



## Santa Clara Law Santa Clara Law Digital Commons

Faculty Publications

Faculty Scholarship

1-1-2013

# Immigration Federalism: A Reappraisal

Pratheepan Gulasekaram

*Santa Clara University School of Law*, [pgulasekaram@scu.edu](mailto:pgulasekaram@scu.edu)

Karthick Ramakrishnan

*University of California, Riverside*

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>

 Part of the [Law Commons](#)

### Automated Citation

Pratheepan Gulasekaram and Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal* (2013),

Available at: <http://digitalcommons.law.scu.edu/facpubs/813>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# IMMIGRATION FEDERALISM: A REAPPRAISAL

PRATHEEPAN GULASEKARAM<sup>†</sup> & S. KARTHICK RAMAKRISHNAN<sup>‡</sup>

*This Article identifies how the current spate of state and local regulation is changing the way elected officials, scholars, courts, and the public think about the constitutional dimensions of immigration law and governmental responsibility for immigration enforcement. Reinvigorating the theoretical possibilities left open by the Supreme Court in its 1875 Chy Lung v. Freeman decision, state 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. In the October 2012 term, in Arizona v. United States, the Court addressed, but did not settle, the difficult empirical, theoretical, and constitutional questions necessitated by these enactments and their attendant justifications. Our empirical investigation, however, discovered that most state and local immigration laws are not organic policy responses to pressing demographic challenges. Instead, such laws are the product of a more nuanced and politicized process in which demographic concerns are neither necessary nor sufficient factors and in which federal inactivity and subfederal activity are related phenomena, fomented by the same actors. This Article focuses on the constitutional and theoretical implications of these processes: It presents an evidence-based theory of state and local policy proliferation; it cautions legal scholars to*

---

<sup>†</sup> Associate Professor of Law, Santa Clara University School of Law.

<sup>‡</sup> Associate Professor of Political Science, University of California, Riverside.

This project has benefited from the comments and encouragement of several scholars in both the legal and political science disciplines, including Professors Sameer Ashar, David Ball, Eleanor Brown, Jessica Bulman-Pozen, Jennifer Chacón, Gabriel J. Chin, Mat Coleman, Justin Driver, Patricia Fernandez-Kelly, David Fitzgerald, Kyle Graham, Zoltan Hajnal, Bill Ong Hing, Bradley Joondeph, Taeku Lee, Stephen Lee, Hiroshi Motomura, Lise Nelson, Michelle Oberman, Cristina Rodríguez, David Rubenstein, Neil Siegel, Reva Siegel, John Skrentny, David Sloss, Sarah Song, Juliet Stumpf, Daniel Tichenor, Jonathan Todres, and David Yosifon. The research contained in this paper was presented at the Conference of Asian Pacific American Law Faculty; the American Constitution Society's Conference on the Constitutionality of State and Local Immigration Laws; the 2012 International Migration Conference at the Center for Comparative Immigration Studies at the University of California, San Diego; seminars at the City University of New York Graduate Center and Princeton University; and faculty workshops at the University of California at Irvine, Lewis & Clark, and Santa Clara University law schools. This is part of a series of papers exploring the implications of our original empirical research for state and local immigration laws.

Thanks to Ulises Aguirre, Philip Brody, Keelin Haddix, and Mariko Kotani (J.D. candidates, Santa Clara University School of Law) and to Rachel Wilf (Woodrow Wilson International Center for Scholars) for their excellent research assistance. We acknowledge the institutional support of Dean Donald Polden of Santa Clara University School of Law, the Russell Sage Foundation, and the Woodrow Wilson International Center for Scholars. Finally, we appreciate the diligence of the *New York University Law Review* editors in preparing this article for publication. Copyright © 2013 by Pratheepan Gulasekaram & S. Karthick Ramakrishnan.

*rethink functionalist accounts for the rise of such laws; and it advises courts to reassess their use of traditional federalism frameworks to evaluate these subfederal enactments.*

- INTRODUCTION ..... 2075
- I. FEDERAL AND SUBFEDERAL IMMIGRATION AUTHORITY  
  IN HISTORICAL CONTEXT: IMMIGRATION LAW VERSUS  
  ALIENAGE LAW ..... 2083
- II. *CHY LUNG* AND THE FLAWED BASES OF THE NEW  
  IMMIGRATION FEDERALISM ..... 2090
  - A. *Federal Inaction and the  
“Mirror Theory” Defense* ..... 2094
  - B. *“Vital Necessity” in State and Local Immigration  
Policies* ..... 2102
    - 1. *Hypothesized Factors Leading to Subfederal  
Policy Proposal and Passage* ..... 2103
    - 2. *Data and Statistical Findings* ..... 2105
  - C. *The Saliency of Partisanship* ..... 2107
- III. IMPLICATIONS OF THE NEW IMMIGRATION  
  FEDERALISM ..... 2108
  - A. *Partisanship and Existing Theoretical Models of  
Subfederal Action* ..... 2108
    - 1. *Designed Policy Proliferation and the Political  
Safeguards of Federalism* ..... 2108
    - 2. *Challenges to Established Theoretical Accounts  
of Subfederal Immigration Action* ..... 2117
    - 3. *The Fallacy of the Functionalist Model* ..... 2120
    - 4. *A Cascade, Not a Steam Valve* ..... 2121
  - B. *Courts and the New Immigration Federalism* ..... 2123
    - 1. *The Values of Federalism* ..... 2124
    - 2. *Equality Concerns with the New Federalism* .... 2130
    - 3. *The Future of Immigration Federalism* ..... 2136
- CONCLUSION ..... 2141
- APPENDIX A ..... 2142
- APPENDIX B ..... 2144
- APPENDIX C ..... 2145

INTRODUCTION

Since the turn of the twenty-first century, the legal landscape of immigration has fundamentally changed as states and localities have dramatically increased their proposal and passage of immigration laws. Officials in these enacting jurisdictions offer two related explanations for this sudden policy proliferation. First, they claim that

recent federal legislative inaction on immigration creates a policy vacuum that invites subfederal participation. Second, they claim they are compelled to fill this legislative void because regional challenges caused by unauthorized immigrants<sup>1</sup>—such as economic depression, overcrowding, and crime—force their hand. Prominent legal scholars, and even the Supreme Court, have accepted aspects of this two-tiered rationalization.<sup>2</sup> In this Article, we argue that this explanation for the current era of immigration federalism is theoretically, legally, and descriptively flawed. Moreover, these misconceptions have serious consequences for the ways in which courts, scholars, and officials analyze and comprehend subfederal immigration regulation. This Article reappraises the phenomenon and offers a necessary corrective.

Prior to the Civil War, states and localities were the primary regulators of immigration.<sup>3</sup> After the outlawing of slavery, however, the federal government became the dominant, if not exclusive, locus of immigration power, and remained so for the subsequent 125 years. In *Chy Lung v. Freeman*, an 1875 case, the Supreme Court established the notion of federal exclusivity in the field of immigration, striking down a California scheme that permitted state commissioners, at their discretion, to exact a bond for certain arriving immigrants.<sup>4</sup> This type of subfederal immigration policy—state and local attempts to expel undocumented immigrants and exercise core immigration functions—is precisely the system that has developed today, with several states and localities enacting immigration enforcement ordinances and laws designed to discover and discourage the presence of undocumented persons. We term this recent resurgence of subfederal legislative activity “the new immigration federalism.”

To justify these contemporary subfederal policies, states and local officials complain that the federal government has forsaken its constitutional and statutory responsibility to control unauthorized migration. In this view, states and localities are left with no choice but to step into the void. For example, in signing Arizona’s E-Verify law, then-Governor Janet Napolitano declared: “Immigration is a federal responsibility, but I signed [the law] because it is now abundantly clear that Congress finds itself incapable of coping with the

---

<sup>1</sup> In this paper, we will mostly refer to the class of persons present in the United States without lawful status as unauthorized or undocumented immigrants, except when intentionally referring to the statements or actions of those who use the terms “illegal aliens” or “illegal immigrants.” Any reference to these persons is intended to refer to those who either entered without inspection, or are otherwise out of status and unlawfully present.

<sup>2</sup> See *infra* Part II.A.

<sup>3</sup> See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, COLUM. L. REV. 1833 (1993).

<sup>4</sup> 92 U.S. 275, 277 (1875).

comprehensive immigration reforms our country needs.”<sup>5</sup> This narrative of federal failure has become so ingrained that in his *Arizona v. United States* dissent in 2012, Justice Scalia declared, without evidentiary citation:

Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.<sup>6</sup>

In this emerging conception, exemplified by the “mirror image” legal defense advanced by states such as Arizona,<sup>7</sup> subfederal legislation and enforcement is framed as vital to achieving adequate and appropriate immigration enforcement, and merely mirrors the priorities espoused by Congress in existing legislation.<sup>8</sup>

This narrative of federal failure, however, is descriptively and legally suspect. First, federal immigration law is not a blank slate; several sweeping enactments over the past decades, and more recent budgetary authorizations, provide a comprehensive legislative background against which to assess claims of federal dalliance.<sup>9</sup> Second, the federal executive has been conspicuously active in immigration policy, even if Congress has not produced new legislation.<sup>10</sup> We argue that it is necessary to consider both of these points to develop a holistic understanding of the federal political branches’ roles in constituting federal immigration policy; at the very least, a complete understanding of the resource constraints and enforcement priorities that

---

<sup>5</sup> Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the House (July 7, 2007), available at <http://www.countysupervisors.org/uploads/07-07-02%20HB%202779%20Statement.pdf>.

<sup>6</sup> 132 S. Ct. 2492, 2522 (2012) (Scalia, J., concurring in part and dissenting in part).

<sup>7</sup> In 2010, Arizona passed S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *enjoined in part* by *Arizona v. United States*, 132 S. Ct. 2492 (2012), a law designed to enhance state immigration enforcement efforts by creating state immigration law crimes, and empowering state and local law enforcement officers to determine and report the legal status of suspected undocumented persons.

<sup>8</sup> Several defenses of subfederal immigration law—most notably Arizona’s defense of S.B. 1070—advanced the “mirror image” theory, to wit: As long as state law relied on federal immigration status definitions and pursued the same general goals of federal immigration law (identification and removal of unlawfully present persons), state immigration enforcement schemes could coexist with federal schemes. The theory positions states as “gap” or resource fillers in the overall immigration enforcement scheme, making up for federal deficiencies by mirroring federal objectives. See Carissa Hessick, *Mirror Image Theory in State Immigration Regulation*, SCOTUSBLOG (July 13, 2011, 2:34 PM), <http://www.scotusblog.com/2011/07/mirror-image-theory-in-state-immigration-regulation/>; see also *infra* notes 108–11 and accompanying text.

<sup>9</sup> See *infra* Part III.A.1.

<sup>10</sup> *Id.*

constitute federal immigration policy complicates the concept of federal dalliance.

In addition to complaining about federal inaction, proponents of subfederal immigration enforcement legislation also claim that their immigration policies are critically necessary. According to subfederal officials and immigration policy activists, federal failure has left states and localities defenseless against the onslaught of difficult demographic problems caused by unlawful migration. According to many restrictionist advocates,<sup>11</sup> state and local immigration laws emerge as compelled solutions to newfound and intractable policy challenges such as economic stress, increased language isolation, wage depression, and overcrowded housing.<sup>12</sup> For example, Alabama's immigration law foregrounds in its statement of purpose that "[t]he State of Alabama finds that illegal immigration is causing economic hardship and lawlessness . . . ."<sup>13</sup> Similarly, Lou Bartletta, the mayor of Hazleton, a small city in central Pennsylvania that was among the earliest to pass a restrictive ordinance, testified to Congress that in Hazleton, illegal immigration "is not some abstract debate about walls and amnesty, but it is a tangible, very real problem."<sup>14</sup>

While it might be tempting to dismiss these claims as the self-serving bluster of politicians and local legislatures, the assumptions embedded in these factual claims have insinuated themselves into judicial opinions and legal scholarship. Justice Kennedy's majority opinion in *Arizona*, striking down three out of four provisions of Arizona's state immigration enforcement scheme, lamented the state's purported immigration woes, stating: "The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration."<sup>15</sup> In addition, some scholars argue for a functionalist understanding of local immigrant regulation, which maintains that the

---

<sup>11</sup> We use the terms "restrictionist" and "restrictive" to describe the range of policy positions arguing for greater immigration enforcement, increased state and local participation in enforcement, decreased ability of unlawfully present persons to access public goods, and fewer discretionary decisions to permit unlawful presence.

<sup>12</sup> See Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006) (criminalizing hiring or harboring illegal immigrants); *Lozano v. City of Hazleton*, No. 07-3531, 2013 WL 3855549, at \*1 (3d Cir. July 26, 2013) (enjoining both the employment and housing provisions of the city ordinance after reconsideration in light of *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), and *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

<sup>13</sup> H.B. 56, § 2, 2011 Leg., Reg. Sess. (Ala. 2011) (enacted and codified in part at ALA. CODE § 31-13-2 (LexisNexis 2011)).

<sup>14</sup> *Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11-13 (2006) (statement of Louis Bartletta, Mayor, Hazleton, Pa.).

<sup>15</sup> *Arizona*, 132 S. Ct. at 2500.

demographic 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.”<sup>16</sup> Accordingly, divergent needs in localities validate contrasting approaches to integrating and regulating the effects of immigrants on local economies.<sup>17</sup> Similarly, Professor Clare Huntington writes that “changing immigration patterns . . . have brought non-citizens to new parts of the country, . . . and to suburban and rural areas. . . . [I]t is notable that the more punitive immigration measures often, although not always, are enacted in areas new to receiving significant populations of non-citizens.”<sup>18</sup> Many media reports have also invoked this same narrative of immigration-induced changes leading inexorably to policy pressures and legislative action at the local level.<sup>19</sup>

This necessity-based justification gives rise to several important questions that require empirical verification.<sup>20</sup> Are states like Arizona and localities like Hazleton distinct in the quantity and quality of the immigration problems they face? Are states like Indiana, Utah, and South Carolina, or cities like Valley Park, Missouri, which have

---

<sup>16</sup> Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609 (2008). To be clear, we are not suggesting that Professor Rodríguez supports the efforts of jurisdictions like Arizona and Hazleton; our reference to her excellent work is limited to the assumptions undergirding her call for local action. Moreover, it is important to clarify that Professor Rodríguez’s work on this point does not specifically address S.B. 1070 or its copycat legislation; rather, her theory of local response deals with a variety of integrationist policies at the subfederal level.

<sup>17</sup> *Id.* at 594 (“Communities are also jumping on the enforcement bandwagon because they seek control over their rapidly changing environments.”).

<sup>18</sup> Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 806 (2008).

<sup>19</sup> See, e.g., Alex Kotlowitz, *Our Town*, N.Y. TIMES MAG., Aug. 5, 2007, at 30, 33 (discussing various legislation passed to discourage illegal immigration); Ian Urbina & Maria Newman, *Virginia County Votes to Deny Services to Illegal Immigrants*, N.Y. TIMES (Oct. 17, 2007), <http://www.nytimes.com/2007/10/17/us/17prison-cnd.html?pagewanted=all> (describing a Virginia state panel’s rejection of a proposed state-run facility to hold undocumented arrestees awaiting federal trial); *Border States Deal with More Illegal Immigrant Crime than Most, Data Suggest*, FOX NEWS (Apr. 30, 2010), <http://www.foxnews.com/politics/2010/04/29/border-states-dealing-illegal-immigrant-crime-data-suggests> (discussing Arizona lawmakers’ claim that restrictionist immigration policies are the result of increasing crime rates among illegal immigrant populations).

<sup>20</sup> See Richard A. Posner, *Justice Scalia Is Upset About Illegal Immigration. But Where Is His Evidence?*, SLATE, (June 27, 2012, 10:21 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_justice\\_scalia\\_offers\\_no\\_evidence\\_to\\_back\\_up\\_his\\_claims\\_about\\_illegal\\_immigration.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration.html) (critiquing Justice Scalia’s dissent in *Arizona v. United States*: “[T]he suggestion that illegal immigrants in Arizona are . . . straining [Americans’] social services, and even placing their lives in jeopardy is sufficiently inflammatory to call for a citation to some reputable source of such hyperbole. Justice Scalia cites nothing to support it.”).

enacted laws similar to those in Arizona and Hazleton, also experiencing a rise in immigration-related concerns?<sup>21</sup> Moreover, what accounts for the lack of restrictive legislation in states and cities like New Mexico and Atlanta—jurisdictions that have experienced the same or even higher levels of demographic change as enacting jurisdictions? If demographic changes cause unwieldy public policy challenges, we might expect that several jurisdictions experiencing population changes, language isolation, and economic stresses similar to those of Alabama or Hazleton would be inclined to at least consider similar legislation. After all, in standard models of state and local behavior, a jurisdiction's successful policy experimentation should theoretically be considered or adopted by others facing common challenges.<sup>22</sup> At the very least, the existence of such similarly situated, but legislatively inert, localities merits a closer inquiry into the factors purportedly compelling some subfederal jurisdictions to enact immigration legislation.

Addressing these questions in empirical work, our findings cast doubt on the factual premise undergirding the necessity of the new immigration federalism. Our data and analysis show that, for the most part, state and local immigration laws are not, as commonly assumed, compelled responses tailored to regionally specific, immigration-induced policy concerns.<sup>23</sup> Our systemic, nationwide investigation of recent subfederal immigration laws finds that demographic change and attendant policy challenges are largely unrelated to the proposal and passage of such laws. Instead, we uncover simpler, more consistent motivations: partisan opportunities and political entrepreneurship. Restrictive state and local immigration laws are largely the product of interested policy advocates who promote such laws in

---

<sup>21</sup> See *infra* Part II.B, note 296, & Appendices A–C.

<sup>22</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (articulating “laboratories” of policy experimentation metaphor for varied state and local action); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 *HASTINGS L.J.* 1673, 1676 (2011); Rodríguez, *supra* note 16, at 571, 609.

<sup>23</sup> See S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 73, 90 (Monica W. Varsanyi ed., 2010) (suggesting that partisanship, rather than economic or cultural factors, influences ordinances on immigration); S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 *ARIZ. ST. L.J.* 1431, 1436–45 (2012) (detailing how local partisanship explains the spread of restrictive immigration laws). Undoubtedly, a particular enacting jurisdiction may in fact be experiencing a measurable and significant growth in its undocumented population and a correlated increase in demographic concerns.



politically receptive jurisdictions, regardless of the demographic concerns facing that jurisdiction.<sup>24</sup>

Our seemingly straightforward explanation profoundly influences the manner in which elected officials, scholars, and courts should understand and evaluate the new immigration federalism. Thus far, these actors have mostly accepted the conventional explanation for subfederal immigration regulation. By doing so, they have mischaracterized and misevaluated these laws in three ways. First, they have incorrectly understood these enforcement-heavy subfederal laws to be something other than state and local regulation of immigration.<sup>25</sup> Second, they have credited, without evidence, traditional tropes about regional variation and about the value of federalist policy experimentation to solve demographic problems.<sup>26</sup> Third, and finally, their acceptance of the narrative of federal dalliance and subfederal necessity has reified reliance on structural power frameworks to evaluate subfederal immigration lawmaking.<sup>27</sup>

Although providing a partisanship-based account for the rise and spread of subfederal policy proliferation does not by itself suggest that such lawmaking is illegitimate or unconstitutional, it should nudge commentators and courts toward better analytic frameworks within which to understand the phenomena. Combining original empirical research with constitutional analysis, we argue:

(1) State and local immigration laws are part of an orchestrated legislative cascade, mostly unrelated to underlying policy concerns caused by unauthorized migration;

(2) the inherent structure of our federalist system creates a dynamic feedback loop whereby subfederal immigration policies hinder comprehensive federal reform efforts;

(3) dominant scholarly theories of immigration federalism must be rethought because these subfederal laws are neither functional responses to regional policy challenges nor isolated expressions of anti-immigrant fervor; and

(4) the dubiousness of demographic claims, coupled with evidence of ethnic antipathy in the genesis of these laws, counsels in favor of an equal protection framework rather than a preemption framework to evaluate the recent spate of immigration lawmaking.

This Article proceeds as follows. Part I begins by briefly describing the history of state and local immigration regulation and

---

<sup>24</sup> See Ramakrishnan & Wong, *supra* note 23, at 89 (suggesting that partisan composition impacts immigration law); Ramakrishnan & Gulasekaram, *supra* note 23, at 1475–80.

<sup>25</sup> See *infra* notes 95–102 and accompanying text.

<sup>26</sup> See *infra* Parts III.A.3 & III.B.1.

<sup>27</sup> See *infra* Parts III.B.1–2.

judicial responses to this regulation. In doing so, this Part articulates the critical jurisprudential distinction between subfederal immigration law and subfederal alienage law, providing a baseline against which to compare and within which to analyze the new immigration federalism.

Part II elucidates a possible constitutional basis for the new immigration federalism, relying on the Supreme Court's dicta in *Chy Lung* regarding federal inaction and vital necessity. Despite this theoretical possibility, the Article shows that the demographic concerns that might justify subfederal immigration under a *Chy Lung* theory are generally not salient in these enacting jurisdictions. Instead, we show that partisanship is a highly salient factor influencing the proposal and passage of restrictionist state and local laws.

Part III explores the implications of our empirical model. It first presents our alternative, evidence-based version of causality in subfederal lawmaking: We show that both subfederal legislative action and federal legislative inaction are galvanized by the same set of political actors and structural forces. We argue that the structure of our federalist system ensures that subfederal policy proliferation inexorably gridlocks federal immigration lawmaking.<sup>28</sup> In addition, we show how this model of policy proliferation resembles a legislative cascade,<sup>29</sup> thus undermining the dominant theoretical models that have thus far sought to explain the phenomena.<sup>30</sup> We conclude by assessing the implications of our model of state and local policy proliferation for judicial evaluation of the constitutionality of such laws.

---

<sup>28</sup> See Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1528 (1994) [hereinafter Kramer, *Understanding Federalism*] (detailing how the mutual dependency of party and elected officials at every level of government affects lawmaking); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer, *Political Safeguards of Federalism*] (arguing that the development of political parties has largely destroyed the distinction between federal and state politics). We also argue, in other work, that congressional filibuster rules and targeted special-interest advocacy have played critical roles in stagnating federal legislative efforts. See Ramakrishnan & Gulasekaram, *supra* note 23, at 1463–67 (providing examples of polarized federal lawmaking).

<sup>29</sup> See Cass R. Sunstein & Timur Kuran, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (describing the role of political activists who capitalize on public discourse and their potential influence in lawmaking).

<sup>30</sup> See, e.g., Huntington, *supra* note 18, at 795–99 (describing the alleged federal dalliance in immigration legislation); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199–200, 230–34 (2006) (discussing states' arrest authority as derived from state sovereign power); Rodríguez, *supra* note 16, at 610–12 (discussing erosion of the federal exclusivity principle); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 85–91 (2007) (noting that state immigration laws are not preempted if they track federal goals); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635–37 (1997) (discussing the virtues of a “steam-valve” theory of immigration federalism).

Of course, the Supreme Court and other federal courts have recently enjoined many provisions of laws in Arizona,<sup>31</sup> Georgia,<sup>32</sup> Alabama,<sup>33</sup> South Carolina,<sup>34</sup> and Farmers Branch, Texas.<sup>35</sup> Nevertheless, even after *Arizona*, other enforcement provisions and policies intended to expel unlawful migrants have survived or continue to present judicial challenges.<sup>36</sup> Some jurisdictions appear to be considering new subfederal policies despite these rulings.<sup>37</sup> Attempts to normalize subfederal involvement merit close scrutiny as debates on the presence of unauthorized immigrants continues to permeate political and legal discourse at all levels of government.

## I

### FEDERAL AND SUBFEDERAL IMMIGRATION AUTHORITY IN HISTORICAL CONTEXT: IMMIGRATION LAW VERSUS ALIENAGE LAW

In order to understand the current legislative and judicial dynamics of immigration federalism, we begin with an abridged

<sup>31</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down three out of four provisions of Arizona's S.B. 1070).

<sup>32</sup> *Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012) (affirming most of the district court's injunction of Georgia's Illegal Immigration Reform and Enforcement Act of 2011, but refusing to enjoin a provision which authorizes investigation of immigration status under certain conditions).

<sup>33</sup> *United States v. Alabama*, 691 F.3d 1269, 1294 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013) (finding several provisions of Alabama's H.B. 56 preempted, but not enjoining provisions related to mandatory investigation of immigration status of certain arrested individuals and individuals who may be driving without a valid license, nor a provision creating a state felony for unauthorized immigrants who attempt to obtain a business or driver's license from the state).

<sup>34</sup> *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013) (affirming preliminary injunction of three sections of the state immigration enforcement act).

<sup>35</sup> *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, 2013 WL 3791664 (5th Cir. July 22, 2013) (en banc) (enjoining city's occupancy license law, which required proof of citizenship or lawful immigration status to rent property within the city).

<sup>36</sup> *See, e.g., United States v. South Carolina*, 906 F. Supp. 2d 463, 470–73 (D.S.C. 2012), *aff'd*, 720 F.3d 518, 533 (4th Cir. 2013) (dissolving preliminary injunction of certain enforcement provisions of state enforcement law after reconsideration in light of the Supreme Court's decision in *Arizona v. United States*); Robbie Brown, *South Carolina: Federal Court Delivers Mixed Verdict on Immigration Measure*, N.Y. TIMES, Nov. 16, 2012, at A24, available at <http://www.nytimes.com/2012/11/16/us/south-carolina-federal-court-delivers-mixed-verdict-on-immigration-measure.html>; *Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013) (upholding city ordinance requiring prospective residents to obtain an occupancy license by identifying their immigration status); Emery P. Dalesio, *NC Immigration Panel Says Fed Should Do More*, BLOOMBERG BUSINESSWEEK (Dec. 7, 2012), <http://www.businessweek.com/ap/2012-12-07/nc-immigration-panel-says-feds-should-do-more>.

<sup>37</sup> *See 2012 Immigration-Related Laws and Resolutions in the States (January 1–June 30, 2012)*, NAT'L CONFERENCE STATE LEGISLATURES (July 2012), <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-and-resolutions.aspx> (reporting bills and resolutions passed or pending in the states in 2012).

account of state and local participation in immigration regulation in the nineteenth and twentieth centuries and explain the presumption of federal exclusivity in the field of immigration law and enforcement. It is this presumption of federal supremacy and exclusivity that contributes to “immigration exceptionalism” in our constitutional order, with the judiciary granting significant deference to Congress when reviewing immigration laws.<sup>38</sup> In doing so, we also explicate the doctrinal difference between “immigration law,” in which the presumption of federal exclusivity applies robustly, and “alienage law,” in which courts have permitted limited policymaking space for states and localities. Establishing a historical baseline of immigration federalism in this Part allows us to later identify precisely how the legal narrative of subfederal regulation in our present era has developed to overcome this default presumption and how that narrative is flawed.<sup>39</sup>

State and local participation in immigration regulation is not new. Indeed, for most of the nation’s first century (from 1776 to 1875), the only significant immigration laws were subfederal ones.<sup>40</sup> The federal government still dictated naturalization,<sup>41</sup> but most controls over ports of entry and regulations about fitness for presence within a jurisdiction were the product of state and local regulations.<sup>42</sup> The predominant reason for this nineteenth-century state of affairs was slavery. In many Southern states, federal immigration laws were viewed as a step towards federal regulation of slave migration and the movement of free blacks.<sup>43</sup> As such, the first federal laws governing entry and exit

---

<sup>38</sup> See Stephen H. Legomsky, Commentary, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 307 (2000) (“Under [the plenary power doctrine], the Supreme Court has accorded exceptional deference to Congress, often approaching non-reviewability, whenever there are issues concerning the constitutionality of immigration legislation.”); cf. *United States v. South Carolina*, 720 F.3d 518, 529 (4th Cir. 2013) (“We note that the presumption against preemption does not apply here because immigration is an area traditionally regulated by the federal government.”).

<sup>39</sup> As an important caveat, we should note that defending the constitutional soundness and normative value of the presumption of federal exclusivity is beyond the scope of this paper. For our present purposes, we simply note its development and existence in our constitutional order.

<sup>40</sup> See Neuman, *supra* note 3, at 1896–97 (noting the absence of a uniform federal immigration policy prior to 1875).

<sup>41</sup> See, e.g., An Act to Establish a Uniform Rule of Naturalization, 1 Stat. 103, Mar. 26, 1790 (repealed 1795).

<sup>42</sup> See Neuman, *supra* note 3, at 1857–58 (listing state regulations on movement or entry of persons).

<sup>43</sup> *Id.* at 1866 (“Historians have reasonably suggested that a primary cause of the federal government’s failure to adopt qualitative restrictions on immigration before the Civil War was the slave states’ jealous insistence on maintaining power over the movement of free blacks as a states’ right.”).

of aliens did not appear until after slavery was abolished as a matter of federal constitutional principle.

Soon after the Civil War, the Supreme Court began laying the foundation for exclusive federal control over immigration terms and enforcement. In *Chy Lung v. Freeman*, the Court struck down a California law allowing a state official, at his discretion, to exact a bond for certain classes of arriving aliens, stating, “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. . . . [T]he responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.”<sup>44</sup> The Court’s methodology in *Chy Lung* would likely be considered something akin to structural or constitutional forms of preemption, which invalidate the state law even in the absence of a robust federal regulatory scheme like the modern-day Immigration and Nationality Act, or a robust federal enforcement apparatus like the Department of Homeland Security.<sup>45</sup>

In 1882, Congress began using this exclusive power in earnest with the passage of the Chinese Exclusion Act, widely recognized as the nation’s first immigration law.<sup>46</sup> That act, which barred immigration from China for a period of time, was renewed and extended in subsequent federal enactments.<sup>47</sup> The Supreme Court upheld the law in *Chae Chan Ping v. United States*, again emphasizing the exclusive federal power to control immigration terms and enforcement.<sup>48</sup>

---

<sup>44</sup> 92 U.S. 275, 280 (1875).

<sup>45</sup> For discussion of a state law scrutinized for both structural and federal statutory preemption, see *infra* notes 61–65 and accompanying text (discussing the district court decision in *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995)); cf. *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, 2013 WL 3791664, at \*30 (5th Cir. July 22, 2013) (en banc) (Higginson, J., specially concurring) (suggesting that the city’s rental ordinance may present dormant Commerce Clause issues); *Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013) (declining to enjoin city’s rental ordinance and stating that “[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality are not tantamount to immigration laws establishing who may enter or remain in the country” (emphasis omitted)).

<sup>46</sup> Angela M. Banks, *The Trouble with Treaties: Immigration and Judicial Review*, 84 ST. JOHN’S L. REV. 1219, 1228 (2010).

<sup>47</sup> *Id.* at 1228–29.

<sup>48</sup> 130 U.S. 581, 603–04 (1889) (“That [Congress] can exclude aliens from its territory is [unquestionable]. . . . While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation . . . .”); see generally Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005) (discussing the establishment of broad congressional power over deportation).

Despite *Chy Lung*, *Chae Chan Ping*, and a third case, *Fong Yue Ting v. United States*,<sup>49</sup> throughout the twentieth century states and localities continued to pass laws directed at immigrants, with the related effect, if not purpose, of affecting immigration.<sup>50</sup> The Supreme Court appears to have divided these laws into two doctrinal categories. To the extent they attempt to control entry and exit, thereby acting as “core” or “pure” immigration regulation, *Chy Lung* invalidates them, unless the enacting state can show both vital necessity and federal inaction.<sup>51</sup> To the extent that these regulations fall outside the category of core immigration regulation, meaning they affect immigrants but do not directly dictate entry and exit, they may be considered “alienage” laws, to which the Supreme Court affords some leeway for state and local governments to enact.<sup>52</sup>

In the realm of alienage law, the Supreme Court has upheld sub-federal discrimination against noncitizens in areas that directly implicate a state’s sovereign functions and process of self-government, as in the hiring of state police officers or teachers.<sup>53</sup> Courts strike down subfederal laws only when either federal law preempts them or the

---

<sup>49</sup> 149 U.S. 698, 727 (1893) (upholding as a valid exercise of Congress’s broad powers over immigration a federal law permitting deportation of Chinese immigrants who could not produce a certificate of residence or attestation to residency by “at least one credible white witness”).

<sup>50</sup> See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 75, 80–81 (1979) (sustaining a New York law barring aliens from teaching in public schools under the “governmental functions” exception); *Graham v. Richardson*, 403 U.S. 365, 370–71, 376–78 (1971) (striking down Arizona welfare laws conditioning benefits on citizenship); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 421–22 (1948) (striking down a California law denying aliens fishing licenses); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking down a Pennsylvania alien registration scheme); *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 396 (1927) (sustaining a law barring aliens from operating billiard halls as a public interest exception to equal protection law); *Truax v. Raich*, 239 U.S. 33, 39–42 (1915) (striking down an Arizona law requiring eighty percent of employed persons in a business to be natural-born citizens as a violation of the Equal Protection Clause); *Patson v. Pennsylvania*, 232 U.S. 138, 145–46 (1914) (sustaining a state law barring aliens from hunting wild game).

<sup>51</sup> See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (holding that Congress has exclusive power over immigration law, but providing, in dicta, that in certain circumstances states may have the right to enact regulations affecting immigrants); see also *infra* notes 82–83 and accompanying text (discussing the vital necessity and federal inaction requirements).

<sup>52</sup> This line, of course, is hard to draw and is theoretically suspect; every law that discriminates against noncitizens likely influences their choices to remain or leave. However, the Court, at least in theory, suggests a doctrinal difference between the actual regulation of entry, exit, and term and conditions of remaining, and all other state and local regulation affecting noncitizens. For purposes of this Article, we accept the notion that there is “core” immigration regulation that is solely federal in nature, and other types of regulation that discriminate or otherwise affect noncitizens that do not directly affect entry, exit, or the conditions of remaining.

<sup>53</sup> See, e.g., *Ambach*, 441 U.S. at 80–81 (upholding New York law barring noncitizens from public school teaching certification); *Foley v. Connelie*, 435 U.S. 291, 294–300 (1978) (upholding New York law barring noncitizens from working as state troopers).

subfederal laws violate other substantive constitutional provisions. For example, in *De Canas v. Bica*, the Court upheld a California law sanctioning employers for hiring unauthorized workers.<sup>54</sup> In response to *De Canas*, Congress restricted the ability of states to enact such laws through the Immigration Reform and Control Act (IRCA) of 1986, creating a federal employer-sanctions scheme and expressly preempting state laws. Similarly, in *Yick Wo v. Hopkins*, an 1886 case, the Court found a San Francisco regulation of laundries unconstitutional on equal protection grounds because it was discriminatorily applied against Chinese noncitizens.<sup>55</sup>

Aside from these limited allowances for subfederal alienage law, state and local participation in immigration enforcement and deterrence is permitted only under the specific and narrowly defined circumstances established by the Immigration and Nationality Act (INA). Under the INA, states and localities may enter into conditioned and circumscribed cooperative enforcement agreements with the federal government (termed 287(g) agreements),<sup>56</sup> and they may arrest individuals for specific immigration crimes (smuggling and harboring of unauthorized immigrants).<sup>57</sup>

While at least one commentator,<sup>58</sup> one Office of Legal Counsel memorandum,<sup>59</sup> and one dissenting opinion in *Arizona*<sup>60</sup> have argued that states and localities have inherent enforcement power, or at least

---

<sup>54</sup> 424 U.S. 351, 254–65 (1976).

<sup>55</sup> 118 U.S. 356, 374 (1886).

<sup>56</sup> It is worth noting that the federal government appears to be scaling back use of 287(g) agreements in favor of its Secure Communities program, which enables local authorities to access federal databases to check the immigration status of persons in their custody. See, e.g., Alan Gomez, *Immigration Enforcement Program to Be Shut Down*, USA TODAY (Feb. 17, 2012, 3:25 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1> (discussing Department of Homeland Security plans to terminate some 287(g) agreements). Secure Communities, however, has also faced significant opposition in large cities and states. See, e.g., Cristina Costantini & Elise Foley, *D.C. Passes Bill to Restrict Secure Communities Immigration Enforcement Program*, HUFFINGTON POST (July 10, 2012, 7:17 PM), [http://www.huffingtonpost.com/2012/07/10/dc-immigration-law-secure-communities-ice\\_n\\_1663214.html](http://www.huffingtonpost.com/2012/07/10/dc-immigration-law-secure-communities-ice_n_1663214.html) (describing bill that would limit local cooperation with federal immigration enforcement efforts).

<sup>57</sup> See 8 U.S.C. §§ 1323(a), 1324(a) (2012) (criminalizing smuggling and harboring of unlawfully present persons).

<sup>58</sup> Kobach, *supra* note 30, at 182.

<sup>59</sup> Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Attorney Gen. John Ashcroft, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), *available at* <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.

<sup>60</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., concurring in part and dissenting in part) (“As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations express in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty.”).

greater power than contemplated by the INA, neither the Court nor the overwhelming majority of immigration scholars has ever accepted this position. For example, California's attempt in the mid-1990s to enact a state immigration enforcement scheme was struck down by a federal district court in *League of United Latin American Citizens v. Wilson*.<sup>61</sup> That case is illustrative of the convergence of both immigration and alienage law analysis, as the district court analyzed the law under both categorizations to enjoin most of California's Proposition 187.<sup>62</sup> Some of the scheme's provisions, such as the use of a state-created immigration status and the requirement that local officials determine the immigration status of persons, report persons of unlawful status to federal officials, and inform those persons of their obligation to leave, were treated by the court as "immigration" laws and therefore invalid.<sup>63</sup> On the other hand, other provisions of Proposition 187—those limiting educational access, for example—were understood as "alienage" law and assessed using traditional pre-emption principles or equal protection analysis.<sup>64</sup> A few such alienage provisions survived the analysis, but most were enjoined.<sup>65</sup>

Moreover, the Supreme Court has consistently and overwhelmingly disapproved of state attempts to regulate immigration, discriminate against noncitizens, or discourage immigrant presence in a particular locality.<sup>66</sup> For example, states and localities may not unequally enforce health and safety regulations,<sup>67</sup> unilaterally deny noncitizens public benefits<sup>68</sup> (even if the federal government may do

---

<sup>61</sup> 908 F. Supp. 755 (C.D. Cal. 1995).

<sup>62</sup> *Id.* at 774, 785–87 (finding that certain sections of law either were aimed at regulating immigration or contravened federal law).

<sup>63</sup> *Id.* at 769–71. *But see* *Ariz. Dream Act Coal. v. Brewer*, No. CV12-02546 PHX DGC, 2013 WL 2128315, at \*10–11 (D. Ariz. May 16, 2013) (declining to enjoin the state's denial of driver's licenses to recipients of the Obama administration's Deferred Action for Child Arrivals program and rejecting any reading of *League of United Latin American Citizens v. Wilson* that suggests that the aspects of Proposition 187 were per se preempted as establishing immigration law).

<sup>64</sup> *See League of United Latin Am. Citizens*, 908 F. Supp. at 774.

<sup>65</sup> *See id.* at 787 (enjoining provisions requiring school districts to verify student immigration status, denying education to undocumented students, and denying undocumented persons access to federally funded benefits and services).

<sup>66</sup> *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) (striking down Arizona welfare law that discriminated on the basis of alienage); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (denying that states have the power to directly regulate immigration).

<sup>67</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 374–75 (1886) (striking down the unequal enforcement of a San Francisco laundry ordinance against noncitizen Chinese laundry owners).

<sup>68</sup> *See Graham*, 403 U.S. at 372. Note, however, that in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Congress purported to allow states to discriminate against noncitizens in the provision of certain types of public benefits. Pub. L. No. 104-132, 110 Stat. 1214, 1273–77.



so),<sup>69</sup> nor deny undocumented children access to public education.<sup>70</sup> Further illustrating this theme, in *Hines v. Davidowitz*, the Court struck down Pennsylvania's immigration enforcement scheme, which included an alien registration system.<sup>71</sup>

In summary, from 1875 through the late 1990s, the Court and Congress prohibited or severely curtailed the ability of states and localities to regulate immigration, create enforcement schemes, and deter the presence of unlawfully present persons. State efforts at enacting "pure" immigration law were rebuffed beginning with *Chy Lung* and rarely, if ever, attempted thereafter. Subfederal alienage laws, as distinct from "pure" immigration laws, were also largely struck down by the Court, although a handful of provisions have survived preemption and equal protection analysis. As a consequence, before 2001, most legislative changes in immigration law occurred through bipartisan national efforts, with comprehensive federal enactments passed in 1924,<sup>72</sup> 1952,<sup>73</sup> 1965,<sup>74</sup> 1986,<sup>75</sup> and 1996.<sup>76</sup>

Given this background, the early twenty-first century's resurgence of subfederal immigration regulation is striking, both in its volume and in its defiance of the legal presumption against state and

<sup>69</sup> See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (upholding alienage distinctions in federal government's public benefits law).

<sup>70</sup> *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

<sup>71</sup> 312 U.S. 52, 68–75 (1941); see also Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 295 (2011) ("This is not the first time in American legal history that state attempts to regulate immigration have been judicially rebuffed."). Indeed, even when the Court recently upheld Arizona's E-Verify law, it did so because federal immigration law contained an express exception for the specific punishment created by the state, not because states may unilaterally enact workplace enforcement laws. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011). The Court relied on IRCA's explicit non-preemption of state "licensing laws" to uphold the Legal Arizona Workers Act (LAWA), which requires businesses within the state to check their employees' immigration status with the federal e-verify database, lest those employers lose their license to do business in Arizona. See 8 U.S.C. § 1324a(h)(2) (2012) (expressly preempting "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens"); *Whiting*, 131 S. Ct. at 1981 ("We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States . . .").

<sup>72</sup> Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

<sup>73</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

<sup>74</sup> Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

<sup>75</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

<sup>76</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1273–77; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2260–70; see also *infra* note 104; see generally THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 15–30 (7th ed. 2012) (providing a survey of federal immigration enactments).

local immigration regulation. The Supreme Court's recent refusal to enjoin all of Arizona's S.B. 1070, and the persistence of similar laws in Alabama,<sup>77</sup> Georgia,<sup>78</sup> Utah,<sup>79</sup> and South Carolina,<sup>80</sup> suggest that proponents of such laws have achieved some success in altering the presumptions that had appeared to be entrenched after *Chy Lung*. The problem, however, is that the constitutional story upon which these new laws are based is descriptively and theoretically flawed, as shown below.

## II

### CHY LUNG AND THE FLAWED BASES OF THE NEW IMMIGRATION FEDERALISM

As the abridged survey presented above shows, subfederal attempts at immigration-related lawmaking are not new. The recent proliferation of the trend, however, is surprising considering the consistent judicial rejection and limitations of such enactments. Perhaps counterintuitively, then, in this new immigration federalism, states and localities have attempted to justify their actions by reintroducing the themes hinted at in *Chy Lung*, the Supreme Court's foundational case on state immigration authority. Recall that the case is still often cited for the proposition that states have no business enacting separate immigration schemes.<sup>81</sup> However, in dicta, the *Chy Lung* Court articulated a potential basis for subfederal immigration regulation:

We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad . . . . Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.<sup>82</sup>

To address public policy problems, the Court thus inscribed into doctrine two elements that theoretically justify state and local intervention in immigration: (1) federal legislative silence, and (2) absolute necessity as long as the law is tailored to that necessity. The legal and

---

<sup>77</sup> H.B. 56, § 2, 2011 Leg., Reg. Sess. (Ala. 2011) (enacted and codified in part at ALA. CODE § 31-13-2 (LexisNexis 2011)).

<sup>78</sup> GA. CODE ANN. § 17-5-100 (2013), *enjoined in part*, Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

<sup>79</sup> UTAH CODE ANN. §§ 76-9-1001-76-9-1009 (West 2013), *enforcement stayed*, Utah Coal. of La Raza v. Herbert, No. 2:11-CV-401 CW, 2011 WL 7143098, at \*1 (D. Utah May 11, 2011).

<sup>80</sup> S.C. CODE ANN. §§ 16-13-480 (2012), *held preempted*, United States v. South Carolina, 720 F.3d 518, 533 (2013); S.C. CODE ANN. § 23-3-1100 (2012).

<sup>81</sup> See *supra* note 51 and accompanying text.

<sup>82</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

political narrative justifying the new immigration federalism implicitly invokes—and is based on—these two factors.<sup>83</sup>

To be clear, states and localities have not expressly invoked *Chy Lung*'s factors in their legal defenses. In fact, to the extent the case has been cited in recent litigation over subfederal enactments, it has been used mainly by challengers to establish traditional principles of federal exclusivity,<sup>84</sup> or by state-defendants attempting to distinguish the case on its facts.<sup>85</sup> In *Graham v. Richardson*,<sup>86</sup> in which the Court struck down a state welfare law that discriminated against noncitizens, the challengers' brief relied on *Chy Lung* to showcase the difficulty of meeting the "vital necessity" standard.<sup>87</sup> The Court, however, did not rely on that rationale for its holding, instead treating the regulations as alienage law, and consequently employing preemption and equal protection grounds to invalidate the welfare law.<sup>88</sup> Indeed, while often citing *Chy Lung* to support federal exclusivity, federal courts have rarely invoked *Chy Lung*'s potential to justify state immigration action, sometimes noting the case obliquely, but generally choosing alternate grounds for their decisions.<sup>89</sup>

As Professor Clare Huntington maintains, this reluctance to openly engage *Chy Lung*'s possibilities could be because historically, [there has] never been an occasion for the Court to explore the second excerpt from *Chy Lung*, which left open the possibility that states may have a role to play in pure immigration law. Indeed, states and localities have not enacted pure immigration laws since the end of the nineteenth century, and now the comprehensive INA statutorily preempts such enactments. Absent a radical change in

---

<sup>83</sup> See *infra* Parts II.A–II.B (elaborating on these factors).

<sup>84</sup> See, e.g., Plaintiff's Brief in Support of Motion for Preliminary Injunction at 12, *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011) (No. 1:11-CV-1804-TWT), 2011 WL 2438945 (citing *Chy Lung* for proposition that the federal government has exclusive power over immigration because of the connection between immigration and foreign relations).

<sup>85</sup> See, e.g., Corrected Response Brief for Appellees and Principal Brief for Cross-Appellants at 17, *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (Nos. 11-14532 & 11-14674), 2012 WL 263053 (arguing that the law at issue functioned differently than the one in *Chy Lung*).

<sup>86</sup> 403 U.S. 365 (1971) (striking down Arizona and Pennsylvania statutes that restricted noncitizens from accessing state welfare benefits on equal protection and federal power grounds).

<sup>87</sup> Brief for Appellees at 21, *Sailer v. Leger* (No. 727), consolidated on appeal with *Graham v. Richardson*, 403 U.S. 365 (1971) (No. 609), 1971 WL 133395 ("Pennsylvania has raised no 'vital necessity' for regulating pauper aliens through differential operation of its general assistance program . . ." (citing *Chy Lung*, 92 U.S. at 280)).

<sup>88</sup> 403 U.S. 365, 382–83 (1971).

<sup>89</sup> See, e.g., *Jew Ho v. Williamson*, 103 F. 10, 18, 23–24 (C.C.N.D. Cal. 1900) (using *Chy Lung*, 92 U.S. 275, to describe the range of state power but relying on *Yick Wo*, 118 U.S. 356 (1886), to invalidate San Francisco's quarantine law based on its unequal application).

immigration law, we are unlikely to see any cases raising this issue.<sup>90</sup>

Post-2001, however, and especially since 2005, states and localities have created exactly such an occasion. Unlike subfederal laws intended to curb noncitizens' access to public benefits or specific types of public employment, which might be characterized as alienage laws, the new immigration federalism cuts to the core of immigration law. With these laws, states have unilaterally decided who may remain within their borders, with an eye towards discouraging the movement of foreigners across the national border.<sup>91</sup> In the words of Kris Kobach,<sup>92</sup> a former law professor who has served as legal counsel for many states and localities that have passed restrictive legislation, both in an individual capacity and as an employee of the Immigration Reform Law Institute (IRLI), the legal branch of the restrictionist advocacy group FAIR: "If we had a true nationwide policy of self-deportation, I believe we would see our illegal alien population cut in half at a minimum very quickly."<sup>93</sup> In other words, if enough states were to enact restrictionist measures, unauthorized immigrants would leave in large numbers.

As self-deportation is the avowed goal of these subfederal enactments, it is difficult to understand them as anything but attempts to control exit and entry: The Arizona legislature unequivocally expressed a purpose of causing "attrition through enforcement,"<sup>94</sup> and the Alabama legislature stated its intent to "discourage illegal immigration."<sup>95</sup> Further, federal courts have interpreted the rental,

<sup>90</sup> Huntington, *supra* note 18, at 823.

<sup>91</sup> See, e.g., *United States v. South Carolina*, 720 F.3d 518, 522 (4th Cir. 2013) ("Legislative supporters of the [state immigration law] said they hoped the bill would encourage persons unlawfully present in South Carolina to find 'a different state to go to . . .'" (quoting *United States v. South Carolina*, 840 F. Supp. 2d 898, 905 (D.S.C. 2011)); *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, 2013 WL 3791664, at \*13 (5th Cir. July 22, 2013) (en banc) (Reavley, J., concurring in judgment) ("[T]he ordinance does more than merely deter the presence of Latinos from Farmers Branch, and instead works to exclude and remove aliens from the City's borders. . . . Illegal aliens will therefore have no recourse but to self-deport from Farmers Branch.").

<sup>92</sup> See *infra* notes 174–75 and accompanying text (discussing the leadership role Kobach has played in fomenting a defense of subfederal immigration policy).

<sup>93</sup> Jefferson Morley, *The Man Behind Romney's 'Self-Deportation' Plan*, SALON (Feb. 22, 2012, 10:44 PM), [http://www.salon.com/2012/02/22/the\\_man\\_behind\\_romneys\\_self\\_deportation\\_dreams/](http://www.salon.com/2012/02/22/the_man_behind_romneys_self_deportation_dreams/) (quoting Kobach in his capacity as advisor to 2012 Republican presidential nominee Gov. Mitt Romney); see generally Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 468 (2008).

<sup>94</sup> S.B. 1070, § 1, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *enjoined in part by Arizona v. United States*, 132 S. Ct. 2492 (2012).

<sup>95</sup> ALA. CODE § 31-13-2 (LexisNexis 2011).

employment, contracting, and other enforcement aspects of these laws as subfederal regulations of entry and exit. The Eleventh Circuit characterized the provision of Alabama's law invalidating contracts entered into by unauthorized immigrants as Alabama "craft[ing] a calculated policy of expulsion," noting that the provision was a "thinly veiled attempt to regulate immigration."<sup>96</sup> The Fourth Circuit<sup>97</sup> and various concurring opinions in the Fifth Circuit's en banc enjoinder of the Farmers Branch, Texas, rental ordinance suggested the same. One such opinion stated: "I repeat what the [Fifth Circuit] panel said about the Farmers Branch ordinance: Because the sole purpose and effect of this ordinance is to target the presence of illegal aliens . . . and to cause their removal, it contravenes the federal government's exclusive authority on the regulation of immigration . . . ."<sup>98</sup>

Despite articulating that contemporary subfederal laws were intended as substitutes for federal immigration enforcement and removal policy, these courts failed to comprehend the full import of that observation. Only the Eleventh Circuit recognized the possibility of structural preemption, reasoning with regards to the Alabama law's contracting provision that because the power to expel aliens from the states "is retained only by the federal government, [the provision] is preempted by the inherent power of the federal government to regulate immigration."<sup>99</sup> Even so, the court buttressed this conclusion by also applying an alienage framework, finding statutory preemption by detailing how the provision conflicted with the INA.<sup>100</sup> Seemingly, state regulation of entry and exit would call for the high constitutional bar set by *Chy Lung*, under which these laws should be struck down unless the enacting jurisdictions can show federal inaction and vital necessity.

Inexplicably, despite the clear intent and focus of these laws, courts and many commentators have continued to rely on an alienage

---

<sup>96</sup> *United States v. Alabama*, 691 F.3d 1269, 1294, 1296 (11th Cir. 2012).

<sup>97</sup> *United States v. South Carolina*, No. 12-1096, 2013 WL 3803464, at \*8 (4th Cir. July 23, 2013) (upholding preliminary injunction of state law criminalizing, inter alia, possession of counterfeit immigration documents).

<sup>98</sup> *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, 2013 WL 3791664, at \*15 (5th Cir. July 22, 2013) (en banc) (Reavley, J., concurring in judgment); see also *id.* at \*18 (Dennis, J., specially concurring) (noting that the Farmers Branch ordinance "violates the principle that the removal process is entrusted to the discretion of the Federal Government" by effectively excluding certain noncitizens from a part of "the United States or the several states" (internal quotations omitted)).

<sup>99</sup> *Alabama*, 691 F.3d at 1294.

<sup>100</sup> *Id.* at 1294-96 (finding the contracting provision conflict preempted because Congress intended the Attorney General to retain discretion over expulsion of removable aliens).

law framework and its concomitant preemption analysis.<sup>101</sup> Despite the mistaken legal analysis, the political narrative employed to defend these policies suggests that states and local elected officials are keenly aware that omnibus enforcement schemes—like S.B. 1070 or the Hazleton ordinance—are, as the Eleventh Circuit assessed, regulations of core immigration functions.<sup>102</sup> Such laws are necessary, the narrative goes, to combat the existential threat caused by unlawful migration and intensified by federal dalliance. Accordingly, this current era of immigration federalism bases its political and theoretical, if not its legal, viability on a claim prefigured by *Chy Lung*: a crisis and threat to sovereignty and an absence of federal legislation. In the following Subparts, we explore these claims in more detail.

### A. Federal Inaction and the “Mirror Theory” Defense

Over the past several years, elected officials and advocates have vociferously decried Congress’s legislative silence on immigration. This federal inaction provides the normative space for state and local involvement in immigration policy and enforcement, and has been a part of nearly every elected official’s defense of their subfederal immigration regulations.<sup>103</sup> Immigration, however, is not a blank slate: Congress has enacted several comprehensive laws over the past century, including a major overhaul in 1996 comprised of the Illegal

---

<sup>101</sup> See *Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1263–65 (11th Cir. 2012) (finding a section of the state law both field- and conflict-preempted); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 101, 140–43 (2013) (arguing that the Court treated S.B. 1070 as an alienage law). We assess the impact of our analysis on preemption analysis *infra* Part III.

<sup>102</sup> See *United States v. South Carolina*, 840 F. Supp. 2d 898, 905–07 (D.S.C. 2011) (reciting legislative statements and history in support of the state law), *modified*, 906 F. Supp. 2d 463 (D.S.C. 2012), *aff’d*, 720 F.3d 815 (4th Cir. 2013); Governor Janice K. Brewer, Press Release Accompanying the Signing of S.B. 1070 (Apr. 23, 2010), available at [http://azgovernor.gov/dms/upload/PR\\_042310\\_StatementByGovernorOnSB1070.pdf](http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf) [hereinafter Brewer, Statement on S.B. 1070]; Josh Gerstein, *South Carolina Immigration Law Sparks Suit from Justice Department*, POLITICO (Oct. 31, 2011, 4:36 PM), <http://www.politico.com/news/stories/1011/67274.html> (citing statements of South Carolina Governor Haley).

<sup>103</sup> See, e.g., Brewer, Statement on S.B. 1070, *supra* note 102 (“We in Arizona have been more than patient waiting for Washington to act. But decades of federal inaction . . . have created a dangerous and unacceptable situation.”); Kim Chandler, *Immigration Law Sponsors Say Issue Isn’t Going Away; Opponents Say It’s Time for Alabama to ‘Move On,’* AL.COM (Apr. 29, 2013, 6:05 PM), [http://blog.al.com/wire/2013/04/alabama\\_immigration\\_law\\_sponso.html](http://blog.al.com/wire/2013/04/alabama_immigration_law_sponso.html) (discussing a statement made by Republican State Senator Scott Beason contending that “[t]he reason we have this problem is the federal government will not do its job”); Valerie Richardson, *Arizona’s AG: Court’s Ruling Is “A 70% Win,”* WASH. TIMES, June 25, 2012, at A4 (citing a remark by Democratic U.S. Senate candidate Richard Carmona that “SB 1070 is the product of the federal government’s failure to act”).

Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>104</sup> the Antiterrorism and Effective Death Penalty Act,<sup>105</sup> and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>106</sup> Since 2001, however, the political landscape of immigration law has changed dramatically, with several omnibus reform efforts defeated in Congress.

Despite the significant amount of background federal legislation, in contemporary evaluations of immigration federalism, states 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? Post-2001 Congress has considered comprehensive federal immigration proposals and partial, stand-alone proposals (such as the DREAM Act) several times without passage. Justice Scalia's dissent in *Arizona v. United States* noted this federal legislative inactivity in response to rising unauthorized immigration, suggesting that federal officials have been "unable to remedy the problem" of unlawful migration affecting Arizona.<sup>107</sup>

In addition to highlighting federal idleness, defenders of subfederal action offer a "mirror theory" to defend state immigration regulation. This defense, proffered notably by Kris Kobach and the state of Arizona, argues that subfederal immigration laws survive constitutional analysis because they mirror federal statutory dictates from past comprehensive overhauls.<sup>108</sup> According to the theory, state and local immigration enforcement laws adopt the same goals and methods of the federal statutory scheme<sup>109</sup> and rely on the immigration categories and definitions already inscribed in federal law;<sup>110</sup> they merely

---

<sup>104</sup> Pub. L. No. 104-208, 110 Stat. 3009-546, 575-92 (1996) (expanding grounds for removal, reducing judicial review of removal, reducing opportunities to seek relief from removal, and expanding list of offenses with mandatory immigration detention).

<sup>105</sup> Pub. L. No. 104-132, 110 Stat. 1214, 1273-77 (1996) (requiring the mandatory detention of noncitizens convicted of a range of offenses).

<sup>106</sup> Pub. L. No. 104-193, 110 Stat. 2105, 2260-70 (1996) (limiting eligibility of noncitizens for federal public benefits and purporting to authorize states to similarly restrict noncitizens' access to certain public benefits).

<sup>107</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Scalia, J., concurring in part and dissenting in part) (referencing Arizona's argument that the federal enforcement efforts over the last decade had left Arizona's border comparatively neglected).

<sup>108</sup> For a full explanation of "mirror theory" and an excellent appraisal of its dubious historical and constitutional footing, see Chin & Miller, *supra* note 71. See also Hessick, *supra* note 8 (recounting the advice Kris Kobach provides to states that decide to enact immigration regulations).

<sup>109</sup> See Chin & Miller, *supra* note 71, at 259 (describing how states have the power to enact laws as long as those laws are nearly identical to federal laws).

<sup>110</sup> See Hessick, *supra* note 8 ("[T]he statute must not attempt to create any new categories of aliens not recognized by federal law.").

provide additional enforcement power to help supplement inadequate federal efforts.<sup>111</sup>

Approximately eleven to fourteen million people are currently unlawfully present in the United States (per the INA's definitions of unlawful presence),<sup>112</sup> but only a fraction of these people have been discovered, prosecuted, and deported.<sup>113</sup> The gap between the number of potentially removable persons and the number of persons actually prosecuted and removed facilitates the claim that states and localities must help the federal government fulfill legislative mandates.<sup>114</sup> Under the mirror image theory, executive decisions to create enforcement priorities or to tolerate a certain level of unlawful migration are not considered a part of federal immigration policy,<sup>115</sup> and therefore do not supplant subfederal regulations which might reduce this level.<sup>116</sup>

While it is true that Congress has not passed any significant immigration regulations since 2001 and has not legislatively responded to the recent spate of state and local enactments, claims of federal inaction are overbroad. First, Congress did pass border fence authorization in 2006,<sup>117</sup> and (more significantly) passed budgetary

<sup>111</sup> Professor Jessica Bulman-Pozen has characterized Arizona's S.B. 1070 as an instance of state "goading" that may help check federal executive power. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 484-86, 490 (2012) ("Arizona has similarly presented its bid to enforce federal immigration law as vindicating congressional intent against an executive branch bent on underenforcing the law.").

<sup>112</sup> See 8 U.S.C. §§ 1182, 1227 (2012) (describing classes of "deportable aliens," including those who were inadmissible at the time of entry (for example, because of having entered without inspection), those remaining after expiration of nonimmigrant visa periods, and those violating the conditions of their nonimmigrant status).

<sup>113</sup> See Hiroshi Motomura, *The Discretion that Matters*, 58 U.C.L.A. L. REV. 1819, 1828-29 (2011) (suggesting there is a chance of less than ten percent that an alien who enters without inspection will be arrested in a given year).

<sup>114</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) ("Of course there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona . . . ."); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 844 (2007) (discussing the government's failure to enforce existing immigration rules).

<sup>115</sup> Reply Brief for Petitioners at 2, *Arizona*, 132 S. Ct. at 2492 (No. 11-182), 2012 WL 1332574. We speak here of executive discretion in the broadest sense, including agency and administrative decisions about priorities, deferred action programs, and individualized considerations in specific cases.

<sup>116</sup> For a persuasive argument that executive enforcement decisions should have no preemptive effect, see Rubenstein, *supra* note 101. See also *Ariz. Dream Act Coal. v. Brewer*, No. CV12-02546 PHX DGC, 2013 WL 2128315, at \*2, \*7 (D. Ariz. May 16, 2013) (discussing Secretary Napolitano's memorandum describing the administrative relief offered as part of the Deferred Action for Childhood Arrivals program, and stating that "the memorandum does not have the force of law and cannot preempt state law or policy").

<sup>117</sup> See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.



authorizations in 2010 and 2012 to fund enforcement efforts.<sup>118</sup> Second, in the wake of congressional gridlock on broader immigration reform, the federal executive has been conspicuously energetic, formulating enforcement priorities and pushing the limits of federal enforcement capacity. Although *Chy Lung* specifically discussed *congressional* inaction (and not federal inaction generally), it was decided at a time with little or no federal immigration policy of any kind. That is, it did not contemplate the manner in which congressional and presidential oversight of immigration would evolve in tandem; the Court could not have predicted the rise of the administrative state, including agencies specifically tasked with managing and enforcing immigration policy. Moreover, as the *Chy Lung* Court made clear, “the responsibility for the character of [immigration regulations] and for the manner of their execution, belongs solely to the national government.”<sup>119</sup> Accordingly, recent descriptive and theoretical models of federal immigration policy advance a framework which considers executive action in evaluating federal immigration actions and policies.<sup>120</sup>

Indeed, a key distinction between the majority and dissents in *Arizona* was their respective characterizations of the executive’s role in defining federal immigration policy. The majority noted that a “principal feature[ ]” of the removal system is the “broad discretion exercised by immigration officials,” and that “[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy.”<sup>121</sup> In sharp contrast, Justice Scalia’s dissent dismissed the role of executive discretion in defining the boundaries of federal immigration policy, responding that although state actors might not adopt federal enforcement priorities, “[t]he State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid

---

<sup>118</sup> See, e.g., Department of Homeland Security Appropriations Act, H.R. 2892, 111th Cong. (2010); Continuing Appropriations Act, H.R. 2017, 112th Cong. (2012).

<sup>119</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (emphasis added).

<sup>120</sup> See Chin & Miller, *supra* note 71, at 299–304 (“There is no question that the president is entitled to execute federal immigration law just like all other federal laws.”); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 462 (2009) (“[I]n reality, the President has historically possessed tremendous power over core immigrant screening policy through three channels: through claims of inherent executive authority; through formal mechanisms of congressional delegation; and through . . . de facto delegation.”); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 *CONN. PUB. INT. L.J.* 243, 244–45 (2010) (describing prosecutorial discretion as welcome and necessary in the area of immigration law).

<sup>121</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012).

federal prohibition. The Executive's policy choice of lax enforcement does not constitute such a prohibition."<sup>122</sup>

Perhaps the most persuasive reason to doubt claims of federal inaction is that Congress's elaboration of the federal immigration code gives the President significant control over removal decisions.<sup>123</sup> For example, the Eleventh Circuit focused on the essential role of executive discretion in defining the overall federal scheme in contrasting that scheme with Georgia's state immigration law:

By confining the prosecution of federal immigration crimes to federal court, Congress limited the power to pursue those cases to the appropriate United States Attorney. As officers of the Executive Branch, U.S. Attorneys for the most part exercise their discretion in a manner consistent with the established enforcement priorities of the Administration they serve. The terms of section 7, however, are not conditioned on respect for the federal concerns or the priorities that Congress has explicitly granted executive agencies the authority to establish.<sup>124</sup>

Thus, rather than federal inaction, it is conscious policymaking, including a consideration of costs and humanitarian concerns, that limits the number of unauthorized immigrants removed each year. This conclusion forecloses *Chy Lung's* precondition that state regulation exist in a federal vacuum and dispels the mirror image

<sup>122</sup> *Id.* at 2517 (Scalia, J., concurring in part and dissenting in part).

<sup>123</sup> See 8 U.S.C. § 1103(a) (2012) (delegating to the Attorney General and other executive officers the power to administer and enforce provisions of the Immigration and Nationality Act); Cox & Rodríguez, *supra* note 120, at 463 (detailing the tremendous authority delegated to the President with regards to setting immigration screening policy); Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1789 (2010) (“[T]he [P]resident exercises . . . power over core immigration policy as a de facto matter, albeit indirectly and in a manner obscured from scrutiny, primarily through prosecutorial discretion or the use of discretionary enforcement power.”). Specifically concerning executive power and the Obama administration's recently instituted Deferred Action for Childhood Arrivals (DACA) program, see Letter from Professor Hiroshi Motomura, UCLA School of Law, on Behalf of Immigration Law Professors, to President Obama (May 28, 2012), available at <http://www.nilc.org/document.html?id=754>; Gary Endelman & Cyrus Mehta, *Yes He Can*, INSIGHTFUL IMMIGR. BLOG (Oct. 28, 2012), <http://blog.cyrusmehta.com/2012/10/yes-he-can-reply-to-professors.html> (detailing the President's power regarding DACA).

<sup>124</sup> Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1265 (11th Cir. 2012) (citations omitted); see also *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 528, 537 (M.D. Pa. 2007) (holding that the city ordinance was unconstitutional and opining that federal law struck a different enforcement balance than the city law), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded*, 131 S. Ct. 2958 (2011), *aff'd in part, rev'd in part*, No. 07-3531, 2013 WL 3855549, at \*1 (3d Cir. July 26, 2013) (enjoining both the employment and housing provisions of the city ordinance after reconsideration in light of *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), and *Arizona v. United States*, 132 S. Ct. 2492 (2012)); Cox & Posner, *supra* note 114, at 844–49 (discussing the role of discretion in immigration enforcement).

defense.<sup>125</sup> Congress's regularly approved funding for immigration prosecution and removal efforts limits the capacity of the enforcement system to the deportation of a fraction of those who are unlawfully present.<sup>126</sup> Utilizing all available resources, immigration adjudicators, and removal mechanisms available, DHS has been removing 400,000 noncitizens per year, a number which represents a historical high, yet still only a small fraction of those unlawfully present in the United States.<sup>127</sup> Congress could choose to recruit and authorize state and local enforcement authorities to help close the enforcement gap, but it has elected not to do so. Instead, Congress has authorized state and local immigration enforcement in specific and limited ways.<sup>128</sup>

In response to this claim, states and localities (and Justice Scalia in his *Arizona* dissent) argue that federal resource constraints and cost concerns can be mitigated by state and local participation in enforcement of entry and exit provisions.<sup>129</sup> This, however, ignores a

---

<sup>125</sup> See Motomura, *supra* note 113, at 1831 (“For the much greater number of unauthorized migrants who simply remain unidentified, the low arrest rate partly reflects the level of resources committed to apprehending unauthorized migrants. . . . INS funding would be adequate to meet congressional enforcement mandates only with a seven-fold increase to \$46 billion.”); see also Cox & Rodríguez, *supra* note 120; Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C.I. L. REV. 147, 155 (2012) (noting the exorbitant cost of current border-fencing, which covers only 700 of over 2000 miles of southern border, and the continued costs of repairing, maintaining, and monitoring the fence); Michael A. Olivas, *Dreams Deferred*, 21 WM. & MARY BILL RTS. J. 463, 475 (2012) (noting that deferred action doctrine became established with the case of John Lennon in the 1970s); Rodríguez, *supra* note 123, at 1798–99 (proffering that prosecutorial discretion is a part of the current immigration system because enforcement may be overwhelming the executive branch's current resources and because the executive may want to perpetuate low-cost labor or accommodate humanitarian concerns); Michael A. Olivas, *The Dangers of Riding the Bus*, N.Y. TIMES (Aug. 1, 2012, 12:00 AM), <http://www.nytimes.com/roomfordebate/2012/08/01/is-getting-on-the-undocubus-a-good-idea/advice-to-immigrants-dont-get-on-the-undocubus>.

<sup>126</sup> See Motomura, *supra* note 113, at 1831 (noting the large number of unauthorized migrants that remain unapprehended).

<sup>127</sup> Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement (June 30, 2010). At present, immigration courts are backlogged at record levels, with 314,147 cases awaiting resolution as of July 2012. Elise Foley, *Immigration Court Backlogs at Record High, Keeping Immigrants in Limbo*, HUFFINGTON POST (July 27, 2012, 4:36 PM), [http://www.huffingtonpost.com/2012/07/27/immigration-court-backlogs\\_n\\_1711505.html](http://www.huffingtonpost.com/2012/07/27/immigration-court-backlogs_n_1711505.html). To supplement existing removal mechanisms, DHS instituted the Secure Communities Program in 2008, requiring that all localities, pursuant to an express federal directive, share information about arrestees with ICE. *Secure Communities*, ICE.GOV, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Aug. 27, 2013).

<sup>128</sup> See Pratheepan Gulasekaram, *No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws*, 5 ADVANCE: J. ACS ISSUE GROUPS, Fall 2011, at 37, 41 (“Rarely, sub-federal enactments have survived, but only when the state or locality has regulated in an area of traditional state concern, and when the federal government had not disapproved of state action.”).

<sup>129</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) (“Of course there is no reason why the Federal Executive's need to

fundamental reality of immigration law: Only the federal government can prosecute removal actions, issue removal orders, detain removable immigrants, and physically effectuate removal. Thus, within this scheme, states and localities are limited to arresting suspected unlawful immigrants and holding them for short periods pending federal custody and action. Even this local action, however, is not costless to the federal government,<sup>130</sup> for any subfederal apprehension or arrest of a suspected unlawful immigrant taxes federal resources and removal systems. Viewed in this light, the federal political branches, in combination, have created and instituted a system which enforces at capacity yet concurrently tolerates a certain level of unlawful entry, unlawful presence, and unauthorized employment.<sup>131</sup> The increasing number of subfederal laws today appear to be entry and exit restrictions in all but name and disrupt the workings of this system.

Along with resource constraints, selective federal immigration enforcement reflects, in part, judgment on the part of Congress and the executive that not every person eligible for prosecution and deportation should in fact be placed in removal proceedings.<sup>132</sup> The executive can, for multiple policy reasons such as the country's need for labor, humanitarian reasons, or foreign policy reasons, elect to limit enforcement of removal provisions for certain groups or persons. Indeed, this long-established scheme of prioritized enforcement constitutes what Adam Cox and Eric Posner have deemed the "second-order" structure of immigration regulation.<sup>133</sup> In this conception, Congress's laws, which directly establish admissibility and deportability for our "first-order" immigration structure, crudely define who should be (and remain) a part of our national community. These "first-order" laws, however, will never alone identify everyone deserving to remain in the United States. Rather, it is a more nuanced set of immigration enforcement decisions, requiring executive input

---

allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona . . .").

<sup>130</sup> *Cf.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1986–87 (2011) (upholding Arizona's mandatory E-Verify law, relying, in part, on the attestation of the federal government that this type of state enforcement would not overly burden federal resources).

<sup>131</sup> *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 219 n.18 ("As the District Court observed . . . the confluence of Government policies has resulted in 'the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed . . .'" (quoting Doe v. Plyler, 458 F. Supp. 569, 585 (E.D. Tex. 1978))).

<sup>132</sup> *See Arizona*, 132 S. Ct. at 2499 ("Discretion in the enforcement of immigration law embraces immediate human concerns.").

<sup>133</sup> Cox & Posner, *supra* note 114, at 844–49 ("Thus, the immigration agencies have structured their enforcement priorities in a way that transforms a central part of American immigration policy from a *de jure ex ante* screening system into a *de facto ex post* screening system.").

and discretion, which allow for finer-grained post-entry judgments on fitness to remain. These determinations together form the “second order” of our enforcement scheme.

This descriptively robust version of federal immigration policy contradicts the narrative of federal failure and stagnation necessary to defend state and local immigration regulation. Not only does inclusion of executive enforcement discretion complicate the story of federal inaction, it also undermines the legal claim that subfederal enforcement schemes mirror and complement the federal scheme.<sup>134</sup> Undoubtedly, this is not a consensus view.<sup>135</sup> Professor David Rubenstein, for example, offers a powerful critique of using executive discretion as the basis for preempting subfederal enforcement prerogatives.<sup>136</sup> And, Professor Bulman-Pozen characterizes S.B. 1070’s non-enjoined section 2 (requiring state officers to determine the federal immigration status of arrestees)<sup>137</sup> as “commandeer[ing] the federal executive in a relatively limited way.”<sup>138</sup> Leaving aside whether executive enforcement priorities should have preemptive effect, it is enough for purposes of our analysis to note that the claim of federal dalliance articulated by officials, advocates, and courts is a highly contested one that does not comport with current budgetary realities and conspicuous executive activity. Moreover, together with our findings on the demographic pressures facing enacting jurisdictions, it becomes clear that the new immigration federalism fails to meet the constitutional preconditions for state and local immigration regulation.

---

<sup>134</sup> See Gulasekaram, *supra* note 128, at 37, 43 (discussing how states often argue their subfederal immigration laws “mirror federal law and are therefore not preempted”); Kobach, *supra* note 93, at 475–77 (detailing how states have attempted to create state-level offenses that mirror federal law).

<sup>135</sup> See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 795 (2013) (critiquing President Obama’s Deferred Action for Child Arrivals program as an unconstitutional exercise of executive power). For an argument that the administration’s program is well within the President’s executive power, see Letter from Professor Hiroshi Motomura, *supra* note 123. For a critique of the existing levels of prosecutorial discretion see Rodríguez, *supra* note 123, at 1796 (criticizing the current immigration system as having “excessive prosecutorial discretion”).

<sup>136</sup> Rubenstein, *supra* note 101, at 107–08 (noting the paradox in immigration law of understanding executive discretion and policy priorities as “law” for preemption purposes, but not for separation-of-powers purposes, and arguing that federal enforcement discretion should not have a preemptive effect); see also *Ariz. Dream Act Coal. v. Brewer*, No. CV12-02546 PHX DGC, 2013 WL 2128315, at \*1 (D. Ariz. May 16, 2013) (ruling that the INA delegates to the Secretary of Homeland Security “a form of prosecutorial discretion [to] decide not to pursue the removal of a person unlawfully in the United States”).

<sup>137</sup> S.B. 1070, § 2, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *enjoined in part by Arizona v. United States*, 132 S. Ct. 2492 (2012).

<sup>138</sup> Bulman-Pozen, *supra* note 111, at 485.

### B. “Vital Necessity” in State and Local Immigration Policies

As noted *supra*, “vital necessity” is the second requirement envisioned by *Chy Lung* for subfederal immigration law. Given the pervasive sentiment felt in media reports, statements of elected officials, academic writing, and even judicial opinions, the claims of necessity underlying much of the new immigration federalism should be quite familiar. The key feature of this account is the assumption that subfederal immigration laws are organic policy responses to the uneven and regionally specific challenges felt by localities with large numbers of immigrants or those experiencing rapid increases in the rate of immigration, especially of undocumented immigrants. Officials and observers suggest that these immigration-related challenges include economic depression, wage competition, overcrowded living conditions, language isolation, and crime.<sup>139</sup> States like Alabama<sup>140</sup> and cities like Valley Park, Missouri assert these claims in the purpose statements of their immigration ordinances:

Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and our residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability, diminishes our overall quality of life, and endangers the security and safety of the homeland.<sup>141</sup>

Seeking to verify these claims, we tested the salience of several factors hypothesized to induce state and local policy responses to immigration. We ran regression analyses on two datasets: city-level and state-level datasets that combine information on restrictive local ordinance activity with demographic data and political contextual data. As summarized below, our analysis of the data reveals that the demographic factors commonly assumed to spur subfederal policy responses are not useful in predicting or explaining the recent rise of such regulations. Instead, our analysis reveals that, after controlling for all other factors, political partisanship emerged as the most theoretically salient factor in explaining the spread of these laws. This

---

<sup>139</sup> See, e.g., Asraa Mustufa, *South Carolina’s Gov. Nikki Haley Makes Good on Anti-Immigrant Promises*, COLORLINES (June 30, 2011, 9:31 AM), [http://colorlines.com/archives/2011/06/south\\_carolina\\_governor\\_signs\\_anti-immigrant\\_bill\\_into\\_law.html](http://colorlines.com/archives/2011/06/south_carolina_governor_signs_anti-immigrant_bill_into_law.html) (reporting Senator Larry Grooms’s commentary that illegal immigrants “cling together in illegal communities and bring with them drugs, prostitution, violent crimes, gang activity”).

<sup>140</sup> See ALA. CODE § 31-13-2 (LexisNexis 2011) (“The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness . . . . [T]he costs incurred by school districts . . . can adversely affect the availability of public education resources to students who are United States citizens . . . .”).

<sup>141</sup> Valley Park, Mo., Ordinance No. 1736, § 2(C) (2007) (stating purpose of city’s illegal immigrant employment and rental law).

finding alone does not render these laws unconstitutional or even unwise; it does, however, undermine the foundational narrative of the new immigration federalism.

### 1. *Hypothesized Factors Leading to Subfederal Policy Proposal and Passage*

We hypothesized that the following factors contribute to the proposal or passage of subfederal immigration regulation. We tested these hypotheses using an original data set of about 25,000 cities<sup>142</sup> and all fifty states. The hypothesized factors are: population of undocumented immigrants, recent immigrants, and growth of Latino and foreign-born populations;<sup>143</sup> high proportions of linguistically isolated households;<sup>144</sup> overcrowded housing;<sup>145</sup> economic stress and

---

<sup>142</sup> Our information on restrictive activity at the city level is based on lists collected by various legal defense organizations, and validated by making phone calls to jurisdictions noted as considering or passing ordinances, as well as by monitoring news stories on local ordinances. We merged information on the proposal and passage of ordinances with census data from the larger universe of over 25,000 cities. We ran a separate analysis involving county subdivisions to account for townships and villages in many states, and find no significant difference in our findings on local partisanship and immigration-related factors. One notable limitation of the county subdivision data is that immigration measures from 2000 (from the SF3 file) are publicly available only by place, not county subdivision. At the state level, two graduate student research assistants coded legislative summaries provided by the National Conference of State Legislatures based on their topic, valence, and severity. See *State Laws Related to Immigration and Immigrants*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> (last visited Aug. 30, 2013) (providing annual legislative summaries from 2005 to 2010). We also incorporated information on immigration-related laws from FindLaw, a Thomson Reuters resource on cases and statutes, available at *State Immigration Laws*, FINDLAW, <http://immigration.findlaw.com/immigration-laws-and-resources/state-immigration-laws/> (last visited Aug. 23, 2013). More information about our datasets can be found in Appendix A.

<sup>143</sup> In our state models, we rely on estimates from the Pew Research Center. PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 (2011), available at <http://www.pewhispanic.org/2011/02/01/authorized-immigrant-population-national-and-state-trends-2010/>. We do not have similar data at the local level, so we instead use "recent immigrants" (the share of foreign-born who have arrived since 2000) as a proxy measure, based on the fact that it is the variable most strongly associated with the growth of the unauthorized population between 2000 and 2007 at the state level ( $r=0.50$ ). U.S. CENSUS BUREAU, 2000 DECENNIAL CENSUS SF3 FILE, YEAR OF ENTRY FOR THE FOREIGN-BORN POPULATION, tbl.P022; U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, YEAR OF ENTRY BY CITIZENSHIP STATUS IN THE UNITED STATES, tbl.B05005.

<sup>144</sup> Measured as the proportion of Spanish-speaking households with no member who speaks English at a proficiency level of "very well," derived from the American Community Survey. U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, HOUSEHOLD LANGUAGE BY LINGUISTIC ISOLATION, tbl.B16002. This variable is run separately from the overcrowding variable because the two variables have a relatively high degree of collinearity ( $r=0.496$ ).

relative group deprivation;<sup>146</sup> naturalized share of the citizen population;<sup>147</sup> local economic interests;<sup>148</sup> party composition of the electorate;<sup>149</sup> and state-level policy climate.<sup>150</sup>

We could have added crime-related hypotheses to the list as well. However, crime data are not available systematically across smaller municipalities, and other factors in our analysis, such as localized poverty rates and overcrowded housing, are also related to the incidence of crime. Furthermore, other researchers have tackled the question of immigrants and criminality in great depth,<sup>151</sup> and have consistently found that the foreign-born are less likely to commit crimes than native-born persons and that neighborhood contexts of increased

---

<sup>145</sup> Measured as more than 1.5 persons per habitable room, derived from the American Community Survey. The findings are similar when using the metric of one person per habitable room. U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, TENURE BY OCCUPANTS PER ROOM, tbl.B25014.

<sup>146</sup> Economic stress measured as the absolute proportion of White and Black residents living below the poverty line; relative economic stress measured as the relative rate of poverty of Whites and Blacks vis-à-vis Latinos, derived from the American Community Survey. U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, POVERTY STATUS IN THE PAST 12 MONTHS BY SEX, BY AGE, tbls. B17001B, B17001H, B17001I.

<sup>147</sup> Proportion of citizen population that is naturalized, derived from the American Community Survey. U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, SEX BY AGE BY CITIZENSHIP STATUS, tbl.B05003.

<sup>148</sup> Measured as the proportion of workers in the jurisdiction that are employed in the agriculture and construction industries, respectively—derived from the American Community Survey. U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, INDUSTRY BY OCCUPATION FOR THE CIVILIAN EMPLOYED POPULATION 16 YEARS AND OVER, tbl.S2405.

<sup>149</sup> Measured as the proportion of voters for George Bush over John Kerry in 2004, with party majority in the geographic area as an alternative measure. See Anthony C. Robinson, *Geovisualization of the 2004 Presidential Election*, PENN. ST. U., <http://www.personal.psu.edu/users/a/c/acr181/election.html> (last visited Aug. 26, 2013). We use presidential voting data because party registration data is not available systematically at the local level across all 50 states. In order to avoid the possibility of reverse-causality (of local immigration opinion on ordinances driving presidential voting preferences), we use the most proximate data *prior* to the rise of restrictive local ordinances starting in 2005.

<sup>150</sup> In our city-level dataset, we use our state-level measure of restrictive or permissive legislation as an explanatory factor. For more details on our coding procedures of state laws, see Appendix B.

<sup>151</sup> See generally, e.g., KRISTIN F. BUTCHER & ANNE MORRISON PIEHL, FED. RES. BANK CHICAGO, *WHY ARE IMMIGRANTS' INCARCERATION RATES SO LOW?* (2005), available at [http://www.chicagofed.org/digital\\_assets/publications/working\\_papers/2005/wp2005\\_19.pdf](http://www.chicagofed.org/digital_assets/publications/working_papers/2005/wp2005_19.pdf); Robert J. Sampson, *Rethinking Crime and Immigration*, CONTEXTS, Winter 2008, at 28, 28–33; Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality*, MIGRATION INFORMATION SOURCE (June 1, 2006), available at <http://www.migrationinformation.org/usfocus/display.cfm?ID=403>.



immigration and concentrated immigration actually lead to greater declines in violent crime.<sup>152</sup>

Our primary finding, presented below and in Appendix B, is that the commonly cited and assumed demographic factors listed as our hypotheses above are generally not salient in determining whether or not a given state or locality will propose or pass an immigration policy.<sup>153</sup> One factor, however—political partisanship—*did* remain consistently salient in this inquiry after controlling for demographic explanations. A more detailed look at our data and methods is included in Appendix A.

## 2. *Data and Statistical Findings*

Among municipalities that passed restrictive ordinances, new immigrants averaged about 3% of the total resident population, slightly higher than the 1% average for municipalities across the country.<sup>154</sup> It is important to recognize that, while arguments for restrictive legislation at the local level are often couched in terms of massive policy challenges from new patterns in immigration, the magnitude of these changes in enacting jurisdictions suggest that the policy problems engendered by new immigration are related more to perceptions of racial threat among local populations than to any characteristics of the newly arriving populations.<sup>155</sup> Even if a level of new immigration that averages 3% in enacting jurisdictions is viewed as an objective basis for restrictive immigration laws, statistical analysis controlling for various other factors reveals that changes in the

---

<sup>152</sup> See, e.g., Rubén G. Rumbaut, Professor of Sociology, U.C. Irvine, Presentation to the Police Foundation National Conference on The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties: Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities, (Aug. 21–22, 2008), available at <http://ssrn.com/abstract=1877365> (showing empirical evidence that immigrants, including illegal immigrants, are less likely to commit violent crimes); Sampson, *supra* note 151.

<sup>153</sup> As discussed in the following subsection, the number of Spanish-dominant households was also a salient factor, but this had a much smaller effect on the data.

<sup>154</sup> These figures are means (averages). We use data from the 2000 Census, given missing data in the 2005–2009 American Community Survey file. The corresponding median figures are 1.72% for restrictive ordinance cities, and 0.16% for cities in the nation as a whole. U.S. CENSUS BUREAU, 2000 DECENNIAL CENSUS SF3 FILE, YEAR OF ENTRY FOR THE FOREIGN-BORN POPULATION, tbl.P022.

<sup>155</sup> This is in line with various strands of the racial threat literature, where the arrival of even a few nonwhites, and misperception of the size and growth of minority populations, fuel racially conservative attitudes. See Daniel Herda, *How Many Immigrants? Foreign-Born Population Innumeracy in Europe*, 74 PUB. OPINION Q. 674, 676–78 (2010) (detailing how individuals often misperceive immigrant population sizes); Cara J. Wong, “Little” and “Big” Pictures in Our Heads: Race, Local Context, and Innumeracy About Racial Groups in the United States, 71 PUB. OPINION Q. 392, 395–99 (2007) (reporting that all races overestimate the presence of minority groups).

proportion of foreign-born populations are not related to the passage of local legislation.<sup>156</sup>

Indeed, the only immigration-related factor that bears a significant relationship to restrictionist legislation at the local level is the proportion of Spanish-dominant households in the locality. Importantly, this variable is not necessarily related to immigration status and cannot be used as a proxy for unlawful migration. Furthermore, the effects of this variable are much smaller than the political effects we uncovered: the share of Republican voters in the county, and the importance of agricultural interests in the local economy. At the state level, political factors are the only ones significantly related to the passage of restrictive legislation (that is, restrictionist laws are more likely in Republican-heavy states and less likely in states with sizable agricultural interests). Consistent with data at the local level, growth of the unauthorized population is unrelated to the passage of state-level restrictive legislation.<sup>157</sup>

*Chy Lung's* “vital necessity” prong might be understood to call not merely for a correlation between demographic factors and restrictive legislation, but rather for a more deterministic finding of necessary and sufficient conditions. But, viewed from this perspective, the argument for demographically driven policy outcomes is even weaker. The vast majority of jurisdictions that share what might be considered sufficient demographic factors—such as growth in immigrant populations or having a recently arrived immigrant population—do not propose or pass immigrant-related laws. Even taking the case of the enacting city with the highest proportion of recent immigrants—Herndon, Virginia, where recent immigrants accounted for about 18% of the town’s residents in the 2005–2009 period—we find that 108 other municipalities with even higher proportional populations of recent immigrants (including thirty-three with recent immigrants accounting for over 25% of the town’s residents) took no action.<sup>158</sup> Thus, even if we were to look for necessary and sufficient conditions rather than statements of probability derived from statistical principles, it is abundantly clear that demographic change from recent immigration is *not a sufficient condition* for restrictive action.

Even if immigration-induced change within a jurisdiction is insufficient, by itself, to provoke legislative response, might such change be necessary? We find that twelve out of the seventy-nine municipalities that have passed restrictive ordinances (or 15% of the cases) have

---

<sup>156</sup> See *infra* Table A.

<sup>157</sup> See *infra* Tables B–C.

<sup>158</sup> U.S. CENSUS BUREAU, 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES YEAR OF ENTRY BY CITIZENSHIP STATUS IN THE UNITED STATES, tbl.B05005.

recent immigrant populations that are *below* the national average for cities, and that fifty of the seventy-nine have below-average growth rates in their foreign-born populations.<sup>159</sup> Thus, we draw the conclusion that demographic change is not only an insufficient condition; it is an unnecessary one as well.

### C. *The Saliency of Partisanship*

Admittedly, tests of necessary and sufficient conditions in a deterministic framework present a much higher bar for confirmation than tests of statistical significance in a probabilistic framework. Regardless of the approach, however, we have the same set of findings: The catalytic characteristic initiating the proposal and passage of subfederal immigration policy in most restrictive jurisdictions is not demographic upheaval. Rather, the single determinative factor seems to be the existence of a partisan mix which is highly receptive to restrictionist legislation. Importantly, 78% of the municipalities that proposed restrictive ordinances, and 83% of municipalities with restrictive ordinances, are in Republican-majority counties. At the state level, nearly two-thirds of states with restrictive immigration laws had a Republican majority of voters, and of those states that have passed major pieces of restrictive legislation on enforcement and employer verification, 94% had Republican majorities.<sup>160</sup>

In sum, our empirical analysis shows that the restrictive responses of local governments to undocumented immigration are largely unrelated to the objectively measurable demographic pressures cited in political, legislative, scholarly, and judicial justifications for the recent proliferation of subfederal immigration regulation. Enacting jurisdictions cannot credibly claim the “vital necessity” required to meet a *Chy Lung* test for validity. The statistical evidence we have gathered and analyzed shows that the recency of migration, the growth of immigrant populations, and local economic and wage stress are irrelevant to the proposal and passage of restrictionist laws. Instead, we have found that political factors not commonly cited by proponents of state and local immigration laws are more important to predicting when

---

<sup>159</sup> Calculations based on jurisdictions present in both the 2005–2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, *supra* note 147, and CENSUS 2000 DECENNIAL CENSUS SF3 FILE, *supra* note 143.

<sup>160</sup> This compares to 57% of states with a Republican majority of voters in 2004. Municipal-level findings are based on authors’ analysis of municipal ordinance data, see Appendix A, and county-level data on 2004 Presidential vote choice as presented in Robinson, *supra* note 149. State-level findings are based on authors’ cross-tabulation of state legislative data, see Appendices B and C, and *Election Results: America Votes 2004*, CNN.COM, <http://www.cnn.com/ELECTION/2004/pages/results/president/> (last visited Sept. 30, 2013) (providing state-level data on 2004 presidential vote choice).

and where subfederal immigration policies will be enacted. In effect, our research provides empirical footing for Professor Bulman-Pozen's observation that "[w]ith the Arizona law, the politics of immigration are paramount."<sup>161</sup>

### III

#### IMPLICATIONS OF THE NEW IMMIGRATION FEDERALISM

The preceding discussion of *Chy Lung's* prerequisites and our unexpected discovery of the importance of partisanship are important because they suggest that the new immigration federalism is galvanized by factors in a manner incommensurate with dominant scholarly and judicial appraisals. When this resurgence of subfederal immigration policy proliferation is accurately assessed, its theoretical and constitutional underpinnings do not hold.

In Part III.A, we situate and contrast our evidence-based model for subfederal policy proliferation within and against existing scholarly models. First, we provide an account of how partisanship and political dynamics matter in both federal and subfederal immigration law-making. Second, we argue that our politicized change model is consistent with descriptions of legislative cascades described by theorists in other policy areas. As such, we draw a contrast with "functionalist" theories of state and local action that assume the salience of demographic change for policy expression, and with "steam valve" theories which suggest that state and local restrictionist policies relieve pressure on national restrictionist efforts.<sup>162</sup>

In Part III.B we turn to judicial analysis, highlighting how our evidence-based model of state and local policy replication clashes with traditional federalism assumptions. Instead of this traditional model, we provide courts an empirically and normatively supportable basis—one based in equality concerns—that should govern judicial evaluation of these laws.

#### A. *Partisanship and Existing Theoretical Models of Subfederal Action*

##### 1. *Designed Policy Proliferation and the Political Safeguards of Federalism*

Our conclusions regarding partisanship undermine the dominant narrative that has been used to justify these laws. In doing so, our data

<sup>161</sup> Bulman-Pozen, *supra* note 111, at 485.

<sup>162</sup> See Rodríguez, *supra* note 16, at 610–11 (advocating a functionalist approach to immigration law that favors state action); Spiro, *supra* note 30, at 1635–37 (discussing the "steam valve" argument for state and local immigration law); see also *infra* Parts III.A.3–4.

raises three important questions about the recent policy proliferation on immigration:

(a) Why is partisanship at the subfederal level relevant to legislation on immigration?

(b) Who is utilizing and mobilizing the partisanship dynamic to achieve these legislative goals?

(c) How do political and policy dynamics at the local level relate to those at the federal level?

This Part presents an abridged discussion of the political dynamics that help answer these questions, directing readers to our prior work for more in-depth explanations.<sup>163</sup> This prior work, grounded in qualitative political science methodology, lays the descriptive foundation for the broader theoretical and legal conclusions we present here.

The answers to these questions reveal the methodology by which partisan conditions have translated into subfederal restrictionist policies in several jurisdictions. We build a theory of politicized change on immigration policy, where dedicated and focused policy activists seek out politically receptive jurisdictions to enact increasingly restrictionist measures. Concurrently, these groups help stall bipartisan immigration reform at the federal level to create the appearance of a federal legislative void that they can then fill through state and local laws.<sup>164</sup> In revealing the true nature of subfederal immigration policy, we provide a more accurate description of the process of policy proliferation, while simultaneously sharpening our ability to identify emerging opportunities for such proliferation.

Finally, in answering the third question listed *supra*, we show how subfederal action and federal lawmaking are inextricably linked, with the former exerting a gravitational pull on the latter, significantly dampening the possibility of federal immigration legislation. Because states and localities have focused significant attention on congressional silence, we emphasize the connection between subfederal policy dynamics and federal legislative stagnation. This dynamic is largely ignored in scholarly and judicial evaluations of the new immigration federalism.

---

<sup>163</sup> Ramakrishnan & Gulasekaram, *supra* note 23, at 1436–45.

<sup>164</sup> As we note in *The Importance of the Political in Immigration Federalism*, restrictionist issue entrepreneurs are able to proliferate immigration laws in several jurisdictions because they have effectively capitalized on two unique post-September 11 political dynamics: increased party polarization and a rise in ethnic nationalism. *Id.* at 1446–48.

a. Why is partisanship at the subfederal level relevant to legislation on immigration?

Popular models of subfederal behavior predict the tendency of state and local officials to advance non-mainstream positions on volatile policy issues. As Professor Roderick Hills notes, “given that nonfederal politicians constitute the major source of competition to congressional incumbents, it is natural that nonfederal politicians want to make a name for themselves by taking the risk of advocating new policies.”<sup>165</sup> There is ample survey evidence to indicate that Republican voters, and especially those who are active in party primaries, care intensely about immigration and hold restrictive views on the matter.<sup>166</sup> When this pattern in public opinion gets harnessed through the primary process, Republican-heavy constituencies have enabled primary challengers to mobilize against incumbents on the immigration issue. Republican incumbents, in turn, have either been defeated by more restrictionist challengers or have taken more conservative positions on immigration to avoid primary defeat.<sup>167</sup>

More recently, Professor Jessica Bulman-Pozen has articulated how partisans have been able to utilize the federalist structure of our government to instantiate subfederal policies oppositional to those advanced by the party in power at the federal level.<sup>168</sup> As she notes,

---

<sup>165</sup> Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 23–24 (2007).

<sup>166</sup> Lymari Morales, *Americans’ Immigration Concerns Linger*, GALLUP (Jan. 17, 2012), <http://www.gallup.com/poll/152072/Americans-Immigration-Concerns-Linger.aspx> (revealing that polls conducted before Republican primaries show 77% of Republican voters were dissatisfied with the level of immigration in the country, and 71% wanted less or the same level of immigration; the poll found that 64% of all Americans polled were dissatisfied with immigration levels during the primary season); Frank Newport, *Republicans Prioritize Immigration; Dems, Financial Reform*, GALLUP (Apr. 30, 2010), <http://www.gallup.com/poll/127607/republicans-prioritize-immigration-dems-financial-reform.aspx> (showing that plurality of self-identified Republican voters favored an immigration-reform bill over finance reform or energy bills, 45% to 37% and 15%).

<sup>167</sup> See Laura Meckler, *The GOP’s Immigration Dilemma*, WALL ST. J., Feb. 26, 2013, at A12 (“For House Republicans, the issue is particularly treacherous. Attracting Hispanic votes is an imperative for presidential candidates, but most House Republicans represent overwhelmingly white districts safely in GOP hands; the most serious political threat they will face is a primary challenge from someone more conservative.”). This dynamic was evident in Arizona as far back as 2004 and 2006, as longstanding Republican incumbents such as Congressman Jim Kolbe faced competitive primary elections by challengers focusing on immigration and border-control issues. See Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. TIMES MAG., Oct. 15, 2006, at 40 (discussing the rise in Republican primary candidates focused on immigration reform, including Kolbe’s 2004 reelection campaign, where immigration-focused challenger Randy Graf won 43% of the vote in the Republican primary).

<sup>168</sup> See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. (forthcoming 2014) (manuscript at 7) (on file with the *New York University Law Review*) (“Today’s ideologically cohesive, polarized parties help to explain state challenges to the federal

subfederal immigration policies, like Arizona S.B. 1070, are a prime example of political parties usage of state fora to contest federal approaches to enforcement, and articulate a competing view of what they believe national policy should be.<sup>169</sup>

- b. Who is utilizing and mobilizing the partisanship dynamic to achieve these legislative goals?

We draw attention to this question because theoretical models of policy proliferation provide that one of the preconditions necessary for rapidly promoting a particular policy is the existence of a small group of intensely interested actors.<sup>170</sup> Once activated, this group can build legislative momentum across several jurisdictions, instantiating the desired policy goals in multiple locales. Moreover, it is important to look beyond elected officials to determine the membership of the group attempting to proliferate these subfederal policies.<sup>171</sup>

While restrictive local policies on immigration have had numerous champions, a few figures emerge as central to the story of immigration federalism as a widespread, national phenomenon. Between 2001 and 2008, Congressman Tom Tancredo (R-CO), cable host Lou Dobbs, the Federation for American Immigration Reform (FAIR), and NumbersUSA played a critical role in preventing immigration legalization from garnering sufficient support among moderate Republicans in Congress.<sup>172</sup> During this time, FAIR also began to support state-level efforts on restrictive legislation, such as Arizona's Proposition 200 in 2004, which imposed proof-of-citizenship and photo-identification requirements for voting.<sup>173</sup>

---

government. . . . Partisan federalism's challenges follow from state-federal overlap and integration, and they involve state and federal actors alike turning to state governments to articulate and stage partisan competition.").

<sup>169</sup> *Id.* at Part I.B.3.

<sup>170</sup> See Catherine L. Carpenter, *Legislative Epidemics*, 58 *BUFF. L. REV.* 1, 8–10 (2010) (describing how a “small core group of people” can cause a legislative epidemic).

<sup>171</sup> See Bulman-Pozen, *supra* note 168, at 9 (“Today’s parties are best understood as networks of individuals and organizations, including elected representatives and party officials, but also allied interest groups, issue activists, . . . and the like.”).

<sup>172</sup> Ramakrishnan & Gulasekaram, *supra* note 23, at 1454–61 (describing the role that a select few individuals and organizations have played in defeating moderate national legislation); see ANTI-DEFAMATION LEAGUE, *IMMIGRANTS TARGETED: EXTREMIST RHETORIC MOVES INTO THE MAINSTREAM* (2008), available at [http://archive.adl.org/civil\\_rights/anti\\_immigrant/Immigrants%20Targeted%20UPDATE\\_2008.pdf](http://archive.adl.org/civil_rights/anti_immigrant/Immigrants%20Targeted%20UPDATE_2008.pdf) (highlighting the anti-immigrant advocacy efforts of centralized groups, media figures, and politicians).

<sup>173</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2252–60 (2013) (holding that Arizona’s evidence-of-citizenship requirement was preempted by the National Voter Registration Act of 1993).

Since 2006, the work of proliferating legislation at the subfederal level has found its strongest champion in Kris Kobach.<sup>174</sup> In addition to providing legal counsel for cities such as Hazleton, Pennsylvania, and Farmers Branch, Texas, Kobach has also played a pivotal role in crafting legislation in many of the same jurisdictions, including cities like Hazleton and states such as Arizona and Alabama.<sup>175</sup> Indeed, IRLI designs and supplies model state and local legislation on its website for use by interested jurisdictions.<sup>176</sup>

Thus, while restrictive policies may have local sponsors in each jurisdiction (a mayor, a state senator, or a governor, for example), news reports and interviews reveal a small, nationally-involved group of actors who are proliferating subnational legislation throughout the country.<sup>177</sup> We term this group of federated, nationally ambitious, and involved actors “restrictionist issue entrepreneurs.”

c. How do partisan and policy dynamics at the local level relate to those at the national level?

As detailed in Part I, legislative gridlock at the national level is a vital doctrinal and political precondition for local action. The two dynamics, however, are conventionally theorized as being only sequentially related, with the pre-existence of the former necessitating the latter. Our institutional and historical analysis, by contrast,

---

<sup>174</sup> See Chin & Miller, *supra* note 71, at 258–62 (noting the importance of Kris Kobach in promoting and defending state immigration laws); Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 29, 2010, at A31.

<sup>175</sup> Ramakrishnan & Gulasekaram, *supra* note 23, at 1456–57; Kent Jackson, *Top Court Gives City 2nd Chance*, STANDARD SPEAKER, June 7, 2011, available at <http://standardspeaker.com/news/top-court-gives-city-2nd-chance-1.1158117> (noting that Kobach, attorney for Hazleton, was encouraged by the Supreme Court’s *Whiting* decision and quoting him as arguing that it “‘put Hazleton on very strong ground’” for remand consideration in front of the Third Circuit); George Talbot, *Kris Kobach, the Kansas Lawyer Behind Alabama’s Immigration Law*, AL.COM (Oct. 16, 2011, 9:44 PM), [http://blog.al.com/live/2011/10/kris\\_kobach\\_the\\_kansas\\_lawyer\\_1.html](http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html); *Hazleton Mayor Plans to Take Immigration Fight to Supreme Court*, FOX NEWS LATINO (Sept. 3, 2013), <http://latino.foxnews.com/latino/politics/2013/09/03/hazleton-mayor-plans-to-take-immigration-fight-to-supreme-court> (noting that Kobach authored Arizona’s immigration law).

<sup>176</sup> See *Model Laws*, IMMIGR. REFORM L. INST., [www.irlf.org/laws](http://www.irlf.org/laws) (last visited Aug. 27, 2013).

<sup>177</sup> See, e.g., *How Attrition Through Enforcement Works*, NUMBERSUSA, <https://www.numbersusa.com/content/learn/issues/american-workers/how-attrition-through-enforcement-works.html> (last visited Aug. 28, 2013) (noting that immigration raids would be unnecessary if federal, state, and local enforcement effectively made “living illegally . . . more difficult and less satisfying over time”); see also David A. Fahrenthold, *Self-Deportation Proponents Kris Kobach, Michael Hethmon Facing Time of Trial*, WASH. POST (Apr. 24, 2012), [http://articles.washingtonpost.com/2012-04-24/politics/35452165\\_1\\_immigration-reform-law-institute-illegal-immigrants-michael-hethmon](http://articles.washingtonpost.com/2012-04-24/politics/35452165_1_immigration-reform-law-institute-illegal-immigrants-michael-hethmon) (reporting the sentiment that without Kris Kobach and Michael Hethmon, a fellow at IRLI, the restrictionist movement would not have gotten off the ground).



indicates that these two processes may work concurrently, or even causally in the opposite direction than established convention.

Local action and federal inaction are connected by two important partisan dynamics in immigration federalism—one political and the other structural. First, restrictionist issue entrepreneurs have at times fomented federal inaction so that they can continue the work of sub-national policy proliferation. Second, the interconnectedness of our federalist system suggests that the passage of state and local measures exerts a gravitational pull on federal lawmaking, with their continued existence stalling the ability to achieve federal legislative agreement.

On the first point, our qualitative empirical analysis shows that at critical times restrictionist entrepreneurs have sought to stall comprehensive immigration reform at the federal level even when the federal proposal ostensibly reflected the restrictionist agenda.<sup>178</sup> This was perhaps most starkly evident in May 2012, when Kris Kobach expressed his opposition to a congressional bill mandating the use of a federal database (E-Verify) to check the immigration status of employees. This stance appeared odd, as Kobach and other restrictionists supported the Legal Arizona Workers Act, which mandated use of that same database for employers within the state, and was upheld by the Supreme Court in *Whiting*. Kobach explained that an analogous federal mandate would “defang[ ] the only government bodies that are serious about enforcing immigration law—the states.” Noting the political interconnectedness between federal and state legislation and judicial activity, Kobach continued: “The timing couldn’t be worse. The bill stabs Arizona in the back, just after it won a victory in [*Whiting*] . . . .”<sup>179</sup>

Thus, at times, restrictionist issue entrepreneurs have purposefully promoted legislative gridlock at the federal level, and then cited the very national legislative inaction they helped foment to justify restrictive solutions at the local level.<sup>180</sup> Notably, engendering federal

---

<sup>178</sup> Such activism makes sense when national compromises would moderate the enforcement-heavy approach advocated by most restrictionists. At times, however, issue entrepreneurs have rallied against national legislation comporting with their goals.

<sup>179</sup> Kris W. Kobach, *Another Amnesty?: New Bill Hobbles Border States*, N.Y. Post (June 15, 2011, 10:53 PM), [http://www.nypost.com/p/news/opinion/opedcolumnists/another\\_amnesty\\_LauPhaZnaURz3fUcpXAphK](http://www.nypost.com/p/news/opinion/opedcolumnists/another_amnesty_LauPhaZnaURz3fUcpXAphK).

<sup>180</sup> Our previous Article, *The Importance of the Political in Immigration Federalism*, *supra* note 23, at 1457–61, details the legislative involvement of FAIR and NumbersUSA. In 2004, while FAIR was striving to push back against legalization efforts in Washington, D.C., following calls for comprehensive immigration reform by George W. Bush and John McCain, it also gave financial backing to Arizona’s Proposition 200 campaign, a measure modeled after Proposition 187 that sought to deny unauthorized immigrants access to many public benefits. See Stephen Wall, *Efforts Against Illegal Immigrants Rise*, SAN BERNARDINO SUN, Nov. 9, 2004 (noting that FAIR spent about \$400,000 to get Prop. 200

legislative gridlock is not a foregone conclusion, as immigrant legalization enjoyed the support of over sixty percent of Americans in 2006 and 2007,<sup>181</sup> and comprehensive immigration reform included enforcement provisions favored by many restrictionists.<sup>182</sup>

Second, applying our findings on partisanship to federalism theory reveals a dynamic feedback loop between subfederal and federal immigration lawmaking. This structural connectedness is baked into our federalist structure and the political parties that dominate it. Specifically, the decentralized structure of political parties across various levels of government facilitates the tendency for subfederal enactments to anchor the political positions taken by national party members. Political parties provide the connective tissue between federal and subfederal actors, and they provide opportunities for factional contests within party electoral contests (like primaries).

As Dean Larry Kramer has long argued, national lawmakers of a particular party are dependent to some extent on state and local officials from the same party.<sup>183</sup> According to Kramer, the unique characteristics of political parties have created “a political climate in which members of local, state, and national chapters are encouraged, indeed expected, to work for the election of party candidates at every level—

---

passed). Indeed, pro-immigrant advocacy organizations in Washington viewed FAIR's foray into Arizona as connected to its Washington-based legislative strategy, as FAIR sought to push back against moderate legislation being offered by Arizona's Congressmen, Representative Jim Kolbe, Senator Jeff Flake, and Senator John McCain. Interview by S.K. Ramakrishnan with Frank Sharry, Executive Director of America's Voice (Apr. 12, 2012) (interview notes on file with the *New York University Law Review*); see also Jim Behnke, *The Tres Amigos—Kolbe, Flake, McCain*, SIERRA VISTA HERALD (Jan. 8, 2004), <http://www.svherald.com/content/january/2009/09/19/23610> (critiquing the immigration bill introduced by Kolbe, Flake, and McCain).

<sup>181</sup> See Joseph Carroll, *Public Still Supports Path to Citizenship for Illegal Immigrants*, GALLUP (Mar. 14, 2007), <http://www.gallup.com/poll/26875/public-still-supports-path-citizenship-illegal-immigrants.aspx> (revealing that a majority of Republicans, Democrats, and independents favor allowing unauthorized immigrants to remain in the U.S. to work or become full citizens).

<sup>182</sup> See Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. §§ 101–102, 112, 202 (2007) (including provisions for enhanced border and interior enforcement).

<sup>183</sup> Kramer, *Understanding Federalism*, *supra* note 28, at 1528; see also Bulman-Pozen, *supra* note 111, at 502 (“On Kramer's account, the role political parties play in building relationships among politicians is what matters: Democratic Congresspersons may be inclined to protect state prerogatives because of their relationships with state Democratic parties, . . . but this should in the aggregate lead Congress to attend to state prerogatives.”). To be clear, our focus here is Kramer's suggestion that political partisanship builds unavoidable and strong links between federal and subfederal officials. See Bulman-Pozen, *supra* note 168 (arguing that understanding parties as ideologically cohesive “bolsters [Kramer's] claim that partisanship generates thick ties between state and national politicians”). We express no opinion on, and do not defend, Kramer's understanding of political parties as nonideological or constructed for the primary purpose of winning elections.

creating relationships and establishing obligations among officials that cut across government planes.”<sup>184</sup> As such, party decentralization and interdependence of officials across jurisdictions helps ensure that the “politics” of the political process will protect federalism values, without court intervention.<sup>185</sup> We use Kramer’s foundational observation to make a related, but different point.

The federated nature of parties forces federal lawmakers to take heed of the immigration positions taken by subfederal officials affiliated with their political party.<sup>186</sup> When state and local politicians promote restrictionist policies in their jurisdictions to gain notoriety or to challenge incumbents by exploiting intraparty schisms,<sup>187</sup> party members at the federal level must account for these positions lest they harm their own chances for reelection.<sup>188</sup> This is so because national

---

<sup>184</sup> Kramer, *Understanding Federalism*, *supra* note 28, at 1528.

<sup>185</sup> *Id.* at 1536 (“[T]he parties influenced federalism by establishing a framework for politics in which officials at different levels were dependent on each other to get (and stay) elected.”); *see also* Kramer, *Political Safeguards of Federalism*, *supra* note 28, at 279 (attributing the unique role of federalism in American politics, in part, to decentralized parties and mutual dependency among them).

<sup>186</sup> Michael A. Olivas, *Immigration-Related State and Local Ordinances*, 2007 U. CHI. LEGAL F., 2007, at 27, 39–40 (“In 1994, his popularity sagging, California Republican Governor Pete Wilson backed . . . Proposition 187. . . . Wilson was re-elected.”).

<sup>187</sup> *Cf.* Hills, *supra* note 165, at 23–24 (“Finally, given that nonfederal politicians constitute the major source of competition to congressional incumbents, it is natural that nonfederal politicians want to make a name for themselves by taking the risk of advocating new policies.” (footnote omitted)).

<sup>188</sup> *See* Kramer, *Understanding Federalism*, *supra* note 28, at 1536 (noting that politicians at various levels of government depend on each other to be re-elected); Meckler, *supra* note 167 (explaining the vulnerability House members face within their districts and noting that Senator Lindsey Graham faces strict opposition from NumbersUSA and other restrictionist entrepreneurs for his support of the proposed comprehensive immigration reform bill). This reputational dynamic was also evident during the Republican presidential primaries of 2012, as the major national candidates backed Arizona’s efforts. *See* Michael A. Memoli, *Romney Calls Arizona Immigration Law a Model for the Nation*, L.A. TIMES (Feb. 22, 2012), <http://articles.latimes.com/print/2012/feb/22/news/la-pn-gop-debate-illegal-immigration-20120222>. Local party actors are increasingly promoting enforcement-heavy positions within their jurisdictions. Subsequently, these policy positions filter upwards and affect the party’s policy vision at the national level, as members of Congress and those vying for the presidency are compelled to expressly or tacitly support the actions of fellow party members. As such, national party officials feel compelled to support enforcement-only provisions at the federal level, because local party members have already generated momentum for restrictionist policies. *See* Ramakrishnan & Gulasekaram, *supra* note 23, at 1472. Consequently, federal immigration proposals—particularly those that are bipartisan and tend to moderate the more extreme enforcement elements of state and local laws—inevitably grind towards gridlock. As examples, comprehensive federal immigration proposals failed in 2002 and 2007, and the DREAM Act failed in 2011, despite significant popular support. *See* AM. IMMIGRATION COUNCIL, THE DREAM ACT: CREATING OPPORTUNITIES FOR IMMIGRANT STUDENTS AND SUPPORTING THE U.S. ECONOMY 5–6 (2011), available at [http://www.immigrationpolicy.org/sites/default/files/docs/Dream\\_Act\\_updated\\_051811.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Dream_Act_updated_051811.pdf).

party members are in part beholden to the endorsements and support of state and local party members. After a state or locality has enacted a restrictionist law, national lawmakers from that jurisdiction must often take care not to oppose such efforts lest they provide fodder for a restrictionist challenger in the next intraparty primary election. Accordingly, subfederal immigration policies effect stalemate at the national level by ensuring that congresspersons, especially House representatives from racially homogeneous, heavily Republican districts, resist comprehensive federal reform efforts that seek to do anything more than increase federal enforcement mechanisms.<sup>189</sup>

The bottom line is this: Subfederal policy proliferation and federal legislative silence are not independent phenomena; they are inextricably linked by the structure of our federalist system and correspondingly federated party structures. Accounting for the federated nature of political parties and the purposeful stalling efforts of entrepreneurs adds an extra layer of caution to the difficulties with federal action that are already described in the literature, including filibuster pivots and targeted minority-group advocacy.<sup>190</sup> To be sure, these legislative forces are operative in policy areas beyond immigration. Yet, it is a point worth emphasizing with respect to immigration specifically: The notion of a federated policy dynamic shaped by party structures, in which the subfederal tail sometimes wags the federal dog, rubs against the still dominant understanding of subnational involvement in immigration enforcement as dictated by the national government. In our model, restrictionist positions that find traction in particular subfederal jurisdictions will necessarily tie the hands of national lawmakers of the same party. Completing the feedback loop, state and local officials argue that this federal stalemate creates the appropriate constitutional conditions of federal inaction and ineptitude to justify more subfederal lawmaking.

None of the points we have made here are intended to act as a negative appraisal of the work of issue entrepreneurs or the use of

---

<sup>189</sup> See Tom Cotton, *It's the House Bill or Nothing on Immigration*, WALL ST. J., July 11, 2013, at A15 (stating that the Senate's immigration bill would be rejected by the House due to its emphasis on legalization and lack of enforcement provisions); Philip Elliott, *House Judiciary Chairman Rejects 'Special Pathway to Citizenship'*, SALT LAKE TRIB. (June 30, 2013, 5:43 PM), <http://www.sltrib.com/sltrib/world/56535553-68/senate-immigration-bill-pathway.html.csp> (noting that Rep. Bob Goodlatte, the Republican Chairman of the House Judiciary Committee denounced the Senate's passage of a comprehensive immigration bill, stating that immigration legislation cannot provide a special pathway to citizenship for illegal residents).

<sup>190</sup> See Hills, *supra* note 165, at 13 (noting that it is much easier to derail federal legislation than it is to enact it). For specifics on how Senate filibuster rules and restrictionist group advocacy have stalled federal immigration legislation, see Ramakrishnan & Gulasekaram, *supra* note 23, at 1446–47.

partisan dynamics to instantiate policy. Further, we are not advocating that courts should concern themselves with the reasons for federal legislative gridlock in their assessment of preemption cases in the immigration setting.<sup>191</sup> Rather, our purpose is to accurately theorize the genesis of the new immigration federalism, so that we can then investigate the assumptions of scholars and courts who evaluate the phenomenon and articulate how courts *should* be evaluating the phenomenon.

## 2. *Challenges to Established Theoretical Accounts of Subfederal Immigration Action*

Many scholars have evaluated the potential utility of state and local immigration regulations, and the value of abandoning exclusive federal control over all matters immigration.<sup>192</sup> In defending constitutional leeway for such enactments, scholars have assumed that these nonfederal policy expressions arise as responses to demographic shifts and variations.<sup>193</sup> Others, even if agnostic to the question of whether subfederal laws are organic responses to pressing concerns, have argued that such regional laws can dissipate extremist impulses at the local level, thereby preventing large-scale instantiation of those intensely held minority perspectives. Our reappraisal of the new immigration federalism undermines these accounts.

The primary problem with current scholarly appraisals of the new immigration federalism is their choice of conceptual frame to describe the trend. Commonly used theoretical models assume the responsiveness of public policy to regional or unique demographic concerns.<sup>194</sup>

---

<sup>191</sup> Indeed, we argue that preemption jurisprudence used in alienage law assessments is not the proper lens through which to view these enactments in the first place. *See supra* notes 95–102 and accompanying text.

<sup>192</sup> *See, e.g.,* Rodríguez, *supra* note 16, at 617 (discussing how the demographic shifts caused by globalization and immigration impact parts of the country differently, and thus the viability of different immigration strategies will vary); Schuck, *supra* note 30, at 68–83 (arguing that federal immigration policy might be better served if Congress authorized state authority in some policy areas, like employment-based admissions, state and local criminal justice systems integration, and employer sanctions); Spiro, *supra* note 30, at 1635–39 (noting that giving states space to enact their own subfederal anti-immigrant legislation relieves political pressure to promote those restrictive policies at the federal level).

<sup>193</sup> *See, e.g.,* Huntington, *supra* note 18, at 805–07 (explaining that subfederal lawmakers feel frustrated by perceived disproportionate burdens suffered as a result of illegal immigration); Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 *DENV. U. L. REV.* 1061, 1071 (2007) (“Indeed, different states and local governments are affected in drastically different manners—both positively and negatively—by illegal immigration. Local governments should be able to respond accordingly, especially if the federal government is not meeting those communities’ needs.”).

<sup>194</sup> *See supra* notes 15–19 and accompanying text (describing the immigration federalism frameworks posited by several authors).

In contrast, our evidence suggests that this recent policy proliferation resembles a “cascade” phenomenon similar to that described by Professors Sunstein and Kuran in other policy areas.<sup>195</sup> The saliency of partisanship—and not demography—in subfederal immigration regulation indicates that this recent spate of state and local immigration regulation is a real-time illustration of Sunstein and Kuran’s model, which highlights the influence of information deficits and reputational concerns on public policy.<sup>196</sup> As they note, in a policy debate, sometimes a minority position or one based on empirically dubious claims can triumph in the legislative and political sphere by exploiting the cognitive biases of the public and elected officials.<sup>197</sup>

In such cascades, interested persons take advantage of limited, and often incorrect, information about an issue or apparent problem to drive public policy.<sup>198</sup> Taking advantage of information scarcity and cognitive biases, they explain, “availability entrepreneurs” are able to create public concern on a topic and proliferate policy solutions, regardless of the necessity, efficacy, or proportionality of those solutions.<sup>199</sup> Sunstein and Kuran explain how these costly cognitive errors have manifested in cascades in water and environmental pollution policy, pesticide contamination of food, and high-profile human tragedies (such as plane accidents).<sup>200</sup> Situating this information-deficit manipulation within the larger legislative context of policy proliferation, Professor Catherine Carpenter argues that rapid legislative momentum develops across several jurisdictions when (a) few, intensely interested actors, (b) armed with a sticky message, (c) operate in a receptive context.<sup>201</sup> She uses examples from drunk-driving, three-strikes, and sex-offender laws to show how legislative cascades initiate and spread at particular moments in our social consciousness, given ripe political and historical factors.<sup>202</sup>

---

<sup>195</sup> Sunstein & Kuran, *supra* note 29, at 715–28.

<sup>196</sup> *Id.* at 685–701 (discussing how availability cascades can generate widespread mistaken beliefs because of informational availability and reputational concerns, and the susceptibility of the public and elected officials to cognitive biases in information processes).

<sup>197</sup> *Id.* at 714; *see also* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71, 76 (2000) (describing how, in the absence of their own private information, people tend to follow others, and this process helps reach extreme policy positions); Eric Talley, *Precedential Cascades*, 73 *S. CAL. L. REV.* 87, 90 (1999) (discussing how “social entrepreneurs” are eager to exploit group pathologies).

<sup>198</sup> Sunstein & Kuran, *supra* note 29, at 714.

<sup>199</sup> *Id.* at 687 (emphasis omitted).

<sup>200</sup> *Id.* at 691–703 (discussing policy responses to the health concerns regarding Love Canal in New York, the anxieties caused by pollutants such as Alar, and the 1996 crash of TWA Flight 800 as examples of availability errors and cascades in action).

<sup>201</sup> *See* Carpenter, *supra* note 170, at 8–10.

<sup>202</sup> *Id.* at 13–21.

Our qualitative empirical work has already identified the intensely interested actors in the immigration policy context—those groups including FAIR, IRLI, NumbersUSA, and individuals such as Tom Tancredo and Kris Kobach—whom we have referred to as restrictionist issue entrepreneurs.<sup>203</sup> Armed with prefabricated model legislation<sup>204</sup> and predesigned legal defenses, these issue entrepreneurs have found willing allies in elected officials such as Arizona Governor Jan Brewer, Arizona state Senator Russell Pearce, and former Hazleton Mayor Lou Bartletta. Foremost amongst the informational deficits exploited by restrictionist issue entrepreneurs are the generally held beliefs required to meet *Chy Lung*'s “vital necessity” standard—i.e., that immigrants are causing uniquely insurmountable public policy problems that require enforcement-heavy responses, the same propositions undermined by our empirical inquiry. These informational claims are particularly sticky in the immigration context, persisting despite the experience of jurisdictions passing immigration legislation—e.g., Riverside, New Jersey; Oklahoma; and Alabama—that have suffered greater economic distress *after* the legislation passed and have, subsequent to the passage of restrictionist legislation, seen a substantial labor source and an important consumer base driven away.<sup>205</sup> Our theoretical orientation draws distinctions with, and identifies the weaknesses of, current scholarly models.

---

<sup>203</sup> See *supra* notes 172–77 and accompanying text for further discussion of restrictionist entrepreneurs.

<sup>204</sup> *Model Laws, IMMIGR. REFORM L. INST.*, available at <http://www.irli.org/laws> (last visited Aug. 27, 2013).

<sup>205</sup> See Patrik Jonsson, *Why Republicans Are Doing an About-Face on Tough Alabama Immigration Law*, CHRISTIAN SCI. MONITOR (Nov. 16, 2011), <http://www.csmonitor.com/USA/Politics/2011/1116/Why-Republicans-are-doing-an-about-face-on-tough-Alabama-immigration-law> (“Prof. Samuel Addy . . . recently predicted that HB 56 will reduce the Alabama economy by \$40 million as income and spending by both illegal and legal Hispanic immigrants will decline. What’s more, employers face troves of fresh paperwork and licensing requirements . . . that they say will potentially hurt business.”); Peter J. Spiro, *Be Careful What You Wish For*, N.Y. TIMES (May 14, 2012, 1:49 PM), <http://www.nytimes.com/roomfordebate/2011/10/04/should-alabama-schools-help-catch-illegal-immigrants/be-careful-what-you-wish-for-alabama> (arguing that Alabama’s law, driving out immigrants, will force the state to appreciate their value); *NewsHour: Alabama’s Immigration Law* (PBS Oct. 13, 2011), transcript available at [http://www.pbs.org/newshour/bb/business/july-dec11/alimmigration\\_10-13.html](http://www.pbs.org/newshour/bb/business/july-dec11/alimmigration_10-13.html) (discussing the adverse impact of HB 56 on the agriculture and construction industries).

### 3. *The Fallacy of the Functionalist Model*

Subfederal immigration policy largely reflects naked political preference and opportunistic use of party polarization.<sup>206</sup> This conclusion complicates assumptions made by a number of scholars. Professor Cristina Rodríguez has argued that what is “missing” from debates over the constitutionality of subfederal enactments is “a functional account that explains why state and local measures have arisen . . . over the past five to ten years, and how this reality on the ground should reshape our conceptual and doctrinal understandings of immigration regulation.”<sup>207</sup> Indeed, we agree with Professor Rodríguez that purely legal constitutional debates over subfederal involvement in immigration focusing on federalism and preemption questions miss crucial on-the-ground factors that should influence judicial and policy evaluations of these laws. However, we argue that the missing reality is *not* the new demography and geography of immigration; rather, it is the new politics of immigration.

Our model proposes that restrictive subfederal immigration laws proliferate in jurisdictions when political conditions are ripe, not because the legislation presents a unique method of addressing an emerging policy challenge. Accordingly, it is far from clear that “local experimentation will be of tremendous value in this context.”<sup>208</sup> The “experimentation” currently occurring in the immigration field has little demonstrative value to other jurisdictions;<sup>209</sup> it changes the terms and tenor of the national debate on immigration, but does not solve the on-the-ground problems.

Undoubtedly, functionalist accounts of subfederal legislation serve the important purpose of carving out a normative space for local involvement, especially in the integrationist efforts with which much of Professor Rodríguez’s work is concerned. It may very well be preferable to locate and institute such measures at the local level. And, we agree with her underlying point that uniformity in immigration policy across the nation may not be necessary or normatively desirable.<sup>210</sup>

---

<sup>206</sup> See *supra* Part II.C; see also Sunstein, *supra* note 197, at 76 (showing how limited private information tends to make people follow others, and reach more extreme policy positions).

<sup>207</sup> Rodríguez, *supra* note 16, at 571.

<sup>208</sup> *Id.* at 609; see also Huntington, *supra* note 18, at 830–38; Parlow, *supra* note 193.

<sup>209</sup> Many of these ordinances, however, do demonstrate the social and economic pitfalls of local regulation. Several states have abandoned or reconsidered their enforcement-heavy approaches after enactment, and after experiencing the consequences of such laws. See Cunningham-Parmeter, *supra* note 22, at 1711–12 (discussing the repeal of anti-immigrant laws in Oklahoma and Riverside, New Jersey after the laws led to dramatic decreases in their migrant worker population).

<sup>210</sup> See Rodríguez, *supra* note 16, at 571, 611.



However, our data shows that current local participation in immigration regulation is not occurring in places that are particularly affected by immigration. Perpetuating the assumption that demographic changes explain policy responses lends credence to the claims of legal necessity proffered by states like Arizona and cities like Hazleton. In contrast, we have shown that states and localities that pass immigration laws often experience little “need” for such regulation—at least not in the functional or instrumental sense.<sup>211</sup>

#### 4. *A Cascade, Not a Steam Valve*

Other theories of immigration federalism must also be reconsidered. For example, it is tempting to agree with Professor Peter Spiro’s intuition that leeway for isolated, subfederal anti-immigrant regulation relieves pressure to promote those restrictive policies by way of federal legislation.<sup>212</sup> Thus, according to his “steam valve” theory, even if subfederal restrictionist measures primarily reflect raw political preference (and not necessary responses to pressing policy problems), those measures in isolated localities could serve a normatively desirable purpose by providing a relatively contained outlet for anti-immigrant feelings.<sup>213</sup> As per the theory, allowing nativist legislative sentiments to find legislative expression at the local level dissipates the pressure to seek federal instantiation of the same policies; in effect, the local expression relieves the pent-up pressure (as a steam valve on a pressure cooker would) caused by restrictionist policy momentum. In one example, addressing Arizona’s S.B. 1070 and the constitutional challenge to the law, Professor Spiro argues that “in the long run, immigrant interests will be better helped if the Supreme Court upholds S.B. 1070. . . . If the Supreme Court strikes down S.B. 1070, anti-immigrant constituencies will redouble their efforts to enact tougher laws at the federal level.”<sup>214</sup>

Spiro supports his argument as to the desirability of restrictionist views by drawing upon historical development through the 1990s. To

---

<sup>211</sup> *Id.* at 576 (“State and local officials are reacting to our shifting demography in extraordinarily varied ways, particularly when it comes to how best to deal with the reality of unauthorized immigration.”); *id.* at 580 (“One way to address the demographic pressures that have given rise to this spectrum of activity would be to call for strong federal intervention to obviate the need for state and local regulation.”).

<sup>212</sup> See Spiro, *supra* note 30, at 1636 (“Affording the states discretion to act on their preferences diminishes the pressure on the structure as a whole; otherwise, because you don’t let off the steam, sooner or later the roof comes off.”).

<sup>213</sup> The limitation has to be defined in terms of the quantity of subfederal jurisdictions; substantively, it is difficult to suggest that Alabama’s recent immigration law—which has had the effect of driving immigrant children out of school—is relatively harmless, even if it occurs only within an individual state.

<sup>214</sup> Peter J. Spiro, *Let Arizona’s Law Stand*, N.Y. TIMES, Apr. 23, 2012, at A19.

support this position, he primarily relies on the defeat of California's anti-immigrant Proposition 187, which he argues presaged the federal efforts that led to the enforcement-heavy 1996 federal immigration reforms contained in IIRIRA and PRWORA.<sup>215</sup> However, his position does not account for immigration federalism post-2001 or the proliferation of laws since 2005. Our analysis of the past decade-plus of lawmaking suggests that the causal paths described by Spiro must be reversed: Suppression of subfederal lawmaking does not necessarily promote restrictionist measures at the federal level;<sup>216</sup> rather, purposeful suppression of federal lawmaking provides the receptive legislative backdrop for promotion of extreme measures at the subfederal level.

The critical difference between a cascade understanding of state and local immigration lawmaking and a steam-valve theory is that in the cascade model, the issue entrepreneurs' goal is to continue proliferation of immigration laws and policies in every jurisdiction that is politically ripe for legislation. Each successive enactment builds, rather than dissipates, horizontal momentum across multiple subfederal jurisdictions; it is a strategy that appears targeted towards building a *de facto* national immigration policy through several subfederal enactments that emphasize heavy enforcement and denial of benefits to noncitizens. Specifically, in the immigration context, we believe that interested policy activists coordinate activity between the local and federal levels so that legislative activity at the federal level does not stand as an obstacle to further subfederal proliferation.<sup>217</sup> A stark example of this dynamic is Kris Kobach's antipathy towards the 2012 federal E-Verify bill on the grounds that it would stifle analogous state provisions, such as Arizona's E-Verify law.<sup>218</sup>

Accordingly, whereas Professor Spiro imagines the restrictionist subnational expression as the pressure-relieving *end* of a policy movement,<sup>219</sup> our explanation perceives such expressions as the *beginning* of a legislative cascade.<sup>220</sup> Hazleton, for example, served as a

---

<sup>215</sup> See Spiro, *supra* note 30, at 1637 & nn.35, 37–38.

<sup>216</sup> *Id.* at 1635 (“A state disempowered from acting in its own jurisdiction will get its way at the national level.”); *id.* at 1630 (“One must look to the consequence of such suppression and the possibility that frustrated state preferences may actually prompt the effectuation of anti-alien measures at the federal level.”).

<sup>217</sup> See *supra* Part III.A.1; see also Ramakrishnan & Gulasekaram, *supra* note 23, at 1445–50 (using qualitative empirical data to show the highly networked and coordinated work of immigration issue entrepreneurs at the federal and subfederal levels).

<sup>218</sup> See *supra* note 179 and accompanying text.

<sup>219</sup> See Peter J. Spiro, *supra* note 214.

<sup>220</sup> Here, we defend this claim only with regard to the time period we investigate (2000–2012). In future projects we will address Professor Spiro's account of legislative action prior to this current era of enhanced party polarization on immigration issues.

purposeful test case that soon led to restrictionist laws in Mississippi, Georgia, Arizona, Alabama, and the cities of Farmers Branch and Valley Park.<sup>221</sup> The goal is to proliferate such subfederal regulations and purposefully forego federal control that might moderate the gains made at the state and local level. Increasing the number of states and localities with restrictionist measures focuses, rather than disperses, the pressure upwards to the federal level. This eventually shifts the terms of national discourse toward a more restrictionist status quo that does not appear to reflect national majoritarian preferences.

Again, our description of the legislative cascade and its consequences in immigration policy is not, by itself, a negative judgment of the phenomenon. Rather, our modest purpose is to frame the trend with a theoretical model that better accounts for the quantitative and qualitative data from our investigation.

### B. Courts and the New Immigration Federalism

Our empirical analysis of the conditions giving rise to recent state and local immigration enforcement laws suggests that when these laws are properly categorized as immigration laws, they cannot survive *Chy Lung*'s exacting standard. Demographic concerns and attendant public policy problems appear to have little to do with the proposal and passage of these laws, and as such, the vital necessity standard required under *Chy Lung* cannot be met. But, as we noted *supra*, courts have chosen to treat these enactments as alienage laws instead of immigration laws. Even the Supreme Court has followed this categorization, despite its acknowledgment that these subfederal ordinances are attempts to control entry and exit of noncitizens. As a consequence, courts have primarily used a preemption framework in determining the validity of these measures.<sup>222</sup>

Under a preemption framework, as opposed to an immigration law structure, our fundamental conclusion on partisanship's catalytic role in the new immigration federalism does not necessarily render

---

<sup>221</sup> See H.B. 488, 2012 Leg., Reg. Sess. (Miss. 2012); H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011) (codified in part at ALA. CODE § 31-13 (LexisNexis 2011)); H.B. 87, 151st Gen. Assemb. (Ga. 2011); Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), available at [https://www.aclu.org/files/pdfs/immigrants/hazleton\\_secondordinance.pdf](https://www.aclu.org/files/pdfs/immigrants/hazleton_secondordinance.pdf); Valley Park, Mo., Ordinance 1708 (July 17, 2006), available at [http://www.aclu.org/files/pdfs/immigrants/valleypark\\_ordinance.pdf](http://www.aclu.org/files/pdfs/immigrants/valleypark_ordinance.pdf); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), enjoined in part by *Arizona v. United States*, 132 S. Ct. 2492 (2012); Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007), available at <https://www.farmersbranch.info/sites/default/files/Ordinance%20No%202903.pdf>, invalidated by *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008).

<sup>222</sup> See, e.g., Rubenstein, *supra* note 101, at 140–43 (arguing that the Supreme Court categorized Arizona's S.B. 1070 as an alienage law).

such laws unconstitutional, or even unwise. Our work, however, does cast doubt on some of the general federalism assumptions undergirding evaluations of state and local authority in this arena. Moreover, emerging research suggests a role for other judicial methods (within an alienage-law framework) which courts have thus far avoided in their analyses of these laws.

As the continued viability of subfederal immigration laws (or certain provisions thereof) in several jurisdictions demonstrates, states and localities have achieved some moderate success in instantiating their laws despite their inability to meet *Chy Lung's* rigorous standards for subfederal involvement. Assuming *arguendo* that recent subfederal enactments are alienage law, we explain in this Subpart the impact of our evidence-based understanding on current judicial analysis of these laws. First, we show that the current spate of subfederal immigration lawmaking does not fit within a traditional paradigm of state and local policy experimentation. Next, we explain why our empirical investigation supports an equal protection framework for evaluating state and local immigration laws. Finally, we offer some concluding thoughts on the longterm constitutional significance of recent judicial decisions in this field.

### 1. *The Values of Federalism*

Courts considering challenges<sup>223</sup> to state and local immigration regulations currently employ preemption and federalism frameworks to guide their discussion of subfederal lawmaking.<sup>224</sup> In cases where specific and recent federal law exists, courts use express preemption methodology to compare federal law to subfederal law, upholding subfederal law where federal law explicitly allows concurrent

---

<sup>223</sup> Currently, several suits concerning the laws of a number of jurisdictions are making their way through the appeals process. Most notably, the Supreme Court decided *Arizona v. United States*, 132 S. Ct. 2492 (2012), and has remanded the Hazleton, Pennsylvania case in light of its decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), which upheld the Legal Arizona Worker's Act. The Supreme Court recently denied certiorari from the Eleventh Circuit's ruling on Alabama's law. *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013). And, in light of *Arizona v. United States*, both the Fourth and the Fifth Circuits have recently rendered opinions on state and local immigration laws. See *United States v. South Carolina*, No. 12-1096, 2013 WL 3803464, at \*1 (4th Cir. July 23, 2013) (enjoining several provisions of state law, but not addressing the district court's decision to dissolve injunction of other provisions); *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, 2013 WL 3791664, at \*1 (5th Cir. July 22, 2013) (en banc) (enjoining city's illegal-alien rental ordinance).

<sup>224</sup> See generally Cunningham-Parmeter, *supra* note 22 (demonstrating that immigration law does not typify issues ripe for the federalism framework).

regulation or maintains an exception for subfederal participation.<sup>225</sup> As an example, in *Whiting*, the Court focused on the specific meaning of the “licensing and similar laws” exception written into 8 U.S.C. § 1324a(h)(2) to determine whether federal law expressly preempted or permitted Arizona’s employer sanctions law.<sup>226</sup>

But, as the opinions in *Arizona v. United States* demonstrate, laws like S.B. 1070 are difficult to assess within an express preemption framework because of the lack of specific or responsive federal legislation on the topic. Thus, in exploring more nebulous grounds for preemption, states and localities, as well as courts, resort to broader notions of federalism.<sup>227</sup> In *Arizona*, for example, the argument that states have inherent sovereign power to exclude unwanted immigrants resonated with at least one Justice.<sup>228</sup> Even amongst courts and justices disinclined toward state and local immigration lawmaking, discussions of the desirability of subfederal action are at times intermingled with invocations of federal exclusivity in immigration policy on the one hand and the benefits of decentralized decision-making on the other.<sup>229</sup> Fundamentally, these assessments view

---

<sup>225</sup> See *Whiting*, 131 S. Ct. at 1981 (upholding Arizona’s licensing law on the grounds that it “falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted”); *Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013) (upholding city’s rental ordinance against preemption challenge).

<sup>226</sup> *Whiting*, 131 S. Ct. at 1977 (“When a federal law contains an express preemption clause, we ‘focus on the plain wording of the clause . . .’ IRCA expressly preempts States from imposing ‘civil or criminal sanctions’ on those who employ unauthorized aliens, ‘other than through licensing and similar laws.’” (citations omitted)).

<sup>227</sup> See, e.g., *Villas at Parkside Partners*, 2013 WL 3791664, at \*19 (“In many contexts, of course, our federalist system permits states to ‘try novel social and economic experiments without risk to the rest of the country.’” (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))); *id.* at 30 (Higginson, J., specially concurring) (“In particular, the Ordinance, inasmuch as it attempts to isolate Farmers Branch from a problem common to other states by burdening other localities with non-citizens illegally in the United States, may be invalid under the dormant Commerce Clause.”); Cunningham-Parmeter, *supra* note 22, at 1676 (noting that “[e]ver since Justice Brandeis characterized states as laboratories of democracy, judges and scholars have championed the ability of states to offer a diverse array of solutions to complex national problems” and stating that “[t]oday, proponents of enhanced immigration restrictions apply the same rationale to state immigration laws. They describe states as policy innovators that represent the future of immigration enforcement”); Huntington, *supra* note 18, at 830–37 (analyzing the “relevance and robustness of traditional federalism debates to the novel questions raised by immigration federalism”).

<sup>228</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part) (“In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States’ traditional role in regulating immigration—and to overlook their sovereign prerogative to do so.”).

<sup>229</sup> See *id.* at 2498–500 (opinion of Kennedy, J.) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful migration.”);

federal and subfederal policymaking as occurring in distinct spheres, with an idealized understanding of state and local action.

As made apparent in the relevant literature,<sup>230</sup> when courts provide constitutional leeway for state and local policymaking, they unlock the theoretical benefits of federalism, to wit: (1) providing more responsive government by matching local problems with local solutions;<sup>231</sup> (2) allowing for policy innovation through variegated experimentation;<sup>232</sup> (3) promoting intergovernmental competition,<sup>233</sup> resulting in desirable outcomes for the citizenry; (4) helping states fulfill their roles as a bulwark against federal tyranny;<sup>234</sup> and (5) increasing democratic participation.<sup>235</sup> The mechanism of politicized legislative growth undermines several of these justifications<sup>236</sup> proffered by courts and commentators invoking federalism-based policy experimentation rationales for preserving state and local immigration regulations.<sup>237</sup>

First, demographic changes and related economic stresses are, for the most part, not unique to the localities proposing and enacting local

---

Hessick, *supra* note 8 (“Preemption cases often turn on close parsing of the relevant federal statute. . . . In addition, however, [Arizona] presents a broader theoretical question about state regulation in other federally preempted fields (such as immigration).”).

<sup>230</sup> See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1261–62 (2009) (discussing autonomy and cooperative federalism models as competing theoretical frameworks for federalism); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 *N.Y.U. L. REV.* 698, 744 (2011) (“Properly understood, federalism is a means to an end. A federal system is desirable not for its own sake, but because decentralized decision making is thought to have various desirable consequences.”); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *IOWA L. REV.* 243, 266 (2005) (“[C]ommentators generally offer a variety of presumed benefits, clustering around five areas: responsive governance, governmental competition, innovation, participatory democracy, and resisting tyranny.”); *supra* note 227 (discussing the broadening notions of federalism embraced by states, localities, and courts).

<sup>231</sup> See, e.g., Lemos, *supra* note 230, at 750 (noting that “state actors are better positioned than national legislators” to respond to local needs).

<sup>232</sup> See, e.g., *id.* at 751–52 (discussing the benefits and limitations of states’ ability to experiment with varying approaches to immigration laws).

<sup>233</sup> See, e.g., *id.* at 745 (“[I]nterstate competition over regulatory authority produces better policies, particularly when citizens can ‘vote with their feet’ by moving from state to state.”).

<sup>234</sup> See, e.g., *id.* at 748 (arguing the purpose of preventing tyranny through federalism is not satisfied in the state enforcement context).

<sup>235</sup> See, e.g., *id.* at 745 (pointing to federalism as means for increased citizen involvement).

<sup>236</sup> We note that a politicized model of subfederal immigration regulation may actually serve to increase democratic participation by the polity, by galvanizing local citizenry in support of such legislation.

<sup>237</sup> Again, we note that we are not calling for the invalidation of all subfederal immigration lawmaking. There may be other justifications and defenses for these laws. Here we only note that—to the extent those laws are defended on federalism-value-promoting grounds—our empirical investigation undermines some of those justifications.

immigration regulations. Indeed, the vast majority of jurisdictions facing the same demographic changes, language isolation, and economic stresses do not even consider (let alone pass) immigration regulation. For example, New Mexico has experienced a rate of increase in its unauthorized immigrant population that is similar to that in Arizona,<sup>238</sup> but the state has not passed any significant restrictionist measures. The partisan conditions have not been favorable in New Mexico, which has an electorate with 47% registered Democrat voters and just 31% Republican.<sup>239</sup> Furthermore, demographic change is often unrelated to subfederal policy responses, as many enacting jurisdictions are states and localities with comparatively and objectively low levels of immigration and immigrants (and the attendant social and economic challenges that would follow). This has certainly been the case in restrictive states such as Alabama, Indiana, and Oklahoma, where the proportion of unauthorized immigrants (2.5%, 1.8%, and 2.0% in 2010, respectively)<sup>240</sup> has been significantly below the national average (3.7%).<sup>241</sup> If, in fact, objective and regionally specific policy concerns could explain this current trend in subfederal law-making, we would expect demographic factors to emerge as highly salient predictors of such laws. Instead, we found that partisanship and political dynamics explain the trend.<sup>242</sup>

Second, this process of politicized change does not produce the type of policy experimentation and innovation envisioned in Justice Brandeis's famous laboratories metaphor—that any given state may independently serve as a “laboratory” for “social and economic experiments.”<sup>243</sup> According to Professor Keith Cunningham-Parmeter, in order for subfederal policies to be effective as policy experiments and innovations, states must (1) internalize costs and (2) provide replicable approaches.<sup>244</sup> He argues that when measured against these

---

<sup>238</sup> PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 23 tbl.A3 (2011), available at <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/>.

<sup>239</sup> See N.M. SEC'Y OF STATE, VOTER REGISTRATION STATISTICS REPORT (June 28, 2013), available at <http://www.sos.state.nm.us/uploads/FileLinks/2966cef424224c59b1abaf5b30a91116/STATEWIDE6282012.pdf> (providing voter registration statistics by district).

<sup>240</sup> See PEW RESEARCH CTR., *supra* note 238, at tbl.A4.

<sup>241</sup> See *id.* at 1.

<sup>242</sup> See *supra* Part II.B; see also Bulman-Pozen, *supra* note 168, at 15 (“The centrality of partisanship instead points to [state contestation of federal policy] grounded in overlap and integration. Party politics means that state opposition need not be based on something essentially ‘state’ rather than ‘national.’”).

<sup>243</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>244</sup> Cunningham-Parmeter, *supra* note 22, at 1693.

standards, the context of immigration federalism limits the ability of states to innovate in meaningful ways and to serve as “laboratories” of reform.<sup>245</sup>

Addressing the first requirement, Professor Cunningham-Parmeter writes that subfederal immigration regulations fail to internalize costs.<sup>246</sup> Even assuming that unauthorized immigrants exacerbate the economic and social problems in states like Arizona and Alabama, the ability of such ordinances to meet those challenges by incentivizing immigrant movement out of the jurisdiction means that these laws will almost certainly recreate and export those burdens to neighboring jurisdictions.<sup>247</sup> Moreover, individual states cannot deport or expel persons from the country; only the federal government can. Thus, enacting jurisdictions may be reducing the incentive to remain within their borders, but they are unlikely to achieve attrition of the unauthorized population from the United States.

In addition, our politicized model undermines the viability of the replicability precondition for successful experimentation.<sup>248</sup> Undoubtedly, the restrictive policies of high-enforcement states mimic each other,<sup>249</sup> but this mimicry is not the type celebrated in federalism theory. Because the state and local laws generally do not respond to critical on-the-ground challenges, other states and localities cannot glean much about the utility of such laws in addressing any policy challenges posed by unlawful migration.<sup>250</sup> When issue entrepreneurs

---

<sup>245</sup> *Id.* at 1676–77.

<sup>246</sup> *See id.* at 1714 (“[S]tate immigration regulations export costs in a number of ways.”); Hills, *supra* note 165, at 8 (listing immigration as an area “in which the risk of external costs are [sic] so high that preemption of state law ought to be presumed (and is, as a matter of judicial practice)”). *But see* Cunningham-Parmeter, *supra* note 22, at 1711–14 (discussing substantial costs states do incur from subfederal immigration reform).

<sup>247</sup> *See* Villas at Parkside Partners v. City of Farmers Branch, No. 10-10751, 2013 WL 3791664, at \*30 (5th Cir. July 22, 2013) (Higginson, J., concurring) (suggesting that an ordinance that discouraged immigrants from living in Farmers Branch burdens other nearby municipalities); Cunningham-Parmeter, *supra* note 22, at 1714–23; *see also* Josh Gerstein, *South Carolina Law Sparks Suit from Justice Department*, POLITICO (Oct. 31, 2011, 4:36 PM) <http://www.politico.com/news/stories/1011/67274.html> (“Pushing undocumented individuals out of one state and into another is simply not a solution to our immigration challenges.” (quoting Assistant U.S. Attorney General Tony West)).

<sup>248</sup> *See* Cunningham-Parmeter, *supra* note 22, at 1697–99 (discussing the necessity that other government bodies be able to duplicate the results of state experiments).

<sup>249</sup> *Id.* at 1724; *cf.* Barak Y. Orbach et al., *Arming States’ Rights*, 52 ARIZ. L. REV. 1161, 1180–83 (2010) (discussing the proliferation of cloned Firearms Freedom Acts in states across the country). To be clear, we have argued that the policies actually accrete punitive provisions from enactment to enactment. We argue that they are largely the same, with each subsequent jurisdiction and variation generally increasing enforcement possibilities.

<sup>250</sup> *See generally* Sunstein & Kuran, *supra* note 29 (arguing that public discourse is distorted by responses to local preferences even in the face of reports and data which make the endorsed local claims suspect).



shop premade immigration solutions to jurisdictions based on partisanship and ripe political factors, the resultant policies are bound to be similar.<sup>251</sup> While this is “replication” in a strict sense, it is manifestly not replication as part of a meaningful process of effective reform.

Third, politicized policy proliferation, with the political and structural entropies described in Part II, undermines competition between governmental bodies.<sup>252</sup> Productive competition is less likely when a key competitor—here, the federal government—is hamstrung by groups and individuals outwardly decrying federal failure while fomenting the very failure they lament.<sup>253</sup> The only comparisons for the prefabricated policies instantiated in receptive jurisdictions are identical or similar policies, framed by the same issue entrepreneurs, enacted in other receptive jurisdictions.

Finally, in our evidence-based description of immigration legislation, state and local lawmaking ceases to be a vital bulwark against federal tyranny. Instead, issue entrepreneurs use states and localities in the immigration legislative landscape as “battering rams” to effectuate a minority position.<sup>254</sup> In this strategy, according to Professors Barak Orbach, Kathleen Callahan, and Lisa Lindemann, “private lawmakers”—a version of our issue entrepreneurs—provide states and localities with legislation and attempt to enact laws in as many jurisdictions as possible, seeking eventually to influence public

---

<sup>251</sup> See Bulman-Pozen, *supra* note 168 (“Often working together directly or through allied interests groups. . . , state and federal politicians shuffle ideas and even bill text back and forth, seeking friendly partisan ground in which to plant their policies. The resulting policies are only ‘state’ or ‘national’ in the sense of their site of enactment, not their purposes or intended audiences.”); Orbach et al., *supra* note 249, at 1182–83 (noting that although Firearms Freedom Acts vary in particulars, all have “remained faithful to the constitutional theories expressed in the original”).

<sup>252</sup> Hills, *supra* note 165, at 4 (“Federalism’s value, if there is any, lies in the often competitive interaction between the levels of government.”). *But see* Bulman-Pozen, *supra* note 111, at 487 (“But when Congress grants administrative authority to both the states and the federal executive, an open-ended grant of authority may instead stimulate competition by empowering states to challenge the federal executive.”).

<sup>253</sup> Professor Heather Gerken argues that S.B. 1070 led to federal engagement on immigration issues. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6, 68 (2010) (arguing that Arizona’s S.B. 1070 finally galvanized national debate and forced national elites to engage the issue). It is worth noting that the engagement Gerken cites in support of her argument is *federal judicial engagement*. Specifically, she explains how S.B. 1070 led the United States Department of Justice to sue Arizona. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

<sup>254</sup> See Orbach et al., *supra* note 249, at 1163 (describing strategy of interest group focus on state and local lawmaking as a “battering ram” to break down the “walls” of federal policy, using the example of subfederal firearms bills).

opinion and federal policy.<sup>255</sup> The success of the strategy depends on marrying a substantive policy position—here, restrictive immigration policy—with states’ rights discourse.<sup>256</sup> In doing so, subfederal entities are able to tie their purported demographic challenges and restrictionist goals with the “classic trope[ ]” of challenging the national government’s violation of the nation’s deepest commitments.<sup>257</sup> In effect, national immigration priorities are co-opted by the tyranny of the minority rather than by that of the majority.

Importantly, we are not arguing that legislative expression of political preference is an illegitimate or unconstitutional use of state and local authority. Rather, we are clarifying that this use of state and local authority has been dominating subfederal immigration policy since 2001, and that it should not be understood as representing replicable policy experimentation that reveals critical information about the costs and benefits of varying legislative fixes. Rather, it should be understood as a prepackaged solution in search of politically responsive jurisdictions.

## 2. *Equality Concerns with the New Federalism*

One of the consequences of miscategorizing recent subfederal immigration enforcement efforts as alienage law (instead of immigration law) is that courts tend to assess these enactments through the structural power frameworks discussed above. But, as we have argued, the dubiousness of the empirical foundation of these state and local laws undermines the assumptions made in traditional federalism analysis. Combined with emerging data regarding the ethnic antipathy fueling the popularity of these laws within enacting jurisdictions, our evidence-based inquiry calls for a wholly different framework—one based in individual rights and equality guarantees—for understanding the new immigration federalism.<sup>258</sup>

---

<sup>255</sup> *Id.* at 1163–64; *see also* Bulman-Pozen, *supra* note 111, at 483–89 (arguing that states, like Arizona with its immigration policy, are “goading” the federal government toward a particular policy goal, and “when state and federal policies clash, states cast themselves as faithful agents of Congress, seeking to carry out a statute as Congress intended, in contrast to a wayward federal executive branch”).

<sup>256</sup> *See* Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589, 620 (2007) (presenting evidence that political elites’ use of the tropes of trust in state government and federalism beliefs negatively influences support for federal policies).

<sup>257</sup> *See* Bulman-Pozen & Gerken, *supra* note 230, at 1279–80 (using Patriot Act objections as an example of subfederal entities “challenging a national policy for violating the country’s deeper commitments”).

<sup>258</sup> *Cf.* Villas at Parkside Partners v. City of Farmers Branch, No. 10-10751, 2013 WL 3791664, at \*30 (5th Cir. July 22, 2013) (Higginson, J., concurring) (“I would point out that several other constitutional claims, under due process, equal protection, and the Privileges

Even within alienage law, preemption and federalism concerns are not the only frameworks for evaluating state and local enactments. As Dean Harold Koh has observed, there is something intuitively disquieting about consistently applying a structural power context to understand lawmaking that is, at its core, about the disparate treatment of individuals based on accidents of birth and veiled racial categories.<sup>259</sup> In this Subpart, we argue that to the extent federal courts insist on treating laws like S.B. 1070 as alienage laws, they must pay heed to the equality concerns inherent in the creation—and not just the execution—of such laws.

Historically, federal immigration law used explicit racial and national origin disqualifiers for both admission and naturalization.<sup>260</sup> Even now, immigrant visas are determined on a per-country basis.<sup>261</sup> This disproportionately delays applicants from Mexico, China, India, and the Philippines, which are countries accounting for a significant percentage of unlawfully present persons.<sup>262</sup> These federal immigration laws have never been subject to searching judicial inquiry.<sup>263</sup>

In reviewing subfederal alienage law, however, the Court, in the wake of the Civil Rights movement, appeared to show some solicitude for applying equal protection analysis.<sup>264</sup> The most prominent equal

---

and Immunities and Commerce Clauses, were raised by the plaintiffs below but not reached by the district court.”).

<sup>259</sup> Harold H. Koh, *Equality with a Human Face*, 8 *HAMLIN L. REV.* 51, 55–56 (1985).

<sup>260</sup> See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (excluding admission of Chinese laborers to the United States) (repealed 1943); Immigration Act of 1924, ch. 190, 43 Stat. 153 (establishing a quota system that limited immigration from Southern and Eastern Europe) (repealed 1952); Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889, 890 (restricting immigration from Asia, and also known as the “Asiatic Barred Zone Act”) (repealed 1952); Naturalization Act of 1870, ch. 254, 16 Stat. 254 (repealed 1943).

<sup>261</sup> See 8 U.S.C. §§ 1152–1153 (providing yearly limitation of visas determined on a per-country basis, and providing formula for calculating visa allocation by country).

<sup>262</sup> See generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 *LAW & CONTEMP. PROBS.* 1 (2009) (describing how U.S. immigration law excludes poor noncitizens of color); see also BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, VISA BULLETIN VOL. IX, NO. 58, IMMIGRANT NUMBERS FOR JULY 2013 (2013), available at [http://www.travel.state.gov/visa/bulletin/bulletin\\_5993.html](http://www.travel.state.gov/visa/bulletin/bulletin_5993.html) (illustrating the oversubscription of visa applicants from China, India, Mexico, and the Philippines).

<sup>263</sup> See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding federal law conditioning federal public assistance on citizenship status, despite the Court having earlier struck down state laws that did the same in *Graham v. Richardson*, 403 U.S. 365 (1971)); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding federal deportation law requiring Chinese residents to produce a credible White witness to attest to their lawful presence).

<sup>264</sup> See *Cabell v. Chavez-Salido*, 454 U.S. 432, 436–44 (1982) (recounting in detail the Court’s decisions that applied equal protection to alienage and applying equal protection to the California statute at issue); *Graham*, 403 U.S. 365, 372 (striking down state law relying, in part, on equal protection grounds); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (striking down city laundry ordinance on equal protection grounds).

protection case featuring unauthorized persons—more specifically, unauthorized children—is *Plyler v. Doe*.<sup>265</sup> *Plyler*'s methodology, however, has always remained elusive:<sup>266</sup> While the Court struck down a Texas law discriminating against unauthorized children, it declined to label unauthorized children a suspect class, or education a fundamental right.<sup>267</sup> Since *Plyler*, however, the Court has shied away from its equal protection jurisprudence, appearing to conclude that earlier alienage decisions are better read as preemption cases.<sup>268</sup>

Courts deciding recent subfederal immigration regulation cases have continued this trend, employing structural power frameworks to the virtual exclusion of equal protection and other individual rights frameworks.<sup>269</sup> Indeed, at the beginning of oral argument in *Arizona*, before the U.S. Solicitor General began his presentation, Chief Justice Roberts conspicuously interjected: "Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief."<sup>270</sup> The Chief Justice's preemptive strike prevented the Solicitor General from establishing the position long held by many immigration scholars that immigration federalism and racial and ethnic discrimination are tightly linked.<sup>271</sup> As an example of the connection, the U.S. Department of Justice recently filed suit against one of S.B. 1070's most vociferous proponents, Maricopa County Sheriff Joe Arpaio, accusing him of unconstitutionally discriminating on the basis of race, color, and national origin.<sup>272</sup>

---

<sup>265</sup> 457 U.S. 202 (1982).

<sup>266</sup> Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1731–34 (2010) (noting the limited impact of *Plyler v. Doe*, 457 U.S. 202 (1982), on later decisions).

<sup>267</sup> *Plyler*, 457 U.S. at 223.

<sup>268</sup> *Toll v. Moreno*, 458 U.S. 1, 11 n.16 (1982) (citing David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979)) (arguing that the Court's alienage decisions are better understood as preemption cases).

<sup>269</sup> Koh, *supra* note 259; *see also* Garrett Epps, *The Blessed Tedium of the Arizona Immigration Case*, ATLANTIC (July 29, 2010, 9:58 AM), <http://www.theatlantic.com/national/archive/2010/07/the-blessed-tedium-of-the-arizona-immigration-case/60585/> (criticizing the district court's lack of attention to equality and dignity concerns, and strict focus on preemption and federalism analysis).

<sup>270</sup> Transcript of Oral Argument at 33–34, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1425227, at \*33.

<sup>271</sup> *See, e.g.*, Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 947–49 (2012) (detailing similarities between laws regulating slaves and laws regulating migrants); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (discussing state discrimination against immigrants in welfare benefits).

<sup>272</sup> Complaint, *United States v. Maricopa County*, No. 2:12-cv-00981-ROS (D. Ariz. May 10, 2012), available at <http://docs.justia.com/cases/federal/district-courts/arizona/>

Despite judicial avoidance of equal protection in its evaluation of state enforcement schemes, the salience of ethnic nationalism in the genesis of the new immigration federalism begs a greater role for equality-based jurisprudential norms.<sup>273</sup> First, political actors have been, and are, aware of the underlying connection between immigration law, state and local law, and race. While enacting S.B. 1070, Arizona's legislature and Governor amended original language in the bill in an attempt to address concerns raised by advocacy groups about the potentially racially disparate effects of state and local immigration enforcement.<sup>274</sup> Thus, while denying that immigration regulation and enforcement are inextricably tied to characteristics like race, national origin, and color, subfederal jurisdictions have nevertheless conspicuously attempted to quash concerns that the laws arose out of illegitimate prejudices or inevitably will be enforced in illegitimate ways.

Second, elected officials and restrictionist issue entrepreneurs have successfully packaged the new immigration federalism within the post–September 11 historical narrative, imbuing immigration discourse with the language necessary to covertly indulge the racial and cultural prejudices of particular voters. With post–September 11 national security considerations adding a level of legitimacy and plausible deniability to the role of racial antipathy in nativist sentiment,<sup>275</sup> issue entrepreneurs conjured this dimension frequently in their advocacy of state and local laws.<sup>276</sup> For example, undocumented

---

azdce/2:2012cv00981/700133/1/0.pdf?1336693795; Jerry Seper, *Justice Dept. Accuses Ariz. Sheriff Arpaio of Racial Profiling*, WASH. TIMES (May 10, 2012), <http://www.washington-times.com/news/2012/may/10/justice-department-plans-sue-ariz-sheriff-arpaio/>; see also *Melendres v. Arpaio*, No. PHX-CV-07-02513-GMS, 2013 WL 2297173 (D. Ariz. May 24, 2013) (finding that class action plaintiffs were entitled to injunctive relief from Maricopa County Sheriff's Office for Fourth and Fourteenth Amendment violations and permanently enjoining the County from other enforcement actions).

<sup>273</sup> See, e.g., Michael A. Olivas, *Lawmakers Gone Wild?*, 61 S.M.U. L. REV. 99, 131 (2008) (describing English-only laws and local ordinances requiring immigration status check for residential rentals as “sure signs of an ethnic and national origin ‘tax’ that will be levied only on certain groups”); Michael A. Olivas, *The Political Efficacy of Plyler v. Doe*, 45 U.C. DAVIS L. REV. 1, 15 (2011) (“Blowback in affected communities and increased prejudice are sure to follow from sub-federal assumption of immigration powers.”).

<sup>274</sup> 2010 Ariz. Sess. Laws 450 (changing S.B. 1070 text from “lawful contact” to “lawful stop, attention, or arrest” and removing “solely” from “may not solely consider race, color, or national origin”), available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

<sup>275</sup> See, e.g., Muneer I. Ahmad, *A Rage Shared by Law*, 92 CAL. L. REV. 1261 (2004) (tracing a genealogy of racial violence post–September 11); Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575, 1575 (2002) (discussing the racialized conception of those identified as “Middle Eastern, Arab, or Muslim” after September 11, regardless of citizenship status).

<sup>276</sup> See, e.g., *United States v. South Carolina*, 840 F. Supp. 2d 898, 905 (D.S.C. 2011) (“The South Carolina General Assembly took up the matter of state immigration

immigrants frequently were lumped together with terrorists in discussions ranging from the U.S.–Mexico border crossing<sup>277</sup> to the attempt by states to grant driver’s licenses to unauthorized immigrants.<sup>278</sup> Indeed, as Professor Jennifer Chacón notes, the term “border security” emerged only after September 11. Prior discussions of “border control” took on military metaphors and subsumed concerns about homeland security and terrorism.<sup>279</sup> Further, as Professor Leti Volpp explains, terrorism and terrorists have been discretely racialized in contemporary social and legal discourse.<sup>280</sup> Thus, the conflation of terrorism and unlawful immigration creates a distinct racial context for subnational immigration laws.

Third, emerging social science research undermines the notion that subfederal immigration laws are free from the taint of racial and ethnic prejudice in their creation. The key findings in this data are: (1) The use or perceived use of a foreign language pushes voters, especially Republican voters, to adopt more restrictive stances on immigration proposals;<sup>281</sup> (2) media references to Latino immigrants produce greater anxiety and provoke greater support for restrictive action than similar references to European immigrants;<sup>282</sup> (3) voters are more likely to hold negative views of illegal Mexican immigrants

---

legislation . . . because of a perceived failure of the United States to ‘secure our southern border,’ which ‘really jeopardize[s] our national security.’” (citations omitted)), *modified*, 906 F. Supp. 2d 463 (D.S.C. 2012), *aff’d*, 720 F.3d 518 (4th Cir. 2013).

<sup>277</sup> See J.D. HAYWORTH & JOSEPH J. EULE, *WHATEVER IT TAKES: ILLEGAL IMMIGRATION, BORDER SECURITY, AND THE WAR ON TERROR* 5–8 (2006) (discussing the possibility of terrorists sneaking in through the U.S.–Mexico border).

<sup>278</sup> CNN’s *Lou Dobbs Tonight* frequently made the linkages between granting state driver’s licenses to illegal immigrants and terrorist threats to homeland security. See, e.g., *Lou Dobbs Tonight* (CNN television broadcast Oct. 17, 2007), *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/071017/ldt.01.html> (“The governor . . . will make it easier for law breakers of all sorts—including terrorists—to take advantage of New York State’s driver’s licenses . . .”).

<sup>279</sup> Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 *CONN. L. REV.* 1827, 1853 (2007) (“[R]emovals of non-citizens . . . can be, and frequently are, depicted as national security policy. With regard to border enforcement efforts, the phrase ‘border security’ has become a ubiquitous descriptive term . . .”).

<sup>280</sup> See, e.g., Volpp, *supra* note 275, at 1576 (“The stereotype of the ‘Arab terrorist’ is not an unfamiliar one. But the ferocity with which multiple communities have been interpellated as responsible for the events of September [11] suggests there are particular dimensions that have converged in this racialization.”).

<sup>281</sup> Dan Hopkins, *How Accents Influence the Immigration Debate*, *WASH. POST* (Feb. 10, 2013, 12:16 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/10/how-accents-influence-the-immigration-debate/> (providing a summary by a political science professor of published work from various scholars on how aversion to foreign languages drives opposition to immigration, particularly among Republicans).

<sup>282</sup> Ted Brader et al., *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 *AM. J. POL. SCI.* 959 (2008).

than illegal immigrants from Asia or Europe;<sup>283</sup> and (4) voters are more likely to monitor the legal status of Latino immigrants than European immigrants for the purposes of granting public benefits.<sup>284</sup>

Thus, we argue that ethnic antipathy is an essential ingredient of these laws *at their inception*. These conclusions bolster the argument for a strong judicial role in monitoring and deterring the use of unlawful and illegitimate characteristics in the genesis of subfederal immigration law.<sup>285</sup> These findings do not rely on disparate or coincidental effects;<sup>286</sup> they show that racial concerns animate laws premised on ostensibly neutral immigration status.<sup>287</sup> While these findings may not yet reflect the level of intentionality required to initiate a claim of racial discrimination,<sup>288</sup> they support the idea that structural power frameworks fail to capture the nuanced racial dynamics actually at play in the creation of subfederal immigration law. As Professor Hiroshi Motomura argues, some courts may already be aware of this latent racial dynamic, implicitly folding equality considerations into their preemption analysis when striking down state and local laws.<sup>289</sup> Indeed, recently, a federal district court assessed, under equal protection standards, the constitutionality of Arizona's denial of driver's licenses to undocumented persons granted deferred action (under the Administration's Deferred Action for Child Arrivals program), concluding that the challengers had shown a likelihood of success on the merits to support their motion for preliminary

---

<sup>283</sup> Karthick Ramakrishnan et al., *Illegality, National Origin Cues, and Public Opinion on Immigration* (2010) (working paper), available at [http://polisci.osu.edu/sites/polisci.osu.edu/files/\\_illegality,%20national%20origin%20cues,%20and%20public%20opinion%20on%20immigration\\_.pdf](http://polisci.osu.edu/sites/polisci.osu.edu/files/_illegality,%20national%20origin%20cues,%20and%20public%20opinion%20on%20immigration_.pdf) (noting that Americans view Mexican immigrants less favorably than immigrants from other parts of the world).

<sup>284</sup> See *id.* at 1 (“[R]acial affect, particularly with respect to negative attitudes towards Latinos, also play a significant role in shaping public anxiety over immigration and immigration policy.”).

<sup>285</sup> See *supra* note 259 and accompanying text.

<sup>286</sup> See *Washington v. Davis*, 426 U.S. 229 (1976) (explaining that evidence of disparate impact alone is insufficient to satisfy the constitutional standard required for a finding of a racial classification).

<sup>287</sup> See *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating Alabama's felony disenfranchisement law based on evidence that the provision was created to disproportionately affect poor Black citizens).

<sup>288</sup> See *Davis*, 426 U.S. at 240–41 (describing cases holding that racial discrimination claims require showing a discriminatory purpose).

<sup>289</sup> Motomura, *supra* note 266, at 1743 (noting that “[a]n equal protection challenge would require proof of discriminatory intent, but a preemption challenge can persuade some judges based on reasonable possibility of discriminatory intent.” and commenting that the court in *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 525–29 (M.D. Pa. 2007) might not have found the ordinance preempted had the plaintiffs not brought forth evidence of racial and ethnic bias).

injunction.<sup>290</sup> Our evidence and explanation of ethnic nationalism lends further weight to this intuition.

We note also that these findings are consistent with what we might expect to arise out of the discourse of states' rights rhetoric applied to regulation of wide swathes of the population. Indeed, racial segregation throughout the late nineteenth and early twentieth century was also defended on federalism grounds. The ultimate repair for racial discrimination in that context was Supreme Court recognition that the claim merited equal protection analysis, followed by substantial federal law concerned with the equality problems caused by segregation and its effects.<sup>291</sup> Undoubtedly, immigration regulation is different from racial segregation, but fundamentally both remind us to be wary of allowing structural power battles to obscure the racial antipathy animating parts of subfederal public policy. As such we propose that courts begin to reconsider their avoidance of equality concerns in the several current and upcoming cases presenting constitutional challenges to state and local immigration laws.<sup>292</sup> At a minimum, more empirical research in this area is warranted.

### 3. *The Future of Immigration Federalism*

Despite some indication that many courts view the new immigration federalism as core immigration regulation and emerging evidence suggesting the propriety of equality-based analysis, it remains unlikely that federal courts will veer from employing an alienage law framework and preemption methodology in the near future. In their current mode of judicial analysis, federal courts have considered the constitutionality of several subfederal enactments under a preemption framework, and the Supreme Court has twice, in as many years, done the

---

<sup>290</sup> See *Ariz. Dream Act Coal. v. Brewer*, No. CV12-02546 PHX DGC, 2013 WL 2128315, at \*24 (D. Ariz. May 16, 2013). Note, however, that the trial court nevertheless denied the motion for preliminary injunction because it found that, although plaintiffs had shown a likelihood of success on the merits of the claim, they failed to show irreparable injury and therefore did not meet the standard for preliminary injunction.

<sup>291</sup> See Civil Rights Act of 1964, 46 U.S.C. § 2000d (2006) (prohibiting discrimination in any program receiving federal assistance).

<sup>292</sup> It is worth noting that not every case would be amenable to judicial consideration of individual liberty claims. For instance, the federal government would likely not have standing to advance equal protection claims in many cases. However, some cases are brought by private individuals who would have standing to advance such claims, and in many cases involving the federal government, courts have consolidated companion cases involving private plaintiffs. See, e.g., *United States v. South Carolina*, 840 F. Supp. 2d 898, 904 (D.S.C. 2011) (considering claims by a private party and the federal government against state immigration law), *aff'd*, 720 F.3d 518 (4th Cir. 2013).



same.<sup>293</sup> These recent decisions have reduced much of the legal uncertainty surrounding such laws, mostly striking down many of the challenged provisions.<sup>294</sup>

We conclude this Article by querying how such preemption rulings are likely to affect the future of immigration federalism and what accounts for the ongoing proposals for state and local immigration laws. Ultimately, it appears that the recent trend in subfederal immigration policy proliferation has had, and will have, subtle but important effects on our constitutional and political order, regardless of legal setbacks in recent judicial decisions. As for our research, the next few years will reveal whether this was an exceptional era in immigration federalism, with our analysis serving as a legal and political autopsy of the period, or whether future developments will breathe new life into the politicized model of proliferation we describe.

First, as we noted, while most recent decisions have enjoined subfederal regulatory efforts, a minority of courts have upheld enactments as legitimate exercises of subfederal authority in a federalist scheme.<sup>295</sup> Notably, many decisions that have struck down subfederal immigration laws have been partial victories. For example, the Court's decision in *Arizona* left section 2 of S.B. 1070 intact for the time being. In other instances—including in *Arizona* and in *United States v. Alabama*—only portions of the restrictionist laws were even placed before the respective courts. In these instances, the remaining provisions survived trial court evaluation and remained in force. Many of the cases, but especially those upholding state and local immigration measures, reified the empirically suspect notion that these variegated subfederal policy experimentations address purported threats to local economies, public safety, and social services.<sup>296</sup> More generally, these

---

<sup>293</sup> See *United States v. Arizona*, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

<sup>294</sup> See *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158, at \*8–9 (S.D. Ind. Mar. 28, 2013) (halting enforcement of S.B. 1070 “copycat” legislation); *State v. Sarrabea*, No. 12-1013, 2013 WL 1810228, at \*17 (La. App. 3 Cir. 5/1/2013) (preempting statute making it illegal to drive without documentation demonstrating lawful presence); *supra* notes 101 & 293 and accompanying text (discussing courts’ preemption analyses).

<sup>295</sup> See, e.g., *Keller v. City of Fremont*, 719 F.3d 931, 942 (8th Cir. 2013) (finding that a rental ordinance’s provisions were not preempted by federal law); *Gray v. City of Valley Park*, 567 F.3d 976, 977 (8th Cir. 2009) (affirming the district court’s ruling that the city’s employment ordinance was not preempted by federal law).

<sup>296</sup> See *supra* Part II.B; see, e.g., *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*25 (E.D. Mo. Jan. 31, 2008) (discussing the claim that the city need only show that there is a rational basis between the ordinance and its purpose and that the city specifically states in the ordinance that “illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and . . . contributes to other burdens on public services, increasing their costs and diminishing their availability, diminishes our overall

cases reify the propriety of an express or conflict preemption framework within which subfederal immigration enforcement schemes can sometimes be shielded; as the Eighth Circuit recently iterated (in reasoning and result discordant with a few sister circuits) while upholding a local rental ordinance:

These related arguments [that illegal alien rental ordinances are constitutionally preempted or field preempted] are premised on the notion that the rental provisions impermissibly ‘remove’ a class of aliens from the City. But the premise is false . . . .

Laws designed to deter, or even prohibit, unlawfully present aliens from residing within *a particular locality* are not tantamount to immigration laws establishing who may enter or remain in the country.<sup>297</sup>

Second, neither *Arizona* nor *Whiting* completely resolve all the questions occasioned by the new immigration federalism because subsequent versions of the regulations in question (as created by enacting jurisdictions) added increasingly punitive features.<sup>298</sup> Currently, civil rights groups are challenging section 2 of S.B. 1070, arguing that this provision, which was left intact by the Supreme Court, will lead to racial profiling and harassment.<sup>299</sup> In *Whiting*, the Court expressly noted that it was only considering the 2007 version of the state E-Verify bill, and that the 2008 amendments to the bill were not before it.<sup>300</sup> Those amendments, which expanded the reach of the Legal Arizona Workers Act (LAWA), could dramatically change judicial analysis of the law if and when such a challenge reaches the Supreme

---

quality of life, and endangers the security and safety of the homeland”), *aff’d*, 567 F.3d 976 (8th Cir. 2009).

<sup>297</sup> *Keller*, 719 F.3d at 941 (8th Cir. 2013) (holding that the city’s rental ordinance was not preempted by federal law and thus declining to enjoin the law).

<sup>298</sup> Alabama’s law, for example, contained provisions about the non-enforceability of contracts entered into by undocumented immigrants, in addition to provisions requiring undocumented public school students to identify themselves to school officials. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011) (codified in part at ALA. CODE § 31-13 (LexisNexis 2011)). Georgia’s law contained provisions regarding driver’s license violations. GA. CODE ANN. § 40-5-20 (2013). None of these provisions existed in the Arizona law.

<sup>299</sup> The Court left intact section 2 of S.B. 1070, but left open the possibility that litigants bring a later as-applied challenge to the law if in fact it proved legally problematic in its execution. *See Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012); *Appeals Court Asked to Block Show-Me-Your-Papers Provision of Arizona Anti-Immigrant Law*, ACLU (Sept. 14, 2012), <http://www.aclu.org/defending-targets-discrimination/appeals-court-asked-block-show-me-your-papers-provision-arizona>.

<sup>300</sup> *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1986–87 & n.10 (2011) (declining to enjoin the 2007 version of the LAWA, which mandated the use of E-Verify for businesses within the state).

Court again.<sup>301</sup> The Supreme Court has also not addressed several other provisions forming the centerpieces of recent litigation that have thus far reached only the appeals court level, including contracting provisions,<sup>302</sup> rental laws,<sup>303</sup> and education-related regulations.<sup>304</sup> The several circuit courts of appeal, in light of *Arizona*, have mostly enjoined these attempts, but several important legal questions remain. The new immigration federalism has thus incrementally explored constitutional limits with each successive turn.<sup>305</sup>

Finally, the sole presence of federal judicial responses, coupled with the absence of federal legislative response, matters. First, it augments the narrative of inaction required by *Chy Lung*, preserving the political narrative necessary to justify future state and local attempts at immigration enforcement.<sup>306</sup> Second, federal judicial response, unaccompanied by federal legislation, appears to exert a relatively diminished deterrent effect on subfederal immigration lawmaking. Even if subfederal contestation of federal prerogatives can occur in the shadow of such governing federal law, subfederal entities can instantiate policy visions and influence national discourse more effectively when they position themselves as filling a gap in federal law rather than blatantly defying it.<sup>307</sup> As Professor Cunningham-Parmeter notes, “[e]ven though courts have struck down a large number of [restrictionist state] provisions, state legislation in this area continues unabated.”<sup>308</sup>

---

<sup>301</sup> *Cf. Lozano v. City of Hazleton*, No. 07-3531, 2013 WL 3855549, at \*8–9 (3d Cir. July 26, 2013) (enjoining, despite *Whiting*, Hazleton’s employment verification ordinance on the basis of its broad scope, which included contractors).

<sup>302</sup> *See United States v. Alabama*, 691 F.3d 1269, 1296–97 (11th Cir. 2012) (enjoining provision of H.B. 56 invalidating contracts entered into by unlawfully present immigrants), *cert. denied*, 133 S. Ct. 2022 (2013).

<sup>303</sup> *Compare Keller v. City of Fremont*, 719 F.3d 931, 942 (8th Cir. 2013) (upholding city’s rental ordinance), *with Lozano*, 2013 WL 3855549 at \*8–9 (enjoining city’s rental ordinance).

<sup>304</sup> *See Hispanic Interest Coal. of Ala. v. Alabama*, 691 F.3d 1236, 1244–50 (11th Cir. 2012) (enjoining provisions of H.B. 56 that required school officials to check the immigration status of students). The Supreme Court has, of course, addressed state attempts to deny public education to undocumented students in the past. *See Plyler v. Doe*, 457 U.S. 202, 223 (1982).

<sup>305</sup> *See Gerken*, *supra* note 253, at 10 (admitting that the author’s claims “push up against a conception of national power that is as deeply rooted in sovereignty as is federalism’s conventional conception of state power”).

<sup>306</sup> *See supra* Part II.B.

<sup>307</sup> *See Bulman-Pozen & Gerken*, *supra* note 230, at 1271–81 (discussing three types of uncooperative federalism: licensed dissent, regulatory gaps, and civil disobedience). Although the authors note that states can effectively contest and dissent from federal policy in all three circumstances, civil disobedience most clearly positions states in a defiant role, forcing change through principled resistance.

<sup>308</sup> Cunningham-Parmeter, *supra* note 22, at 1690.

Of course, whether the new immigration federalism will have continued momentum after *Arizona* and this recent round of federal judicial responses remains to be seen.<sup>309</sup> Although many of the laws constituting the new immigration federalism have been significantly limited or wholly struck down by federal courts, elected officials in enacting jurisdictions are in no worse position than they were prior to enactment.<sup>310</sup> Certainly, state and local officials will have expended political capital, and not all the jurisdictions' costs in defending their policies will be offset by well-funded private interest groups. Nevertheless, data shows that elected officials who supported immigration laws that were ultimately struck down or severely curtailed reaped (and still reap) political benefits within their constituencies for having vocally backed these restrictionist measures.<sup>311</sup>

Indeed, after the *Arizona* decision, Governor Jan Brewer, who signed S.B. 1070 into law, declared victory and vowed to continue

---

<sup>309</sup> See Gulasekaram, *supra* note 128, at 37 (discussing the renewed spate of local and state laws impacting the lives of immigrants); Mary Slosson, *States Hope to Implement Immigration Laws After Arizona Ruling*, REUTERS (June 27, 2012).

<sup>310</sup> See Dianne Solis, *Farmers Branch Has Many Waiting for Its Decision on Its Renters Ordinance Aimed at Illegal Immigration*, DALLAS MORNING NEWS, Aug. 8, 2013, <http://www.dallasnews.com/news/20130808-farmers-branch-has-many-waiting-for-its-decision-on-its-renters-ordinance-aimed-at-illegal-immigration.ece> (describing financial support for a contested renters' ordinance aimed at illegal immigrants); *Numbers USA Donates \$100,000 to Help Defend Anti-Immigration Ordinance in Farmers Branch, Texas*, OFFICIAL BLOGS FROM THE ANTI-DEFAMATION LEAGUE (Sept. 28, 2012), <http://blog.adl.org/civil-rights/numbers-usa-donates-100000-to-help-defend-anti-immigrant-ordinance-in-farmers-branch-texas> (describing a \$100,000 donation supporting the defense of the Farmers Branch ordinance); Sam Galski, *Empire Heir Donates \$50,000 to Support Hazleton's Immigration Battle*, REPUBLICAN HERALD, May 10, 2013, <http://republicanherald.com/news/empire-heir-donates-50-000-to-support-hazleton-s-immigration-battle-1.1486915> (reporting Dallas real estate heir Trammell S. Crow's large donation to a fund for the legal defense of Hazleton's ordinance). Undoubtedly, these enactments are not costless. Both the legislative process and subsequent legal defenses entail significant costs for these governmental entities. However, oftentimes, these costs are borne or mitigated by restrictionist advocacy organizations and wealthy individuals who help fund and provide the legal defense for these enactments. See *About FAIR*, FED'N AM. IMMIGR. REFORM, <http://www.fairus.org/about> (last visited Aug. 31, 2013); *Immigration Reform Law Institute: Litigation*, IMMIGR. REFORM L. INST., <http://www.irli.org/litigation> (last visited Aug. 31, 2013). Kris Kobach was a significant contributor to Arizona's S.B. 1070, and the main author of Alabama's H.B. 56. He is currently of counsel with the Immigration Reform Law Institute, the legal wing of FAIR, and recently represented the city of Fremont in the *Keller* case. See *City of Fremont Ordinance Upheld, IRLI Wins in the Eighth Circuit*, IMMIGR. L. REFORM INST., <http://irli.org/node/80> (last visited Sept. 4, 2013); Margery A. Beck, *Federal Panel: Neb. City's Immigration Law Legal*, A.P. ONLINE (June 28, 2013, 6:24 PM), <http://bigstory.ap.org/article/federal-panel-neb-citys-immigration-law-legal-0>.

<sup>311</sup> See Ramakrishnan & Gulasekaram, *supra* note 23, at 1441 (noting that Republican incumbents face pressure from newcomers with a hard-line stance on immigration).

pursuing the state's goal of attrition through enforcement.<sup>312</sup> Similarly, the Alabama Attorney General, occupied with the legal challenges to his state's immigration law, was enthused by the Court's *Arizona* decision, stating: "Today the Supreme Court acknowledged that state law enforcement can play an important role in assisting the federal government in fulfilling its responsibility to enforce [federal immigration law]." <sup>313</sup> The very near future should reveal whether these assertions were merely face-saving bluster or precursors to future subfederal policymaking. While comprehensive federal immigration reform could potentially help clarify the muddled future of immigration federalism, our research suggests that our federalist structure and the politics of immigration will likely forestall a national legislative response for the immediate future.<sup>314</sup>

### CONCLUSION

Since the turn of the century, and especially in the last seven years, states and localities have markedly increased their immigration lawmaking. Contrary to popular conception, however, these laws are rarely responses to pressing public policy problems. This paper provides an evidence-based reappraisal of this rising phenomenon, offering a necessary corrective to the flawed political, legal, and theoretical discourse that has dominated the field. We explicate the implications of our findings for existing legal theories of federalism, including the lack of evidentiary support for functionalist accounts of subfederal legislation on immigration, and the varying applicability of legislative cascades and federated party dynamics to restrictive legislation.

---

<sup>312</sup> Valerie Richardson, *Arizona's AG: Court's Ruling Is "A 70% Win,"* WASH. TIMES (June 25, 2012), <http://www.washingtontimes.com/news/2012/jun/25/arizonas-ag-courts-ruling-is-a-70-win/?page=all> (quoting Governor Brewer calling the Supreme Court decision a "victory"); Yvonne Wingett Sanchez, *Gov. Jan Brewer Claims Victory*, AZCENTRAL (June 25, 2012, 1:47 PM), <http://www.azcentral.com/news/politics/articles/20120625arizona-immigration-law-gov-jan-brewer-claims-victory.html> (quoting Governor Brewer stating that the Supreme Court had upheld the "heart of the law").

<sup>313</sup> Jorge Rivas, *Ala. Attorney General Luther Strange Reacts to SCOTUS SB 1070 Ruling*, COLORLINES (June 25, 2012, 12:58 PM), [http://colorlines.com/archives/2012/06/ala\\_attorney\\_general\\_luther\\_strange\\_responds\\_to\\_scotus\\_sb\\_1070\\_ruling.html](http://colorlines.com/archives/2012/06/ala_attorney_general_luther_strange_responds_to_scotus_sb_1070_ruling.html).

<sup>314</sup> See *supra* Part III.A (arguing that federal lawmakers, especially House members, are beholden to, and influenced by, subfederal lawmakers and restrictionist policies from their respective jurisdictions); see also Ramakrishnan & Gulasekaram, *supra* note 23, at 1476–83 (detailing federal legislative inaction during Obama's first term).

APPENDIX A

We started with a baseline of municipalities (defined as “places” in most states, but also including “county subdivisions” in others). Next, we obtained lists of municipalities that have proposed restrictive ordinances and regulations from various sources, including the American Civil Liberties Union, LatinoJustice PRLDEF, the Fair Immigration Reform Movement, the National Immigration Law Center, and the Migration Policy Institute. We then validated these lists by making phone calls to jurisdictions noted as considering or passing ordinances, as well as by monitoring news stories on local ordinances through December 2011. Still, the data on municipal ordinances become less reliable after 2007, due to a sharp decline in newspaper reports of new municipal ordinances and no further tracking of municipal legislation by national advocacy groups. We merged information on the proposal and passage of ordinances with demographic data from the 2000 Census and the 2005–2009 American Community Survey. Our municipal analysis is presented in Table A below.

*Multivariate Regression Analyses*

*Table A*  
*Logistic Regression Estimations of Municipal Ordinances*

Factor	Model I	Model I (P) Value	Model II	Model II (P) Value
Republican majority in county	1.381***	[0.335]	1.329***	[0.326]
Naturalized share of citizens	0.004	[0.030]	0.009	[0.022]
Growth of foreign born (2000–2007)	0	[0.001]	0	[0.000]
Spanish-dominant households	0.059***	[0.015]	0.061***	[0.008]
Agriculture jobs (share)	-0.196*	[0.103]	-0.165**	[0.074]
Share of immigrants who are recent arrivals	0.007	[0.007]	0.007	[0.006]
White poverty rate	-0.024	[0.024]	-0.023	[0.019]
Black poverty rate	-0.004	[0.008]	-0.003	[0.008]
Population (ln)	0.705***	[0.074]	0.673***	[0.060]
Restrictive state policy climate	0.155	[0.110]	0.159	[0.112]
Constant	-12.679***	[0.822]	-15.070***	[0.699]
<i>Observations</i>	16,384		16,384	
<i>Pseudo-R-squared</i>	0.17			

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%, based on two-sided t tests

Significance (p) values in brackets

Note: The number of observations is reduced because of missing data on nativity in cities below 6000 residents. Poverty rates from 2000 census are used because of missing data on black poverty rates in an additional 7176 cities.

Model I is a standard logistic regression, which is appropriate for regressions where outcomes take on binary values of 1 and 0. Logistic regressions also have the benefit of allowing coefficients to be converted easily to odds ratios.<sup>315</sup> Model II is a rare-events logistic regression, using the *ReLogit* statistical software package from <http://gking.harvard.edu/relogit>.<sup>316</sup> The model weights the sample such that the weighted ratio of 0s and 1s in the sample matches that of the population, a process designed to correct for selection on the dependent variable.<sup>317</sup>

---

<sup>315</sup> See Magdalena Szumilas, *Explaining Odds Ratios*, 19 J. CAN. ACAD. CHILD ADOLESCENT PSYCHIATRY 227, 227–29 (2010) (“When a logistic regression is calculated, the regression coefficient (b1) is the estimated increase in the log odds of the outcome per unit increase in the value of the exposure. In other words, the exponential function of the regression coefficient ( $e^{b1}$ ) is the odds ratio associated with a one-unit increase in the exposure.”).

<sup>316</sup> Michael Tomz et al., *ReLogit: Rare Events Logistic Regression*, GARY KING, <http://gking.harvard.edu/relogit> (last visited Aug. 31, 2013).

<sup>317</sup> See *ReLogit: Rare Events Logistic Regression Package Description*, <http://www.stanford.edu/~tomz/software/software.shtml> (last visited Oct. 1, 2013).

APPENDIX B

For Table B, we came up with a measure of state-level legislative activity on immigrant integration based on reports from the National Conference of State Legislatures from 2005, 2006, and 2007, and included any measures that bear a significant relationship to illegal immigration. Two graduate research assistants were instructed to code the bills on an ordinal scale of 1: “low impact” and 2: “high impact” on immigrant rights and/or access to benefits. These categories were drawn based on the provision’s likely effects on immigrant life chances and the number of immigrants likely to be affected. Since these two categories offered a stark distinction, inter-coder reliability was 94%. In the cases where two codes conflicted, the principal investigator provided the tie-breaking vote. The dependent variable is no major laws, one major law, and two or more major laws. We model the results as an ordered logistic regression, which is appropriate when outcomes take on 3 or more ordinal values.

*Table B*  
*Ordered Logistic Regression Estimations of Restrictive State Laws Enacted, 2005–2010*

Factor	Regression Estimation	(P) Value
Republican share of population	0.182***	[0.001]
Growth of unauthorized population (2000 to 2007)	-0.009*	[0.061]
Spanish-dominant households	-0.256	[0.198]
White poverty	0.058	[0.714]
Black poverty	0.184**	[0.016]
Agriculture jobs (share of total)	-0.330**	[0.074]
<i>Cut Point 1</i>	13.40	
<i>Cut Point 2</i>	15.20	
<i>Observations</i>	50	
<i>Pseudo R-squared</i>	0.22	

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%, based on two-sided t tests

Significance (p) values in brackets

Note: The dependent variable is no major laws, one major law, 2 or more major laws.



APPENDIX C

Finally, for Table C, we also measured state policies on enforcement and employer mandates, as of January 2012, using a database from Findlaw.<sup>318</sup> Factor analyses revealed that these two measures represented one underlying factor. We use an Ordinary Least Squares (OLS) estimator, given that the outcome is a continuous (non-dichotomous) variable, and present the results as standardized coefficients.

*Table C*  
*OLS Regression Estimations of Restrictive State Policies on Immigration Enforcement and Work Authorization*

Factor	Regression Estimation	(P) Value
Republican share of population	0.778***	[0.001]
Growth of unauthorized population (2000 to 2007)	0.112	[0.381]
Spanish-dominant households	-0.484	[0.681]
White poverty	0.089	[0.521]
Black poverty	-0.036	[0.787]
Agriculture jobs (share of total)	-0.670***	[0.001]
Observations	50	
R-squared	0.54	

\* significant at 10%; \*\* significant at 5%; \*\*\* significant at 1%, based on two-sided t tests

Standardized coefficients, (p) values in brackets

---

<sup>318</sup> Information retrieved on January 12, 2012 from FindLaw, a Thomson Reuters resource on cases and statutes. *State Immigration Laws*, FINDLAW, <http://immigration.findlaw.com/immigration-laws-and-resources/state-immigration-laws/>.