

NOTE

DO TOO MANY SUBFEDERAL COOKS IN THE KITCHEN SPOIL THE REGULATORY BROTH?: A CRITICAL ANALYSIS OF THE FEDERALIST IMMIGRATION REGULATORY REGIME

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ABSTRACT

On November 4, 2024, incoming President Donald Trump vowed to “launch the largest deportation program of criminals in American history.”¹ Within six months of taking office, it became clear that this was no empty threat. A defining characteristic of the Trump II Administration’s aggressive immigration enforcement agenda is the substantial authorization of, and reliance upon, subfederal action. Albeit unconventional, the Trump II Administration’s mobilization of subfederal immigration regulatory channels is far from unprecedented.

In recent years, states and localities have emerged as the leading architects of immigration laws and policies, outpacing the federal government in terms of both influence and scope. Although it is well-established that the federal government maintains exclusive authority over pure immigration determinations and that subfederal entities retain the residual authority to adopt non-conflictual alienage provisions, the intricacies of this power-sharing relationship remain underexamined.

While the subfederal propagation of restrictionist policies threatens to violate individual constitutional rights, entrench stigmatizing anti-immigrant narratives, and erode noncitizens’ quality of life, this Note proffers several prescriptive recommendations designed to mitigate these harms. In addition to clarifying how preemption challenges involving subfederal immigration laws should be resolved, courts should meaningfully consider the equal protection concerns arising out of the same legislative nuclei. Furthermore, the federal government should appoint a liaison to manage vertical integration discourse with subfederal governments and should, in response to articulated grievances, regularize the dispersal of federal funds to offset the subfederal costs associated with immigration-related activity because subfederal governments are more likely to engage with integrationist ideas when they are not exclusively responsible for bearing the burden of the associated costs.

* J.D. from Georgetown University Law Center (2025); B.A. in Government & Law and International Affairs from Lafayette College (2022). Sincere thanks to Professor Allegra McLeod for her guidance and feedback on this Note, and to Professor John Hasnas for introducing me to the process and practice of legal scholarship. I am grateful to the ACLR staff for their insightful and encouraging review. The views expressed herein are exclusively my own and are not attributable to any institutions with which I am, have been, or may become affiliated. © 2026, Kelly Mwaamba.

1. *What Has Donald Trump Promised to do on Day One of His Second Term?*, AL JAZEERA (Jan. 18, 2025), <https://aje.io/47frff> [<https://perma.cc/LV45-CJ2W>].

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INTRODUCTION

Despite the dominant perception of immigration law as an exclusively federal domain, the creation and enforcement of immigration law have, over time, moved towards a “polycentric” model implicating both non-traditional federal and subfederal actors.² This reconfiguration of power is aptly described as the

2. See, e.g., Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. C.R. & C.L. 95, 102 (2017) (“[A] great deal of legislative activity relating to immigration has occurred at the subfederal level in recent years.”); Michael Flynn, *Kidnapped, Trafficked, Detained: The Implications of Non-State Actor Involvement in Immigration Detention*, 5 J. MIGRATION & HUM. SEC. 593, 594 (2017).

“new immigration federalism.”³

While immigration law is generally characterized as civil, subfederal engagement with the regulatory regime operates predominantly within the criminal framework.⁴ Professor Juliet Stumpf popularized the term “crimmigration” to highlight the substantive and procedural entrenchment of criminal legal norms in the immigration landscape.⁵ The criminal dimensions of immigration law are threefold. First, criminal history is directly linked to adverse immigration outcomes.⁶ Second, the methods used to enforce immigration laws mirror traditional criminal enforcement strategies.⁷ Finally, laws adopted throughout the United States (U.S.) impose criminal sanctions for administrative (and, therefore, definitionally civil) immigration-related activities.⁸

Taking into consideration the gradual devolution of immigration law from a federal civil pursuit to a subfederal criminal venture, this Note argues that the subfederal propagation of restrictionist policies threatens to violate individual constitutional rights, entrench stigmatizing anti-immigrant narratives, and erode noncitizens’ quality of life unless the applicable doctrinal standards of review are revised *and* the federal government adopts a more involved role in the management of the federal-subfederal immigration relationship. Part I summarizes how states and localities have emerged as the dominant subfederal curators of immigration law, and examines the nontraditional criminal enforcement functions of domestic corporations and the military. Part II offers a novel doctrinal and ethical account of how we ought to assess the permissibility of these efforts, emphasizing the importance of centering instructive migrant perspectives and experiences. Finally, Part III advocates, first, for the resolution of dangerous deficits in the existing preemption analytical framework and, second, for the normalization of federal support to facilitate constructive subfederal integrative endeavors based on the efficacy of similar approaches that have been adopted in two commonly situated liberal democratic federalist nations: Germany and Canada.

3. Pratheepan Gulasekaram & Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076 (2013) (describing a shift in the balance of power between the federal government and state governments regarding immigration affairs whereby state power functionally rivals, and potentially threatens to supersede, federal government control).

4. See David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 159 (2012) (“Immigration enforcement and criminal justice are now so thoroughly entangled it is impossible to say where one starts and the other leaves off”); César G. Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 223 (2018).

5. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (using the term “crimmigration” to describe the increasing overlap between criminal law and immigration law).

6. Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 43 (2017).

7. *Id.* at 39.

8. See *Sessions v. Dimaya*, 584 U.S. 148, 184 (2018) (Gorsuch, J., concurring in part) (“[T]he Court has sometimes ‘expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.’”).

I. THE MANIFOLD NON-TRADITIONAL AND SUBFEDERAL IMMIGRATION LANDSCAPE

The recent rise in subfederal immigratory engagement is primarily attributed to the deficiency of federal policy activity in the field.⁹ The grievance is not that the federal government *never bothered* to establish a regulatory regime; rather, the contention is that Congress has failed to maintain and update that regime *as of late*.¹⁰ Despite the hopeful climate that existed throughout the 113th Congress,¹¹ the federal immigration landscape has remained close to dormant since the early-2000s.¹²

This influx of subfederal activity also reflects growing state and local dissatisfaction with one-size-fits-all solutions (federal action) as applied to uniquely individual state-based immigration challenges.¹³ Conventional wisdom once held that border states incur the strongest negative externalities associated with unauthorized immigration given their close spatial proximity to physical border sites,¹⁴ but the narrative tide is changing.¹⁵ Beginning in the early 2000s, non-border states like Georgia have emerged as new sites for mass immigration.¹⁶ Despite shifts in

9. See Gulasekaram & Ramakrishnan, *supra* note 3, at 2074 (“[S]tate and local officials characterize their laws as unavoidable responses to the policy problems they face when they are squeezed between the challenges of unauthorized migration and the federal government’s failure to fix a broken system.”); Huyen Pham and Pham Hoang Van, *The Subfederal in Immigration Polarization*, 42 MINN. J. L. & INEQ. 33, 33–34 (2024).

10. See Gulasekaram & Ramakrishnan, *supra* note 3, at 2095 (“[S]tates and localities have successfully refocused the political and legal inquiry when considering subfederal immigration measures on apparent congressional silence over the past ten to twelve years. In other words, what has Congress done lately?”).

11. See Kit Johnson & Peter Spiro, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. 100, 110 (2012) (“[W]hen Congress undertakes comprehensive immigration reform it should give a close look to state’s ideas about immigration. I say *when* and not *if* because, in the week following the presidential election, representatives from both political parties have indicated that immigration reform is going to be a priority for the 113th Congress.”).

12. See William A. Galston, *The Collapse of Bipartisan Immigration Reform: A Guide for the Perplexed*, BROOKINGS INST. (Feb. 8, 2024), <https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a-guide-for-the-perplexed/> [https://perma.cc/U8QE-JX8J] (“The last comprehensive immigration reform was enacted almost four decades ago”); Hesley Gonzalez, *Release from Legal Purgatory: Adding A Category to the Secretary of Homeland Security’s Power to Paroline in Place*, 50 W. ST. U. L. REV. 21, 28 (2023) (describing Congress’ failure to enact substantial comprehensive immigration reform legislation after 2001).

13. Justice Scalia credited this justification for subfederal immigration involvement, stating that “Arizona bears the brunt of the country’s illegal immigration problem Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.” *Arizona v. United States*, 567 U.S. 387, 436 (2012) (Scalia, J., concurring in part).

14. See Ryan T. Chin, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1901 (2011) (“Arizona is one of the main points of entry along the U.S.-Mexico border and will necessarily face different immigration issues than a state like Minnesota.”).

15. ANITA KHASHU, *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES* 6 (2009) (“Not only is the number of immigrants in the United States reaching historically high levels, the population is also becoming more dispersed and areas of the country with no history of immigration are experiencing large influxes of immigrants.”); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 574 (2008) (“Migrants are bypassing traditional urban centers and gateway states, heading for destinations—namely the Southeast—whose past exposure on immigration has been limited . . .”).

16. See Aaron Terrazas, *Immigrants in New-Destination States*, MIGRATION POL’Y INST. (Feb. 8, 2011), <https://www.migrationpolicy.org/article/immigrants-new-destination-states> [https://perma.cc/3S2G-KUET].

terms of *where* new immigrant communities are landing, it nonetheless remains true that states and localities—based on their specific histories, needs, capacities, and resources—experience immigration on an individualized basis, thus legitimizing requests for individualized remedies.¹⁷

Subfederal and non-traditional entities engage with immigration law in two ways: first, by cooperating with the federal government to enforce existing immigration standards and, second, by creating their own immigration laws and policies.

A. *States and Localities: Enforcing Existing Immigration Law*

1. Federal Delegation of Cooperative Enforcement Authority

Three federal legislative policies—the 1952 Immigration and Nationality Act (INA),¹⁸ the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA),¹⁹ and the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA)²⁰—have defined the contours of the state and local cooperative landscape as it exists today. This legislative trifecta works together to “translate criminal-law arrests and incarceration into immigration enforcement actions,”²¹ and relies heavily on subfederal cooperation to do so.

The Secure Communities program was launched pursuant to the authority contained in the INA.²² The initiative functions as a data-sharing program and requires

17. See Gulasekaram & Ramakrishnan, *supra* note 3, at 2079 (“[D]emographic shifts caused by globalization and immigration ‘are felt differently in different parts of the country, and the disruption immigration causes, as well as the viability of different immigration strategies, will vary.’”); Brittney M. Lane, *Testing the Borders: The Boundaries of State and Local Police Power to Regulate Illegal Immigration*, 39 PEPP. L. REV. 483, 495 (discussing judicial recognition of the “the importance of local regulation as a means of handling conflicting immigration interests in different states” in the context of disparate eastern versus western state geographical interests).

18. Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163, 234 (1952) (current version at 8 U.S.C. § 1358).

19. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276 (1996).

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

21. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 98–99 (2016).

22. Unlike the other cooperative mechanisms created through the INA, which have remained active and stable after their initial launch, Secure Communities has transitioned in and out of effect several times. Launched in 2008, the Secure Communities program was temporarily discontinued in 2014 due to strong criticism. See U.S. DEP’T OF HOMELAND SEC., SECURE COMMUNITIES (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities_0.pdf [https://perma.cc/2F7N-FPY3] (on file with author) [hereinafter “Secure Communities Memo”] (“Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.”). Much of this dissent stemmed from the Department of Homeland Security’s transition of the program from voluntary to mandatory in 2011. See Amdur, *supra* note 21, at 104. From 2015 through 2017, Secure Communities was replaced by the Priority Enforcement Program (PEP) which operated as a loose corollary of the Secure Communities program. See *Secure Communities Memo* at 3. In 2017, then-President Trump enacted Executive Order 13768 which ousted PEP and reinstated the Secure Communities initiative. Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8801

state and local law enforcement agencies to report all noncitizen criminal arrests.²³ These individuals' fingerprints are then stored in a national centralized database, thus essentially equipping the federal government to, "if it chooses, initiate immigration enforcement proceedings against any arrestee determined to be in the country illegally."²⁴ Under Section 439(b) of the AEDPA, this information is now stored in the National Crime Information Center (NCIC) database to "assist State and local law enforcement officials in carrying out [immigration-related arrest and detention] duties."²⁵ By deliberately designing the database to house both civil immigration-related and criminal information, the federal government has rendered it functionally impossible for subfederal agencies to avoid encountering sensitive information—which may, in some circumstances, constitute grounds for removal—during the course of their daily enforcement activities.²⁶ While the discovery of certain sensitive information may constitute a legitimate basis for removal, the problem is that states may not always *wish* to become automatically entangled with the federal government's removal regime simply by way of performing their standard day-to-day duties. While some states actively seek out the opportunity to collaborate with the federal government (with a particular emphasis on 287(g) agreements discussed below, for example), other states may not want to implicate themselves in the execution of controversial federal agendas through unavoidable exposure to immigration-related offense data.

Section 372 of the IIRIRA modified Section 287 of the INA to create what are now referred to as 287(g) agreements.²⁷ Pursuant to a 287(g) agreement, state and local agencies can volunteer for federal deputization which, in turn, grants those subfederal actors the otherwise-unpermitted authority to investigate, apprehend, and detain individuals suspected of violating immigration law "at the expense of the State or political subdivision and to the extent consistent with State and local law."²⁸

The Secure Communities initiative prioritized the formation of relationships between the federal government and state governments,²⁹ whereas the 287(g) program increasingly focuses on relationships between the federal government and

(Jan. 25, 2017). In 2021, President Biden revoked the executive order and, as of 2024, the Secure Communities program remains inactive once more. Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051, 7051 (Jan. 20, 2021); *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/secure-communities> [<https://perma.cc/6QK3-M7K2>] (last visited Jun. 21, 2025).

23. See *Secure Communities Memo*, *supra* note 22.

24. Sklansky, *supra* note 4, at 187.

25. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276 (1996).

26. Amdur, *supra* note 21, at 103 (States must now "screen every arrestee in the country for potential deportability").

27. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. 104-208, § 372, 110 Stat. 3009-646 (1996).

28. KHASHU, *supra* note 15, at 3–4 (subfederal jurisdictions currently maintain active 287(g) agreements with the federal government); *National Map of 287(g) Agreements* IMMIGRANT LEGAL RES. CTR. (Apr. 23, 2025), <https://www.ilrc.org/resources/national-map-287g-agreements> [<https://perma.cc/QC9M-8EHY>].

29. See Maria P. Lopez, *The Intersection of Immigration Law and Civil Rights Law: Noncitizen Workers and the International Human Rights Paradigm*, 44 BRANDEIS L.J. 611, 627 (2006).

localities.³⁰ This pattern is not coincidental; the further down the subfederal totem pole the federal government ventures, the less resistance it encounters as localities “lack[] the political clout, financial security, and legal resolve to resist federal pressure, even when they had concerns about participating.”³¹

In addition to the language of the INA, AEDPA, and IIRIRA, Department of Justice (DOJ) press releases represent key sources of guidance for subfederal governments seeking to interpret the proper scope of delegated authority.³² The first relevant press release was issued by the Carter Administration in 1978 and emphasized that local police should not detain “any person not suspected of a crime, solely on the ground that they may be deportable aliens.”³³ In 1996, the Clinton Administration confirmed that state and local enforcement agencies “lack recognized legal authority to arrest or detain aliens solely for purposes of civil deportation proceedings.”³⁴ However, in 2002, shortly after the September 11 attacks, the Bush Administration’s DOJ issued a memorandum overruling the 1996 advice, condemning it as “mistaken.”³⁵ This memorandum framed state participation in immigration law enforcement as a “force multiplier” and “invi[te]d state and local police to use their ‘inherent authority’ as sovereigns to join federal immigration authorities in enforcing civil immigration laws.”³⁶ The DOJ’s 2002 pivot towards cooperative delegation appears to paint a clear, pro-cooperation picture which has given rise to the policies and practices described below.

2. Subfederal Use of Delegated Authority in Practice

Federal law explains that noncitizens’ criminal conduct may trigger federal civil removal proceedings, but subfederal agents are primarily responsible for determining which actions fall within the scope of sufficient criminal conduct.³⁷ State police are responsible for ten percent of total foreigner arrests,³⁸ and by 2013, states surpassed the federal government as the primary enforcers of interior federal immigration law.³⁹

State and local agencies engage in enforcement activity through three mechanisms: incidental discoveries, collaborative state-federal ventures, and independent

30. See Sklansky, *supra* note 4, at 187.

31. Amdur, *supra* note 21, at 116.

32. It should be noted that DOJ press releases do not constitute binding authority. Linda R. Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. L.J. 9, 38 (1994) (“A press release does not have any power to compel state action because it does not carry the same weight that a law or an act of Congress would.”). As such, states must defer heavily to the language of the statutes, even if those provisions contradict the sentiments expressed in press releases.

33. *Id.* at 36.

34. Chin, *supra* note 14, at 1899.

35. See *id.*

36. See Pham & Van, *supra* note 9, at 35; Amdur, *supra* note 21, at 101.

37. See Sklansky, *supra* note 4, at 180.

38. Yañez & Soto, *supra* note 32, at 11.

39. Amdur, *supra* note 21, at 106.

enforcement.⁴⁰ Incidental discoveries typically occur when a subfederal agency detains a noncitizen on independent state law grounds and information relevant to an immigration violation is disclosed during this detention, oftentimes during the interview stage. Collaborative state-federal operations arise, for example, when federal Immigration and Customs Enforcement (ICE) identifies a noncitizen suspect through database reports and requests the state's assistance in facilitating the detention.⁴¹ Designated support assignments and paired border patrolling programs also fall into the collaborative operations bucket.⁴² Finally, in an independent state enforcement situation, state officers pursue noncitizens suspected of violating federal immigration law without any federal mobilization or oversight.⁴³ Of the three arrangements, independent enforcement operations "present the greatest risk for civil rights violations" because officers "lack the specialized training and knowledge required to enforce immigration law."⁴⁴

3. Generating New Subfederal Immigration Laws

States and localities attempt to create immigration policy through the enactment of pure immigration laws, which regulate noncitizens' entry and exit,⁴⁵ and alienage laws, which affect noncitizens' integration without directly addressing entry or exit.⁴⁶ Two broad legislative categories have emerged: integrationist laws "aimed at social and economic incorporation of immigrants"⁴⁷ and restrictionist laws "designed to promote noncitizen self-removal by depriving them access to valuable or necessary community resources."⁴⁸

Pure subfederal immigration laws are uncommon in practice because they are impermissible on preemption grounds, as will be discussed at length in Part III. The preemption principle reflects the notion that once the federal government has legislated in an area of exclusive federal jurisdiction, subfederal agents may not circumvent that authority by legislating over the federal government's articulated

40. See Yañez & Soto, *supra* note 32, at 43–51; Rodríguez, *supra* note 15, at 592.

41. See, e.g., *Gonzalez v. U.S. Immigr. and Customs Enf't*, 975 F.3d 788, 798–800 (9th Cir. 2020) (describing the collaborative process through which federal immigration agencies issue detainers to local governments authorizing the forty-eight-hour detention of targeted individuals); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 607–08 (E.D. Pa. 2017) (recounting specific instances where such detainer requests were issued by federal agencies to the Philadelphia city government).

42. Yañez & Soto, *supra* note 32, at 47.

43. *Id.* at 49–50.

44. *Id.*

45. Hiroshi Motomura, *Federalism, International Human Rights and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) ("[T]he law pertaining to the entry of noncitizens and their continued stay in the United States.").

46. *Id.* ("[T]he treatment of noncitizens in the United States with respect to matters other than entry and expulsion.").

47. Ryo, *supra* note 2, at 103.

48. Chin, *supra* note 14, at 1902.

will.⁴⁹ Although the Constitution does not expressly bestow the federal government with exclusive jurisdiction over immigration matters,⁵⁰ exclusive federal jurisdiction over civil entry and exit determinations is assumed through the Supremacy Clause.⁵¹ Under this configuration, pure immigration law is exclusively controlled by the federal government.⁵² Alienage laws, on the other hand, are not immediately strikable on preemption grounds as long as they do not infringe on the federal government's administrative sorting authority.⁵³

Integrationist alienage laws are prevalent across many states, especially those housing sanctuary cities. These policies often emerge in the context of enhanced access to public resources, such as education and healthcare.⁵⁴ For example, Texas, California, New York, Illinois, Utah, and Nebraska have all enacted legislation allowing unauthorized immigrant students to pay in-state tuition rates, thus reinforcing youth integration pathways by increasing access to education and, in

49. BRYAN L. ADKINS, JAY B. SYKES & ALEXANDER H. PEPPER, CONG. RSCH. SERV., R45825, *FEDERAL PREEMPTION: A PRIMER* 3 (2023).

50. See, e.g., Chin, *supra* note 14, at 1881 (“[T]here is no express grant of immigration authority in the Constitution.”); Rodríguez, *supra* note 15, at 611 (“Nowhere in the Constitution is the federal government explicitly given exclusive power over immigration.”); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y. 81, 122 (2013) (“[T]he Constitution does not obviously require federal exclusivity.”); Stella B. Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 711 (2013) (“The United States Constitution does not expressly define the scope of federal power to regulate immigration.”). While a handful of scholars disagree with the dominant position, dissent is minimal. See B.J. Smith, *Emma Lazarus Weeps: State-Based Anti-Immigration Initiatives and the Federalism Challenge*, 80 UMKC L. REV. 905, 917–18 (2012) (“Article I of the U.S. Constitution specifically states that the federal government has the power to regulate immigration This intention was made clear through the Constitution, highlighted by the authors of The Federalist Papers in 1787, and is continuously endorsed by the Supreme Court.”).

51. BLAS NUÑEZ-NETO, KARMA ESTER & MICHAEL J. GARCIA, CONG. RSCH. SERV., RL32270, *ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT* 5 (2009). Historically, states played a larger role than the federal government in the administration of immigration law before the Civil War on the theory that subfederal communities should “be held responsible for the health, safety, and welfare of their members.” Chin, *supra* note 14, at 1885. The Supreme Court introduced the idea of federal immigration primacy in the immigration sphere in *Chy Lung v. Freeman*, holding that Congress, rather than the states, possessed the authority to regulate immigration policies after California attempted to extort discretionary gold bonds from travelers arriving from China. 92 U.S. 275, 278, 280 (1876). Then, in *Chae Chan Ping v. United States*, the Court upheld the primacy principle by holding that Congressional legislation abrogates prior state treaties when the federal law would conflict with the state provision. See Shira M. Levine, *A “Vital Question of Self-Preservation”: Chinese Wives, Merchants, and American Citizens Caught in the 1924 Immigration Act*, 9 STAN. J. C.R. & C.L. 121, 136 (2013). Federal exclusivity in the immigration regulatory domain was solidified in the 19th century when the federal government definitively abolished slavery throughout the states. Gulasekaram & Ramakrishnan, *supra* note 3, at 2084–85.

52. Johnson & Spiro, *supra* note 11, at 103 (citing *Traux v. Raich*, 239 U.S. 33, 42 (1915)) (“The power to deny entrance and abode, the Court said, is like the power to remove foreign nations: it is purely federal.”); Rubenstein, *supra* note 50, at 119; Elias, *supra* note 50, at 711.

53. Elias, *supra* note 50, at 711–12 (“[A]lienage laws . . . can, according to the same longstanding doctrine, be enacted by either federal government or the states.”).

54. See Emily Ryo, *supra* note 2, at 105 (describing prevalence in the educational context); Elizabeth Keihne & Quinn Hafen, *State and Local Integrationist Policies and the Physical and Psychological Health of Undocumented Immigrants*, 48 CURRENT OP. IN PSYCH. 1, 1 (2022) (healthcare context).

turn, expanding avenues for economic independence.⁵⁵

While sanctuary zones do participate in the affirmative adoption of integrationist legislation, they more frequently work to pass legislation prohibiting information-sharing and enforcement collaboration between the local and federal government. For example, California's 2017 omnibus public safety law, which prevented local enforcement agencies from signing Intergovernmental Support Agreements (IGSA) and thus prohibited participation in federal enforcement initiatives, represents an attempt to foster an integrationist environment by restricting avenues for noncitizens' removal.⁵⁶ In 2012, Chicago enacted a similar nonparticipation ordinance providing that "[n]o agent or agency shall participate in civil immigration enforcement operations or assist the civil enforcement of federal immigration law."⁵⁷ In 2022, the Unified Government of Wyandotte County and Kansas City enacted the Safe and Welcoming City Act to create the same effect.⁵⁸

Subfederal integrationist measures also take creative forms extending beyond the realm of traditional legislation. The Utah Compact, created in 2010, is a "balanced 'declaration of principles,' supported by state civic, religious, and business leaders, to guide the state on immigration issues."⁵⁹ The declaration—which states that "[i]mmigrants are integrated into communities across Utah," and that the state "must adopt a humane approach to this reality, reflecting [Utah's] unique culture, history and spirit of inclusion"—is signed by several members of the state legislature, heads of state executive agencies, the Catholic Diocese of Salt Lake City, and various other community leaders.⁶⁰ While the functional impact of the Compact is primarily symbolic, the social impact is far-reaching.

While many states and localities adopt alienage laws to further integrationist agendas, restrictionist laws at the subfederal level are equally, if not more, prevalent.⁶¹ Arizona's 2010 S.B. 1070 offers one of the most contentious examples. The policy sought to criminalize noncitizens' failure to carry federally issued alien registration cards at all times and would require local enforcement agents to affirmatively determine the immigration status of all noncitizen detainees.⁶² In addition to identification requirement measures, restrictionist policies frequently arise in the form of rental ordinances that prohibit noncitizens' tenancy without prior proof

55. See Rodríguez, *supra* note 15, at 605.

56. See CAL. GOV'T CODE § 7310 (West 2019).

57. CHI., ILL., MUN. CODE § 2-173-020 (2012).

58. WYANDOTTE COUNTY/KANSAS CITY, KAN., UNIFIED GOVERNMENT CODE ch. 18, art. III, div. 5, §§ 18-162 to -168 (2022).

59. Johnson & Spiro, *supra* note 11, at 108.

60. Salt Lake Chamber, *Compact & Signatories*, THE UTAH COMPACT ON IMMIGR. (reaffirmed on Mar. 21, 2019), <https://theutahcompact.com/compact-%26-signatories> [<https://perma.cc/A766-JWGN>] (on file with author).

61. Johnson & Spiro, *supra* note 11, at 111 ("Do states and localities sometimes try to enact pro-immigrant legislation? Yes, but such ventures are atypical. Overwhelmingly, state and local lawmaking is politically lopsided against immigrants."); Elias, *supra* note 50, at 742 ("[M]ore states have introduced immigrant-exclusionary measures in recent years than have introduced immigrant-inclusionary provisions . . .").

62. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

of legal status. In 2007, the city of Farmers Branch, Texas, enacted such an ordinance—modeled after Hazleton, Pennsylvania’s infamous 2006 restrictionist rental ordinance—and acknowledged that it served one purpose: “in one word, to remove.”⁶³ Both the Texas Farmers Branch rental ordinance and portions of Arizona’s S.B. 1070 were ultimately struck down on preemption grounds,⁶⁴ but these procedural roadblocks have not dampened the restrictionist spirit.

In November of 2024, Arizona constituents voted to pass Proposition 314, which would empower state and local police to arrest any noncitizen who enters the country through any means other than an official port of entry.⁶⁵ Dubbed Arizona’s largest restrictionist measure since S.B. 1070, civil rights organizations fear that the proposition will open the door for unprecedented levels of racial profiling.⁶⁶ Two months prior, Texas Governor Greg Abbott enacted Executive Order GA-46, requiring hospitals to collect and submit demographic data on undocumented patients seeking care from state facilities.⁶⁷ While undocumented individuals are still able to receive treatment, “the real danger of the order is the likelihood that it will create fear and confusion in immigrant communities, eroding patient trust in the healthcare system and discouraging families—especially undocumented individuals—from seeking needed medical care.”⁶⁸

B. Domestic Corporations as Enforcement Liaisons

Domestic corporations represent an understudied series of “significant and significantly misunderstood . . . immigration decision makers.”⁶⁹ Under Title 8 Section 1324 of the U.S. Code, employers are prohibited from “hiring, harboring, and transporting noncitizens.”⁷⁰ The definition of “harboring” includes the act of hiring noncitizens who do not possess work authorization.⁷¹ Additionally, following the passage of the Immigration Reform and Control Act (IRCA), employers must verify the work authorization credentials of new hires using I-9 eligibility processing forms.⁷²

63. Johnson & Spiro, *supra* note 11, at 102.

64. *Id.* at 104–06.

65. H.R. Con. Res. 2060, 56th Leg., 2d Reg. Sess. (Ariz. 2024).

66. See *No on Proposition 314*, AM. C.L. UNION OF ARIZ. (Jun. 20, 2024) <https://www.acluaz.org/en/news/no-proposition-314> [<https://perma.cc/8KU5-PUCH>].

67. Tex. Exec. Order No. GA-46 (Aug. 8, 2024).

68. *New Texas Executive Order Requires Hospitals to Ask About Immigrant Status. Here’s What It Means for Texas Children and Their Families*, CHILD.’S DEF. FUND: BLOG (Nov. 6, 2024), <https://www.childrensdefense.org/blog/texas-hospitals-are-now-required-to-ask-patients-about-their-immigration-status/> [<https://perma.cc/QT4U-KM93>].

69. Brandon L. Garrett, *Corporate Crimmigration*, 2021 U. ILL. L. REV. 359, 372 (2021) (quoting Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1105 (2009)); see Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 82 (2006) (“[E]mployer sanctions and corporate criminal liability are crucial pieces of this country’s legal scheme to prevent illegal immigration.”).

70. Garrett, *supra* note 69, at 372.

71. *Id.*

72. See *id.*

While the prosecutorial consequences for corporations caught violating these provisions pale in comparison to those generally imposed against individual perpetrators⁷³—in part, due to the increased use of non-prosecution and deferred-prosecution agreements in this sector⁷⁴—corporations are statutorily subject to criminal sanctions for violating federally prescribed hiring practices.⁷⁵ To ensure corporate compliance with hiring laws, the federal government orchestrates strategic audits and investigations,⁷⁶ although the frequency of these audits has decreased dramatically over time.⁷⁷

In response to this federally constructed scheme, subfederal governments have taken action to bypass verification procedures where possible, thus enabling noncitizens to access additional employment opportunities. State licensing provisions present the most convenient avenue for these reforms. Several states, including Alaska, Delaware, Illinois, and Washington, allow noncitizens to obtain counseling, social work, engineering, and physician's assistant licenses without providing a Social Security number or equivalent identifying information.⁷⁸ While these licensing carveouts teeter on the edge of permissibility under the preemption doctrine,⁷⁹ the understudied effects they produce within the broader immigration landscape should not go unacknowledged.

C. Military Enforcement of Immigration Law

Although the U.S. military is not a subfederal entity, an account of the subfederal and non-traditional enforcement landscape would be incomplete without consideration of the military dimension. Military participation in immigration enforcement is justified under a dual framework that recognizes (1) a security-oriented approach to

73. *Id.* at 359 (describing the contrast between mass prosecution of individuals and “the leniency-oriented approach towards firms that carefully considers collateral consequences . . .”).

74. *See id.* at 362; Tanger, *supra* note 69, at 60.

75. *See, e.g., IFCO Senior Managers Plead Guilty to Unlawful Employment of Illegal Aliens*, U.S. IMMIGR. & CUSTOMS ENF'T (Sep. 15, 2011), <https://www.ice.gov/news/releases/ifco-senior-managers-plead-guilty-unlawful-employment-illegal-aliens> [<https://perma.cc/CF7T-8AWN>] (describing maximum prison sentences for corporate executives charged with unlawfully hiring unauthorized immigrants); *Howard Industries Pleads Guilty to Employment-Related Immigration Conspiracy*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 25, 2011), <https://www.ice.gov/news/releases/howard-industries-pleads-guilty-employment-related-immigration-conspiracy> [<https://perma.cc/332G-SBAZ>] (describing \$2.5 million criminal fine enforced against corporation charged for conducting unlawful immigrant employment practices).

76. One of the most famous examples of these investigations was the 1997 investigation into Tyson Foods, Inc. The evidence presented at trial included 422 undercover audiotapes, 36 videotapes, and 360,000 pages of subpoenaed documents used to claim that the corporations maintained an established practice of hiring unauthorized immigrant workers. Twenty-four of the original counts were dismissed, leaving only twelve remaining for jury deliberation. The corporation was ultimately acquitted in 2003. *See* Tanger, *supra* note 69, at 59–60, 81.

77. *Id.* at 67.

78. *State Professional/Occupational Licensure Requirements for Immigrants*, COLO. STATE UNIV., (Jul. 2023), <https://career.colostate.edu/wp-content/uploads/2024/04/FINAL-State-Guides-on-Professional-Occupational-Licensure-July-2023-1.pdf> [<https://perma.cc/2UCQ-ST5W>].

79. *See* Kait L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 881, 886–87 (2014).

immigration in the wake of the September 11, 2001 attacks and (2) the perceived need to crack down on drug-related activities at the border.⁸⁰

The military's enforcement authority arises primarily out of the 1878 Posse Comitatus Act (PCA).⁸¹ The PCA originally prohibited the use of military forces for domestic law enforcement purposes but, over time, Congress has eroded this prohibition and granted the military narrow enforcement control.⁸² While the PCA authorizes limited military involvement in civil law enforcement operations, military involvement in "a search, seizure, or other similar activity" is expressly disallowed.⁸³

The 1981 Military Support for Civilian Law Enforcement Agencies Act (MSCLEA) modified the meaning of the PCA by listing a series of activities that are not considered "law enforcement activities" and, consequently, are not prohibited under the PCA.⁸⁴ This, in turn, essentially created a loophole through which military immigration enforcement could be legitimized.⁸⁵ Permitted activities include information sharing "relevant to the violation of any Federal or State law" and the use of military equipment for enforcement operations.⁸⁶ The resulting blend of legal and regulatory infrastructure "force[s] the military to aid the Border Patrol in guarding the border."⁸⁷

Some of the most formidable immigration enforcement operations have hinged upon military effectuation. In 1954, President Eisenhower authorized "Operation Wetback" during which "USBP agents, aided by the county, state, federal authorities, and the military, rounded up and deported over one million aliens."⁸⁸ In 1989, as part of the secret Operation Border Ranger II initiative, armed troops were deployed to "assist civilian law enforcement agencies with drug and immigration enforcement."⁸⁹ That same year, the Joint Task Force Six (JTF-6) program was created to "coordinate military support of civil law enforcement agencies along the border" and authorized participating operators to shoot and kill any suspect thought to pose a danger to either military or civilian law enforcement.⁹⁰ Joint Task Force-North (JTF-N), enacted concurrently with JTF-6, facilitated the arrest of 3,865 undocumented immigrants in 2010 and between 6,500–8,000 undocumented immigrants the year after.⁹¹ In 2020, the

80. See Melvin G. Deaile, *Crossing the Line: A Study of the Legal Permissibility of Using Federalized Troops to Protect the Nation's Borders* 34–35 (Jun. 6, 2003) (M.S. thesis, Air University) (on file with Defense Technical Information Center).

81. 18 U.S.C. § 1385.

82. See John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress' Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717, 717 (2007).

83. Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act, 45 Op. O.L.C. 1, 4 (2019) [hereinafter O.L.C. Determination].

84. Longley III, *supra* note 82, at 731.

85. *Id.*

86. *Id.*

87. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1509 (2013).

88. Deaile, *supra* note 80, at 34.

89. Hernández, *supra* note 87, at 1509; see Deaile, *supra* note 80, at 1 (describing the military as "deputized Border Patrol agents").

90. Hernández, *supra* note 87, at 1510.

91. *Id.*

Department of Homeland Security (DHS) solicited the Department of Defense's (DoD) approval to enlist U.S. military assistance at the southern border.⁹² After conducting a thorough PCA analysis, the DoD agreed,⁹³ thus demonstrating how the PCA remains an essential device for controlling military immigration enforcement power.

II. AN IMMIGRANT-CENTERED ANALYSIS OF THE EFFECTS OF SUBFEDERAL ENGAGEMENT

Whether the rise of subfederal activity should be praised as an opportunity for productive growth or shunned as an affront to federal suzerainty is inevitably a question of perspective. The following doctrinally conscious, ethically driven analysis proceeds on three assumptions: Inequality between nation-states is a catalyzing force behind immigration trends, admissibility determinations have historically been the result of racialized sorting, and international immigration provides an essential pathway for the procurement of fundamental human rights.

While much immigration discourse stems from the presumption that nation-states are equal actors within the global system, states—in large part due to colonial-settler dynamics exacerbated and maintained through the entrenchment of extractive neoliberalism—remain vastly unequal in several regards.⁹⁴ Sweeping distinctions are often acknowledged between the conditions of states located in the Global North versus the Global South,⁹⁵ but we must recognize that these distinctions are nuanced and exist on both an inter-hemispheric and intra-hemispheric scale, with deviation across socioeconomic and political lines as well as subcultural and ethnological axes. As such, immigration is not always a neutral endeavor fueled by a desire for cultural enrichment, but is oftentimes, instead, a charged upstream pursuit in search of security and stability.

In certain circumstances, immigration represents one's last opportunity to access fundamental human rights. The statutory illegality of unauthorized entry propels the nativist claim that "the longest law-breakers should be given the harshest penalties—not membership rights."⁹⁶ However, while unauthorized entry into the United States is unlawful, it is not a continuing violation, meaning that once the individual has moved beyond their original port of entry, their crime is no longer in

92. O.L.C. Determination, *supra* note 83, at 1.

93. *See id.* at 27–28.

94. *See generally* Aziz Rana & Daniel Denvir, *Rethinking Migration with Aziz Rana*, THE DIG (Jan. 9, 2019), <https://thedigradio.com/podcast/rethinking-migration-with-aziz-rana/> [<https://perma.cc/EEL2-QLXQ>]; JACKIE WANG, *CARCERAL CAPITALISM* (2018); TANYA M. GOLASH-BOZA, *DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR AND GLOBAL CAPITALISM* (2015).

95. *See* Nika Chitadze, *The Global North-Global South Relations and Their Reflection on the World Politics and International Economy*, 8 J. Soc. Scis. 42, 42 (2019) ("The two groups are often defined in terms of their differing levels of wealth, economic development, income inequality, democracy, political and economic freedom, as defined by freedom indices.").

96. Carol M. Swain, *The Case for Amnesty—Forum Response*, BOS. REV. (May 1, 2009), https://www.bostonreview.net/forum_response/apply-compassion-offered-illegal-immigrants-most-vulnerable-citizens-carol-swain/ [<https://perma.cc/HD8R-9UBS>].

progress—the transgression now exists solely in the past tense.⁹⁷ Jackie Wang’s “politics of innocence” framework pushes back against the nativist assertion that unauthorized immigrants’ lack of legal immaculacy renders them undeserving of dignity and fundamental justice.⁹⁸ These values are enshrined in international law, as exemplified through the provisions of the Universal Declaration of Human Rights (UDHR) under which “[e]veryone has the right to leave any country” and is entitled to “life, liberty and the security of person” and freedom from “torture or . . . cruel, inhuman or degrading treatment or punishment.”⁹⁹

Despite the UDHR’s promise to deliver these rights regardless of “race, colour, . . . language, . . .” or “national or social origin,”¹⁰⁰ racial considerations continue to influence the design and operation of immigration policy.¹⁰¹ Whether this dynamic reflects what Wang describes as a translation issue, where admissibility determinations proxy race-based inclusion and exclusion, or E. Tendayi Achiume’s “racial aphasia,” a deliberate unwillingness to confront race’s role in societal functions, immigration determinations ultimately hinge on a racially informed separation between desirable and undesirable populations.¹⁰²

Together, these conditions render immigration a treacherously uneven terrain for noncitizens to traverse. While integrationist subfederal policies do not solve the problems considered above, they undoubtedly help absorb their impact by creating pathways to employment and economic independence, as well as expanding access to services designed to address the residual traumas associated with the immigrant experience. Consequently, the following analysis examines the extent to which subfederal policies improve but also simultaneously encumber progress towards an integrationist immigration landscape.¹⁰³

97. See *Criminalizing Undocumented Immigrants*, AM. C.L. U. (Feb. 2010), https://www.aclu.org/sites/default/files/field_document/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf [https://perma.cc/47LH-36KR].

98. See Jackie Wang, *Against Innocence - Race, Gender, and the Politics of Safety*, LIES J. (2012), <https://www.liesjournal.net/volume1-10-againstinnoce.html> [https://perma.cc/M4MM-QNQ8].

99. G.A. Res. 217 (III) A Universal Declaration of Human Rights (Dec.10, 1948).

100. *Id.*

101. See Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1729–30 (2021); Mae M. Ngai, *The Case for Amnesty—Forum Response*, BOS. REV. (May 1, 2009), https://www.bostonreview.net/forum_response/historically-america-both-legalized-and-deported-migrants-mae-ngai [https://perma.cc/83MQ-RKGY]; CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *WELCOME THE WRETCHED: IN DEFENSE OF THE “CRIMINAL ALIEN”* 8–10 (2024).

102. See Wang, *supra* note 98; E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 447 (2022); HERNÁNDEZ, *supra* note 101, at 11.

103. The point I seek to make here is delicate. Answers to the question of ‘how far unauthorized immigration should be tolerated’ exist on a spectrum. On one end are those who view it as an irreversible moral transgression for which there exists no remedy beyond expulsion. On the other end are those who believe that unauthorized immigration should be completely decriminalized, largely for the reasons articulated above. The Note does not focus on whether unauthorized immigration should be decriminalized but, rather, distinguishes between two different questions that are relevant at two different points in time; it is one thing to consider whether one *should or should not* be in the country (in the immediate aftermath of their entry, lawful or otherwise), but a separate question exists in terms of once they *are* here (in the long run following their initial entry), *how* they should be treated. Restrictionist subfederal policies should not be used as a continuing solution to a non-continuing

A. Individual Constitutional Rights Violations

The poor performance of subfederal enforcement duties has historically resulted in the violation of individual constitutional rights.¹⁰⁴ For example, in *United States v. Perez-Castro*, where the Tucson, Arizona police department ejected a noncitizen from his apartment during the night without a warrant and transported him to Border Patrol facilities for processing, the Ninth Circuit court held that a Fourth Amendment violation had occurred.¹⁰⁵

Despite claims that subfederal agents tasked with federal enforcement duties are adequately trained to navigate the complex contours of immigration law,¹⁰⁶ subfederal agents are often woefully underprepared to manage taxing immigration tasks.¹⁰⁷ The result is that subfederal officers across the country remain confused about when and how they can lawfully participate in federally sanctioned enforcement operations.

Applying the principles of David Sklansky's ad hoc instrumentalist theory in this context, one could argue that subfederal actors lack authoritative and comprehensive guidance on how to proceed when confronted with enforcement challenges.¹⁰⁸ Sklansky explains that "[i]n any given situation . . . officials are encouraged to use whichever tools are most effective against the person or persons causing the problem."¹⁰⁹ This methodology "is instrumental rather than formalistic . . . and it is ad hoc as opposed to systematic."¹¹⁰ In lieu of clear federal instruction, subfederal agencies are left with no choice but to "pull whatever legal levers are most effective in removing the offenders from the community."¹¹¹

Sklansky's analysis suggests that the risk of experiencing an enforcement-related rights violation may be greatest when noncitizens interact with local enforcement agencies, rather than state-operated organizations. The lower the level at which the discretionary choice is made, the less scrutiny the decision will receive because "we have grown less suspicious of low-level discretion and less sanguine

violation: If states do not wish to accommodate those who have entered unlawfully, they may cooperate with the federal government to orchestrate that individual's formal removal but the following analysis vehemently rejects the improper utilization of subfederal restrictionist policies as illegitimate proxies for failed enforcement efforts.

104. See NUÑEZ-NETO ET AL., *supra* note 51, at 25.

105. *United States v. Perez-Castro*, 606 F.2d 251, 252–53 (9th Cir. 1979); Yañez & Soto, *supra* note 32, at 14.

106. See KHASHU, *supra* note 15, at 21.

107. See NUÑEZ-NETO ET AL., *supra* note 51, at 25, 28.

108. See Sklansky, *supra* note 4, at 161.

109. *Id.*

110. *Id.* "Instrumentalism" refers to the notion that the law is a tool designed to be flexibly maneuvered towards the achievement of particular objectives. Under an instrumentalist approach, the same series of legal tools may be deployed in various manners across different contexts to ensure procurement of desirable outcomes at each interval. A "formalistic" approach, by contrast, conceptualizes the rule of law as a rigid device that dictates outcomes regardless of underlying objectives. Under a formalistic approach, the law must be applied in the same manner every time that it is invoked so as to achieve procedural consistency at the possible expense of outcome satisfaction. See *id.*

111. *Id.* at 203.

about the possibilities of eliminating it, or even reducing it significantly. Low-level discretion has come to seem ubiquitous and unavoidable.”¹¹² Essentially, the more local the wrongdoing, the more difficult it becomes to ensure accountability. Thus, local noncitizen communities find themselves subject to greater levels of risk without access to remedial pathways, in part, because the process through which the violation occurred was never clear to begin with.

B. Reducing Noncitizens’ Trust in Local Enforcement Agencies

When subfederal enforcement agencies cooperate with the federal government to enforce immigration laws, agencies risk “undermin[ing] . . . efforts to build trust with immigrant communities.”¹¹³ Some local enforcement agencies recognize the unique vulnerability of noncitizen communities and are consequently motivated by a desire to protect these groups.¹¹⁴ In one study, more than half of all surveyed police chiefs reported that undocumented immigrants are more likely than other groups to become the victims of certain crimes, like robberies and theft,¹¹⁵ and thus require special protections that can only be facilitated through the maintenance of strong relationships with those affected communities. Conversely, other subfederal agencies do not acknowledge the inherent uniqueness of their relationships with noncitizen communities and, instead, view noncitizens’ cooperation as instrumental to the broader goal of delivering constituency-wide services without regard to the specialized challenges that migrant communities may endure.¹¹⁶

Underlying intentions aside, many police departments across the country are unwilling to pursue vertical federal collaboration efforts at the expense of their relationships with noncitizen communities. When immigration laws are “aggressively enforced,” 74 percent of surveyed police chiefs believe that community trust in policing decreases.¹¹⁷ Cumulatively, respondents ranked “immigration issues” as the lowest order priority after resource concerns, staffing, violent crime, gangs, community relations and drugs (tied), and property crime.¹¹⁸ This demonstrates that immigration-related offenses are not considered an aspect of many day-to-day enforcement agendas and, to the extent that such concerns arise, subfederal agencies are often unwilling to sacrifice the trust of noncitizen communities in the name of assisting federal enforcement.

112. *Id.* at 210–11.

113. KHASHU, *supra* note 15, at 33.

114. *See e.g., id.*

115. *Id.*

116. *See, e.g., Immigration Enforcement IACP Policy Fact Sheet*, INT’L ASS’N OF CHIEFS OF POLICE, 3, https://www.theiacp.org/sites/default/files/IACP_Immigration_Policy_Fact_Sheet.pdf [<https://perma.cc/S3YX-YYT7>] (acknowledging that “[p]olice agencies need the cooperation of immigrants, regardless of immigration status, in solving crime”) (last visited Jun. 21, 2025).

117. KHASHU, *supra* note 15, at 24.

118. *See id.* at 26.

C. Entrenching and Expanding Stigmatizing Anti-Immigrant Narratives

To claim that public perception of immigrant communities disproportionately conflates the relationship between noncitizen status and criminality would be a gross understatement. Narratives of immigrant criminality are frequently broadcast across mainstream news media outlets—particularly during politically sensitive periods such as election years—thus impelling the misunderstanding that a lack of citizenship equates directly with criminal proclivity.¹¹⁹

More disturbing than this fact itself is Emily Ryo's recent discovery that exposure to subfederal anti-immigrant policies exacerbates harmful social misconceptions about noncitizen criminality.¹²⁰ Specifically, Ryo's study reveals that while exposure to anti-immigrant laws intensifies preconceived notions of immigrant criminality, equal exposure to comparable pro-immigrant policies has no tangible effect on community perceptions of the intersection between immigrant status and criminality.¹²¹ In other words, this is a one-way trend that stands to mobilize recipient communities against noncitizen arrivals without offering a pathway for reversing this ideological disenfranchisement.

Ryo explains that exposure to immigrant-related legislation, regardless of whether the legislation is integrationist or restrictionist, "activate[s] in-group/out-group distinctions."¹²² In-group favoritism perceives certain immigrants as worthy of respect and inclusion whereas outgroup hostility "cast[s] immigrants as deserving of contempt and exclusion."¹²³ Under an expressive theory of the law's effects—whereby the law "influences beliefs, emotions, or behavior by what it expresses"¹²⁴—constituents feel deferential towards laws when those laws are regarded as credible judgments designed to bring clarity to an otherwise uncertain landscape.¹²⁵ At the same time, individuals tend to view legislation as reflecting the beliefs of the majority of the community, thus encouraging those seeking social acceptance to embrace similar views themselves.¹²⁶

Building on Ryo's work, Huyen Pham and Pham H. Van introduce a related theory under which the subfederal passage of integrationist policies in one jurisdiction

119. See *id.* at 10.

120. Ryo, *supra* note 2, at 95 ("My analysis shows that exposure to an anti-immigration law is associated with increased perceptions among study participants that Latinos are unintelligent and law-breaking.").

121. *Id.*

122. *Id.* at 98.

123. *Id.* at 98, 125; see also Frost, *supra* note 6, at 50 ("The public also tends to view immigrants in binary terms: They are either legal and thus 'good,' or illegal and thus 'bad.'").

124. Ryo, *supra* note 2, at 106.

125. *Id.* at 107, 109 ("[T]he public appears conflicted and ambivalent about immigration.' In these situations, I argue, people may seek to resolve such ambiguities by looking to laws not only as a source of reliable information about immigration and immigrants, but also as an embodiment of the community's consensus on immigrant's proper 'place' in society."); Cecilia Menjivar & Leisy Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380, 1386 (2012) ("[T]hey (mis)recognize the social order, including, for instance, the power of the law in their everyday lives, as natural Inequalities and rights violations in the social order can go unquestioned because 'it is the law.'").

126. Ryo, *supra* note 2, at 107.

provokes a proliferation of reactionary restrictionist policies in a neighboring jurisdiction, and vice versa.¹²⁷ This cycle is called the copycat counter-law effect.¹²⁸ For example, after the 2010 passage of Arizona's S.B. 1070, several copycat restrictive measures were proposed in ten states including Utah, Georgia, Indiana, Alabama, and South Carolina.¹²⁹ In protest of Arizona's staunch restrictionist position, California enacted the 2012 Transparency and Responsibility Using State Tools Act (TRUST Act) limiting state compliance with federal immigration detainer requests, with Assemblyman Tom Ammiano declaring that the Act "signals to the nation that California cannot afford to be another Arizona."¹³⁰ Then, in 2013, California enacted A.B. 60, allowing California noncitizen residents to apply for driver's licenses.¹³¹ That same year, Vermont passed a similar law and, in 2022, Massachusetts followed suit.¹³²

Pham and Van's argument is not that reactionary responses are adopted in direct or immediate response to any particular bill: First, Arizona's restrictionist policy primarily implicated noncitizens' need to carry identification whereas California's responses targeted completely unrelated issue areas (detainer requests and drivers' licenses) and, second, substantial time passed between the initial adoption of Arizona's restrictionist measure and the passage of California's integrationist responses.¹³³ Instead, the broader point is that subfederal action in one direction generally invites an oppositional counter-response.

On one hand, competing subfederal policies are useful in that they allow for "broader [policy] experimentation."¹³⁴ With state governments "articulat[ing] [] competing view[s] of what they believe national policy should be,"¹³⁵ federal policymakers can observe how the effects of different models—intended or otherwise—play out across varying contexts. Armed with this data, the federal government can rekindle discussions around comprehensive immigration reform (CIR) with a renewed sense of confidence and purpose.¹³⁶

127. Pham & Van, *supra* note 9, at 71–72.

128. *Id.*

129. *Id.* at 77; see Utah Illegal Immigration Enforcement Act, H.B. 497, 2011 Gen. Sess. (Utah 2011); Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg. Reg. Sess. (Ala. 2011); Act No. 69, Gen. Assemb., 119th Sess. (S.C. 2011).

130. Pham & Van, *supra* note 9, at 78.

131. 2013 Cal. Stat. 524.

132. Pham & Van, *supra* note 9, at 69.

133. *Id.* at 69, 78.

134. Johnson & Spiro, *supra* note 11, at 109 (2012); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261 (2008).

135. Gulasekaram & Ramakrishnan, *supra* note 3, at 2111; see also Amdur, *supra* note 21, at 150 ("Integration has produced wide-ranging vertical friction, allowing communities across the country to weigh in on national policy . . .").

136. See Johnson & Spiro, *supra* note 11, at 108. This argument assumes that CIR is a desirable goal, but this position has not garnered universal support. Tania Unzueta, for example, argues that CIR is an unattractive goal because it (1) is difficult to progress across bipartisan lines; (2) necessarily requires compromise, thus limiting the ceiling of its integrationist potential; and (3) avoids addressing time-sensitive problems on the basis that the

If, as Pham and Van warn, reactionary policies become exponentially more intense with each iterative engagement,¹³⁷ restrictionist measures and their associated harms threaten to become progressively more extreme. Subfederal experimentation indeed establishes a reputation for states as creative laboratories, but such experimentation comes with a human cost. The American Civil Liberties Union labeled Texas's recently passed S.B. 4, under which state and local enforcement agents can arrest individuals suspected of entering the country unlawfully,¹³⁸ "one of the most extreme pieces of anti-immigrant legislation to emerge from any state legislature."¹³⁹ S.B. 4 passed on the heels of several landmark integrationist legislative enactments in Oregon, California, and Washington,¹⁴⁰ thus illustrating Pham and Van's worrisome predictions in action.

An encouraging point to emphasize in light of this trajectory is that integrationist states have, over time, emerged as powerful sites of "resistance and assistance" in the face of increasingly restrictionist conditions.¹⁴¹ Pham and Van's research focuses, in part, on Immigrant Climate Index (ICI) scores, with a higher ICI score reflecting a more integrationist policy posture.¹⁴² Looking at 2017 as a particularly eventful policy year at the subfederal level, Pham and Van note that even "[t]hough . . . laws were primarily enacted at the city and county levels, and thus have less influence on ICI scores (versus statewide laws), the sheer number of laws and their uniformly immigrant-protective nature have positively influenced the national ICI score."¹⁴³ In other words, the data suggests that subfederal immigration policies can counterbalance and, in some instances, actually outweigh the effects of restrictionist policy influxes. While this realization does not prevent restrictionist measures from arising at their source, nor does it alleviate the concern that restrictionist policies are becoming increasingly unmerciful by the day, it should at least provide some element of temporary comfort to immigrant communities who presently fear the effects of restrictionist fanaticism.

timeline for passage cannot accommodate urgent requests. Tania Unzueta, *How I Stopped Believing in CIR and Learned to Love 'Piecemeal' Legislation*, IMMIGR. YOUTH JUST. LEAGUE (Aug. 2012), <https://discuss.ilw.com/articles/articles/380798-article-how-i-stopped-believing-in-cir-and-learned-to-love-piecemeal-legislation-by-tania-unzueta> [<https://perma.cc/2YU4-DDAZ>].

137. See Pham & Van, *supra* note 9, at 87.

138. S.B. 4, 88th Leg., 4th Sess. (Tex. 2023).

139. AM. C.L. UNION, *The Most Extreme Anti-Immigration Bill We've Seen* (Apr. 4, 2024), <https://www.aclu.org/podcast/the-most-extreme-anti-immigration-bill-weve-seen> [<https://perma.cc/48KK-VVJS>].

140. NAT'L IMMIGR. L. CTR., *States Continue to Invest in the Health and Well-Being of Immigrants: Highlights from 2023* (Jan. 2024), https://www.nilc.org/wp-content/uploads/2024/01/NILC_StateReport-2024-1.pdf [<https://perma.cc/J6QW-FLDZ>]; see H.B. 3352, 81st Leg. Assemb., Reg. Sess. (Or. 2021); S.B. 184, Reg. Sess. (Cal. 2021); H.B. 1191, 67th Leg., Reg. Sess. (Wash. 2021).

141. David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 224 (2019); see also Robert A. Schapiro, *Toward A Theory of Interactive Federalism*, 91 IOWA L. REV. 244, 289 (2005) ("A state law can provide an important protest—a powerful criticism of the federal approach.").

142. Pham & Van, *supra* note 9, at 45–47.

143. Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 NYU L. REV. 125, 130 (2019).

D. Restrictionist Policies Diminish Noncitizens' Quality of Life

“Legal violence” is a broad term used to describe the “materially and symbolically injurious effects of the law” on one’s daily operations.¹⁴⁴ Restrictionist subfederal laws resemble acts of legal violence in that they consistently force noncitizens—and undocumented immigrants in particular—to “move[] under duress[.]”¹⁴⁵ Moving under duress, in this context, means operating in a chronic state of reduced autonomy whereby the freedom to make essential life decisions is heavily impeded by the substance of ever-evolving restrictionist policies.¹⁴⁶ Consequently, immigrants must ultimately “alter[] expectations for [their] future based on [their] legal status.”¹⁴⁷ The “accumulated pressure of [this] persistent vulnerability”¹⁴⁸ is grating, and the detrimental effects it exerts on noncitizens’ quality of life are observable across various contexts. The most troubling aspect of this quality of life analysis is that the detrimental consequences detailed in the following subsection are not contingent on the enactment of restrictionist policies; *the mere legislative consideration of restrictionist policies is sufficient for inflaming each of the consequences outlined below.*¹⁴⁹

The first context considers the constraining effect of restrictionist subfederal policies on residential choice, also referred to as residential integration. Undocumented individuals often perceive neighborhoods with restrictionist cultures as “off-limits” because they invite “punitive contact with law enforcement.”¹⁵⁰ In response to this hypervisibility concern, several undocumented groups recall their decisions to settle in predominantly Black neighborhoods on the theory that it “renders them less visible to law enforcement.”¹⁵¹ The underlying assumption here is that local enforcement agencies prioritize the regulation of Black conduct above the enforcement of anti-immigrant residential ordinances. Whether

144. Asad L. Asad & Eva Rosen, *Hiding Within Racial Hierarchies: How Undocumented Immigrants Make Residential Decisions in an American City*, 45 J. ETHNIC & MIGRATION STUDS. 1857, 1860 (2019); see also Menjívar & Abrego, *supra* note 125, at 1387.

145. Thomas S. Dee & Mark Murphy, *Vanished Classmates: The Effects of Local Immigration Enforcement on School Enrollment*, 57 AM. EDUC. RSCH. J. 1, 20 (2019); see also Seline S. Quiroga, Dulce M. Medina & Jennifer Glick, *In the Belly of the Beast: Effects of Anti-Immigration Policy on Latino Community Members*, 58 AM. BEHAV. SCI. 1723, 1725 (2014) (“[E]fforts to control immigrants’ lives through local legislation and policy become a source of ‘legal violence.’”).

146. See generally Dee & Murphy, *supra* note 145 (demonstrating the restrictive effects of Immigration and Customs Enforcement partnerships on local Hispanic student mobility).

147. Andrea Flores, Kevin Escudero & Edelina Burciaga, *Legal-Spatial Consciousness: A Legal Geography Framework for Examining Migrant Illegality*, 41 DENV. J. INTL. L. & POL’Y. 12, 17 (2019).

148. Menjívar & Abrego, *supra* note 125, at 1402; see Frost, *supra* note 6, at 47 (“[L]eaves unauthorized immigrants in ‘legal limbo’ . . .”).

149. See Florencia Torche & Catherine Sirois, *Restrictive Immigration Law and Birth Outcomes of Immigrant Women*, 188 AM. J. EPIDEMIOLOGY 24, 25 (2018) (“[T]he threat of a punitive law, even in the absence of implementation, can have a harmful effect on the birth outcomes of the next generation.”); Asad & Rosen, *supra* note 144, at 1867.

150. Asad & Rosen, *supra* note 144, at 1858.

151. *Id.* at 1870.

residential decisions are skewed based on narrowed perceptions of viable immigrant-friendly options or are reduced by the desire to live among communities that deflect law enforcement attention, restrictionist subfederal laws reduce noncitizens' quality of life by stifling residential decision-making.¹⁵²

The second context examines how restrictionist subfederal policies intensify stress-related medical conditions among immigrant groups while simultaneously disincentivizing these groups from using available health care services.¹⁵³ Immigrant communities describe many looming fears, two of which are particularly pertinent in the enforcement context: first, the immediate fear of deportation and, second, the creeping concern that harmful restrictionist policies will continue to cut off access to an increasing number of essential services.¹⁵⁴ This psychological distress—which arises specifically in connection with exposure to restrictionist subfederal policies—manifests physically among immigrant populations, with studies reporting both declines in fertility and reduced birth weights among immigrant women compared to their citizen counterparts.¹⁵⁵ These deteriorations are augmented by the fact that immigrants residing in restrictionist jurisdictions are less likely to feel safe using state and local healthcare services, which, in turn, only further facilitates the decline in quality of life among noncitizen populations.¹⁵⁶

A third context considers the reduction in quality of life that undocumented youth experience in connection with restricted educational opportunities. Andreas Flores, Kevin Escudero, and Edeline Burciaga compared subfederal education-related policies as they affect young immigrants' quality of life in California versus Georgia.¹⁵⁷ The authors not only learned that restrictionist educational policies predictably limited students' reported access to employment, but also that students

152. These concerns spill over and affect immigrant perceptions about not only where they may live, but also which areas are safe to pass through. “[V]enturing outside the co-ethnic community . . . feels like asking for trouble[,]” one interview explained, while another described how she and her husband never travel in the same vehicle in case they are identified by enforcement and deported, leaving their young children without guardianship. *Id.* at 1868; see Menjívar & Abrego, *supra* note 125, at 1400.

153. See Edward D. Vargas, Gabriel R. Sanchez & Melina Juárez, *The Impact of Punitive Immigrant Laws on the Health of Latino Populations*, 45 POL. & POL’Y. 312, 325 (2017) (“[R]espondents who live in states that pass a low and medium amount of punitive immigration laws relative to states that pass a high number of anti-immigrant laws are more likely to report optimal health, all else equal.”).

154. See Quiroga et al., *supra* note 145, at 1730; Julia Shu-Huah Wang & Neeraj Kaushal, *Health and Mental Health Effects of Local Immigration Enforcement*, 53 INTL. MIGRATION REV. 970, 971–72 (2018).

155. Torche & Sirois, *supra* note 149, at 24.

156. Vargas et al., *supra* note 153, at 315; Russel B. Toomey, Adriana J. Umaña-Taylor, David R. Williams, Elizabeth Harvey-Mendoza, Laudan B. Jahromi, & Kimberly A. Updegraff, *Impact of Arizona’s SB 1070 Immigration Law on Utilization of Health Care and Public Assistance Among Mexican-Origin Adolescent Mothers and Their Mother Figures*, 104 AM. J. PUB. HEALTH S28, S29 (2014).

157. California has enacted legislation allowing undocumented students to pay in-state tuition rates and granted both state and institutional financial assistance to those students. Georgia, on the other hand, requires noncitizen students to produce identification upon request and has largely eliminated access to public colleges and universities, constructing an effective “education ban” throughout the state. Flores et al., *supra* note 147, at 17–20.

from integrationist and restrictionist states alike reported experiencing the same sense of entrapment caused by their undocumented status.¹⁵⁸

Eduardo, a food service worker in Georgia, aspired to attend college within the next five years but expressed uncertainty about pursuing those plans due to his undocumented status.¹⁵⁹ Jovan, an undocumented immigrant living in Georgia explained, “I couldn’t go to school, you know, I couldn’t do the military, I couldn’t do all of this, and I felt just stuck.”¹⁶⁰ “He lamented the freedom that his citizen peers enjoyed of being able to ‘go off and . . . figure out life.’”¹⁶¹ Yesenia, an undocumented sophomore at a four-year California college, “conveyed resentment about feeling ‘stuck’ in California, despite the relative certainty that she would eventually get a college degree[.]”¹⁶² This sentiment was shared by Miguel, an engineering graduate student at a California university, who was forced to “let go of some of his original expectations for his future” after learning that a career in the aerospace industry requires citizenship.¹⁶³ While these four students’ “mobility pathways were qualitatively and substantively different,” their experiences were unanimously defined by a sense of immobility and the realization that no academic endeavor could equip them with the freedom of their citizen peers.¹⁶⁴ Thus, Flores, Escudero, and Burciaga illustrate that while integrationist subfederal education policies are preferred over restrictionist measures, access to education in both environments remains a particularly sensitive and unrelieved source of anxiety for undocumented youth. This is only exacerbated by subfederal variation and uncertainty.¹⁶⁵

III. PRESCRIPTIVE RECOMMENDATIONS FOR THE CREATION OF AN INTEGRATIONIST FEDERALIST IMMIGRATION REGIME

Before introducing any doctrinal or institutional reforms targeted towards the redesign of the current federalist system, it is first necessary to acquiesce in the reality that federal and subfederal co-occupation of this domain is a permanent feature of the immigration regulatory landscape in the United States, at least for the foreseeable future.¹⁶⁶ Resituating regulatory agency exclusively in subfederal hands would require the unprecedented relinquishment of the federal government’s closely guarded authority, and several scholars have already acknowledged that the total excision of subfederal voices from this conversation would be

158. *Id.* at 21.

159. *Id.* at 19.

160. *Id.*

161. *Id.*

162. *See id.* at 18.

163. *Id.* at 19.

164. Flores et al., *supra* note 147, at 19.

165. *See* Raquel E. Aldana, *Taming Immigration Trauma*, 44 CARDOZO L. REV. 387, 389 (2022) (“Mental health experts have documented the enormous trauma children especially have been forced to endure under these practices, with ill effects likely to last well into adulthood.”).

166. *See* Rodríguez, *supra* note 15, at 571.

an undesirable development.¹⁶⁷ Therefore, the forthcoming prescriptive recommendations consider several pathways for effectively redistributing immigration-related powers between different tiers of government¹⁶⁸ to facilitate a transition towards a more integrationist enterprise.¹⁶⁹

A. Rearticulating the Preemption Doctrine to Incorporate Constitutional Equal Protection Values

1. Clarifying Judicial Application of the Preemption Doctrine

The preemption doctrine, as it currently applies to contested subfederal immigration laws, suffers from two defects. First, courts examining subfederal immigration policies sometimes prematurely strike subfederal laws on preemption grounds simply because the policies, on their face, implicate immigration-related themes.¹⁷⁰ This trend, referred to as the presumption in favor of preemption, is deemed a “shadowing effect of the exclusivity principle.”¹⁷¹ On this theory, courts incorrectly assume that because civil administrative determinations are the federal government’s responsibility, any subfederal activity that touches on the broader topic of immigration must necessarily violate the exclusivity principle, thus casting a shadow on subfederal attempts to enact integrationist provisions in lieu of any demonstrated conflict with federal law.¹⁷²

Second, preemption analyses are conducted inconsistently both between and within jurisdictions because it is not immediately clear whether the provision at issue is a pure immigration law or an alienage law. Consider, for example, the judicial disunity that erupted following the passage of three functionally identical restrictionist subfederal housing ordinances in Pennsylvania,¹⁷³ Texas,¹⁷⁴ and

167. See, e.g., Gulasekaram & Ramakrishnan, *supra* note 3, at 2120 (“[W]e agree with her underlying point that uniformity in immigration policy across the nation may not be necessary or normatively desirable.”); Amdur, *supra* note 21, at 157 (“Disuniformity, in this context, might actually be a healthier way to negotiate some deep national conflicts . . .”); Rodríguez, *supra* note 15, at 580 (“[P]lacing all of our eggs in the federal basket would be misguided and counterproductive.”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1284 (2008) (“[I]t is desirable to have some level of friction, some amount of state contestation, some deliberation-generating froth in our democratic system.”).

168. See Chin, *supra* note 14, at 1906 (“The challenge is to define the scope of the power delegated to each side.”); Schapiro, *supra* note 141, at 246 (“Federalism remains an exercise in line-drawing.”).

169. For further discussion as to why these reforms are geared towards integrationist progress, see *supra* note 102.

170. Bulman-Pozen & Gerken, *supra* note 167, at 1303.

171. Rubenstein, *supra* note 50, at 122.

172. See *id.* at 122 (“The cumulative effect is (1) a type of presumption in favor of preemption; (2) a Court less tolerant of federal-state conflict; and (3) an expansion of the types of conflicts . . . that will count toward preemption.”).

173. HAZLETON, PA., ORDINANCE 2006-18 (2006), *invalidated by* Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010).

174. FARMERS BRANCH, TEX., ORDINANCE NO. 2952 (2008), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013).

Nebraska.¹⁷⁵ The United States Court of Appeals for the Third Circuit struck down the Pennsylvania ordinance on preemption grounds, arguing that it constituted a pure immigration regulation.¹⁷⁶ If it were permitted to stand, the Third Circuit reasoned, the “federal government’s control over decisions relating to immigration would be effectively eviscerated.”¹⁷⁷ The Eleventh Circuit struck down the Texas ordinance on the same preemption rationale.¹⁷⁸ The Eighth Circuit, treating the rental ordinance as an alienage law, disagreed and allowed the Nebraska ordinance to stand as “the . . . rental provisions would only indirectly effect [sic] the ‘removal’ of any alien from the City.”¹⁷⁹ These disparate outcomes demonstrate the difficulty that judges encounter when distinguishing between pure immigration laws versus alienage laws.¹⁸⁰ The answer to this threshold inquiry, albeit challenging to decipher, is crucial because pure immigration laws and alienage laws should be subject to different preemption tests, as discussed below.

The first step in resolving these issues is to devise an effective system for distinguishing between pure immigration laws and alienage laws. While the Supreme Court has generally discussed the exclusivity of federal administrative functions,¹⁸¹ a uniform definition for what constitutes a pure immigration law for preemption purposes has not been established or, rather, *enforced*. In the 1976 *DeCanas v. Bica* case, in which a group of migrant farmworkers challenged a section of California’s labor code as unconstitutional, the Court proffered an articulate definition of what constitutes a pure immigration regulation: “Essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”¹⁸² The “conditions under which a legal entrant may remain” language refers to the technical conditions of one’s continuous presence (like the need to maintain visa status), not the social conditions of that presence. Under this definition, subfederal laws that directly attempt to control entry and exit (de jure exit control) *or* attempt to force exit by encouraging functional self-deportation (de facto exit control) both constitute pure immigration

175. FREMONT, NEB., ORDINANCE NO. 5165 (2010). For a comprehensive comparison of the courts’ treatment of these provisions, see Pham & Van, *supra* note 9, at 33, 71–74.

176. *Lozano v. City of Hazleton*, 620 F.3d 170, 221, 222, 224 (3d Cir. 2010), *vacated sub nom.* *City of Hazleton v. Lozano*, 563 U.S. 1030 (2011).

177. *Id.* at 222 (quoting *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:08-cv-1551-B, Hrg. Tr. at 136 (N.D. Tex. Sept. 12, 2008)).

178. *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (en banc).

179. *Keller v. City of Fremont*, 719 F.3d 931, 941, 944 (8th Cir. 2013). For additional examples of judicial confusion regarding the correct preemption treatment of pure immigration and alienage laws, see Rodríguez, *supra* note 15, at 618–19.

180. Rubenstein, *supra* note 50, at 119 (“The first sorting involves the placement of subfederal regulations into the ‘immigration’ or ‘alienage’ bucket The conceptual divide between immigration and alienage laws is obscured in application.”).

181. *See, e.g., Arizona v. United States*, 567 U.S. 387, 410 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *Takahashi v. Fish & Game Comm’n.*, 334 U.S. 410, 416 (1948).

182. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976); *see also Chin, supra* note 14, at 1866.

laws. Conversely, any regulation falling outside that scope would necessarily constitute an alienage law.¹⁸³

Once it is clear whether the provision at issue is a pure immigration law or an alienage law, it is necessary to assign the appropriate preemption inquiry.¹⁸⁴ Pure immigration laws are arguably most appropriately addressed through a field preemption analysis.¹⁸⁵ I conceptualize field preemption as addressing a theoretical question: Can this subfederal law *theoretically* coexist as part of the regulatory regime in light of the federal government's established exclusive authority? Under a field preemption analysis, pure immigration regulations cannot stand because, by definition, they attempt to legislate in an area of exclusive federal domain.¹⁸⁶ Field preemption analysis is, therefore, relatively straightforward in this context. To appropriately honor the established exclusivity principle, all pure subfederal immigration laws must necessarily be struck down, and that is the end of the inquiry.

Unlike the pure immigration field analysis, alienage laws require considerably more searching review. Having established that an alienage law, by definition, does not tread on the toes of federal authority, the mode of inquiry shifts from a field preemption question to a conflict preemption analysis.¹⁸⁷ I conceptualize a conflict preemption analysis as a functional question: Can the subfederal provision *functionally* coexist within the current federal framework, or is there something about the provision that renders its enforcement particularly costly or otherwise disruptive to the operation of the overarching regulatory regime?¹⁸⁸ This approach "would require courts to identify an actual conflict, as opposed to a general incompatibility, before preempting state law."¹⁸⁹ Since conflict preemption analyses require fact-intensive review of the contested provision,¹⁹⁰ courts will be dissuaded from prematurely striking down subfederal measures that, upon exacting

183. See Chin, *supra* note 14, at 1907.

184. There are three broad categories of federal preemption: Express preemption (occurring when a state attempts to legislate in an area within which the federal government has explicitly articulated exclusive control), conflict preemption (when federal and state laws conflict on an issue and the state law is subjugated below federal will), and field preemption (arising when federal legislation is so pervasive within a subject matter that state legislation is presumably impermissible). See ADKINS, *supra* note 49, at 2–4.

185. As Johnson explains, the precise selection of applicable preemption doctrine (express, conflict, or field) is not essential because subfederal regulations are examined under multiple preemption theories—they are not mutually exclusive. See Johnson & Spiro, *supra* note 11, at 104. Having acknowledged Johnson's point, this Note argues that preemption analysis and subfederal immigration regulation at large requires reform in the direction of doctrinal consistency. If consistency is the objective, a field preemption analysis provides the best approach because unlike express or conflict analyses which raise fact-specific inquiries about extrinsic markers of Congressional intent or conflicting provisions, the basic field preemption inquiry will always be the same: *Has Congress generally regulated this area of law such that state regulation is presumably impermissible?*

186. See *id.*

187. For a discussion of the distinction between a field preemption analysis and a conflict preemption analysis, see *supra* note 184.

188. Rodríguez, *supra* note 15, at 625.

189. *Id.*

190. *Id.* at 626.

evaluation, do not conflict with the wider regulatory regime, thus resolving the “presumption in favor of preemption” issue.

2. Expanding Subfederal Alienage Preemption Analysis to Incorporate an Anti-discriminatory Equal Protection Inquiry

Having solved for the most glaring deficiencies plaguing the existing immigration preemption framework, there is still room for further improvement. Given the deep impact of subfederal legislation on immigrant communities¹⁹¹ and the opportunities that these laws create for malicious discrimination based on constitutionally protected characteristics like race and national origin,¹⁹² it is worth considering how the conflict preemption framework—as applied to alienage laws—can be further bolstered by embedding an equal protection inquiry.¹⁹³

Although the surge of subfederal immigration activity is a relatively recent phenomenon, states “have accumulated well over 100 years of experience in passing largely reactionary anti-immigrant legislation.”¹⁹⁴ The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁹⁵ This provision is construed as a prohibition against the state-orchestrated subordination of non-dominant groups.¹⁹⁶ Scholars have already acknowledged that racial animus has inspired some of the most notorious subfederal restrictionist alienage provisions.¹⁹⁷ Such animus is clearly at odds with the anti-discriminatory values of the Equal Protection Clause and, therefore, must not go unchallenged.

The problem is that while noncitizens can theoretically challenge restrictionist subfederal alienage laws as violative of the Equal Protection Clause, these challenges almost always fail due to the unachievably high threshold showings that noncitizen plaintiffs must present to allege a viable claim.¹⁹⁸ As such, calls for the

191. See *supra* Part III.

192. See Maxwell L. Stearns, Obergefell, Fisher, and the *Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1043 (2017).

193. From this point onward, this Note focuses exclusively on restrictionist alienage laws, rather than immigration laws. As previously discussed, subfederal immigration laws should be immediately preempted, thus mooted the inquiry as to whether their terms violate the Equal Protection Clause.

194. Johnson & Spiro, *supra* note 11, at 110.

195. U.S. CONST. amend. XIV, § 1.

196. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 3 (2021).

197. See generally Gulasekaram & Ramakrishnan, *supra* note 3, at 2132, 2135 (arguing that ethnic antipathy is an essential ingredient of racial and ethnic discrimination within immigration federalism laws); KHASHU, *supra* note 15, at 8; Smith, *supra* note 50 at 924.

198. Carrie L. Rosenbaum, *(Un)equal Immigration Protection*, 50 SW. L. REV. 231, 237 (2021). A detailed explanation of the different standards that may apply in noncitizen equal protection challenges is beyond the scope of this Note. For additional information on how noncitizen equal protection claims are evaluated, see generally Ariel Subourne, *Alienage as a Suspect Class: Nonimmigrants and the Equal Protection Clause*, 10 SETON HALL CIR. REV. 199 (2014); Jason H. Lee, *Unlawful Status as a “Constitutional Irrelevancy”?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1 (2008).

revision of the doctrinal standard have emerged.¹⁹⁹ The most urgent critique of the extant doctrinal framework is that it “misses out on [the] important . . . dimension of actual impact”²⁰⁰ In other words, even a comprehensive application of the Court’s current equal protection analysis fails to consider the extent to which restrictionist subfederal alienage laws breed discriminatory outcomes.²⁰¹ While this *should* be the central focus of equal protection analyses, the Court has instead become fixated on a rigid series of procedural inquiries that ultimately hinder the intended protective functions that the Clause was designed to serve. The solution, this Note argues, is to insert a second inquiry into the alienage law analytical framework: Does the contested provision distinguish between citizen and noncitizen groups in a way that threatens to limit efforts towards noncitizens’ integration? While this inquiry may appear overly reductive in comparison to the current equal protection standards applied to noncitizen inquiries, I argue that this single question more effectively strikes at the core of the Equal Protection Clause’s anti-discriminatory objectives in this context.

I deliberately frame the distinction along the broad citizen/noncitizen axis to eliminate the possibility of unequal outcomes based on whether one is a legal permanent resident, a temporary worker, undocumented, or otherwise. The inquiry specifically considers whether the law “threatens” to limit integration because, as critiques of the existing doctrinal framework show, the anti-discriminatory purpose of the Equal Protection Clause is hindered when judicial inquiry focuses too narrowly on questions of intent versus actual effect.²⁰² This all-encompassing “threat” framing functionally incorporates considerations about the legislature’s intent *and* the actual effects of the policy without forcing targeted communities to endure actual harm before the provision can be contested (as would be the case in a traditional disparate impact claim). Finally, the focus toward the broad goal of “noncitizen integration” is intentional. There is no affirmative duty for states to adopt integrationist measures, *but*, under this inquiry, states cannot strive to exclude migrant communities, regardless of whether the state can articulate a compelling interest for doing so.²⁰³

199. Stearns, *supra* note 192, at 1043.

200. R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN’S L. REV. 1119, 1129–31 (2019).

201. Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2343–46 (2006).

202. See Bernick, *supra* note 196, at 7–8 (“Many antisubordination scholars consider Fourteenth Amendment doctrine’s focus on discriminatory intentions to be misplaced, either because intentions are exceedingly difficult to discover or because they are less important than the impact of policies on disadvantaged groups.”); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 164 (1984) (explaining that such an approach “misdirects constitutional analysis by deflecting the focus of inquiry toward abstractions (the tiers of scrutiny) that have little to do with the specific merits of a case”).

203. This position is based on the principles discussed *supra* note 103, namely that restrictionist alienage laws are not an acceptable proxy for unsatisfying admissibility/exclusion outcomes: Once noncitizens are present, while they can be removed under immigration laws, they should be treated fairly under applicable alienage laws for the duration of their presence.

While preemption and equal protection analyses are two discrete doctrinal beasts, it is appropriate to situate this embedded equal protection inquiry within the context of alienage law preemption analysis because subfederal alienage laws almost exclusively raise two types of problems: preemption concerns and equal protection problems.²⁰⁴ If these two doctrinal problems arise out of the same common legislative nucleus, then there is a strong efficiency argument for addressing them concurrently at the time a protest on either front is raised. Additionally, the preemption assessment and the equal protection evaluation revolve around the same central theme of conflict. Preemption considers whether the alienage law conflicts with the function of the federal regulatory framework, whereas the equal protection evaluation asks whether the provision conflicts with the protective values of the Equal Protection Clause. The theme of conflict arises across both inquiries, thus supporting the argument that it is efficient to address these twin concerns simultaneously.

Of course, this proposal constitutes a radical departure from several core tenets of current equal protection analysis. It removes the balancing test component (which is otherwise only abandoned when there is an established fundamental right at issue, like in *Obergefell v. Hodges*²⁰⁵ [same-sex marriage] and *Shapiro v. Thompson*²⁰⁶ [interstate movement]); it unconventionally combines disparate treatment, disparate impact, and discriminatory intent questions; and it abandons the Court's tiers of scrutiny model.²⁰⁷ Radical as this departure may be, these changes are necessary for effectuating the true anti-subordinating objectives of the Fourteenth Amendment's Equal Protection Clause as applied in the subfederal alienage context.

B. Importing Practices from Comparable International Contexts

In addition to reforming the operation of preemption and equal protection analyses, a final recommendation to aid the construction of an integrationist immigration landscape involves the adoption of the successful power-sharing practices observed in other similarly situated liberal democracies, the two prime examples being Canada and Germany.²⁰⁸ Based on the lessons provided by the Canadian and German models, there are two interrelated steps the United States should take.

204. See Rosenbaum, *supra* note 198, at 232; Jenny-Brooke Condon, *The Preempting of Equal Protections for Immigrants?*, 73 WASH. & LEE L. REV. 77, 125 (2016).

205. *Obergefell v. Hodges*, 576 U.S. 644, 663–64, 675–76 (2015) (holding that state laws banning same-sex marriage violate the fundamental right to marry).

206. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (abandoning the traditional balancing test approach when a state regulation infringed on the fundamental right to interstate travel).

207. The idea of abandoning the dominant tiers of scrutiny framework is not new. Bernick, *supra* note 196, at 64–65 (“[T]here is no justification for any claim that original meaning requires either doctrine.”); J. Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT’L AFFS. 72, 73 (2019) (“That framework ought to be abandoned. The tiers of scrutiny have no basis in the text or original meaning of the Constitution.”).

208. See Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 L. & CONTEMP. PROBS. 107, 113 (1992) (“The Canadian system illustrates that the United States’s ways of doing things are not the inevitable ones. Nor are they the only workable ones.”); Friedrich Heckmann, *Commentary: General and Special Integration Policies in Germany*, in *CONTROLLING IMMIGRATION: A COMPARATIVE PERSPECTIVE*, 345, 348 (James F. Hollifield

First, the federal government should establish a centralized channel of communication through the appointment of a designated integration affairs liaison to allow states to communicate their support needs to the federal government. Second, based on subfederal requests for assistance, the government should regularize the dispersal of funds to subsidize subfederal integrationist action.

1. The Canadian Case Study: The Role of Representative Committees

Vertical communication between federal integration liaisons and subfederal entities is essential for diagnosing the flaws in the current federalist immigration landscape. The Canadian federal government oversees thirteen self-governing territories and maintains intragovernmental immigration treaties with all but one.²⁰⁹ These agreements do not contest Canadian federal supremacy over admission and expulsion decisions, but rather, specify how state governments must use their residual alienage-adjacent powers.²¹⁰ Similar to the United States context, Canadian subfederal alienage laws may not conflict with the pure immigration regulations established by the federal government.²¹¹

Each agreement is tailored to reflect the individualized labor, spatial, and resource needs of each territory²¹² and stresses how territories rely on the federal government to provide “appropriate, fair, equitable, predictable and ongoing

et al. eds., 4th ed. 2022) (“Overall, Germany’s institutions and society are united in striving for successful migrant integration.”); Rubenstein, *supra* note 50, at 123; Rodríguez, *supra* note 15, at 632.

209. Nunavut is the only Canadian territory that does not maintain an immigration agreement with the federal government. *Federal-Provincial/Territorial Agreements*, GOV’T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial.html> [<https://perma.cc/S8XU-RNM9>] (last visited Aug. 10, 2025).

210. See, e.g., Agreement for Canada-Yukon Co-operation on Immigration, Can.-Yukon, § 5, May 9, 2008, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/yukon.html> [<https://perma.cc/T73U-L7HE>] (last visited Sept. 11, 2025) [hereinafter Yukon Agreement]; Canada-Nova Scotia Agreement on the Atlantic Immigration Program, Can.-N.S., § 3.2, § 4.1.1, Feb. 1, 2022, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/nova-scotia.html> [<https://perma.cc/YE7J-QPDE>] (last visited Sept. 11, 2025) [hereinafter Nova Scotia Agreement].

211. Davide Strazzari, *Immigration and Federalism in Canada: Beyond Quebec Exceptionalism?*, 9 PERSPS. ON FEDERALISM 56, 62 (2017).

212. See, e.g., Agreement for Canada-Alberta Cooperation on Immigration, Alta.-Can., § 1.12, May 11, 2007, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/alberta/agreement-canada-alberta-cooperation-immigration-2007.html> [<https://perma.cc/AU97-VL88>] (last visited Sept. 11, 2025) [hereinafter Alberta Agreement] (“Agreement will support the Province’s efforts to address unique needs, resulting from unprecedented economic growth and development.”); Canada-Manitoba Immigration Agreement, Can.-Man., § 2.2, Jun. 6, 2003, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/manitoba/canada-manitoba-immigration-agreement-june-2003.html> [<https://perma.cc/VLP9-VUFR>] (last visited Sept. 11, 2025) [hereinafter Manitoba Agreement]; Canada-British Columbia Immigration Agreement, B.C.-Can., § 3.2.1(c), May 7, 2021, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/british-columbia/canada-british-columbia-immigration-agreement-2021.html> [<https://perma.cc/Q8L2-4VXT>] (last visited Sept. 11, 2025) [hereinafter British Columbia Agreement]; Canada-Saskatchewan Immigration Agreement, Can.-Sask., § 1.2(e), May 7, 2005, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/saskatchewan/canada-saskatchewan-immigration-agreement-2005.html> [<https://perma.cc/9K3L-8V9T>] (last visited Sept. 11, 2025) [hereinafter Saskatchewan Agreement].

funding” to subsidize the implementation of each agreement’s provisions.²¹³ Consequently, several agreements include robust instruments for the management of federal-state cost-sharing programs.²¹⁴

To ensure that agreements are properly implemented at both levels, representative committees are tasked exclusively with maintaining the Canadian federal-state relationship as it pertains to immigration affairs.²¹⁵ These committees meet at least once a year to discuss an evolving agenda of immigration-related topics²¹⁶ and pledge to include concerns raised by sub-territorial entities, including local governments and non-governmental organizations, to ensure comprehensive representation across all subfederal levels.²¹⁷

However, the dissimilarity in political climates between the United States and Canada may render the direct importation of Canadian methods difficult in practice. The U.S. federal government and the Canadian federal government operate from different sets of ideological principles. While both federalist systems acknowledge that immigration admission determinations are the jurisdiction of the federal government,²¹⁸ Canadian federal legislation—including the Immigration and Refugee Protection Act and the Canadian Charter of Human Rights—identifies integration as a societal benefit and governmental imperative.²¹⁹ These principles, described by the territories as humanitarian, subsequently embed themselves in the

territorial/saskatchewan/canada-saskatchewan-immigration-agreement-2005.html [https://perma.cc/EM4N-THF3] (last visited Sept. 11, 2025) [hereinafter Saskatchewan Agreement].

213. Alberta Agreement, § 6.1.5; see Manitoba Agreement, § 4.5; British Columbia Agreement, § 3.2.1(d).

214. See, e.g., Yukon Agreement, § 3.9; Alberta Agreement, § 4.1.1.

215. See, e.g., British Columbia Agreement, § 12.1.1 (“The Agreement Management Committee, with two Co-Chairs, the Assistant Deputy Minister, British Columbia Ministry of Municipal Affairs, and the Assistant Deputy Minister, Department of Immigration, Refugees and Citizenship Canada, or their designates where mutually agreed upon, will be established.”).

216. See, e.g., Yukon Agreement, § 9.2; Alberta Agreement, § 7.2.2; Manitoba Agreement, § 7.2; British Columbia Agreement, § 12.1.3.

217. See, e.g., Canada-Newfoundland and Labrador Immigration Agreement, Can.-Nfld., § 6.2, Oct. 4, 2022, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/newfoundland-labrador/immigration-agreement-2022.html> [https://perma.cc/X24Q-9MDS] (last visited Sept. 11, 2025) [hereinafter Newfoundland and Labrador Agreement] (“The Parties agree that Local Governments play an important role in attracting and retaining newcomers, in supporting the successful settlement and integration of Immigrant in Newfoundland and Labrador and in ensuring that communities are welcoming and inclusive.”); Canada-New Brunswick Immigration Agreement - General Provisions, Can.-N.B., § 6.2.1, Jun. 29, 2023, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/new-brunswick/canada-new-brunswick-immigration-agreement-general-provisions.html> [https://perma.cc/H8G7-CAZ6] (last visited Sept. 11, 2025) [hereinafter New Brunswick Agreement] (“The Parties agree that Local Governments play an important role in attracting and retaining newcomers . . .”).

218. Constitution Act, 1867, 30 & 31 Vict., c. VI, § 95 (UK); Strazzari, *supra* note 211, at 61–62.

219. Jeffrey G. Reitz, *Canada: Continuity and Change in Immigration for Nation-Building*, in *CONTROLLING IMMIGRATION: A COMPARATIVE PERSPECTIVE* 124 (James F. Hollifield, Philip L. Martin, Pia M. Orrenius & François Héran eds., 2022) (With many Canadians viewing the duty to aid integrative measures as an affirmative “civic duty”).

content of the resulting subfederal agreements.²²⁰ While all major Canadian political parties have pro-immigration policies, both mainstream American political parties run on anti-immigrant narratives.²²¹

Despite these stark differences in political conditions, the United States would likely benefit from the appointment of a federal integration affairs liaison to facilitate vertical communication about the nuances of unique subfederal integrationist challenges. With 50 states and 14 territories, it seems infeasible for the U.S. government to simultaneously administer individual agreements with every state and territory. It would, however, be feasible to establish a communicative infrastructure that, similar to the Canadian representative committee structure, allows states to inform the federal government of their grievances and work collectively towards devising a solution.

2. The German Case Study: Regularizing Federal Subsidization of Subfederal Integrationist Costs

The German example both reinforces the conclusion that the United States should appoint an integration liaison but also emphasizes the importance of enacting consistent federal subsidization practices. The German federal government (*Bund*) oversees the operation of 16 federal states (*Länder*), which are comprised of 2,000 cities and 11,000 municipal governments.²²² Situated in the Schengen Zone, the federal government retains little authority over immigration across national borders, thus placing the federal government in a defensive position at the expense of the European Union.²²³ This sense of helplessness over national immigration flows has contributed to an anti-immigrant social sentiment among pockets of the German population.²²⁴

In the face of a relaxed national border, German constituents have long feared the phenomenon of “ethnic withdrawal,” whereby nativist communities worry they will become displaced by incoming immigrants who “interact mostly or

220. See, e.g., Alberta Agreement, § 6.1.1 (“[R]ecognize that full participation of newcomers in Canadian society is essential to achievement of the economic and social benefits of immigration policy and programs.”); Newfoundland and Labrador Agreement, § 10, (“The Parties recognize the importance of an inclusive, diverse and cohesive society that is free of racism and which may be advanced through multiculturalism.”); New Brunswick Agreement, § 1.15.

221. See Reitz, *supra* note 219, at 147; Anna Flagg & David Eads, *Trump’s Immigration Lies Paid Off at the Polls*, THE MARSHALL PROJECT (Nov. 6, 2024), <https://www.themarshallproject.org/2024/11/06/election-result-trump-harris-immigration-crime> [https://perma.cc/ZL4V-BX6C].

222. Dagmar Soennecken, *Germany and the Janus Face of Immigration Federalism*, at 4, 8, <https://yorkspace.library.yorku.ca/server/api/core/bitstreams/600ec669-021f-477b-b687-b5f77d8f9e8f/content> [https://perma.cc/7C5Z-D5UV] (last visited Oct. 25, 2025).

223. Philip L. Martin & Dietrich Thränhardt, *Germany: Managing Migration in the Twenty-First Century*, in *CONTROLLING IMMIGRATION: A COMPARATIVE PERSPECTIVE* 330 (James F. Hollifield, Philip L. Martin, Pia M. Orrenius & François Héran eds., 2022).

224. See *Migration Rises Up List of Germans’ Fears, Survey Says*, REUTERS (Oct. 12, 2023), <https://www.reuters.com/world/europe/migration-rises-up-list-germans-fears-survey-2023-10-12/> [https://perma.cc/VE46-9P2S].

exclusively with other members of their [own] community.”²²⁵ Assimilative resistance narratives are most strongly associated with Islamic immigrant communities.²²⁶ There is little merit to these self-proclaimed nativist concerns, as data shows German migrant communities experience poverty at three times the rate of their nativist counterparts, are underrepresented in educational settings, and experience a growing fear of xenophobic prejudice over time.²²⁷ The federal government nonetheless enacted several legislative items—including the Immigration Law of 2005 (announcing Germany as “an immigration country”), the Anti-Discrimination Policy of 2006, and the National Integration Plan of 2007²²⁸—to improve Germany’s reputation as a welcoming destination. It is against this background that Germany earned its reputation as “a reluctant immigration nation,”²²⁹ which arguably describes the current climate in the United States.²³⁰

In light of these conditions, the German federal government appointed a Commissioner for Integration²³¹ and a Federal Commissioner for Anti-Racism²³² in 1978 and 2022, respectively. Through the centralization of authority via these appointments, Germany has been able to master the art of subsidizing subfederal integrationist pursuits.

Like the state governments in the United States, the German *Länder* maintain significant control over educational spending which serves as an important device for managing integrationist progress.²³³ Many German cities have developed rigorous integrationist plans (*Leitbild*) that are implemented with the help of local and non-governmental participants alike.²³⁴ With subfederal collectives handling the design of integrationist regimes, the only remaining question is one of funding.²³⁵ German subfederal integration programs are funded through public and private channels at the national and international levels.²³⁶ Among these funding sources are the European Union’s Erasmus+ program, the European Regional Development Fund, the German

225. Ingrid Tucci, *Commentary: Can Germany Master the Integration Challenge*, in *CONTROLLING IMMIGRATION: A COMPARATIVE PERSPECTIVE* 353 (James F. Hollifield, Philip L. Martin, Pia M. Orrenius & François Héran eds., 2022).

226. *Id.* at 351.

227. *Id.* at 35354.

228. See EUROPEAN COMMISSION, *Governance of Migrant Integration in Germany* (Jun. 2014).

229. Soenneken, *supra* note 222, at 7, 9.

230. Like the United States, the German government struggles to apply a consistent approach to equal protection-adjacent inquiries. See Douglas B. Klusmeyer & Demetrios G. Papademetriou, *Aliens Policy and the Federal Courts*, in *IMMIGRATION POLICY IN THE FEDERAL REPUBLIC OF GERMANY: NEGOTIATING MEMBERSHIP AND REMAKING THE NATION* 12024 (2009) (“Critics of the Constitutional Court’s decision have viewed it as disturbing in that it treats the *Spätaussiedler* differently than other German citizens.”).

231. EUROPEAN COMM’N, *supra* note 228.

232. *Id.*

233. Heckmann, *supra* note 208, at 345.

234. *Id.* at 346.

235. See Klusmeyer et al., *supra* note 230, at 97, 101.

236. EUROPEAN COMM’N, *supra* note 228.

federal government, the Mercator Foundation, the Robert Bosch Foundation, and the IKEA Foundation.²³⁷

In the United States, the federal government funds state activities through the passage of congressional appropriations bills.²³⁸ Congress has previously been called upon to provide subsidized funding to offset the costs that state and local law enforcement incur while cooperating with the federal government,²³⁹ and in 2005 Congress appropriated \$5 million to support subfederal actors who entered into 287(g) cooperative agreements.²⁴⁰ It was possible for the federal government to fund subfederal immigration-related endeavors in the past, so it is possible to do so again. Increased access to funding at the subfederal level is likely to encourage more integrationist subfederal policies because state and local governments will no longer be saddled with the responsibility of funding these projects.

IV. CONCLUSION

Having explored the roles that different subfederal actors play in the enforcement and creation of immigration-related laws and policies, it is evident that subfederal engagement—in its present form—threatens to violate individual constitutional rights, entrench stigmatizing anti-immigrant narratives, and erode noncitizens' quality of life. At first glance, it appears that legal scholars might be inclined to believe that too many subfederal cooks in the kitchen risk spoiling the regulatory broth. But, through the proper judicial administration of preemption analyses coupled with the meaningful consideration of antidiscrimination concerns, the judiciary can be transformed into a valuable resource for mitigating the major harms that result from restrictionist subfederal activity. Additionally, by implementing a federal liaison system to facilitate integration-related discourse with subfederal actors—as has proven successful in other federalist liberal democratic contexts—the federal government can better position itself to understand and consequently resolve subfederal pleas for assistance. After all, subfederal governments are more likely to engage with integrationist ideas when they are not exclusively responsible for bearing the burden of the associated costs.

Despite the Trump II Administration's uncompromising commitment to the entrenchment of anti-immigrant measures at every actionable opportunity, the major structural components of the immigration power-sharing relationship outlined in this Note have not changed, nor are they likely to in the foreseeable future. While the federal government retains exclusive regulatory authority over pure

237. *Id.*

238. See generally JAMES V. SATURNO, MEGAN S. LYNCH, BILL HENIFF JR., & DREW AHERNE, CONG. RESEARCH SERV. R47106, *THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW* 13 (2023) (explaining Congress's process to appropriate money to federal agencies and states for various purposes).

239. NUÑEZ-NETO ET AL., *supra* note 51, at 23.

240. Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, 119 Stat. 2064, 2068 (2005).

immigration matters, subfederal entities will remain largely free to tailor the contours of integration as they see fit. In the face of the Trump II Administration's brazen immigration regime, subfederal governments must remember that they are not powerless to resist anti-immigrant action at the federal level. By prioritizing integration over restriction and cooperation over fragmentation, subfederal governments can enact meaningful change in individual immigrant lives. So *are* there too many subfederal cooks in the regulatory kitchen? No. Right now, we need all hands on deck.