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## Political Economy of State and Local Immigration Regulation: comment on Olivas and Hollifield, Hunt & (and) Tichenor, The

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# THE POLITICAL ECONOMY OF STATE AND LOCAL IMMIGRATION REGULATION: COMMENTS ON OLIVAS AND HOLLIFIELD, HUNT & TICHENOR

*Karen Engle\**

ON September 26, 2007, the *New York Times* reported that Riverside, New Jersey had rescinded its year-old ordinance penalizing anyone who employed or rented to an undocumented immigrant. The ordinance had apparently been too successful in its attempt to decrease the number of undocumented residents, with consequences few of its supporters had imagined:

Within months, hundreds, if not thousands, of recent immigrants from Brazil and other Latin American countries had fled.

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With the departure of so many people, the local economy suffered. Hair salons, restaurants and corner shops that catered to the immigrants saw business plummet; several closed. Once-boarded-up storefronts downtown were boarded up again.

Meanwhile, the town was hit with two lawsuits challenging the law. Legal bills began to pile up, straining the town's already tight budget. Suddenly, many people—including some who originally favored the law—started having second thoughts.

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"I don't think people knew there would be such an economic burden," said Mayor George Conard, who voted for the original ordinance.<sup>1</sup>

But apparently not everyone relented. Some residents continued to support the ban, even with its negative economic consequences.<sup>2</sup> Charles Hilton, the former mayor who had backed the ordinance explained: "It

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\* Cecil D. Redford Professor in Law & Director, Rapoport Center for Human Rights and Justice, University of Texas. Thanks to George Martinez and the SMU Law Review for facilitating an enriching symposium, and to James Hollifield and Michael Olivas for the panel discussion at the symposium. I am also grateful to Josh Clark and Barbara Hines for their comments on an earlier draft of these remarks and to Matthew Dunlap and Christine Turner for their research assistance.

1. Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

2. *Id.* ("Some residents who backed the ban last year were reluctant to discuss their stance now, though they uniformly blamed outsiders for misrepresenting their motives. By

changed the face of Riverside a little bit. . . . The business district is fairly vacant now, but it's not the legitimate businesses that are gone. . . . It's all the ones that were supporting the illegal immigrants, or, as I like to call them, the criminal aliens."<sup>3</sup> For the former mayor, it would seem, businesses owned, operated by, or even with a clientele of undocumented residents are to be compared with illegal drug or other criminal enterprises.

I would like to use the papers presented by Michael Olivas<sup>4</sup> and James Hollifield<sup>5</sup> to consider whether the forces behind the Riverside ordinance, the operation of the ordinance itself, the rescission of it, and the reaction to the rescission are best characterized as "political" or "economic." Both papers offer us entry points into this question. In particular, the papers account for, in very different ways, economic and non-economic political factors that have historically fed and continue to feed into immigration policy at the federal level (Hollifield)<sup>6</sup> as well as the state and local levels (Olivas).<sup>7</sup> Both papers make significant contributions in a number of areas, but I will try to bring them together around a discussion of their understandings of the extent to which political versus economic factors drive immigration. I am interested both in the different ways the political and economic interact in the context of immigration policy and in what gets labeled "political" as opposed to "economic."

As a starting point, it should be noted that comparing the papers is difficult at one very basic level. Hollifield's immigration flow data only legal forms of immigration, while Olivas's paper considers ways in which state and local entities treat their residents that are presumed to be undocumented. In this sense, the Riverside discussion ties in more directly to Olivas's paper. Yet, I hope to suggest some ways in which these two papers nevertheless speak to each other in the context of considering Riverside and similar cases.

It seems to me that political and economic arguments were made on all sides of the debate in Riverside. Sometimes the economic and political interests were aligned (and inextricably intertwined). Other times, they were in tension, so that one had to forego an efficient market position to maintain a restrictionist position on immigration. I have to admit that I enjoy watching efficient market/restrictionist advocates struggle with the contradiction that sometimes surfaces in their position.

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and large, they said the ordinance was a success because it drove out illegal immigrants, even if it hurt the town's economy.")

3. *Id.*

4. Michael Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008).

5. James F. Hollifield, Valerie F. Hunt & Daniel J. Tichenor, *The Liberal Paradox: Immigrants, Markets and Rights in the United States*, 61 SMU L. REV. 67 (2008). James Hollifield presented the paper at the conference on behalf of his colleagues. When I reference Hollifield in the text, I am referring to this jointly authored paper.

6. *Id.* at 68–71.

7. Olivas, *supra* note 4, at 105–06.

While in Dallas for this symposium, I conducted a few informal interviews with some Anglo residents of the Dallas metroplex about the recent and controversial ordinances in the nearby municipalities of Farmers Branch and Irving.<sup>8</sup> Speaking of the Farmers Branch ordinance, one Dallas resident told me: “All it does is prevent apartment owners from renting to illegal aliens.” He and another person continued to explain to me how—based on their own anecdotal evidence, from a relative who works in an emergency room—“illegal aliens” use the vast majority of the area’s public services, at least emergency health services.

One of the people with whom I was speaking is a CPA at a large accounting firm and considers himself to be a fiscal conservative. I decided to appeal to his pro-business side. I asked whether he believed that landlords should have their property rights trammled in such a way. I also asked if he had heard about what had happened in Riverside, New Jersey. He was at first surprised to hear that Riverside had rescinded its ordinance. But, when he heard the economic reasons for the decision, he immediately understood. As I began to make headway, he said he could now understand why President Bush is, as he put it, so “far to the left” on immigration. I discussed with him how Bush was supported in his guest-worker proposal by many with business interests. I used some of what I had read in Hollifield’s paper to explain some of the unpredictable alliances formed around and against certain immigration policies. Another person chimed in that “Texas would die without illegal immigrants.” By the end of the conversation, it seemed my interviewees were questioning the utility and efficiency of ordinances such as those in Farmers Branch. I even had them considering how, if employers were required to provide insurance to their undocumented workers, the workers would not need to resort to the emergency room for everyday health issues. Providing benefits for such jobs, I suggested, might in fact have the consequence of making those same jobs more appealing to non-immigrant workers, thus reducing economic pull factors for people to cross the border.

It appeared that my appeal to pro-business interests had worked. But there is a way in which I always feel a bit disingenuous about making that appeal. It downplays important substantive issues both about labor exploitation and about why it is so often assumed that human rights, including the guarantee of basic health services, should be dependant upon which side of any given border one might have originated. Although I

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8. The Farmers Branch ordinance requires landlords to verify citizenship or legal immigration status before renting to potential tenants. Landlords are subject to up to \$500 a day for violations of the Ordinance. See Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006). While Farmers Branch set up a system much like employer sanctions, placing the burden of enforcement on private agencies, the City of Irving ordinance attempts to enforce immigration laws more directly. See Press Release, City of Irving, Irving Partners with ICE Through 24/7 CAP, available at <http://cityofirving.org/news-articles/24-7-CAP.html> (creating a “partnership between the Irving Police Department and the U.S. Immigration and Customs Enforcement (ICE) agency. Under the program, Irving jailers notify federal officials if they have an arrested person who may be in the country illegally. If ICE makes a request, the prisoner is held on their authority.”).

was able to slip both of those issues into the discussion about emergency health services, it was clear that such overt arguments were unlikely to be persuasive to this audience. I did not say what I think I believe, which is that, even were it not efficient or pragmatic, we should have open borders, or at least openly porous borders.<sup>9</sup>

Both Hollifield and Olivas offer lenses into this tension between my instincts to make anti-restrictionist arguments on political and justice grounds, on one hand, and economics on the other. I do not want to suggest, of course, that the economic is not political or vice versa. Hollifield and Olivas would likely agree that economic factors have different political importance for different actors.

By analyzing the correlation between certain economic factors (unemployment and GDP) from 1891 to 2003 and legal immigration flows, Hollifield and his co-authors conclude that U.S. immigration policy has had a significant impact on such flows after World War II.<sup>10</sup> They demonstrate this impact by noting increasing legal immigration—facilitated by Congressional action—even in certain periods of economic downturn in the United States.<sup>11</sup> Their paper then delves into an analysis of the roll-call votes in Congress on major immigration legislation in 1965, 1986 and 1990, comparing the results to those on civil rights and trade legislation from the same periods.<sup>12</sup>

The paper does important work that only statistical models can do. By holding GDP and unemployment levels as constants, it is able to consider the extent to which those factors seem to affect legal immigration flows (which are generally a result of U.S. policy decisions).<sup>13</sup> My concerns with the analysis stem from the limitations of statistical models. Economic factors almost certainly affected immigration openness and restrictions during the years the authors suggest prior to World War II, but they cannot easily be separated from “political” factors such as xenophobia fueled by religious, ethnic, and racial bias against particular groups of immigrants. Indeed, sometimes it was the apparent success of certain groups during otherwise economic hard times that fueled restrictions. Direct and indirect discriminatory measures against Chinese immigrants in the late nineteenth century are particularly poignant.<sup>14</sup>

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9. I am sympathetic to most of Kevin Johnson’s proposals in Kevin Johnson, *Opening the Floodgates: Why America Needs to Rethink Its Immigration Laws*, 61 SMU L. REV. 3 (2008), as well as to distributional justice arguments that the U.S. is largely responsible for economic and social conditions that encourage the flow of migration to the north. For the latter argument, see, e.g., Larry van der Linden & Josh Clark, *Economic Migration and Justice*, 18 INT’L J. APPLIED PHIL. 45 (2004).

10. Hollifield, Hunt & Tichenor, *supra* note 5, at 80.

11. *Id.* at 80–83.

12. *Id.* at 89–94.

13. *Id.* at 72–78.

14. For discussion of two such examples, see *The Chinese Exclusion Case*, Chae Chan Ping v. United States, 130 U.S. 581, 589–604 (1889) (upholding the Chinese Exclusion Act of 1882), and *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (striking down a San Francisco ordinance used to refuse permits to Chinese-owned laundries). Although Hollifield’s statistical analysis does not begin until 1891, similar dynamics continued after that date. See

Further, Hollifield admits that the statistical analysis is limited by its exclusive focus on the flows of legal immigration.<sup>15</sup> This focus potentially distorts the analysis. As Linda Bosniak reminded us shortly after the passage of the Immigration Reform and Control Act of 1986 (“IRCA”), undocumented immigrants have for many years played an important role in the United States polity:

Undocumented immigrants . . . have long occupied a unique, deeply ambivalent place in the United States. Despite their vital place in the American economy, this country has deprived them of recognition as members in most contexts, but it has also extended them such recognition in others. . . . They are both outsiders and members, regulated objects of immigration control and subjects of membership in limited but important respects.<sup>16</sup>

More than not attending to undocumented immigration flow, the statistical data provided by Hollifield and his co-authors also do not take into account all attempts to curb immigration, particularly undocumented immigration. IRCA legislation, for example, expanded legal immigration—in part by legalizing large numbers of people already in the United States—but it was also quite restrictionist in terms of future (undocumented) immigration.<sup>17</sup> Indeed, IRCA was a compromise between those favoring and those opposing amnesty;<sup>18</sup> employer sanctions were put into the bill in large part to protect the future of jobs for U.S. workers by attempting to stem the tide of new immigrants.<sup>19</sup> In their coding of the Act and correlation of it to trade legislation from the same time period, however, Hollifield and his co-authors treat IRCA as legislation that demonstrates that those who voted for it were “for” immigration.<sup>20</sup>

Were the restrictionist rather than legalization tendency attended to, it might appear that economic pressures played more of a role than the data otherwise suggest. Hollifield and his co-authors are not unaware of this possible reading:

Economic stagnation and decline in the United States and other receiving countries in the 1970s brought renewed pressure for lower levels of immigration. Yet the push-pull model could not anticipate formidable political resistance from a number of strategically-situated lawmakers and special interests, like the growers in California and the Southwest, who supported large-scale immigration and who postponed policy action during economic hard times by brokering support for a bipartisan commission to study immigration—the Se-

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Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror*, 75 COLO. L. REV. 59, 60–71 (2004).

15. Hollifield, Hunt & Tichenor, *supra* note 5, at 87–88.

16. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956.

17. Catherine L. Menino, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 YALE L.J. 409, 424 (1988).

18. *Id.* at 409.

19. *Id.* at 410.

20. Hollifield, Hunt & Tichenor, *supra* note 5, at 90.

lect Commission on Immigration and Refugee Policy.<sup>21</sup>

In fact, I would argue those economic pressures from the 1970s made their way into political arguments in favor of restricting future immigration in the 1980s. Moreover, this part of Hollifield's piece suggests the need to consider the different economic needs of various parts of the country, something for which his model does not fully account.

Considering various measures that state and local entities have taken to attempt to affect immigration flows, Michael Olivas's paper sheds light on the extent to which attitudes and policies toward immigration and immigrants are in fact often local and regional.<sup>22</sup> Nearly all local measures—whether restrictionist or pro-immigrant—respond to what their proponents see as federal trends that are either too lax (and therefore must be enforced or enhanced at the local level) or too draconian (and therefore must be avoided through the locality serving as a safe haven, or sanctuary, for immigrants).<sup>23</sup> Most of these measures are aimed at the treatment of undocumented workers and residents.<sup>24</sup>

Olivas focuses the majority of his paper on post-secondary education, refuting challenges to decisions by some states to grant in-state residency to undocumented residents. While he notes that most of the states that have granted residency are "major immigrant-receiving states such as Texas, California, Illinois, New Mexico, and New York," other states—Nebraska, Kansas, Oklahoma and Utah—have done so as well, which he finds surprising.<sup>25</sup> Even though he does not explicitly mention economic push/pull factors, the assumption seems to be that at least states with high levels of undocumented immigration have increased economic incentives to provide education to the children of undocumented residents.

For the most part, however, Olivas does not overtly discuss economic factors. Indeed, if Hollifield's paper is in part a call for those who better wish to understand immigration flows to consider non-economic political factors that lead to restrictionist as well as liberal immigration policies, Olivas's paper is a partial response. In considering "the sharp rise" in numbers of local and state bills aimed at restricting immigration, he attributes them to "issues of perceived terrorism threats, overburdened locales, well-publicized and highly polarized federal failures in immigration enforcement," as well as to Lou Dobbs, Bush's fall in approval ratings, and anti-Mexican sentiment.<sup>26</sup>

In fact, a number of people have attempted to identify the precise factors that determine whether states and localities are likely to pass restrictive or pro-immigrant laws (if either). A recent study by S. Karthick Ramakrishnan and Tom (Tak) Wong suggests that political factors—

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21. *Id.* at 81.

22. Olivas, *supra* note 4, at 101–03.

23. *Id.*

24. *Id.*

25. *Id.* at 114–15.

26. *Id.* at 104–05.

“most notably partisan composition and the politicization of national immigration reform legislation at the local level through protests and rallies”—correlate most strongly with both pro-immigrant and restrictive state and local legislation.<sup>27</sup> Although these factors are the most empirically significant in terms of whether proposed ordinances pass, the study by Ramakrishnan and Wong shows that some economic factors, such as the extent to which Blacks are disadvantaged in relationship to Latinos, suggest the likelihood that a restrictive ordinance will be proposed.<sup>28</sup> Moreover, restrictionist policies are more likely to pass in areas where a large percentage of jobs are in agriculture.<sup>29</sup>

Olivas does consider economic factors in response to two of Kris Kobach’s arguments against residency status for undocumented post-secondary education students. Kobach argues that the ability to attend college is a pull-factor in immigration and that granting tuition benefits to undocumented students costs the state millions of dollars.<sup>30</sup> Olivas is not persuaded by either claim.<sup>31</sup>

Kobach’s pull-factor argument suggests that in-state tuition encourages individuals to enter the country illegally so that they or their families can obtain such a benefit.<sup>32</sup> Olivas states that Kobach takes this position “despite evidence to the contrary,” but Olivas does not himself cite the contrary evidence.<sup>33</sup> Olivas suggests that Kobach and his allies are in fact motivated by a “[feeling] that the students should not benefit from their parents’ actions.”<sup>34</sup> Olivas responds with similar incredulity to Kobach’s second argument with regard to the cost incurred by states, which Kobach further maintains violates the provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) that prohibits states from granting certain postsecondary education “benefits” to aliens “not lawfully present in the United States.”<sup>35</sup> Olivas reads the statute so as not to prohibit the granting of tuition residency by claiming that the benefit is “non-monetary.”<sup>36</sup> He argues that because “[t]o educate an undocumented student costs a state or institution no more than it does to educate a native born citizen or other non-resident,” Kobach “miscon-

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27. S. KARTHICK RAMAKRISHNAN & TOM (TAK) WONG, IMMIGRATION POLICIES GO LOCAL: THE VARYING RESPONSES OF LOCAL GOVERNMENTS TO UNDOCUMENTED IMMIGRATION 22 (Nov. 9, 2007), <http://www.law.berkeley.edu/centers/ewi/Ramakrishnan&Wongpaperfinal.pdf>

28. *See id.* at 20 (“Higher levels of black disadvantage relative to Latinos is associated with a slightly higher likelihood of proposing restrictionist legislation. These results are in line with Claudine Gay’s (2006) findings in Los Angeles neighborhoods, where economic competition between blacks and Latinos erodes African American support for policies favorable to Latinos.”).

29. *Id.*

30. Kris Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 473, 477, 517–21 (2006-07).

31. Olivas, *supra* note 4, at 101–03.

32. Kobach, *supra* note 30, at 498–503.

33. Olivas, *supra* note 4, at 114 n.58.

34. *Id.* at 115.

35. *See id.* at 120–22 (quoting 8 U.S.C. § 1623 (1999)).

36. *Id.* at 122–23.

strues both the transaction and the prohibition.”<sup>37</sup>

Although I agree with Olivas that residency status should be granted without regard to documentation and that the statute is unclear with regard to its prohibition of “benefit,” I believe that it should be clarified by subsequent legislation, such as the DREAM Act. I am not as certain as Olivas that IIRIRA only refers to direct monetary benefits or that there are no monetary costs (or losses) connected to providing such residency status.<sup>38</sup> Providing resident status for the purpose of admission and tuition purposes grants a privilege to certain individuals. It often does so, however, based on an understanding that the students have paid for part of their education in other ways through, for example, the taxes they and their parents have paid over the years. I wonder if an argument that in-resident tuition does not entail a “benefit” might better be made on these grounds: that the status is meant, in effect, to give credit to the contributions that students and their families have otherwise made to the state.

This is not to say that a state could not make more (or lose less) money by denying resident tuition to a group of students such as those who are undocumented. Assuming a given state would permit the admission of the same student but require her to pay out-of-state (or more likely even the generally higher foreign) tuition, the same state would receive fewer real dollars by granting her residency. Or, if the state school refused to admit undocumented students, it might give that same spot to a non-resident, thereby receiving more tuition. While states differ in their policies regarding the distribution of resident and non-resident students, these scenarios would be accurate in at least some of the cases.

I disagree with Kobach, however, to the extent that he argues that there are only economic costs, not gains, to states that grant in-state residency. Post-secondary schools compete for the best and brightest graduates of secondary institutions, and the granting of state residency is an incentive for top students in the state to attend state public schools. Indeed, in-state tuition is often provided to a variety of non-state resident students that state universities would like to attract. A refusal to grant this benefit to undocumented students who would otherwise qualify for admission would presumably come at a cost to the school if the student were to choose not to attend.

Moreover, recall Olivas’s lack of surprise that states with large undocumented populations have provided residency status without regard to documentation.<sup>39</sup> I suggested that the lack of surprise comes at least in

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37. *Id.* at 125.

38. For Olivas, “benefit” in the statute “refers to dollars” because of the statute’s reference to “amount, duration, and scope.” See Olivas, *supra* note 4, at 124 (discussing section 505(a) of the DREAM Act, which states “[n]otwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.” 8 U.S.C. § 1623(a) (1999)).

39. Olivas, *supra* note 4, at 114–15.

part from some attention to economic incentives on Olivas's part. States, of course, believe they will do better economically in the long run with a well-educated citizenry.<sup>40</sup> This rationale is one that figured prominently in the Supreme Court's decision in *Plyler v. Doe*, in which the Supreme Court found it unconstitutional for states not to require primary and secondary education to undocumented children.<sup>41</sup> In the majority opinion, Justice Brennan wrote:

It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.<sup>42</sup>

Certainly, the consequences of failing to receive a post-secondary education are not nearly this dire. Yet, we know there is a positive correlation between education levels and income,<sup>43</sup> so that education levels and usage of needs-based public services are generally inversely correlated. Even states that benefit from large numbers of undocumented workers in the informal economy would seem to see the advantage in ensuring that the next generation, the one almost certain to stay in the United States and ultimately participate in the formal economy, is a beneficiary of higher education. Of course, the tighter the enforcement of immigration law, the less likely it is that the state will be able to benefit from the education achieved by these students. This realization at least partly explains support for the DREAM Act, even by many legislators who are not normally considered "pro-immigration."

In addition to arguing for an interpretation of IIRIRA that does not prevent resident tuition for undocumented residents, Olivas posits a constitutional line between permissible and impermissible state and local measures affecting immigration. Based primarily on decided cases, including one of which Olivas was on the losing side (in Virginia), his line would allow, but not require, states to grant resident status for post-secondary education purposes to undocumented state residents.<sup>44</sup> In general, it would permit cities and counties to provide benefits to its undocumented residents when "purely state, county, or local interests are governed and if federal preemptory powers are not triggered," and the

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40. See, e.g., SANDY BAUM & KATHLEEN PAYEA, *EDUCATION PAYS 2004: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY* 14 (rev. ed. 2004), available at [http://www.collegeboard.com/prod\\_downloads/press/cost04/EducationPays2004.pdf](http://www.collegeboard.com/prod_downloads/press/cost04/EducationPays2004.pdf); JENNIFER CHEESEMAN DAY & ERIC C. NAIBURGER, *THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNING* (2002), available at <http://www.census.gov/prod/2002pubs/p23-210.pdf>.

41. 457 U.S. 202, 230 (1982).

42. *Id.*

43. BAUM & PAYEA, *supra* note 40, at 14. Of course, immigrants, particularly undocumented immigrants, might be an exception to this rule.

44. See Olivas, *supra* note 4, at 105–06.

policies “are not subterfuges for replacing exclusive federal authority.”<sup>45</sup>

He concludes his paper with a policy argument: “[W]hen I count the rise of immigration-related proposals at the local and state level, I am convinced that no good can come of these.”<sup>46</sup> He reads the existing ordinances as “sure signs of an ethnic and national origin ‘tax’ that will only be levied upon certain groups, certain to be Mexicans in particular, or equally likely, Mexican Americans.”<sup>47</sup>

While it is hard to disagree that these ordinances have—and are intended to have—effects on particular groups of undocumented residents (with the target groups varying depending upon geography), this argument does not address the larger political questions that Olivas claims motivate the move toward local ordinances:

Like a fugue playing in the background, the issue in play here [with regard to postsecondary residence] is the inchoate permission to participate in the U.S. polity and cultural life that *Plyler* represents. And with the torrent of state legislation related to immigration, it is clear that the larger polity is as concerned with these localized conditions as is Professor Kobach. As the best indicator of this trend, the National Conference of State Legislatures (“NCSL”) gathers and analyzes immigration legislation data, and it has recorded that, in the first half of 2007, hundreds of immigration-related bills had been introduced in state legislatures and hundreds had been enacted in most states.<sup>48</sup>

If in fact the question here is about citizenship and membership, I wonder if Olivas does not sweep too broadly (or perhaps narrowly) with his constitutional analysis. He seems to believe that local governments can do very little to grant greater membership rights than the federal government permits. In the symposium, Olivas objected to the use of the term “sanctuary cities” insisting it is a misnomer used to malign the refusal of municipalities to cooperate with federal officials in ways that Olivas would sometimes consider unconstitutional.<sup>49</sup>

Yet, some state and local governments have in fact been quite creative in terms of creating membership opportunities for their residents who might not be documented, such as providing them with voting rights for

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45. *Id.*

46. *Id.* at 130.

47. *Id.* at 131.

48. *Id.* at 101 (citing NATIONAL CONFERENCE ON STATE LEGISLATURES, 2007 STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (Aug. 6, 2007), <http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm>).

49. Michael A. Olivas, Remarks at the Immigrants and Immigration Reform: Civil Rights in the 21st Century Symposium (Oct. 19, 2007).

local elections,<sup>50</sup> supporting and helping to regulate day-labor sites,<sup>51</sup> working with banks to issue ATM cards,<sup>52</sup> offering identification cards to city residents regardless of their immigration status,<sup>53</sup> and making employers criminally liable for failing to pay workers.<sup>54</sup> A number of economic and non-purely economic factors weigh into these decisions, but I support such policies and would like to encourage them because of their basic respect for the human rights of the recipients, regardless of whether they are economically efficient for the municipalities and employers.

The work of Hollifield and his co-authors and recent debates around proposals for guest-worker legislation and another round of amnesty indicate that federal policies in the area of immigration are unpredictable. State and local governments can sometimes provide a progressive approach when federal policies unduly restrict or overly enforce immigration laws.

On the other hand, I read Bosniak's analysis of pre- and post-IRCA legislation as a warning of the ways in which local and private employer openness to undocumented workers functions in tandem with restrictive laws on the books, often taking the pressure off the federal government to enforce otherwise draconian immigration laws. Might state and local governments unwittingly be legitimizing a system that both prohibits and relies upon labor by undocumented workers? And might even discussions about membership and citizenship both ignore the extent to which at least many Mexican workers need cross-border mobility?<sup>55</sup> Finally,

50. Takoma Park, Maryland, was one of the first municipalities to permit non-citizen voting. The ordinance prohibits inquiries into citizenship. See Takoma Park, Md., Municipal Code 9.04 ("Rights of Non-U.S. Citizens in Takoma Park"). The same statute prohibits inquiries into citizenship. See *id.* at 9.04.020, available at [http://www.takomaparkmd.gov/code/Takoma\\_Park\\_Municipal\\_Code/index.htm](http://www.takomaparkmd.gov/code/Takoma_Park_Municipal_Code/index.htm). For general information on non-citizen voting initiatives, see <http://immigrantvoting.org/material/about.html>.

51. Several cities throughout the United States have opened day labor centers, where typically-undocumented immigrants wait to be picked up for jobs. Cities that operate day labor centers include Garland, Fort Worth, and Plano, Texas, and Herndon, Virginia. Diane Solis, *Day Labor Sites are Hot Spots in Immigration Fight*, DALLAS MORNING NEWS, Mar. 5, 2007; N.C. Aizenman & Timothy Dwyer, *Words Fly at Day-Laborer Center in Herndon*, WASH. POST, Dec. 15, 2005, at B01.

52. In Austin, Texas, the local police department led the effort to convince banks to accept alternative forms of identification for opening bank accounts. ANNA PAULSON ET AL., FINANCIAL ACCESS FOR IMMIGRANTS: LESSONS FROM DIVERSE PERSPECTIVES 64 (2006), [http://www.brookings.edu/metro/pubs/20060504\\_financialaccess.pdf](http://www.brookings.edu/metro/pubs/20060504_financialaccess.pdf).

53. In November, 2007, the City of San Francisco approved a program to provide residents, regardless of immigration status, identification cards that "qualify them for health services at city-run clinics, public library privileges and resident discounts at museums and other cultural institutions." Associated Press, *San Fran OKs ID Card for Immigrants*, Nov. 28, 2007.

54. Around 2003, the City of Austin Police Department began enforcing "theft of wages" claims against employers who did not pay workers. David Hafetz, *Lawsuit Aims to Get Immigrants Their Due*, AUSTIN AM. STATESMAN, Jan. 10, 2003.

55. For a moving account of the difficulties of lack of mobility, see LETTERS FROM THE OTHER SIDE (Front Porch Films, 2006).

might the economies of many developing countries benefit more from workers who bring back skills they have learned and honed in the United States than they do from remittances?<sup>56</sup>

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56. For a similar argument with regard to Mexico, see Alvaro Santos, *Remarks at Conference Entitled Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor*, 40 TEX. INT'L L.J. 732, 735 (2005).