morrison*, 529 U.S. 598 (2000) (concluding that Congress lacked the authority to enact the civil remedy provision of VAWA under the Commerce Clause or 14th Amendment and that it was outside the federal government’s remedial power); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not use its Article I powers to destroy states’ sovereign immunity given by the 10th Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (explaining that while Congress may require the federal government to regulate commerce directly, in this case, by performing background checks on applicants for handgun ownership, the Necessary and Proper Clause does not empower it to compel states to fulfill its federal tasks); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (concluding that the Indian Commerce Clause did not give the federal government the authority to abrogate the states’ sovereign immunity through the gaming act); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Zoning Act was unconstitutional because it went beyond the power of Congress to regulate commerce); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress’ “take title” provision of the Radio Active Policy Amendments Act was impermissibly coercive and threatened state sovereignty); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (concluding

tion regions would also serve to coordinate and moderate local and state responses to the perceived “immigration crisis,” and to set policy according to regional needs and forward-looking interests as within constitutional parameters. “Immigration regionalism” would allow various stakeholders to have input into the formulation of rules and policy, but the input and processes would be bureaucratic and administrative rather than legislative.<sup>269</sup> This adaptation somewhat “splits the difference” between a purely federal approach and subnational ones wherein legislators and voters may try to take matters into their own hands in the form of dangerous, over-reaching self-help measures on “illegal immigration” that impinge upon an exceptionally complex federal regulatory scheme<sup>270</sup> and use legislative and law enforcement mechanisms for illegitimate applications or constitutionally-suspect ends. Regional immigration councils could provide important prophylactic measures against Arizona- and Hazleton, Pennsylvania-styled attempts to use punitive measures and force federal, state, and local law enforcement officers and administrations, and even private actors, into quasi-deputized subnational immigration enforcement roles.<sup>271</sup> While it is likely true that the federal, state, and local branches of government are currently too far apart in our system of immigration federalism, subnational self-help measures wrongly presume that immigration laws are simple and self-

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that under the Commerce Clause, Congress can extend the Fair Labor Standards Act, requiring state and local governments to provide minimum wage and overtime pay to their employees); *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (ruling that Congress could not exercise its power under the Commerce Clause to force choices upon states that they believed were essential in the way they executed their governmental functions).

269. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005) (proposing “a permanent advisory commission, authorized to draft bills for legislature to consider under a closed-rule procedure, or for the citizenry to address by referendum”); Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787 (2010) (proposing that Congress address the dysfunctions of the immigration system by adopting a new approach on its institutional design; this would include a shift in “certain decisions from the exclusive control of the legislative process to the realm of administrative law and process”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1576 (1992) (“With proper restraints on bureaucratic decision making . . . the administrative state holds the best promise for achieving the civic republican ideal of inclusive and deliberative lawmaking.”).

270. See KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW, at iii (2009) (“Only the much-maligned Internal Revenue Code rivals the intricate, lengthy, and frequently obtuse Immigration & Nationality Act of 1952, which is the centerpiece of American immigration law.”); see also *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”) (citation omitted); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (stating that U.S. immigration laws resemble “King Minos’s labyrinth in ancient Crete”).

271. See Keith Aoki et al., *(In)visible Cities*, *supra* note 60, at 499-501 (explaining problems with Hazleton-style approach).

educating rather than a complex mix of discretionary powers about resource allocation and other decision-making. An “immigration regionalism” could help to alleviate or even prevent this problem.

Second, regional solutions may serve to curtail the harshness of second-order borders in terms of unequal access to and distribution of resources while also easing pressure on the federal government in terms of maintaining and defining first-order national borders.<sup>272</sup> Currently, a gulf between first- and second-order borders has been emerging that seems unbridgeable. As Professor Rick Su has pointed out, noncitizen migration into and out of the United States and the movement of immigrants within the United States implicate different borders, as well as boundary differences between regulating immigration and regulating immigrants (either under laws of general applicability or under alienage law); many problems arise from confusing these two different layers of regulatory power and conflating these boundaries. Traditionally, second-order borders have been used to buttress the autonomy of local governments, and on the federal level have been upheld repeatedly against challenges in cases such as *Milliken v. Bradley*,<sup>273</sup> *San Antonio v. Rodriguez*,<sup>274</sup> and *Village of Arlington Heights*.<sup>275</sup> They have not, however, been implicated in immigration policy. To the extent that the economic and social internal lines drawn and maintained by municipalities and other local governments serve to exacerbate inequalities, they also serve to heighten pressure on federal first-order national boundaries. Immigration regionalism may provide a way to build a reasoned, reasonable bridge between the first-order national borders and second-order state and local government borders.

Third, a federally structured system that generates and analyzes labor statistics could provide an empirically derived baseline for determining national and regional employment needs and labor demands, in both the short- and long-term.<sup>276</sup> At the very least, the production and circulation of reliable data about labor migration would help focus the policy debates on desirable levels, rather than on unsubstantiated and rhetorically heated claims about threats posed by immigration. Spending precious public re-

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272. First-order borders pertain to entry into the country; second-order borders pertain to states, counties, localities and entities such as school districts.

273. *Milliken v. Bradley*, 418 U.S. 717 (1974) (interdistrict school busing).

274. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (challenge to drastically unequal K-12 public school funding).

275. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (challenge to exclusionary zoning).

276. For a related and potentially complementary approach to these concerns, see *Rodriguez*, *supra* note 269, at 821 (proposing the congressional creation of an executive branch agency with delegated powers and significant independence to set labor visa policy).

sources on information-gathering, forecasting, and policy implementation to take advantage of labor migration would be a more productive use of scarce funds than would using them to attempt to track and remove undocumented workers by the hundreds of thousands and millions. Rather than drawing a bright line between federal and state/local policy areas, decision-makers from each level of government and across the public and private sectors come together to solve problems with the federal government providing the leadership and supervision. By breaking labor, housing, and other markets into immigration regions, there is great potential for more sensitivity to local conditions, greater accountability and rationality in immigration policy, and more state and local sensibility about the regulation of immigrants (not state and local interference in matters of who gets to come into or stay within the United States).

Fourth, a regionally-sensitive immigration policy making and implementation structure could provide crucial federal oversight for promising experimental approaches to addressing regional needs and then replicating and adapting successful practices to national implementation.

One likely candidate is Utah's "Golden Spike Initiative,"<sup>277</sup> which blends localism and transnationalism and proposes a kind of national and transcontinental unification through targeted labor-based immigration to advance commerce interests. Under this proposal, Utah would work with individual Mexican states to help fill Utah's private-sector employment needs.<sup>278</sup> The state would handle regulatory responsibilities, with Utah issuing guest worker cards and driving permits, and the Mexican states handling employment applications and background screening processes.<sup>279</sup> Although this is an intriguing proposal, as presented it would encroach on a federal prerogative and contribute to a patchwork of laws. Thus, the Utah proposal would require federal permission. An "immigration regionalism" would provide appropriate mechanisms for bringing forth, tailoring, and implementing such innovations, and indeed replicating good practices, in constitutionally permissible ways that support federal policy aims.

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277. It should be acknowledged that, as with efforts to revive "The New Colossus," the "Golden Spike" metaphor retrieves a piece of nineteenth century Americana that recalls an extremely rough period in American history for many immigrants (Chinese immigrant workers, in particular), not to mention indigenous populations. See *Utah's Immigration Debate—A Better Way: Utah May Offer a Better Model Than Arizona for Dealing With Illegal Immigration*, ECONOMIST, Aug. 5, 2010, available at <http://www.economist.com/node/16743623> (describing Utah's Attorney General's plan for controlling immigration from Mexico; the idea is to create a guest worker program that can be controlled by the state).

278. See *id.*

279. See *id.*

Fifth, if one takes seriously Professor Gerald Frug's ideas regarding regional governance, an "immigration regionalism" could relieve destructive interjurisdictional competition on issues of housing and education, thus creating common ground for dialogue between groups that often find themselves pitted against one another.<sup>280</sup> Similarly, regional immigration councils could be empowered to access the federal purse to return federal income taxes paid by undocumented immigrants to communities that are under stress from such immigration.<sup>281</sup>

Sixth, the immigration regionalism framework would be federally created and overseen. Thus, the new framework would work within and reaffirm the view that "[s]ince 1875, the federal government has comprehensively regulated immigration."<sup>282</sup> Yet the new framework also dissolves views of immigrants (be they legal permanent residents or undocumented or unauthorized immigrants) as *solely* a federal population.<sup>283</sup> The work of Rick Su,<sup>284</sup> Cristina Rodriguez,<sup>285</sup> and Hiroshi Motomura,<sup>286</sup> in

280. See Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 61 (2008) ("Conflicts between African Americans and immigrants, particularly Latina/o immigrants, unfortunately are nothing new.").

281. CONG. BUDGET OFFICE, *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 6-7* (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf> (reporting the estimated amount that unauthorized immigrants pay in state and federal taxes); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 4 (2006) ("Undocumented immigrants, like all citizens and residents of the United States, are required to pay taxes."); Ruben Navarrette Jr., *Illegal Immigrants and Social Security*, SAN DIEGO UNION TRIB., Apr. 10, 2005, available at [http://www.signon.sandiego.com/uniontrib/20050410/news\\_mz1e10ruben.html](http://www.signon.sandiego.com/uniontrib/20050410/news_mz1e10ruben.html) ("If not for the billions in payroll taxes that illegal immigrants are paying into the system, the funding crisis facing Social Security would be much more serious and much more imminent."); Eduardo Porter, *Illegal Immigrants are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, at A1, available at <http://www.nytimes.com/2005/04/05/business/05immigration.html>.

282. See JOHNSON ET AL., *UNDERSTANDING IMMIGRATION LAW*, *supra* note 270, at 105.

283. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (upholding penalties on employers for employing undocumented immigrants, but nonetheless reaffirming that the federal power over immigration was exclusive; "[p]ower to regulate immigration is unquestionably exclusively a federal power").

284. See Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1623 (2008) ("[L]ocal efforts to address immigration are largely considered to be illegal, undesirable, or ineffective, if not denounced as an impermissible infringement on the federal government's broad plenary powers over immigration.").

285. See Rodriguez, *supra* note 61, at 570 (stating that immigration control is the exclusive responsibility of the federal government, and that this "exclusivity principle has become deeply entrenched in constitutional and political rhetoric").

286. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729 (2010) ("Today's prevailing view of immigration federalism [is] that federal immigration regulation displaces any state laws on the admission and expulsion of noncitizens.").



particular, attends to the overlap of federal exclusivity over regulating the conditions of entry and removal of immigrants with the simultaneous residency of immigrants of whatever legal status. While we acknowledge and welcome this settled constitutional principle that immigration regulation and enforcement are federal powers, this principle does not alter the fact that immigrants are also residents of the places where they live, work, own businesses, attend school, raise families, pay taxes,<sup>287</sup> attend religious services, receive public services, participate in their communities, and have other meaningful ties.<sup>288</sup> In other words, *immigrants are people too*. In recognition of this reality, cities like San Francisco,<sup>289</sup> Oakland,<sup>290</sup> and New Haven<sup>291</sup> have implemented municipal identification card systems, with ID cards made available to all city residents regardless of immigration

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287. See CONGRESSIONAL BUDGET OFFICE, *supra* note 281; Lipman, *supra* note 281; see also IMMIGR. POL'Y CTR., UNDOCUMENTED IMMIGRANTS AS TAXPAYERS (2007); Travis Loller, *Many Illegal Immigrants Pay Up At Tax Time*, USA TODAY, Apr. 11, 2008, available at [http://www.usatoday.com/money/perfi/taxes/2008-04-10-immigrantstaxes\\_N.htm](http://www.usatoday.com/money/perfi/taxes/2008-04-10-immigrantstaxes_N.htm) (reporting on the fact that undocumented immigrants do pay taxes that benefit the Medicare and Social Security programs); Alberto Ponce de Leon, *Undocumented Immigrants Pay More in Taxes Than They Receive in Benefits*, EL DIARIO DEL EL PASO (May 3, 2010), <http://www.truth-out.org/undocumented-immigrants-pay-more-taxes-than-they-receive-benefits59264> (“During their working life, undocumented immigrants in the United States will pay, on average, approximately \$80,000 more in taxes per capita than they use in government services.”).

288. See MOTOMURA, *supra* note 206, at 81.

289. See Wyatt Buchanan, *S.F. Supervisors Approve ID Cards for Residents*, S.F. CHRON., Nov. 14, 2007, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/11/14/BAB9TBP5H.DTL> (announcing that the Board of Supervisors voted to issue ID cards to all city residents regardless of the immigration status); Cinnamon Stillwell, *San Francisco ID Program: Legitimizing Illegal Immigration*, S.F. GATE, Nov. 28, 2007, available at [http://articles.sfgate.com/2007-11-28/opinion/17267855\\_1\\_illegal-immigration-id-cards-cards-as-valid-identification](http://articles.sfgate.com/2007-11-28/opinion/17267855_1_illegal-immigration-id-cards-cards-as-valid-identification) (noting both sides of the arguments on the debate to issue ID cards to all residents regardless of immigration status—some believe that this measure is legitimizing the undocumented immigration).

290. See Anna Gorman, *Oakland to Offer Identification Cards for Illegal Immigrants*, L.A. TIMES, June 5, 2009, available at <http://articles.latimes.com/2009/jun/05/local/meidcard5> (reporting on the passage of the city ID card that would be accessible to the illegal immigrants, similar to what the City of San Francisco passed in 2007); Mathai Kuruvila, *Oakland Proposes ID Cards for Undocumented*, S.F. GATE, May 27, 2009, available at [http://articles.sfgate.com/2009-05-27/bay-area/17202449\\_1\\_card-identification-oakland-police-department](http://articles.sfgate.com/2009-05-27/bay-area/17202449_1_card-identification-oakland-police-department) (discussing the ID card measure that Oakland's city council proposed and the debate on the issue—“the card would encourage crime victims and witnesses to come forward,” others say that “[w]hat it conveys to everyone in the community—whether it's immigrants, employers or anyone else—is that the city of Oakland does not take federal immigration law seriously”).

291. See Melissa Bailey, *City ID Plan Approved*, NEW HAVEN INDEPENDENT, June 5, 2007, available at [http://newhavenindependent.org/archives/2007/06/city\\_id\\_plan\\_ap.php](http://newhavenindependent.org/archives/2007/06/city_id_plan_ap.php) (reporting on the passage of the city ID card measure in New Haven); Lucy Nalpathanchil, *Illegal Immigrants to Get ID Cards in Connecticut*, REUTERS, July 22, 2007, available at <http://www.reuters.com/article/idUSN2227446920070723> (reporting that New Haven is the first city to issue local ID cards to undocumented immigrants);

or citizenship status. The card systems typically provide or increase cardholder access to a variety of public and private sector facilities and services, and encourage cardholder utilization of law enforcement services.<sup>292</sup>

Should others seek to take “immigration regionalism” from idea to implementation, we would be remiss if we did not offer some caveats and point out some potential pitfalls that warrant careful consideration and planning. Some are rather obvious and general concerns, like dangers of “mission creep” or particular stakeholders finding ways to “game the system.” Skepticism about the wisdom and value of inserting another level of government, and public apathy toward regional planning (even to the point of underfunding so they become superfluous) are also likely to arise. Thus, institutional and procedural design, including commitments to transparency and participatory input, would be of great importance. These commitments are upheld, in part, by clarifying why and how certain types of decisions are made and taking input as to possible changes and modifications in law and policy.

Another concern is that “immigration regionalism” is only successful if it can really help to solve specific puzzles and avoid replicating them, and if it meets the threshold of justice and non-discrimination concerns, reform principles, and bureaucratic and adjudicatory improvements as discussed in the preceding sections. For example, “immigration regionalism” must help to reform the relationship between immigration policy and the regulation of immigrants, and help break the logjam over the presence and status of the estimated twelve million undocumented persons already in the United States. Although simplification of immigration law and policy is not an immediately evident by-product of an immigration regionalist approach, of crucial importance is that movement between immigration regions be free rather than restricted. Adding yet another layer of borders and border crossings within the United States would reinforce rather than meliorate the salience of borders in terms of labor migration, thus undermining simplification and other comprehensive reform desiderata. If the regional immigration councils lack enforcement powers, there is a danger of creating balkanized regional zones with new levels of “documentation” requirements—this is just to repeat, on a grander scale, one fold of the Amerizona prob-

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292. See Emily Bazar, *Illegal Immigrants are Issued ID Cards in Some Places*, USA TODAY, Oct. 4, 2007, available at [http://www.usatoday.com/news/nation/2007-10-03-Immigrant\\_N.htm](http://www.usatoday.com/news/nation/2007-10-03-Immigrant_N.htm) (noting that municipal ID cards and driver’s licenses are being issued to undocumented immigrants by some states); see also Mark Scheerer, *ID Cards for Illegal Immigrants a Good Thing?*, PUB. NEWS SERVICE (May 20, 2010), <http://www.publicnewsservice.org/index.php?/content/article/14074-2> (explaining how some local governments issue ID cards to the illegal immigrants in order to help them function within the society).

lem. For reasons discussed by Professor Johnson, an “open borders”-styled labor migration model similar to the European Union might be adaptable for American purposes, particularly if regional forecasts were able to take account of differences. Similarly, “immigration regionalism” would need to take account of the importance of consistency such that immigrants from one region are not materially disadvantaged in comparison to other regions.

#### CONCLUDING REMARKS: WHICH IS THE WAY FORWARD?

After the unfinished duel in the Arizona desert, in early September 2010 the Third Circuit Court of Appeals upheld a lower court’s decision in *Lozano v. Hazleton* to enjoin permanently the City of Hazleton from implementing its “illegal immigration” employment and housing ordinances.<sup>293</sup> The court determined that the employment provisions are unconstitutional as preempted by federal law because they stand as an “obstacle to the accomplishment and execution of federal law”;<sup>294</sup> the housing provisions also are preempted as an impermissible regulation of immigration.<sup>295</sup>

Yet at the end of this long hot summer of immigration debate, we conclude by asking our readers for their guidance. Which way leads out of the immigration impasse, away from “dystopian dreams” and toward a “usable future”? Is it the status quo of twelve million undocumented persons living in limbo, permanently vulnerable to the forces of demagoguery and political opportunism, now with their U.S.-born children targeted in the birthright citizenship debate? Is it federal “enforcement now, enforcement forever,” as voiced by Homeland Security Secretary Janet Napolitano, or, more stringently, a modernized restyling of the Immigration Act of 1924? Is it a Commerce Clause nightmare of patchwork immigration regulation, driven by “states’ rights” and the “New Federalism”? Is it a “New Jim Crow,” in which temporary workers—who are marked as “other” by race, nationality, language, gender, class, employment status, and vocation—form a permanently disenfranchised underclass with no chance of legal permanent residence or citizenship? Is it admission based on national origins, not as in decades and centuries past, but out of concern for leveraging America’s economic dynamism through immigration and “the New Localism”? Conversely, is it denial of admission based on national origins, out of concern to advance global human and economic development by preventing “brain drain” and other resource drains? Is it regularization and expansion of pathways to legal permanent residence and citizenship for

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293. *Lozano v. City of Hazleton*, No. 07-3531, 2010 U.S. App. LEXIS 18835, at \*153 (3d Cir. Sept. 9, 2010).

294. *Id.* at \*106-07.

295. *Id.* at \*135.

those who can “go to the back of the line” and “get right with the law”? Is it open borders (with free passage of immigrants) or modified open borders (subject to national security and public safety concerns), so that labor supplies can follow jobs and labor demands—both into, and once within, the United States? Is it, in the end, the introduction of an “immigration regionalism” to help answer these questions? Is “immigration regionalism” an idea whose time has come?

