

# Chapter 1

## Introduction

Sasha Baglay and Delphine Nakache

In the past two decades, our home country of Canada has seen the emergence of a two-tiered immigration system, whereby selection of economic immigrants is exercised through federal as well as provincial/territorial programs. We were intrigued by this development and its implications, especially given that increased sub-national activity in immigration regulation has also been observed in other countries such as Australia and the US. Yet, we were surprised that little research has been dedicated to comparing how federal states deal with this so called “immigration federalism”.<sup>1</sup> As immigration lawyers, we were particularly interested in the human rights implications of immigration federalism—an issue that received very scant attention outside of the US, although some debates are starting to emerge in other jurisdictions (see, Dobrowolsky 2013; Lewis 2010). Thus, we undertook this book project in order to gain a better understanding of the phenomenon of immigration federalism and its impact on non-citizens. Our research questions can be summarized as follows:

1. What are the main characteristics of immigration federalism, why and how has it developed? Are there any common trends across jurisdictions, especially when

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<sup>1</sup> One recent book analyzes the role of sub-national jurisdictions in immigrant settlement and integration in Australia, Canada, the USA, Germany, Belgium, Switzerland and Spain. See: *Immigrant Integration in Federal Countries*, C. Jopke and L. Seidle, eds. (McGill-Queen’s University Press 2013). In addition, some issues relevant to the discussion of immigration federalism have been explored in *Managing Immigration and Diversity in Canada: A Transatlantic Dialogue in the New Age of Migration*, Dan Rodriguez-Garcia, ed (Montreal & Kingston: Queen’s Policy Studies Series, 2012).

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S. Baglay (✉)

Faculty of Criminology, Faculty of Social Science and Humanities,  
University of Ontario, Institute of Technology, 2000 Simcoe St. N,  
Oshawa, ON L1H 7K4, Canada  
e-mail: sasha.baglay@uoit.ca

D. Nakache

School of International Development and Global Studies,  
University of Ottawa, 120 University (8005), Ottawa, ON K1N 6N5, Canada  
e-mail: delphine.nakache@uottawa.ca

we compare traditional countries of immigration (such as Canada, the United States and Australia) with others (e.g., Switzerland, Germany)?

2. What are the implications of immigration federalism for immigration systems and non-citizens? Overall, does immigration federalism have a positive or negative impact on non-citizens' rights and immigration opportunities?

To explore these issues, we have structured the book in two parts. Part One introduces the reader to perspectives from three sets of literature—federalism, governance and non-citizens' rights—that, in our opinion, provide a necessary framework for understanding immigration federalism's multiple facets, its various institutional models and impacts on non-citizens. Part Two comprises six case studies: Australia, Canada, Germany, Switzerland, the United States and the European Union (EU). Although not a federal entity in a traditional sense, the EU was included because, similarly to federal states, this supranational organization faces important policy questions of choosing between centralized vs. decentralized models of regulation of various migration streams. In selecting federations for case studies, we have included countries that share some common characteristics, yet are diverse enough to be sufficiently representative of different issues related to immigration federalism. All five federations have high numbers of international migrants: they constitute 13 % or more of total population (United Nations 2011). In all but one of the five countries (Switzerland), more than 75 % of all immigrants who arrived in the last two decades came from developing countries (Siemiatycki and Triadafilopoulos 2010, p. 2). However, these federations also have important differences. First, the United States, Canada and Australia have long histories as immigrant-receiving societies, whereas Germany and Switzerland have started receiving significant volume of immigrants (not counting intra-European migration) only since World War II (Seidle and Jopke 2012, p. 4). Second, two of the five countries (Canada and Switzerland) are dealing with more than one territorially concentrated cultural-linguistic community on their soil (see Houle's and Manatschal's chapters in this book). Third, there is significant variance in the degree of devolution in immigration regulation and its 'location' relative to the area of the immigration process in the examined jurisdictions. For example, in the US immigration federalism developed in immigration enforcement, while in Australia and Canada—with respect to immigrant selection and in Switzerland and Germany—in several areas of the immigration process (the chapters in this book, however, particularly focus on integration/naturalization policies).

In the next sections, we offer a definition of immigration federalism and discuss the complexities and tensions that underlie this concept. We then provide an overview of book chapters.

## 1.1 Immigration Federalism: A Definition

Although over the past several years, increasingly more literature has focused its attention on immigration federalism, no precise and unified definition of this concept has emerged yet. Some of the challenges of conceptualizing this phenomenon in a

single definition are due to the difference in the shapes, location and factors influencing immigration federalism in various jurisdictions.

The majority of current literature on immigration federalism emanates from the US (see, for example, special issues of *Law and Policy* 2011; *Tulsa Journal of Comparative & International Law* 2008; *Harvard Law Review* 2005; *New York University Annual Survey of American Law* 2002). So far, this literature has operated with an implicit understanding that immigration federalism denotes the involvement of multiple levels of government in immigration matters and is associated with the shift from a centralized to decentralized or devolved model of regulation (Varsanyi et al. 2012; Su 2008; Schuck 2007; Spiro 2002). While such a characterization captures the general nature of this new phenomenon, its association of immigration federalism with a developing devolution trend is more reflective of contexts such as Australia, Canada and the US. In these three countries, immigration has been traditionally associated with nation-building, foreign policy, and other areas of national interest, which deemed it naturally aligned with federal (i.e., centralized) rather than local regulation. Although sub-national entities have always played a role in the immigration process, their impact was felt mostly at the level of migrant's actual ability to integrate into a local community (e.g., depending on local employment, welfare, safety legislation). The fundamental questions of admission, membership in a nation, border control and enforcement have usually been determined in a centralized manner by federal legislation. Thus, in Australia, Canada and the US, for the most part of the twentieth century, the federal government has been the dominant player in immigration regulation, producing a unified model of immigrant selection and enforcement governed by an idea of immigration into a nation (rather than into a specific locality) (Reitz 2005; Spiro 2002; Baglay and Nakache 2013). In the last two decades, however, these three countries have seen the emergence of new actors—sub-national units (provinces, states, even cities and municipalities)—seeking to take a more active role in the immigration process.

In contrast to Australia, Canada and the US, in Germany and Switzerland, sub-national units such as *Länder* and cantons (respectively) have traditionally been responsible for the implementation of national immigration policy and have enjoyed significant autonomy in immigration-related matters. They have also played a prominent role in defining questions of belonging reflecting the idea that immigrant integration is a locally embedded process. For example, in Germany, although conferral of citizenship is under federal jurisdiction, *Länder* have traditionally overseen the naturalization process. In Switzerland, a naturalization application must be approved at three levels of authorities: local, cantonal and national. Thus, for these countries immigration federalism is not exactly a new phenomenon. In Germany, in fact, the renewed attention to immigration at the national level has potentially pointed in a direction of centralization. Similarly, in Switzerland, some steps have been taken to provide a national unification of integration standards, although they have not altered the key role of cantons in this area. These developments may be partially explained by a changing understanding of immigration in Germany and Switzerland: while traditionally not seeing themselves as countries of immigration, they are gradually acknowledging this reality and are making corresponding policy adjustments with the objective of providing more of a national framework for various aspects of the immigration process.

As the above discussion demonstrates, immigration federalism is not always associated with a devolutionary trend, but may also embrace centralization initiatives in historically decentralized immigration systems. Thus, immigration federalism may be seen as a ‘shifting terrain’ where the ratio of federal vs sub-national involvement fluctuates over time, and it may be appropriate to *define it as follows*: it refers to the powers and regulatory activities of federal/state/provincial/territorial governments in various areas of the immigration process as well as modes of interaction between various levels of government in the process of exercising their immigration-related activities.

Immigration federalism involves negotiation and re-negotiation of immigration visions and priorities between levels of government. Although the constitutional division of powers provides the parameters for federal/sub-national roles in immigration, the interpretation and utilization of such powers can change over time. For example, until the 1990s, Canadian provinces, which possessed the constitutional power to regulate immigration into their respective territories, had no interest in exercising it (except for Quebec, which has been involved in immigrant selection since the 1960s). In the US, the last decade has seen much academic and judicial debate on which level of government has the constitutional power to regulate various aspects of the immigration process and in particular about the proper authority of states and localities in immigration enforcement. In fact, as Chacón suggests in Chapter 10, a clear delineation between federal and sub-federal enforcement no longer exists. Thus, federal states may over time move along the centralization—devolution continuum under the influence of various factors, often specific to a given jurisdiction. These factors may include, for example, a model of federalism adopted in a given country, visions of national/local identities, the need to balance unity and diversity considerations, concerns over costs and resources, efficiency, national security, actual or perceived sentiment towards migration generally or towards certain groups of migrants, etc. Ultimately, the historic trajectory of immigration regulation in federal states can be seen as an attempt to answer two key questions:

1. What should be an optimal allocation of powers over each aspect of the immigration process?
2. Are interests of the host community as well as migrants better served by greater centralization or decentralization?

The current reality in federations examined in this book is that immigration federalism has created a multiplicity of regulatory regimes (among sub-federal units as well as between national and sub-national levels) in relation to one or several aspects of the immigration process: selection, settlement/integration or enforcement. For example, in the US, local action with respect to enforcement targeted mostly at undocumented migrants has resulted in a “multilayered jurisdictional patchwork” of immigration enforcement with significant variation across localities (from proactive to “don’t ask, don’t tell” to laissez-faire policy), demonstrating different attitudes to irregular migration (Varsanyi et al. 2012). In Canada, the two-tiered

federal/provincial system for selection of economic immigrants reflects different visions of what kind of skills and qualifications would make one worthy of admission. Similarly, in Australia, state sponsorship programs create locally defined definitions of “desirability.” In Switzerland, varying cantonal integration policies reflect different notions of citizenship, correspondingly creating either more accessible or more restrictive pathways for formal inclusion of immigrants in local communities. Similarly, in Germany, a variation in practices, at times following partisan lines, has been observed in some matters administered by the *Länder* (e.g., issuance of residency permits).

From the perspective of local communities, such multiple regimes may be appropriate in order to reflect local needs and peculiarities. However, on the national scale, such diversity of local practices may pose questions related to policy coherency, efficiency, and equal treatment of individuals. From the perspective of non-citizens, these multiple regimes may create both advantages and limitations. Local policies that favour immigration and adopt inclusive notions of community membership could facilitate admission and integration of non-citizens. This is, for example, the case with PTNPs in Canada where some provinces have allowed for nomination of low-skilled workers—an option previously not available under any other independent immigration streams (see Chap. 5 in this book). However, local experimentalism and innovation may also transform into, borrowing Wishnie’s (2001) phrase “laboratories of bigotry.” Writing in the US context, Wishnie warned that devolution in immigration enforcement may lead to the race-to-the-bottom among states (in discriminatory measures against non-citizens) and overall erosion of the equality principle in various areas of non-citizens’ rights, a position shared by Chacón in this book. Immigration federalism amplifies the notion that the treatment of non-citizens is locally defined and can vary across a given country. Hence, while we can still characterize non-citizenship status as a bundle of certain restrictions and protections applicable nation-wide, a more nuanced analysis of that status also requires consideration of non-citizen regimes in specific localities. As case studies demonstrate, these locally defined criteria may touch upon not only non-citizens’ every-day activities (e.g., through employment safety, education, social security regulation), but also their access to permanent resident or citizenship status. For example, in Canada, low-skilled workers employed in Manitoba may apply for immigration under a provincial nominee program, while in Ontario low-skilled workers do not enjoy such an opportunity. In Switzerland, naturalization requirements are more onerous in German-speaking than in French-speaking cantons. This wide-ranging devolution that touches upon both every-day activities and membership policy is changing the very relationship between the state and the non-citizen. This relationship is increasingly shaped by several levels of legal regimes: local, provincial/state/cantonal and national. As Varsanyi (2008) pointed out, such devolution and multiplicity of regimes makes state power more permeating, including through greater involvement of non-state actors in ‘policing’ of non-citizens (for more on this see Pham 2008; Pham 2009).

We now turn to the overview of individual chapters.

## 1.2 Overview of The Book

### 1.2.1 *Part 1: Three Discourses Informing Understanding of Immigration Federalism*

Each of the chapters in Part One focuses on one set of literature—federalism, governance or non-citizens' rights—thereby providing an analytical lens for understanding immigration federalism in general and in specific jurisdictions. The relevance of these three discourses, when put together, can be explained as follows:

- a. The literature on federalism outlines various models of federalism (see Chap. 2 for more details) and illuminates institutional and other factors shaping the relationships between levels of government. A model of federalism adopted in a given jurisdiction allows us to see what channels exist for sub-national units to provide their input into national policies, whether the two levels of government work cooperatively or whether one level dominates, and what would be the ideal type division of powers in relation to a given subject matter. These considerations not only help explain the past and current federal/sub-national relations in a given jurisdiction, but also how much room there is for centralization/decentralization fluctuations over time. For example, in Germany, the particular model of federalism characterized by coordination, joint decision-making and power sharing allowed states to be rather actively involved in federal policy-making on immigration.
- b. While the literature on federalism provides a useful insight into the interaction of levels of government, it is equally important to account for other factors and actors involved in formation of policies and practices, as the literature on governance does. For example, in immigration context, such actors as municipalities, cities, local communities and even employers play a role in both shaping and implementation of immigration regulation. Thus, it may be more appropriate to view immigration federalism as a governance process. This characterization is particularly fitting for Switzerland and Germany, which are impacted not only by domestic factors, but also by EU regulation (see Chaps. 8, 9 and 11).
- c. The literature on immigration law and non-citizens' rights adds one more dimension to the study of immigration federalism: the perspective of another—if not the most important stakeholder—the non-citizen. Frequently silenced in the context of immigration law generally, the non-citizen is often viewed merely as a subject of a host state's laws and policies rather than a bearer of rights. Immigration law is inherently centered on the interests of the host community and its main objective is to differentiate between 'desirable' and 'undesirable' candidates for admission (Dauvergne 2004; Dauvergne 1997; Kyambi 2004). Thus, being in an already vulnerable position vis-à-vis the host state, what happens to non-citizens under multiplied and more permeating reach of the state in the context of immigration federalism? Is the discriminatory nature of immigration law likely to be amplified or alleviated by immigration federalism?

In the opening chapter, **Rob Vineberg** uses the lens of the literature on federalism to explain the reasons underlying the development of immigration federalism and to offer a reflection on an “ideal” model of immigration federalism (that is, a model that is the most effective and the most satisfactory to both state/provincial and federal governments in a given constitutional, economic and social context). Vineberg’s “ideal” model of immigration federalism is as follows: (a) immigration control policies are left to the central government; (b) integration policies are left to states/provinces (with a federal coordinating role); (c) the overall immigration selection policy is led by the central government (i.e., federal leadership) but states/provinces are given some authority to select immigrants on the basis of regional needs and local priorities. Vineberg applies his ideal model to Australia, Canada and the US (although, as he points out, this model is equally relevant to the other two countries under consideration in this book (Germany and Switzerland)). He demonstrates that over time, the three jurisdictions have moved closer to the ‘ideal’ model: they conform to it in terms of immigration control and enforcement<sup>2</sup>, but only Canada and Australia conform to this model in terms of immigrant selection and settlement and even then, not completely as immigrant selection and settlement is determined through both central and sub-national government policy. He views such a trajectory as generally desirable, if not inevitable. Vineberg’s contribution allows us to understand that, from the perspective of the literature on federalism, there are strong reasons why federal states ought to be open to decentralized immigrant selection and settlement policies, either through a cooperative model where both the federal and state/provincial governments share the policy-making role or through a devolution model where these policies are ceded entirely to the state or province. As he notes, aiming at this “ideal” model of immigration federalism is important for both “the immigrant and the host society” because they “will clearly benefit from the greatest possible integration and co-ordination of federal and state/provincial immigration activities.”

In Chapter 3, **Hélène Pellerin** discusses global migration governance thereby providing a broader context for understanding national and international trends in migration regulation. Despite the absence of formal institutions to administer a global migration regime, recent years have seen the emergence of many initiatives that resulted in converging political priorities and policy measures among states. This convergence reflects the power of governance to shape agendas and define the range of possible policy options. Being dominated by the neoliberal framework, current global migration governance facilitates the fluidity of migration, but does not translate into greater freedom of mobility or equal protection of all migrants. The “logic of efficiency” promotes the highly skilled migration and encourages the

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<sup>2</sup> Vineberg’s position on the United States (i.e., that US enforcement policies are mainly centralized) may seem at first sight radically different from the positions of other authors in this volume (i.e., Chacón and Aldana). However, Vineberg focuses only on the “formal” allocation of power and, namely that the US Constitution does not allow states to directly control the entry of non-citizens into their territory. He does not consider the situation on the ground (i.e., the devolution by the federal government of some of their traditional functions in immigration to states and localities).



shifting of some responsibilities for worker welfare to local and/or private actors. Pellerin observes that had human rights based initiatives “garnered the support of developed states and major international organizations, the global governance of migration would have been quite different.” Similarly to what has been noted by Pellerin in relation to global migration governance, some cases studies in this book demonstrate both the dominance of the neoliberal pressures and the scarcity of human rights focus on immigration federalism in current discourses. For example, Soenneken (Chap. 8) situates her discussion of German immigration federalism in the broader context of the age of neoliberalism and views it as a way for the state to adapt and reconstitute itself to the changing circumstances. Baglay and Nakache (Chap. 5) demonstrate that in Canada, skilled and low-skilled workers are often treated differently under PTNPs and the underlying concern in evaluation of nominee programs is whether they benefit the host community rather than through the lens of non-citizens’ rights (see for example, CIC 2011). In the US context, devolution, combined with border militarization and lax enforcement, allows the federal government to strike a compromise between the competing interests of economic liberalization and restrictive approach to membership (Varsanyi 2008).

It is precisely this missing/neglected dimension of non-citizens’ rights that is discussed in the last theoretical chapter by **Raquel Aldana**. The author offers a comparative analysis of “asymmetrical immigration federalism” (a term used to refer to the diversity of laws and policies occasioned by the rise of immigration federalism) in Australia, Canada, the European Union, Belgium, the United Kingdom, Switzerland, and the United States. The key question asked by Aldana is whether asymmetrical immigration federalism has improved or worsened non-citizens’ rights and protections in those respective jurisdictions. After having highlighted common arguments in the literature on advantages and disadvantages of immigration federalism (from an immigrants’ rights’ point of view), she demonstrates that immigration federalism is conducive to anti-immigrant policies as well as generous and innovative integration and welfare policies at the localities. For example, in Australia, Canada, and the United Kingdom, immigration federalism provides non-citizens with greater immigration and integration opportunities, a position shared by Baglay and Nakache in this book (see Chap. 5). In other countries, such as the United States, Switzerland and Belgium, immigration federalism seems to have both positive and negative impact on non-citizens’ rights and welfare. Aldana examines the US in particular detail, providing a survey of state laws and ordinances related to immigration. While it is a common assumption in the media and scholarly literature that increased local involvement has negative implications for non-citizens, Aldana demonstrates that this assumption should be qualified as a sizeable number of state immigration-related measures also seek to expand the rights of non-citizens rather than to diminish them. Local factors (such as political divergence between national and local interests; the nature and degree of co-operative federalism that exists between the federal and regional governments, etc.) ultimately determine whether immigration federalism has negative or positive effects on non-citizens. Therefore, as Aldana puts it, the implications of immigration federalism for non-citizens are “highly contextualized and cannot be generalized”. The case studies in Part Two of the book provide exactly such a contextualized examination.



## 1.2.2 *Part 2: Case Studies*

To ensure coherency of the volume, we asked each contributor of a case study chapter to address the following issues: (1) constitutional division of powers over immigration in their jurisdiction; (2) brief history of immigration regulation (with particular reference as to whether it tended to be more centralized in the past and is currently moving towards decentralization or vice versa; (3) factors impacting the roles of federal and provincial/state governments in immigration regulation; (4) nature of current federal/provincial/state interaction in each area of the immigration process—selection, settlement, enforcement; (5) implications of the changes for an immigration system of a given country and for non-citizens.

The case studies can be grouped into two trends: on the one hand, Australia, Canada and the US—where devolution has started to develop only in the past two decades; and, on the other, Germany and Switzerland, which have traditionally given sub-national units substantial autonomy in immigration-related matters. Australia, Canada and the US are examined first followed by Germany and Switzerland. The chapter on the European Union usefully concludes the collection by, first, explaining the supranational migration regimes, which directly and indirectly impact migration regulation in countries such as Germany and Switzerland and, second, exemplifying the particular challenges of supra-national immigration multilateralism, which echo those raised by immigration federalism in domestic contexts.

The first two chapters are dedicated to the study of Canada in order to account for the two different models of sub-national participation in immigration regulation: Quebec model and Provincial/Territorial Nominee Programs.

**Sasha Baglay and Delphine Nakache** examine Provincial/Territorial Nominee programs (PTNPs), which allow provinces/territories to nominate for immigration candidates with skills and qualifications in local demand. Developed in the past two decades, these programs can be seen as a response primarily to the ineffectiveness of federal programs in satisfying peculiar local social/demographic/economic needs and/or achieving more even distribution of newcomers across Canada. PTNPs exemplify a high degree of decentralization in immigrant selection: there are no national baseline requirements for provincial/territorial nominees (except for federal security, criminality and health checks<sup>3</sup>) and provinces/territories have wide latitude in determining design and scope of their programs. As a result, the selection criteria vary widely across provinces/territories with some of them exclusively focusing on highly educated and skilled, while others allowing for nomination of low-skilled workers as well as on the basis of family or community connections. This diversity of PTNPs has both advantages and disadvantages for applicants. On the positive side, it expands existing and/or provides new immigration opportunities. However, these opportunities are not always easily accessible, application processing lacks

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<sup>3</sup> As of July 1, 2012, federal department of Citizenship and Immigration requires all nominees in semi- and low-skilled professions to undergo mandatory language testing, but no such mandatory testing is required for skilled workers nominated under PTNPs (CIC 2012).

transparency and there are limited remedies for applicants who want to contest a decision of a provincial authority.

In contrast to other provinces, Quebec has long occupied a unique place in Canada's immigration system. Its first interest in immigrant selection dates back to the 1960s<sup>4</sup> and its powers are more extensive than those envisioned for other provinces under PTNP agreements (e.g., Quebec has control over settlement and integration). Most importantly, Quebec's desire for its own immigration program has been traditionally explained by identity politics: immigration was necessary to maintain French language and culture and Quebec's uniqueness within Canada.<sup>5</sup> In her chapter, **France Houle** explores and questions this understanding of Quebec's immigration program. She explains that interculturalism—namely, promotion of “cultural pluralism, but with the ultimate goal of developing a common public culture” based on French as the official language—has dominated Quebec selection policy since the 1960s. This was reflected in, for example, the significant weight allocated to French language and adaptability factors under the Quebec points system as well as in the approach to immigrant integration. However, according to Houle, Quebec has recently moved away from selection governed by interculturalism towards a more economy-driven approach. Such a shift is significant as it seems to demonstrate certain convergence among all provincial and federal programs for selection of economic immigrants in their underlying prioritization of efficiency and economic benefits of selection. Thus, although Quebec remains unique in the history and scope of its immigration program, perhaps in other respects it no longer stands as far apart from other provincial programs as it has in the past.

Taken together, chapters by Baglay/Nakache and Houle demonstrate that in Canada, there are three main selection systems at play: federal programs, PTPNs and Quebec program. Despite notable variation in their approaches, the selection of economic immigrants under all of them is primarily driven by efficiency considerations. Such policy convergence likely happens not by design but more so as a coincidence of each government's own policy choices. The divergence occurs in how each government interprets who is a ‘desirable’ migrant and who is likely to make a valuable contribution to economy. It is these varying interpretations that produce a great diversity of selection streams and criteria at federal and provincial levels.

The immigration federalism in Australia has some parallels with Canada: as **Bob Birrell** describes, the federal government has long played a dominant role in immigration, but since the 1990s, states and territories have been allowed to administer their own sponsorship programs to select immigrants with skills in local demand. However, despite the existence of state/territorial programs, the federal government plays a stronger coordinating role in Australia's selection system than in Canada. Every year states must negotiate a migration plan with the federal Department of Immigration and Citizenship (DIAC), setting out occupations eligible for sponsor-

<sup>4</sup> In fact, Quebec has served as an example for other provinces who sought greater role in immigrant selection (Vineberg 2008).

<sup>5</sup> See, e.g., *Canada—Québec Accord Relating to Immigration and Temporary Admission of Aliens*, (February 5, 1991), s. 2, online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/policy/fed-prov/can-que.html>

ship and quota of admissions. Sponsored individuals also must meet a federally prescribed minimum language requirement and lodge an initial application through the DIAC administered Skill Select system. Importantly, as Birrell explains, recent developments in Australian immigration policy need to be understood in the context of the mining boom. For example, the increase in state sponsored immigrants was in large part motivated by the need to ensure a supply of labour during the mining boom and Western Australia, which is at the centre of the resource boom, is one of top destinations. However, the future of state sponsorship remains to be seen as the slowdown of the mining boom in 2012 is likely to have significant impact on overall migration policy in Australia.

In contrast to Australia and Canada where immigration federalism is exhibited most strongly in immigrant selection and with the objective of attracting migrants, in the US, sub-federal participation relates primarily to immigration enforcement and frequently with the objective of deterring undocumented migrants (often motivated by frustration about the perceived lack/failure of federal enforcement). While much of this local action is not sanctioned as such by federal immigration law, it seems that states and localities are “actually exercising the discretion that definitively shapes federal enforcement”. **Jennifer Chacón** analyzes a series of recent court decisions on immigration and their implications for both the understanding of state/federal powers and for the treatment of non-citizens. In its most recent decision *Arizona v United States* (2012), the US Supreme Court upheld the pre-emption argument, namely that federal government controls immigration policy and that where a comprehensive federal regulatory scheme is in place, there is no room for additional state action. Chacón projects that notwithstanding the Court’s formal endorsement of federal primacy in immigration, state and local activities will continue playing an important role in immigration enforcement in the United States in future years. One of the significant weaknesses of the Arizona decision is its failure to address the discriminatory effect of local enforcement, which as Chacón argues “will mean that, for migrants, more aggressive and racially-motivated policing will certainly follow from the decision.” Clearly, federal immigration enforcement is not free from discriminatory practices, but Chacón believes that the dispersal of immigration enforcement powers is likely to amplify such problems, first because sub-federal agents are less likely than federal agents to be trained properly on immigration issues and second, because of the lack of a centralized mechanism to oversee and track constitutional rights violations occurring at the local level.

Finally, the case studies of Germany and Switzerland illustrate the workings of immigration federalism in societies that have until recently been dominated by the ‘guest worker’ approach to immigration, but where sub-national units traditionally enjoyed substantial role in various areas of the immigration process.

In Germany, immigrant selection has always been a federal government’s responsibility but, in contrast to other federations, Länder (states) played a prominent role in the realm of immigration enforcement and integration from early on. Over the years, their role in these areas has even expanded, explains **Dagmar Soennecken**, “not because of a formal devolution of federal responsibilities to the subnational

level but largely because subnational actors made full use of their powers while the federal government dragged its feet". However, in contrast to the United States, it is not the "frustration" with the lack of federal action that has led Länder to take a more active role in immigration: the expansion of Länder role in this area happened with consensus instead of conflict—which is partially due to the model of German federalism characterized by high degree of coordination and joint decision-making between the two levels of government. Soennecken suggests that German immigration federalism can be understood as going through phases that oscillate between centralization and decentralization. Despite traditionally extensive role of the Länder in the immigration process, German federalism is currently in the centralization phase. For example, the federal level has begun reasserting its power in the area of naturalization (including through opening up citizenship to the *jus soli* principle), although the oversight of naturalization has always been a responsibility of the Länder. In enforcement and staying of deportation orders, federal reforms have mandated a more uniform approach, limiting the discretion of the Länder. Asylum laws and policies have been tightened at the federal level, although this has happened under the pressure of the Länder that sought to reduce the costs of the reception and settlement of refugees. As Soennecken demonstrates, these 'phases' of immigration federalism can lead to both restriction and expansion of non-citizens' rights—which one it ultimately depends on the power of the underlying discourse and political, institutional, economic and other considerations.

Similarly to Germany, Swiss cantons have traditionally had significant role in the immigration field as main regulatory actors, as agents implementing national legislation as well as through political channels. Thus, here, too, one cannot speak of a recent trend towards greater devolution but rather one can observe some recent attempts towards building a national framework on immigrant integration. As **Anita Manatschal** shows, cantonal powers have resulted in "a heterogeneous puzzle of [...] integration policies." She argues that, in the Swiss context, marked by considerable demographic, linguistic and cultural differences, devolution in integration policy is preferable to centralization for several reasons: it allows for better response to local needs, facilitates evolution and sharing of best practices and is less prone to symbolic party politics. However, she also acknowledges that these varying policies may be a source of structural discrimination against non-citizens. Cantonal integration policies represent a "limitrophe" along cultural-linguistic lines whereby French-speaking cantons are influenced by France's more inclusive notion of citizenship and German-speaking cantons—by Germany's more restrictive citizenship tradition. For example, French speaking cantons allowed for greater participation rights for non-citizens (e.g., voting in municipal elections) compared to German-speaking and Italian-speaking cantons. Similarly, naturalization requirements are less demanding in French-speaking rather than German-speaking cantons.

The last of the case studies by **Elsbeth Guild** is on the European Union (EU). The EU is not a federal entity per se, nor does the EU call itself a federal state. However, the competences of the EU have been extended to the area of immigration prompting questions similar to those arising in federal states: how and which areas of migration to harmonize through EU regulation? At present, low-skilled labour

migration is not yet regulated by the EU, while skilled labour migration—which is the focus of Guild’s chapter—is. That skilled labour migration is regulated mainly by EU law, not the law of the (currently) 28 Member States, is an indication that the EU is, according to Guild, moving towards federalism. However, what kind of EU labour market is in place today? This question is important, explains Guild, because “the more ‘complete’ the EU’s internal market for people to move and reside the greater the convergence of the EU to a federal model may be” and the “greater the rights for the individuals concerned”. Having had a close look at EU’s legislation regarding labour migration, Guild concludes that accessibility of the EU labour market depends on who the person is. *For nationals of EU Member States* who move across intra-EU borders in search of a job, the legal regime is clear: nationals of any Member State accompanied by their third country national family members can move freely and seek employment anywhere (with the exception of temporary transitional arrangements for new member states). Thus, labour migration of EU nationals is treated as a single common EU labour market and “the system may be considered to have a federal element”. *For third country nationals* (i.e., non-EU citizens), the legal regime tells however a very different story. Third country nationals who move to the EU for the purpose of labour migration are subject to a wide diversity of conditions, requirements and restrictions, depending on the job the person is likely to perform. What’s more, first admission of third country nationals to EU territory is always limited to one Member State—even where that admission is regulated by EU law. Given the complexity and fragmentation of EU law relating to the admission of third country nationals, it can be said that the EU labour market for non-EU citizens consists of 28 different national markets. In addition, third country nationals are not allowed to move within the EU labour market before a certain period of time spent in the country of admission: 18 months for the Blue Card holders and 5 years for long-term resident third country nationals, beneficiaries of international protection and their family members. They also have to fulfill various conditions (related to work, accommodation, resources etc.) after admission to be authorized to move across intra- EU borders. And even after 18 months or 5 years spent in the country of admission, another Member State is entitled to re-examine whether the various conditions imposed on them are fulfilled. Thus, one common EU labour market for third country nationals is not really achieved, and Member States are still permitted to impose strong constraints when non-EU citizens seek to exercise their mobility right. This differential legal treatment between EU and non-EU citizens reveals, as Guild puts it, that “the EU is a place of struggles around federalism” because there is as of today no convergence in EU regulation over movement of persons.

## References

- Baglay, S., Nakache, D. (2013). The Implications of Immigration Federalism for Non-citizens’ Rights and Immigration Opportunities: Canada and Australia compared. *American Review of Canadian Studies*, 43(3), 334-357.





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