Defining a Federalist Approach to Immigration Reform: The Left Stands on Firmer Legal Ground

By Simon Davis-Cohen
August 23, 2014

La Gloria corner store is packed with nearly 200 Mexican men, passports and checks in hand. They are temporary workers - blueberry pickers - on contract from Mexico, and today is payday. They're here to wire money home, because, I am told, the local Wells Fargo won't serve them.

That was last summer, in Whatcom County, Washington, the most northwestern county in the nation. La Gloria owner PetraApreza told me she'd never seen anything like it, at least not in Whatcom; the region's berry farm owners have long relied on domestic migrant workers for labor - not guest workers bused in from Mexico.

And just south of Whatcom is the fertile Skagit County, where agricultural (H-2A) guest workers also arrived last year. However, the guests' arrival in Skagit came after more than 300 *domestic* berry pickers struck at Sakuma Farms Inc., the region's largest producer. Their grievances included wage theft, ethnic and racial harassment, the presence of private security guards, being forced to work while sick and poor living conditions. Thanks to the strikes, the workers won agreements with Sakuma that protected the workers from retaliation, gave them a say in how wages are calculated and abolished the use of security guards on the farm. But the fight did not end there.

Sakuma's next move - to declared a labor shortage and bring in H-2A guest workers - revealed an effort to "shift the whole face of the workforce in Whatcom and Skagit County," said Rosalinda Guillen, executive director of Community to Community, which works closely with the workerst.

The systemic abuse within the H-2A program, and its undermining of US labor has been well documented.

H-2A

Recently, the "unskilled" H-2A guest worker program - the progeny of the highly controversial *bracero* guest worker program (1942-64) - has ballooned from 16,011 workers nationally (1997) to 31,538 (2002) to 65,345 (2012), (not counting some Caribbean nationals); and 1,984 (2009) to 6,251 (2013) in Washington State. Dan Fazio, director of the Washington Farm Labor Association (WAFLA) attributes the expansion to the crackdown on undocumented work seen since 2001. The militarized boarder and programs like E-Verify have made it harder to employ undocumented workers, increasing demand for guests. WAFLA is a guest worker middleman - in 2013 they were responsible for 46 of the 56 standard H-2A applications in the state.

Compared to working while undocumented, says Fazio,t he H-2A program gives workers "higher wages, better benefits, and best of all, the dignity of legal presence." And some farm workers agree. Emiliano Garcia, 65, who in his youth jumped the border annually to work in the fields of Texas and California, tells me that contracted work, during his time, was preferable to taking the risks that came with illegal border crossings and working while undocumented. But that's not saying much.

The recent expansion of the guest worker program, Fazio tells Truthout, is taking place "in spite of, not because of, the government." In Washington, some of this expansion has come from farm-owner-to-farm-owner cooperation. Through WAFLA, growers can provide workers with consecutive contracts, (workers can stay in the country for as long as three years, but no longer than 10 months at any one farm).

And the federal government's refusal to pass immigration reform and the accompanying expansions for guest worker programs - requested by large-scale employers - has only encouraged these non-federal tactics.

The conservative powerhouse that is the Cato Institute, highlighted the concept of state-based visas and state-based guest worker programs in a recent executive summary titled "State-Based Visas: A Federalist Approach to Reforming U.S. Immigration Policy." The summary argues, "A federalist approach to immigration is preferable to one entirely dominated by the federal government." As Cato points out: State-based visas have been proposed in California and elsewhere, and Utah passed a state-based guest worker program in 2011 - though it still awaits a federal waiver. And there are precedents: Canada and Australia sport provincial and regional visa programs.

These state-based approaches require federal approval. However, those wanting to expand guest worker programs are getting impatient, as are a broader swath of immigration reformers.

According to the National Conference of State Legislatures,184 state-level immigration-related laws were passed in 2013, up from 156 in 2012. And all but five states passed an immigration-related law or resolution in 2013.

Attempts at a state-based approach to immigration can take on ghastly forms: Consider Arizona's Senate Bill 1070, which tried to criminalize undocumented life. In the hands of

the guest worker industry and xenophobes frustrated with the federal government's "stasis" on immigration, "federalism" could be a sharp and very damaging weapon.

However, with the support of century-old law - the Civil Rights Act of 1870 - a growing push from the left is also taking to the states and local governments.

State and local governments are increasingly granting in-state tuition for noncitizens; authorizing drivers licenses and municipal IDs for the undocumented; offering free legal counsel to immigrant detainees; allowing noncitizens to practice law and to vote; and opting out of discriminatory federal initiatives that target noncitizens, like ICE's "Secure Communities." Says Emily Tucker, attorney for the Center for Popular Democracy, a group proposing the concept of state-based citizenship in New York, which would empower the state to loosen, but never to tighten, federal citizenship requirements [note: thanks to the 14th Amendment, states have NO power to restrict citizenship, but Tucker et al. argue that states might have the power to expand on federal citizenship, raising the floor (this specific argument has not been tested in the courts, and it might merely be a symbolic gesture as it has already been found, legally, that noncitizens can be afforded *benefits* of citizenship, like the vote, so making them state-based citizens might not actually have much impact): "Localities are realizing that they actually do have a lot of power to change what the day-to-day experience is of an immigrant."

So what is - legally - the difference between sub-federal laws that increase protections for noncitizens and those that discriminate?

It depends on whether federal law is defined as a *floor* that states and local governments canraise, or if it is a *ceiling* that cannot be moved. And if federal law is a floor, the question then centers on the difference between lowering and raising the floor. As federal law does provide protections against discrimination, furthering the intent of that law - i.e. imposing greater protections - would be considered a raise of the floor, while passing discriminatory state/local laws contrary to that intent - i.e. a lowering the floor.

This debate was brought to the fore in the Supreme Court's Arizona v. United States (2012) ruling, which struck down portions of Arizona's infamous law. The sections struck down were those that made it a crime for the undocumented to work, made it a crime to be undocumented *and* not registered as such, and permitted police to arrest persons they had probable cause to think committed a "public offence" that would justify deportation, without a warrant. The court did not strike down the section that requires police to ask for immigration papers from people stopped for unrelated reasons. But rather than articulate how Arizona had *lowered* the federal floor of discrimination protections, the court remained silent on the floor issue and discrimination. Instead, the court rested its decision and authority on SB 1070's potential impact on foreign relations (a federal matter) and the Constitution's Supremacy Clause.

Writes Lucas Guttentag, founder and former director of the ACLU Immigrant Rights Project: "The court read federal law as erecting a *de facto* federal ceiling on immigration enforcement that state laws cannot exceed."

As Guttentag argues in his paper "The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870," the Arizona decision overlooked the key Civil Rights Act of 1870, which defines federal immigration law as a *floor* - that local and state governments can build on. The 1870 Act expanded equal protection for all *citizens* (freed slaves) to all *persons* (noncitizens) - in direct response to state-based discrimination against Chinese and other immigrants at the time.

The 1870 Act provides a foundation for the immigration floor/ceiling debate.

Thanks to the Act of 1870, part of that "intent" includes protections against discrimination.

And beyond this contribution to the definition of federal "intent," writes Guttentag, the 1870 Act "helps to distinguish between two types of contemporary subfederal immigration measures;" those that degrade federal protections for noncitizens, and those that complement or bolster them.

A federalist approach to immigration provides space for sub-federal governments to participate. But that space is conditional - floors cannot be lowered, only raised. The 1870 Act helps define that role for sub-federal immigration policies by adding "a grounds for preempting laws that cause discrimination *and* for validating measures that promote integration and protection," writes Guttentag (my emphasis).

But in Skagit and Whatcom, the debate is less abstract. Beating back the expansion of guest worker programs is at the fore. This year, workers won round two, defeating Sakuma's 2014 H-2A application by proving - through written testimony - their willingness to work.

According to the Washington State Employment Security Department, other than the 438 guest workers requested by Sakuma, two other H-2A applications totaling 26 workers were also submitted in Skagit in 2014. None were requested in Whatcom.

Washington berry pickers are not alone in challenging the exploitation of farm labor. The Florida-based Coalition of Immokalee Workers is famous for the change they've driven into corporate buying standards - to improve the lot of both domestic and guest workers. There, after years of community-based organizing, workers shifted their focus from growers to the corporate buyers that CIW attorney Steve Hitov tells Truthout, "set the terms of the market." This is in line with what guest worker labor organizer Saket Soni said during a June 2014 lecture at Stony Brook University: "We need to bargain with the people who are really controlling the economy, not just the people who are signing checks." And despite the odds in North Carolina, thousands of guest workers have been unionized.

Says Guillen,"In the agricultural industry and in the food system, I believe, organizing strategies should be based regionally." Corporate buyers don't control the Whatcom and Skagit berry market as they do Florida's tomato industry. Håagen-Dazs, which has been

pressured to drop Sakuma's account, accounts for a fraction of Sakuma's sales only. For now, in Skagit and Whatcom, "the pressure is on the [check-signing] employer . . . because that's where the authority is," Guillen told Truthout.

The workers and their local allies are demanding a union contract. But it's not coming easily, as many members of Familias Unidas por la Justicia, Guillen tells me, have not been hired. The fight continues.

And whether the feds act or not, immigrant and worker-friendly locals like Familias Unidas will remain in the crosshairs of federal and nonfederal forces. And those working locally from the left appear to rest on sturdier legal ground than their counterparts; raising the floor of protections for noncitizens is supported by established legal precedent, while measures like AZ 1070 have been proven unconstitutional and state-based guest worker expansion dependent on federal approval.

Of raising the federal "floor," Tucker says, "I think it's really important for localities and states that have strong immigrant populations to think about the fact that they have the power to impact people's daily lives."