

The Need For Facts In Immigration Policymaking

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Ming H. Chen, *Leveraging Social Science Expertise in Immigration Policymaking*, 112 **Northwestern L. Rev. Online** (forthcoming 2018), available at [SSRN](#).

In President Donald J. Trump's first [State of the Union](#) address he framed immigrants as dangerous criminals—gang members and murderers. To address this public safety threat President Trump proposed building a wall along the Southern border, ending the visa lottery, and eliminating the majority of family-based green cards. Yet social science research dating back to the early 1900s has found that immigrant criminal activity is significantly lower than United States citizen criminal activity. Despite these robust social science findings, immigration policy makers continue to promote and adopt policies based on the idea that immigrants present a significant public safety risk to the American public.

[Ming H. Chen's](#) forthcoming essay, *Leveraging Social Science Expertise in Immigration Policymaking*, offers a critical intervention at this time in immigration policymaking. Chen's essay presents concrete strategies that immigration policymakers can utilize to ground immigration policymaking in facts and social science insights. Chen's recommendations focus on the process by which immigration decisions are made and seek to bring traditional administrative and constitutional principles into the process. First, bring presidential policymaking into the administrative state. Second, use political mechanisms to improve the quality of evidence used in the immigration policymaking process. Finally, strengthen judicial review of immigration policy.

These proposals are based on the traditional role that expertise has played in administrative decision-making. Experts and administrative procedure are two ways that administrative law has safeguarded against arbitrary decision-making. Administrative agencies traditionally embraced social science evidence to improve the quality of the agency decision-making. These agencies have relied on experts within the government and externally. Civil servants are the internal experts, and they offer learned expertise as a result of accumulating experience in the complex policy matters that they work on. External experts are used on advisory councils and confer with agency experts while maintaining their university or nonprofit positions. Advisory councils offer a forum in which social scientists are able to offer their professional norms regarding information-gathering and research methods. Incorporating external experts into the policymaking process provides a basis for decision-making based on professional norms rather than politics.

Administrative procedure is the other means by which agencies have limited arbitrary decision-making. Courts have increasingly required agencies to "identify their assumptions, methods, and evidence, as well as explain their reasoning." (P. 4.) Today administrative decision-making is highly proceduralized, as evidenced by the [Administrative Procedure Act](#) ("APA") and other trans-substantive legislation. Additionally, many organic statutes dictate what can and cannot be considered during decision-making.

Part II of Chen's essay illustrates how immigration policymakers reject expertise. This section analyzes border control policies, federal responses to sanctuary cities, and the exclusion of refugees to demonstrate the institutional failures that allow immigration policymakers to ignore facts and social

science insights. Chen contends that incorrect assumptions about the drivers of unauthorized migration by Republicans and Democrats has led to border control policies that are ineffective at best and at worst counterproductive. For example, sociological research regarding the factors driving migration suggests that a border wall is likely to exacerbate unauthorized migration rather than halt it. Sociologist Douglas Massey's research indicates that heightened border control prevents circular migration such that individuals remain in the United States and establish roots rather than traveling to the United States for seasonal work opportunities and returning to their country of origin.

Federal responses to sanctuary cities are based on a "strong belief in immigrant criminality." (P. 10.) This belief leads the federal government to adopt policies to punish sanctuary cities. Yet the idea that immigrants commit more crimes than citizens is false. Chen cites numerous reports and social science research findings showing that immigrants do not commit more crimes than citizens. Despite these facts the perception of immigrants is shaping immigration policy.

Finally, President Trump's decision in January of 2017 to prohibit refugee admissions and his decision to reduce the refugee cap by more than half are based on the idea that refugees present a heightened terrorist threat. These presumptions ignore evidence regarding the rigorous vetting process that refugees undergo and "conflate terrorists and their victims." (P. 14.)

Chen argues that importing traditional administrative and constitutional principles can bring more social science expertise into the immigration decision-making process. First, presidential policymaking should be brought into the administrative state by involving civil servants when undertaking executive action. Consulting with the affected agencies and encouraging those agencies to promulgate further regulations to carry out the executive orders would facilitate this goal. Second, use political mechanisms to improve the quality of evidence used in the immigration policymaking process. For example, amend the APA or the Immigration and Nationality Act to require that policies be based on a factual record that is subject to review and that information regarding methods and data sources for any studies relied upon be disclosed. Finally, strengthen judicial review of immigration policy. Chen suggests that normal standards of constitutional and statutory review should apply to immigration decisions. Such an approach "would require courts to take a 'hard look' at the rationality of agency decision-making, or at least be sure that the agency has taken a hard look and provide some kind of rational explanation for the policy changes." (P. 19.)

Immigration policy is a key part of the President's legislative agenda. As an increasing number of policy decisions are made in the area of immigration it is critically important that these decisions are based on accurate and reliable information. Chen's essay makes two important contributions. First, it outlines the various ways in which current immigration policy is not based on accurate and reliable information, which causes the policies to be ineffective and at times counterproductive. Second, it provides an important roadmap for operationalizing administrative and constitutional principles to provide for more evidence-based immigration policy.

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