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THE LABORATORIES OF DEMOCRACY: STATE INITIATIVE AND PROMOTION OF IMMIGRATION REFORM

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Although states have been experimenting with their own initiatives on immigration, they have been related to mainly punitive enforcement laws, the most notorious being Arizona's SB 1070. Section 2(B) of the Arizona law, which was upheld by the Supreme Court in *Arizona v. USA*, requires police officers to determine the immigration status of anyone they stop if they have a "reasonable suspicion" that the person in "unlawfully present in the United States." While such punitive laws have received the most media attention, other states have been experimenting with initiatives that attract immigrants.

But state laws need not always be punitive. If we have the eyes to see them, examples of positive state actions on immigration are all around us, such as the issuance of driver's licenses to undocumented immigrants in California and Connecticut. Many of the progressive achievements in modern American history, such as progressive income taxation, women suffrage, popular election of senators, wage and hour laws, occupational safety, and most recently health care and same sex marriages, to name but a select few, first appeared on the state level. The many instances where federal intervention has been necessary to protect civil rights against state abuse should not blind us to the possibility that state action can also be a force for good. State action on immigration harkens back to salad days of our national existence. It is certainly true that, for the first century of American independence, there were no illegal aliens in a national sense for the simple reason that Congress had not yet placed any limits on immigration and would not do so until 1875. This incorrectly assumes that, prior to the Civil War, the states had no proper constitutional role to play in regulating

immigration. A leading scholar has called this period of our history " the lost century of American immigration law." See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). The federalization of US immigration policy is a relatively recent historical development, dating as it does from the late 19th century, largely in response to inadequate and ineffective state and local efforts. Not until the early years of the last century would the states cease to play an active role in shaping American immigration policy. What is happening now, therefore, is not a new approach but is a selective incorporation of what what is the original American approach on immigration. Long ago, Justice Brandeis recognized in that federalism offered a constitutional framework for experimentation and creativity:

> *To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country…*

> *New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J. dissent)*

A case in point is Massachusetts's launch of the Global Entrepreneur in Residence program. The GEIR is part of the 2014 Economic Development Bill, which facilitates partnerships with institutions of higher education such as universities to provide valuable, relevant part-time work opportunities to foreign graduates who are entrepreneurs and want to grow their companies, but cannot remain in the United States due to the H-1B visa annual cap. The university, as a cap exempt employer under INA section 214(g)(5)(A), can sponsor a foreign national who will not be counted towards the numerical limitations in INA section 214(g)(1). Non-profit affiliates to institutions of higher education can also qualify as cap-exempt employers.

So far so good, but there is a golden nugget by way of INA section 214(g)(6) that allows one who has been sponsored by a cap exempt university employer to accept concurrent employment with an employer who is subject to the H-1B numerical limitation. INA section 214(g)(6) reads as follows:

> *Any alien who **ceases** to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5).*

The magic word in section 214(g)(6) is "ceases." In other words, so long as the foreign national has not ceased to be employed with an H-1B cap-exempt employer, he or she can be approved for an H-1B visa through a cap-subject employer without regard to the H-1B annual numerical limitation. Once the H-1B visa petition through the cap-subject employer is approved, according to a May 30, 2008 USCIS Policy Memo, even if the foreign national ceases employment at the cap exempt employer, he or she may continue to remain in H-1B status through the cap-subject employer, although a subsequent extension request will get denied unless there are new H-1B cap numbers available at the time of the new filing.

Vivek Gupta is one such recipient of the GEIR program. The University of Massachusetts, according to the CNN news story, sponsored him in the university's Venture Development Center as an "entrepreneur in residence," where he will advise other founders of startup companies. This would allow Gupta's own startup WealthVine, a cap subject employer, to sponsor him. While we do not know whether Gupta's H-1B visa petition through his company got approved, the GEIR would allow entrepreneurs like Gupta to work for their companies in H-1B visa status, which otherwise may not have been available to them due to the annual H-1B limitation. The USCIS Entrepreneurs Pathways portal provides a guide to how founders can use their startups to apply for H-1B visas.

Michigan is another state that is actively innovating to attract top foreign talent. GOP Governor Snyder of Michigan will support those applying for the green card through the National Interest Waiver. While the specifics of Michigan's plan have not yet been spelt out, it appears that Michigan will support applicants for the National Interest Waiver who reside in Michigan and who contribute to Detroit's economic growth. There is ample scope for states to further develop the standards under the National Interest Waiver pursuant to President Obama's November 20, 2014 Executive Action. Indeed, one of the Executive Action memos entitled Policies Supporting U.S. High Skilled Businesses and Workers

acknowledges the under-utilization of the National Interest Waiver, and states can assist the DHS in establishing criteria for supporting applications from entrepreneurs and others that promote economic growth in the state. The same memo also indicates that DHS will use its "significant public benefit" parole authority under INA 212(d)(5) to develop criteria to bring in promising entrepreneurs who do not yet meet the National Interest Waiver cut. Here too states can provide input regarding developing criteria, and supporting entrepreneurs' applications to the federal government when applying for parole to come to the United States.

In the same vein, a state can designate certain occupations as shortage occupations, which may assist the Department of Labor in more easily certifying a labor certification pursuant to INA § 212(a)(5) of an employer filed on behalf of a non-citizen resident in the state. A state can be a more effective judge of shortage occupations than the federal government, and if a labor certification is filed on behalf of a non-citizen in that particular state designated shortage occupation, the DOL may be more influenced in making a favorable determination on the labor certification. In fact, increased involvement by the states in identifying labor market shortages in their jurisdictions is precisely what Congress had in mind when in created the modern system of labor certification in 1965. Rather than a hyper-technical system of individualized recruitment, Congress thought it was setting up a structure in which the states would funnel information on job vacancies to their federal unemployment insurance colleagues that would then guide the Secretary of Labor:

> *The system set up by the DOL after 1965 was exactly what Sen. Edward M. Kennedy (D-Mass.) had promised Congress when he served as the floor leader for this legislation: a system based not on individual recruitment but on statistical calculation. That is also precisely why the DOL lost case after case in the federal courts: the willing requirement cannot be satisfied by statistics. Badly wanting an immigration bill that would abolish the national origin quotas and admit more immigrants, Sen. Kennedy agreed to the price set by organized labor-namely, a more stringent form of labor market control. Congress went along with Sen. Kennedy but did so in the belief that the Secretary of Labor would have access to the names of individual U.S. job seekers already on file with the state employment services, who were the human faces behind all these numbers..That is why the DOL placed the Foreign Labor*

> *Certification Program squarely within the Unemployment Insurance (UI) Division, now known as the Workforce Security Division. This was done so that the statistics would be readily available to the labor certification administrators at the DOL from the UI folks. Ultimately, the thought went, statistics represent people, and the states could funnel the names and addresses of such people to the Secretary of Labor who, in turn, would provide them to an employer so that labor certification would not be necessary..*

> *See Endelman, The Lawyer's Guide to INA 212(a)(5)(A): Labor Certification from 1952 to PERM, www.ilw.com/articles/2004,1102-endelman.shtm*

Similarly, even with regards to an undocumented immigrant, a state may be able to enact criteria for recommending that such a person, who has otherwise not been convicted of significant crimes and is say an essential farm worker, is deserving of prosecutorial discretion by the federal government under its new enforcement priorities pursuant to President Obama's executive actions to remain in the state and prevent its farm produce from otherwise rotting away. There may already be such authority under INA section 287(g), which authorizes the federal government to enter into a written agreement with a state to perform the function of a qualified immigration officer in relation to the "investigation, apprehension and detention" of non-citizens. In the era where the government has implemented a broad prosecutorial discretion policy, a state can assist the federal government in the "investigation," rather than the apprehension or detention, of an individual who may merit such discretion from the federal government.

The Tenth Amendment of the United States Constitution provides that "all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This is the constitutional foundation for the "laboratories of democracy" concept and is integral to the American federalist tradition. Under the general rubric of the state police power, the idea was that different policies could be road tested on the state level without directly influencing anyone else. If any one or more of those policies worked in any one statehouse laboratory, they could then be expanded to the national level by act of Congress. For example, Massachusetts established

a health care reform law in 2006 that became the model for the subsequent Affordable Care Act at the national level in 2010. As the Supreme Court has allowed a seemingly limitless expansion of the federal power to regulate interstate commerce since the late 1930's, the relevance of the "laboratory of democracy" model has significantly faded. However, now that we know that the federal government cannot use the Commerce Clause to compel consumers to purchase health insurance, perhaps the Progressive-era invocation of the states as laboratories of democracy will witness a modest revival.

There are, however, undeniable limits that properly circumscribe what experiments the state laboratories can conduct when it comes to immigration . Only the Congress can determine who comes to the United States and under what terms or conditions. Any state-attempt to cross that line and set immigration policy on its own will find a less than friendly judicial reception. That is why after upholding Section 2B of SB 1070 the Supreme Court did not allow Arizona to criminalize unauthorized employment (Section 5(c) of SB 1070) or failure to carry an alien registration document (Section 3 of SB 1070). That is why Arizona was not allowed to sanction warrantless arrest of aliens concerning whom a police officer had probable cause to believe had committed a removable offense (Section 6 of SB 1070). That is why Utah has not implemented its guest worker law 3 years after enactment. That is why a federal district court in 2009 held the Illinois ban on employer enrollment in E-Verify to be violative of the Supremacy Clause.

What then distinguishes what Michigan and Massachusetts have done from the constitutionally infirm policies attempted in other states? Does not encouragement of state immigration laws implicitly encourage infringement of the plenary federal power over immigration policy? The key difference is that Michigan and Massachusetts rely exclusively on what Congress has already done. They seek only new and improved ways to take advantage of existing law, to adapt national standards to state and local needs. There is no attempt to create new visas or enforce new restrictions above and beyond what Congress felt was necessary and proper. A state immigration law linked to the existing INA has nothing to fear. A state immigration law that substitutes its own judgment for that of Congress cannot be allowed to stand. That is the difference between what we advocate and what the federal courts will not accept.

The Massachusetts and Michigan experiments are useful and relevant for another reason. It seems sadly obvious that Congress will not, in the absence of a national consensus, enact comprehensive immigration reform, though we

devoutly wish this was not so. In response, the President has and doubtless will continue to exercise his inherent discretionary power to partially remediate our dysfunctional immigration system. The objections to such actions are grounded on a claimed violation of separation of powers. For those who hold such views, and we do not, the resort to constitututionally compatible state immigration laws, should be a more palpable alternative. Some states will be more hospitable while others will not be, although at the local level, immigrants will be able to bring about changes for themselves as has been witnessed in California from the inhospitable Proposition 187 in 1994 to the issuance of driver's licenses to the undocumented today. For those who endorse what the President has done, and we proudly count ourselves among them, such state immigration laws should be embraced as welcome companions in the campaign for a more just system. That it seems a bit odd should be no reason to pull back from such a step. As that noted American political philosopher Lawrence Peter Berra so aptly noted: "When you come to a fork in the road, take it!"

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