A federalist approach to immigration reform

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For the last century or more, immigration policy has been dominated by the federal government. That's an inversion of what most of the Founding Fathers expected. James Madison and Thomas Jefferson, among many others, objected to the Alien Acts of 1798 in large part because the original meaning of the Constitutiondid not give Congress any general power to restrict immigration, but rather largely left the issue to the states.

We are unlikely to fully restore the original meaning of the Constitution. But earlier this week, Republican Senator Ron Johnson (Wisconsin), and Representative Ken Buck (Republican, Colorado), put forward a proposal under which states would exercise considerably greater power over migration. The proposal would allow each state to admit guest-workers from abroad for a period of up to three years, that could then be renewed by the state. The visas in question would still be issued by the federal government, but largely at the discretion of the states. Senator Johnson's version of the bill would enable each state to issue visas admitting up to 5,000 workers. There would be an additional pool of 250,000 visas from which states could draw, allocated based on the state's population as a percentage of the total US population. In the House version of the bill, the numbers are smaller (2500 per state, plus an additional pool of 125,000). The numbers could potentially go up over time, depending on various factors, such as GDP growth. The cap for an individual state would increase by 10 percent in any year in which 97 percent of the guest-workers sponsored by that state complied with the terms of their visas and did not enter the black market. It would decrease by 50 percent in any year in which the state missed that target. After four years in which they missed the target, the state would be suspended from the visa program for five years.

Participating workers would be barred from virtually all federal welfare and health care benefits, including those available under the Affordable Care Act, the Earned Income Tax Credit, and other progams. The state visas also would not give participants either citizenship or permanent residence status, though Congress could potentially grant either in the future.

Unlike with the current federal H1B visa, Johnson-Buck state visas would not be tied to a particular employer. Workers would be free to change jobs, if they wish. That is extremely important, both because it deters mistreatment of workers by employers and because it enables workers to seek out new positions where they would be more productive, and thereby contribute more to the economy. However, workers would not be allowed to take jobs in a state other than the one that issued them the visa. If they do so, they would lose their legal status, and be subject to deportation. Given the enormous advantages of legal status, that is a significant deterrent to seeking out of state jobs. The proposal does allow participating states to form "compacts" under which guest workers admitted by one could also seek out jobs in the other, and vice versa.

If the bill passes, the guest workers admitted by the states would be among the biggest beneficiaries. Many thousands would get freedom and economic opportunity, and escape having to languish in poverty and oppression. That is important to consider, because it is unjust to make immigration policy without reference to the rights and interests of potential immigrants themselves. But American citizens also stand to gain, because immigrant workers make major contributions to the American economy. By channeling immigrants into legal employment, this program could also diminish deportations, which come at a high cost to taxpayers.

Wall Street Journal columnist Jason Riley and Cato Institute immigration policy expert David Bier have further commentary on the proposal, outlining several of its advantages. They point out that a state-based visa program would enable to states to make adjustments based on different local economic needs. As with political decentralization on other issues, it could also help mitigate the poisonous partisan conflict created by federal control, where a single, one-size-fits all approach is imposed the entire country. Regional visa programs have worked well in Canada and Australia, two diverse federal democracies with histories and political traditions similar to our own.

The key political question about this bill is whether it can get through Congress. Donald Trump has made clear that he wants to drastically cut legal immigration, as well as illegal. And some of his strongest allies among congressional Republicans feel the same way. By creating a system of state-issued visas without cutting any of those available under current law, the Johnson-Buck proposal would likely result in a substantial increase in legal migration, relative to the status quo. It is thereby a challenge to Trump's restrictionist agenda.

How many congressional Republicans will support the challenge remains to be seen. But it is significant that the proposal has been advanced by two influential conservative Republicans. Johnson is also notable for being Chairman of the Senate Homeland Security Committee, which has jurisdiction over many immigration-related issues.

Another key political question is whether the bill will attract Democratic support. In recent years, Democrats have been increasingly favorable to immigration. But, historically, some elements of the far left have been hostile to it, especially when it comes to guest-worker programs. Senator Bernie Sanders, the rising star of the left, has a long history of hostility to increasing immigration and guest-worker programs (until making a partial reversal during the 2016 Democratic primaries). He once even described open borders as a "Koch brothers" plot against American labor. Hopefully, progressive Democrats' growing sympathy for immigrants and understanding of their contributions to the economy will win out over the zero-sum thinking represented by Sanders and Donald Trump. This is one area where the two of them are eerily similar.

Ultimately, decentralization of immigration policy to the state level is not as good as the even more complete decentralization that would occur if these decisions were made by individual workers and employers. Among other things, the latter are in an even better position to judge relevant economic needs than state officials are. But a state-based worker visa program would still be a major improvement over the status quo. It would boost the economy, provide greater freedom and opportunity for many thousands of people, and save taxpayer money. As always, the best should not be the enemy of the good.

UPDATE: A post at the Hot Air blog responds to this post, claiming that the Migration or Importation Clause of the Constitution shows that the Founders gave Congress power over immigration. I addressed that argument in detail here. The Migration or Importation Clause does not presume any general federal power over immigration, but merely temporarily limited Congress' authority over the importation of slaves and indentured servants.