MOVING TOWARD SUBFEDERAL INVOLVEMENT IN FEDERAL IMMIGRATION LAW

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In Chamber of Commerce v. Whiting, *the U.S. Supreme Court decided that state governments could mandate compulsory enrollment in the otherwise voluntary federal E-Verify program. Though it deals primarily with employment of unauthorized workers, this case raises broader questions of the role of federalism in the current immigration regime. State and local entities continue to engage in immigration regulation because of their dissatisfaction with the federal approach and because of the impacts felt at the community levels. Looking to both the history of subfederal predominance and the current de facto tolerance of subfederal involvement provide perspective on the benefits of a system that contemplates a larger subfederal role. Using that as a launching point, this Comment proposes a new juridical approach in the hopes of allowing for greater subfederal involvement while protecting federal and individual interests.*

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INTRODUCTION

The rising frustration with the federal government's policy on immigration regulation is exemplified by the recent controversy surrounding Arizona Senate Bill 1070 (SB 1070). On April 13, 2010, the Arizona state House of Representatives passed SB 1070, which quickly became regarded as "the toughest measure in the country against illegal immigrants" because of its directive forcing local police to determine the immigration status of any individual they reasonably suspected was undocumented.[1] All cities and agencies are required to comply with the bill and a citizen suit provision exists to compel performance.[2] Many immigrants' rights advocates were concerned that the bill would effectively sanction and mandate racial profiling.[3] Nevertheless, Arizona state lawmakers defended the bill on the grounds that it regulated crime, kidnapping, drugs, and the use of social welfare programs.[4] The bill received

1. Nicholas Riccardi, *Arizona Passes Strict Illegal Immigration Act*, L.A. TIMES, Apr. 13, 2010, at A1, *available at* http://articles.latimes.com/2010/apr/13/nation/la-na-arizona-immigration14-2010apr14.

2. *Id.*

3. *See, e.g.*, *id.* (citing Chris Newman, legal director of the National Day Laborer Organizing Network).

4. *Id.* (citing John Kavanagh, Representative for Arizona).

national media attention and placed immigration reform squarely in both the legal and public discourse.[5] In turn, at least eighteen states and localities have considered measures similar to SB 1070.[6] This Comment argues that the prevalence of subfederal[7] involvement in immigration regulation reflects the failures of the current immigration regime to address local interests. As a response, this Comment explores ways to alter the current system to better construct a judicial model that seeks to provide greater consistency and clarity in the context of federal preemption of subfederal immigration regulation.

Since 2007, there has been a significant increase in local legislation concerning immigration.[8] This increased subfederal involvement in immigration regulation is a response to a federal regime that is widely believed to inadequately address local concerns.[9] The validity of such regulation is legally complex because the U.S. Supreme Court has traditionally granted the federal

5. The Obama administration challenged the Arizona law in federal court. On July 28, 2010, a federal district court issued a preliminary injunction against the most controversial provisions of the law. The governor of Arizona immediately stated her intention to appeal the ruling. *See* Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, N.Y. TIMES, July 28, 2010, at A1, *available at* http://www.nytimes.com/2010/07/29/us/29arizona.html?_r=2&scp=1&sq=judge%20arizona&st=cse. The talk surrounding the law has also been a point of national public discussion. *See, e.g.*, Huma Khan, *Immigration Debate: Number of City, State Bills Relating to Immigration Increase*, ABC NEWS, Aug. 2, 2010, http://abcnews.go.com/Politics/immigration-debate-number-city-state-bills-relating-immigration/story?id=11220316.

6. The Associated Press reports that as many as eighteen states have expressed a desire to enact similar measures. *See* Bob Christie, *Arizona Preparing Appeal of Immigration Ruling*, WASH. TIMES, July 29, 2010, http://www.google.com/hostednews/ap/article/ALeqM5hZ8Gy51rOgX8-wDT3iqTGWw1uLiAD9H8O1A80. The National Conference of State Legislatures similarly reports that six states—Illinois, Michigan, Minnesota, Pennsylvania, Rhode Island, and South Carolina—introduced bills similar to SB 1070. NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES 1 (2010), *available at* http://www.ncsl.org/documents/immig/2010immigrationreport.pdf.

7. This Comment uses the word subfederal to refer to state and local government entities in contrast with the federal government.

8. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, 2009 STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION JANUARY 1–DECEMBER 31, 2009 (2009), *available at* http://www.ncsl.org/default.aspx?tabid=19232 (finding the number of state laws enacted growing from 84 in 2006, to 240 in 2007, to 206 in 2008).

9. *See* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976, 979 (9th Cir. 2008) (stating that the challenged law reflected "rising frustration with the United States Congress's failure to enact comprehensive immigration reform"), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005) (advocating local enforcement because it aids federal enforcement); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575–76 (2008); Elizabeth Redden, *An In-State Tuition Debate*, INSIDE HIGHER ED, Feb. 28, 2007, http://insidehighered.com/news/2007/02/28/immigration ("We feel like the federal government has not stepped up and accepted its responsibility for a federal issue, and therefore states all across the country are initiating their own legislation." (quoting Virginia House of Delegates lawmaker John S. Reid) (internal quotation marks omitted)).

government expansive and exclusive powers over the nation's immigration policy, especially as it pertains to the admission of noncitizens into the United States.[10] While traditional Supremacy Clause analysis requires a conflict between state and federal laws and relies heavily on congressional intent,[11] the Court has applied the preemption doctrine to immigration law cases in a unique manner. For example, the Court has invalidated state laws using federal preemption even in cases where there was no conflict with federal law,[12] and also in cases where the ordinances relied directly on federal immigration standards.[13] The justification for broad preemption in these examples stems from the idea that immigration regulation is traditionally thought of as a field reserved for the federal government.[14] But the courts are far from uniform in their application of the preemption analysis, and states and localities are often uncertain how far their immigration regulation and enforcement powers extend. Because current law establishes that states and localities are not permitted to regulate immigration, the courts are left with the choice of finding the subfederal law preempted, or preserving the subfederal law by circumventing the definition of immigration regulation altogether.

Although federal admissions schemes are concerned with issues of national security and foreign policy, arguments in favor of local legislation are frequently based on the reality that subfederal government entities often have the exclusive task of dealing with the tangible consequences of immigration. This is demonstrated by the fact that most of the recently proposed subfederal

10. *See generally* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (permitting the government to deport a noncitizen lawful permanent resident on the basis that he had not satisfied the congressional requirement of a white witness attesting to his residency); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (finding inherent congressional power to exclude or revoke membership from individuals).

11. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

12. *See* Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that a state law concerned with alien registration was superseded by federal law because it was an obstacle to the accomplishment of the federal law's goals).

13. In one case, the rationale behind preemption was that reliance on the Immigration and Nationality Act (INA) to define "illegal alien" implied that burdens would likely be placed on the Department of Justice (DOJ) and Department of Homeland Security (DHS), which would impede the functions of those agencies. *See* Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006). Conversely, another case reasoned that the reliance on federal immigration status might result in overenforcement of federal immigration laws. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007) (explaining that the federal government may not intend or desire to enforce the INA in the same manner as the Hazleton ordinances), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3370 (U.S. June 6, 2011) (No. 10-772); *see also* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2062–64 (2008) (explaining the reasoning behind the *City of Escondido* and *Hazleton* cases).

14. *See, e.g.*, *The Chinese Exclusion Case*, 130 U.S. 581 (finding the ability to exclude or remove noncitizens to be a power incidental to national sovereignty).

immigration laws deal with state-funded areas that are traditionally left to state control.[15] This suggests that a uniform federal policy will never be able to adequately address all the complex economic effects of immigration, let alone more abstract questions of morality and integration. To be sure, there are many benefits to having a uniform federal immigration policy,[16] but it is apparent that the current regime of exclusive federal control does not sufficiently respond to the needs of local communities.[17]

Underlying this tension between federal and subfederal immigration regulation is the fundamental question of how to address the significantly increasing unauthorized population, currently estimated to be around 10.8 million.[18] With this number reaching record heights, public consciousness has similarly grown in magnitude. Issues of immigration and the undocumented population have become centerpieces of the political agenda, as politicians seek to win votes by incorporating immigration policy into their platforms.[19] As political pressure mounts, subfederal involvement in immigration regulation will continue. These regulations will likely face challenges in federal courts, and thus create the need for an applicable judicial standard.

Immigration cases need a consistent analytical framework that can properly address the contemporary challenges facing lawmakers. There is nothing per se problematic about the current framework; rather, the problem stems from confusion caused by the courts' unpredictability regarding when deference will be given to the federal government. The courts need a body of law with more clarity and consistency on preemption. A successful approach necessarily begins with a clear definition of the scope of the federal immigration power.

At its core, this Comment seeks to improve the current framework applied in resolving the federalism conflicts in subfederal immigration regulation. In that vein, Part IV of proposes a standard that advocates for continued adoption

15. Of the 218 laws enacted in 2010, 124 fell into the categories of education, employment, health, identification cards and other licenses, or law enforcement. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 6, at 3.

16. For example, Cristina Rodríguez asserts that "efficiency and coherence require federal control over the formal admissions and removal processes." Rodríguez, *supra* note 9, at 572.

17. *See* Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 423 (2010) ("At the very least it is because the tools that we have for drawing the necessary lines simply fail to address many local aspects of the immigration regime described here.").

18. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010). This was, however, a decrease from the 11.8 million mark reported in 2007. *Id.* Nevertheless, the overall increase between 2000 and 2009 was 27 percent. *Id.*

19. To illustrate, it is believed that the 2010 Arizona state House of Representatives and state gubernatorial elections played a large role in the passing of Arizona SB 1070. *See, e.g.*, Riccardi, *supra* note 1.

of the *De Canas v. Bica*[20] definition of immigration regulation as determinations of admission and removal because it opens up space for subfederal involvement without encroaching on federal powers.[21] Next, this approach adopts a presumption against preemption articulated along the rationale of the states' police power. Finally, potential problems arising from stronger subfederal involvement in immigration are addressed in the form of a pretext analysis. Under this approach, intermediate scrutiny applies if a prima facie case is made based on a disparate impact on immigrants or racial minorities.

This proposal is not a drastic departure from the established judicial role in these immigration regulation cases. The sheer number of enacted laws and regulations shows that there is already a considerable amount of subfederal immigration-related legislation permitted. In fact, the E-Verify cases[22] discussed in Part I employ a very similar analysis.[23] Yet, these cases end in conflicting outcomes as a result of confusion over the scope of the activities reserved for federal power. These decisions avoid questions of the subfederal role in immigration regulation by applying subconstitutional approaches to reach normative outcomes.[24] Regardless of whether these outcomes are good for the national immigration policy, this approach is ultimately unsustainable because it leaves the courts without a clear standard.

Arguing in favor of greater subfederal involvement in immigration law, Part II turns to the history and development of immigration regulation to dismantle the fallacy that the federal immigration power has always been a fixture of United States law. This examination makes it possible to consider the weight of rationales in favor of subfederal regulation.

In that vein, Part III looks to the current state of federal and subfederal regulation. Local participation is now so entrenched in immigration regulation that it is simply impractical to view immigration as an exclusively federal area of the law. A closer examination of the current ways subfederal entities engage in immigration regulation is necessary to fully understand the legislators' rationales and to consider what type of subfederal involvement is desirable as a

20. 424 U.S. 351 (1976).

21. *Id.* at 355.

22. This Comment will use this term to refer to a group of cases comprised of *CPLC*, *Gray*, *Lozano*, and *Henry*. *See infra* notes 35, 37, 39–40.

23. *See* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011); Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009). *But see* Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3370 (U.S. June 6, 2011) (No. 10-772).

24. *See infra* Part I.B.

policy matter. Ultimately, the current immigration regime's failure to address local interests reflects the need for change. This Comment seeks to identify ways to alter the current judicial approach in order to create space for subfederal governments to act directly, rather than be subjected to the whims of the courts.

I. THE E-VERIFY CASES AND THE DIVERGENT PREEMPTION STANDARDS

The ambiguity over the extent to which states and localities can engage in immigration regulation leads to inconsistencies in immigration law. One arena in which this problem has become an issue is in the employment of undocumented workers. The shortcomings of the current juridical approach are exemplified by a recent set of cases concerning undocumented employment. This is only one small example of the multitude of problems with the current immigration system, but an in-depth contextual examination of the issue begins to reveal some of the underlying tensions the courts must deal with when ruling on subfederal immigration legislation.

In light of the Immigration Reform and Control Act of 1986 (IRCA)[25] and *De Canas v. Bica*,[26] courts have yielded opposing conclusions regarding whether states and localities can pass laws dealing with the employment of undocumented immigrants or whether federal law preempts such attempts. This is the product of outcome-driven decisions reached through the use of subconstitutional mechanisms. Specifically, the courts have split as to whether subfederal governments could mandate the use of E-Verify, a federal internet-based work eligibility verification system. The program checks I-9 forms against government records and alerts employers when there is a mismatch. Criticism of the program is largely based on its error rate and potentially inaccurate results. The question of whether there is subfederal authority to mandate enrollment in the program was eventually brought before the Supreme Court based on Arizona's E-Verify law.[27] In a 5–3 opinion, the Supreme Court found that neither of Arizona's two laws were preempted and upheld the Ninth Circuit's ruling permitting mandatory enrollment in E-Verify.[28] Though temporarily resolving the E-Verify question, this decision fails to address the deeper problems endemic to the current approach to immigration regulation as reflected in the E-Verify cases.

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25. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).
26. 424 U.S. 351 (1976).
27. *Whiting*, 131 S. Ct. 1968.
28. *Id.*

A. The Continuing Vitality of *De Canas* and Its Definition of Immigration Regulation

Prior to IRCA, in *De Canas*, the Supreme Court addressed the issue of whether California could enact a law that prohibited the employment of foreign nationals without work authorization. The Court defined immigration regulation as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[29] In holding that the California law was not preempted by federal law, the Court relied on the idea that the federal immigration scheme at the time did not "draw in the employment of illegal aliens as 'plainly within . . . [that] central aim of federal regulation.'"[30]

When the U.S. Congress enacted IRCA in 1986, it was said to have placed the issue of employment of unauthorized workers "at the heart of the nation's immigration policy."[31] By bringing the employment of unauthorized aliens within the central aim of federal regulation, IRCA placed *De Canas*'s vitality into question. However, IRCA did not expressly overrule *De Canas*, and most of the subsequent E-Verify cases adopt the *De Canas* definition of immigration regulation as being a determination of admission and removal.[32] *De Canas*'s definition of immigration regulation creates a space for subfederal legislation not dealing with admission and removal. However, IRCA contains an express preemption clause which states, "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, recruit or refer for a fee for employment, unauthorized aliens."[33] Thus, present in the E-Verify cases is a debate surrounding the meaning and scope of the "licensing and similar laws" exception, known as the "savings clause."

The E-Verify cases have yielded three different approaches to judicial challenges to subfederal regulation of these employment practices.[34] One approach is seen in *Chamber of Commerce v. Henry*,[35] which ignores *De Canas* in

29. *De Canas*, 424 U.S. at 355.

30. *Id.* at 359 (quoting San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959)).

31. Gary Endelman & Cynthia Juarez Lange, *Preemption of State Immigration Laws After* CPLC, 1768 PLI/CORP 289, 294 (2009).

32. *See* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom. Whiting*, 131 S. Ct. 1968; Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3370 (U.S. June 6, 2011) (No. 10-772).

33. 8 U.S.C. § 1324a(h)(2) (2010).

34. *See* Endelman & Lange, *supra* note 31, at 300.

35. 2008 U.S. Dist. LEXIS 44168 (W.D. Okla. June 4, 2008).

finding that states could not mandate E-Verify as a compliance tool because it conflicted with IRCA.[36] An alternative view expressed in *Lozano v. City of Hazleton*[37] is that IRCA explicitly preempted states from using licensing regulation to control employment of unauthorized workers, and that Congress completely occupied the immigration field with respect to IRCA.[38] Finally, there is the approach seen in *CPLC v. Napolitano*[39] and *Gray v. City of Valley Park*[40] that employs a presumption against preemption and holds that IRCA explicitly authorized states to enact licensing laws even if they deal with the field of immigration.[41]

Ultimately, resolution of this conflict reflects a fundamental policy decision as to whether regulation of unauthorized employment should be a matter of state or federal affairs. Each of the decisions may be thought of as implicitly tipping the balance in favor of either federal or state control. But rather than addressing this difficult political question directly, the courts reach their respective outcomes based on conflicting interpretations of IRCA's savings clause. The result is that the current state of the law regarding preemption is unclear and unpredictable.

1. Approach 1: IRCA Overrules *De Canas* and Brings Employment of Undocumented Immigrants Into Federal Immigration Regulation

One position is that IRCA rendered *De Canas* moot. The premise of this position is that *De Canas* relied on a finding that the Immigration and Nationality Act (INA)[42] did not plainly concern itself with federal regulation of employment of undocumented workers.[43] The Court considered INA provisions dealing with employment of undocumented workers at best a "peripheral concern."[44] The 1974 amendments to the Farm Labor Contractor Registration Act[45] also suggested that Congress intended for states to regulate the

36. *See id.* at *15–16. This is notable because the court refers to both the savings clause and *Lozano* yet makes no mention of *De Canas* despite the heavy discussion of this case in parallel cases.

37. 496 F. Supp. 2d 477.

38. *See* Endelman & Lange, *supra* note 31, at 300.

39. 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

40. 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009).

41. *See* Endelman & Lange, *supra* note 31, at 300.

42. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as Title 8 of the U.S. Code).

43. De Canas v. Bica, 424 U.S. 351, 359 (1976).

44. *Id.* at 360.

45. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1652–59 (amending 7 U.S.C. §§ 2041–2053 (1970)).

employment of undocumented workers as long as the regulation was consistent with federal law.[46] The Court stated in a later opinion that Congress's intent to allow states to regulate the employment of undocumented workers was central to the *De Canas* decision.[47] IRCA, however, made employment of unauthorized workers a central issue of U.S. immigration policy and has been interpreted as such by the Court.[48] With this understanding, continued reliance on *De Canas* would be misguided because these employment issues were incorporated into the comprehensive federal immigration scheme via IRCA.

a. *Chamber of Commerce v. Henry/Chamber of Commerce v. Edmondson*

In *Chamber of Commerce v. Henry*,[49] the court granted a preliminary injunction against provisions that mandated enrollment in E-Verify because the requirements were preempted by IRCA.[50] The court essentially read the *De Canas* holding as being based on the finding of INA not plainly dealing with the employment of undocumented workers. Presumably, the opinion never mentions *De Canas* because the court found that IRCA had made the opinion irrelevant to the analysis. The *Henry* court adopts IRCA as incorporating the employment of unauthorized workers into federal immigration regulation, which implicitly expands the scope of preemption. This decision seems to be an outlier from its companion cases. But the conclusion is supported by the fact that the impact of the *De Canas* decision was relatively limited until recently.[51]

The injunction as it applied to E-Verify was later repealed by the Tenth Circuit Court of Appeals in *Chamber of Commerce v. Edmondson*.[52] The Tenth Circuit, however, did not rely on *De Canas* to reach its decision.

46. *De Canas*, 424 U.S. at 361–62.

47. Toll v. Moreno, 458 U.S. 1, 13 n.18 (1982) ("We rejected the preemption claim [in *De Canas*] not because of an absence of congressional intent to preempt, but because Congress intended that the states be allowed, 'to the extent consistent with federal law, [to] regulate the employment of illegal aliens.'" (citation omitted)).

48. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (finding that IRCA made the employment of unauthorized workers "central to '[t]he policy of immigration law'" (citation omitted)).

49. Chamber of Commerce v. Henry, 2008 U.S. Dist. LEXIS 44168 (W.D. Okla. June 4, 2008), *aff'd in part, rev'd in part sub nom.* Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010).

50. *See id.*

51. *See* Endelman & Lange, *supra* note 31, at 294 (stating that *De Canas* did not have much of an effect around the country, did not lead to copycat statutes, and received relatively little notice until recently because many thought it was of little importance after IRCA was enacted).

52. 594 F.3d 742.

Instead, the court assumed that IRCA occupied the field of regulation of undocumented workers.[53] And at least one judge on the panel subscribed to the belief that the regulation should have been impliedly preempted.[54] Thus, while the Tenth Circuit partially reversed the district court, much of the rationale that IRCA superseded *De Canas* appears to remain intact.

2. Approach 2: Explicit Preemption: IRCA Wholly Occupies Regulation of Undocumented Workers

A broader application of *De Canas* could amount to a more complicated test in which courts consider whether the regulation amounts to a practical admission decision.[55] Such was the case in *Lozano*, in which the court found the city's ordinances[56] to be preempted even though regulation of admission was not at issue.[57]

a. *Lozano v. City of Hazleton*[58]

In *Lozano v. City of Hazleton*, the court found preemption on the basis that IRCA was a comprehensive statutory scheme that made combating the

53. *See id.* at 751.

54. Judge Carlos Lucero dissented from the majority and found that implicit preemption should be applied. Crucial to Judge Lucero was the fact that IRCA was essentially the product of congressional balancing of competing goals. As a result, any divergence from IRCA could potentially disturb that balance, as it did here. *Id.* at 767–70 (Lucero, J., dissenting).

55. While not dealing with the federalism issue, this argument can also be seen in the detainment line of cases. For example, *Zadvydas*, *Clark*, and *Kiyemba* each debate whether reading a statute to forbid indefinite detainment and require release where there is no other possible destination country amounts to de facto admission of the person into the United States. *See* Zadvydas v. Davis, 533 U.S. 678 (2001) (reading a statute to contain an implicit "reasonableness" limitation rather than construing it to allow for indefinite detainment of deportable aliens in order to avoid questions of the constitutionality of indefinite detainment); *see also* Clark v. Martinez, 543 U.S. 371 (2005) (extending the holding in *Zadvydas* to include inadmissible aliens); Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009) (addressing constitutional questions of indefinite detainment more directly because the statutes involved in *Zadvydas* and *Clark* did not apply).

56. At issue were the Illegal Immigration Relief Act Ordinance (IIRA) and the Tenant Registration Ordinance. Of pertinence, IIRA required mandatory participation in E-Verify for all city agencies and all businesses seeking a city contract or grant. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 524 n.45 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3370 (U.S. June 6, 2011) (No. 10-772).

57. *Id.*

58. This Comment focuses on the district court opinion because its rationale is more illustrative of the normative tensions between *Lozano* and *CPLC*. Though the result was the same at both levels, the district court opinion found express preemption where the Third Circuit did not and thus reaches a conclusion even further from that of *CPLC*. Notably, the Third Circuit upheld the finding of the employment laws being invalid on the basis of conflict preemption but overturned the district court's finding of express preemption. *See Lozano*, 620 F.3d at 207–19.

employment of illegal aliens central to the United States' immigration laws. The court ignored the fact that the city ordinance did not regulate immigration under the *De Canas* definition.[59] Finding that the savings clause did not apply, the court reasoned that an interpretation that allowed for laws revoking business permits would result in the "'ultimate sanction'" of forcing the employer out of business, which simply did not make sense given that the states were prohibited from levying less harsh penalties.[60] The savings clause was intended to permit business revocation for violations of federal IRCA provisions as opposed to violations of local laws.[61] The court went on to find that IRCA implicitly preempts any local laws because it leaves no room for state regulation and any additions would necessarily be in conflict with or duplicative of IRCA.[62] The court also found that the Hazleton ordinance was in conflict with federal law because the law struck a different balance between "preventing the employment of persons not authorized to work in the United States while not overburdening the employer in determining whether an employee or prospective employee is an authorized worker."[63]

Based on the reading that IRCA disrupted the holding of *De Canas*, the court assumed Congress intended to draw IRCA in a way that established a strong, complete federal scheme that left no room for local government intervention. This is evidenced by the court's reading of the savings clause as allowing for business license regulation only for violations of IRCA.[64] Interpreting IRCA as implicitly superseding *De Canas* results in strong judicial deference to the federal government, which ultimately leads to a finding of preemption.

3. Approach 3: Explicit Authorization: Finding a Presumption Against Preemption

Finally, there is the view that *De Canas* lays the foundation for the preemption analysis in cases involving employment of undocumented workers. Under

59. *Lozano*, 496 F. Supp. 2d at 518, 524.

60. IRCA prohibits states and localities from levying civil or criminal sanctions against employers. The *Lozano* court believed that interpreting IRCA to allow local governments to shut down businesses would be inconsistent with its prohibitions on less drastic civil and criminal sanctions. *See id.* at 519.

61. *Id.*

62. *Id.* at 523 (finding IRCA to be a complete and thorough regulation as it pertained to employment of undocumented immigrants).

63. *Id.* at 528.

64. *See id.* at 519 ("In House Report No. 99-682(I), the United States Congress provides its interpretation of the type of 'licensing' permitted under the statute. The 'licensing' that the statute discusses refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws.").

a strict reading of the *De Canas* definition of immigration regulation, preemption is only at issue when a regulation involves determinations of admission into the country.[65] Theoretically, this definition would limit preempted ordinances to a small size since subfederal regulations very rarely engage in direct determinations of admission, as was the case in *CPLC* and *Gray*.[66]

a. *CPLC v. Napolitano*

The Ninth Circuit decision in *CPLC v. Napolitano* held that individual states could broadly regulate employment practices by requiring mandatory enrollment in the federal E-Verify work authorization verification program.[67] The court stated that the determination of whether the subject matter was in an area traditionally left to state or federal government was central to the case. In addressing this question, the court turned to *De Canas* and relied on its determination that "the authority to regulate the employment of unauthorized workers is 'within the mainstream' of the state's police power."[68] The court explicitly rejected the argument that IRCA brought the regulation of unauthorized employees within the scope of federal immigration law.[69] Adopting a presumption against preemption, the court went on to find that neither field nor conflict implied preemption applied.[70] The court ultimately found that the Arizona law fit within the scope of the savings clause and was thus expressly permitted.[71]

While both the district court in *Lozano* and the Ninth Circuit in *CLPC* relied on *De Canas* as precedent, the courts diverged in their interpretation of the impact IRCA had on the *De Canas* decision. The *CPLC* opinion actually mentions *Lozano* yet fails to address the conclusion that IRCA expressly preempted the local ordinances. The court instead found regulation of the employment of unauthorized workers to fall under the states' police powers despite Congress's creating IRCA and making combating the employment

65. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976) ("[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.").

66. *See* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011); Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009).

67. *See CPLC*, 544 F.3d at 983.

68. *Id.*

69. *See id.*

70. *Id.* at 983–86.

71. *Id.* at 983–85.

of illegal aliens central to the policy of immigration law.[72] This conclusion is somewhat perplexing given that IRCA is a comprehensive statutory scheme that provides for sanctions against employers who hire unauthorized workers, establishes a system of checking employees' work eligibility, and provides safeguards against discrimination.

It seems unlikely that the court truly believes Congress did not intend to occupy the field of regulating unauthorized workers with IRCA. Rather, the assertion that "the power to regulate the employment of unauthorized aliens remains within the states' historic police powers"[73] could be viewed as a normative decision. It is of note that the first line of the opinion proclaims that the case "reflects rising frustration with the United States Congress's failure to enact comprehensive immigration reform."[74] At a deeper level, the court's opinion appears to reflect a belief that states should have the power to regulate immigration indirectly.

CPLC exemplifies a balancing of state and federal interests in order to obtain a practical result. Though the court conducts preemption analyses, it is skewed by the heavy reliance on *De Canas* and an assertion that IRCA does not occupy the field of regulation. Traditionally, the state police power preserves state action where the activity promotes public health, safety, or welfare. The *CPLC* decision can be read to stand for the proposition that regulating the employment of unauthorized aliens is necessary to the health, safety, or welfare of the state's citizens, and is thus in line with the police power. While this result is logically sound, it is a departure from the traditional preemption analysis in immigration.

Rather than pushing against the established norms of constitutional immigration law, the court ultimately relies upon statutory interpretation to create an express permission for the viability of the law. Functionally, this yields the same result as the police power analysis. But, it is less disruptive because it does not disturb the federal immigration power and it evades the argument that Congress intended to occupy the field of regulation of undocumented workers with IRCA. In that sense, a holding articulated along the lines of the savings clause accomplishes the same political objectives without launching into a larger debate over federal versus subfederal control.

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72. In a case discussing the issue of employment and immigration, the Court pointed out that a primary purpose of restricting immigration is to protect jobs for American citizens. The Court went on to say that "[t]his policy of immigration law was forcefully recognized most recently in the IRCA." INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 n.8 (1991).

73. *CPLC*, 544 F.3d at 984.

74. *Id.* at 979.

b. *Gray v. City of Valley Park*

A similar line of reasoning is found in *Gray v. City of Valley Park*.[75] The district court began by framing the issue as one of "determin[ing] whether the Ordinance in question involves an area of law traditionally governed by the states, the regulation of business licenses, or an area traditionally governed by the Federal government, immigration."[76] Relying on *De Canas*, the court concluded that the ordinance dealt only with regulations of business licenses, an area of state regulation, and not with admissions. The court used this determination to find a presumption against preemption because business licensing has traditionally been a state power.[77] Finding that express preemption did not apply, the court reasoned that the plain meaning of IRCA clearly carved out an exception for business licensing laws like the one in the challenged ordinance, and the legislative history was too ambiguous to conclude this was contrary to the congressional intent.[78] The court next took up the implied field preemption question and found that Congress did not have a blanket intent to occupy the field of immigration regulation.[79] Conversely, the court concluded that Congress clearly did not intend to preempt the entire field of immigration regulation because IRCA allows some state licensing regulations to exist.[80] Finally, the court found no implied conflict preemption since it was possible to comply with both the federal law and the ordinance.[81]

The City of Valley Park passed the ordinances to exert control over the leasing and employment of undocumented immigrants.[82] While the ordinance does not fit the *De Canas* definition of immigration regulation on its face, the practical effects of the ordinance are tantamount to a de facto denial of admission to the community. The court never questioned whether the ordinance was intended to regulate immigration or not. In fact, the court conceded that the purpose may very well have been to address illegal

75. 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009).

76. *Id.* at *25.

77. *Id.*

78. *Id.* at *35–37.

79. *Id.* at *40–41 (citing *De Canas*).

80. By explicitly writing in provisions that allowed for exceptions, the court determined that Congress had clearly not intended to occupy the entire field of law. *See id.* at *41.

81. *Id.* at *47–48 (finding that not every slight difference between local and federal law will create issues of conflict preemption).

82. The original ordinance enacted by the City of Valley Park was entitled "An Ordinance Relating to Illegal Immigration Within the City of Valley Park, Mo." The ordinance generally prohibits all business entities in Valley Park from knowingly employing unauthorized aliens, and business entities found to be in violation of the ordinance can be required to enroll in the E-Verify program. *Id.* at *14.

immigration, as shown in the title of the law itself.[83] Drawing these formal distinctions allows for a clearer, more easily applied set of rules, and it avoids the fundamental conflict occurring in these cases. The court's conclusion that the challenged ordinance necessarily had to be either a law regulating business licenses or a law regulating immigration presupposes that the two areas are exclusive of each other. Most likely, this dichotomy was drawn because the classification of the law determined whether there would be a presumption against preemption as a state power or a presumption in favor of preemption given the federal exclusivity principle.

Additionally, it is curious that Judge E. Richard Webber, Jr. concluded that IRCA did not fully occupy the field of regulating unauthorized employment because of the small exception embedded in the savings clause. Because the court framed the issue as one of regulating business licenses, it would seem that the field preemption inquiry should be moot. Yet contrary to the finding that the ordinance is not involved in immigration regulation, the court tacitly acknowledges that the ordinance might engage in immigration regulation simply by conducting this analysis. It is clear that IRCA is a part of the federal immigration scheme. It is equally clear that the ordinance in *Gray* occupies the same field that IRCA does. It is undeniable that the ordinance would, at the very least, deal with immigration in the same manner as IRCA regardless of whether implied field preemption applies. Yet the court paints a very different picture: It asserts that the ordinance does not engage in immigration regulation because it does not deal with formal admissions categories. In that sense, much like in *CPLC*, the court in *Gray* grants broader subfederal control without having to articulate a rationale that would formally disturb the federal–subfederal distinction in immigration regulation.

B. Subconstitutional Norms in Subfederal Immigration Law

It is not uncommon for courts to employ the canon of avoidance to navigate around complex constitutional questions in the field of immigration. In the context of immigrants' constitutional rights, Hiroshi Motomura argues that courts often relied on "phantom constitutional norms" to undermine the plenary power in immigration law.[84] Looking at the evolution of constitutional immigration cases, a prevalent trend was for courts to address these

83. The court stated that "[t]he purpose of the law may indeed be, as stated in the title, to address illegal immigration within the city of Valley Park, however, licensing laws may have any number of purposes." *Id*. at *32.

84. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

constitutional issues at a subconstitutional[85] level to reach desired outcomes and create an "alternative body of constitutional immigration law."[86]

A contemporary example of this phenomenon is the 2001 Supreme Court case, *Zadvydas v. Davis*,[87] and its 2005 follow-up, *Clark v. Martinez*.[88] These cases dealt with situations that resulted in the de facto indefinite detainment of deportable and inadmissible aliens respectively. In *Zadvydas*, the Court found indefinite detainment to be impermissible by reading the immigration statute to require release within a reasonable amount of time.[89] As a matter of statutory consistency, the Court extended this rationale to inadmissible aliens in *Clark*.[90] While both cases ultimately relied on statutory holdings, close examination of the *Zadvydas* opinion reveals that much of its reasoning was based on constitutional arguments.[91] The cases unavoidably raise constitutional questions as to whether indefinite detainment would be permissible. Nevertheless, consistent with the canon of constitutional avoidance, the Court used the tool of statutory interpretation to avoid the more difficult constitutional question regarding detainment.[92] One motivating factor for reaching this holding through statutory interpretation may have been to circumvent the prior

85. For the purposes of this Comment, subconstitutional law refers broadly to the interpretation and application of legal principles addressing the validity of laws in ways that do not directly involve questions of substantive constitutionality. To illustrate, a question about the substantive admissions criteria addresses constitutional questions of legislative sovereignty over admissions. However, the *Zadvydas* and *Clark* opinions might be thought of as subconstitutional opinions because they rely on statutory interpretation to avoid addressing the questions of admission. *See infra* text accompanying notes 87–94.

86. *See* Motomura, *supra* note 84, at 610.

87. 533 U.S. 678 (2001).

88. 543 U.S. 371 (2005).

89. *See Zadvydas*, 533 U.S. at 682.

90. This was arguably the primary reason that Justice Scalia went from being in favor of allowing the indefinite detainment in *Zadvydas* to authoring the majority opinion in *Clark* that extended the holding of *Zadvydas*. The Court made this determination on the basis that the immigration statutes did not differentiate between the two classes and that they should therefore be treated equally. *See Clark*, 543 U.S. at 378 ("The operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one.").

91. In discussing the Fifth Amendment's Due Process Clause, the *Zadvydas* Court stated that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690.

92. *See generally Constitutional Law: Canon of Avoidance*, 119 HARV. L. REV. 169, 386–95 (2005) (discussing *Zadvydas* and *Clark* as cases avoiding the constitutional questions by relying instead on principles of statutory interpretation).

Supreme Court precedent announced in *Mezei*,[93] which permitted indefinite detainment of a returning lawful permanent resident.[94]

While Motomura's article focuses on immigrants' constitutional rights, this same principle is present in the context of state and local control of immigration regulations. Consistent with the mechanism described in Motomura's article, the E-Verify cases also apply subconstitutional reasoning to achieve desirable outcomes on what are essentially constitutional issues. The E-Verify cases boil down to interpretations of the savings clause in IRCA, but they fundamentally implicate decisions of whether the power to regulate employment of undocumented immigrants should vest in the federal government or in subfederal entities. Established doctrine typically errs on the side of granting power to the federal government, but there is also recognition that state and local governments should be afforded some role in immigration control.[95] *CPLC* and *Gray* can be read to rely on statutory interpretation to grant subfederal entities authority to regulate the employment of undocumented workers, while avoiding the federal exclusivity principle and preemption issues. As noted, there is considerable pushback against the federal immigration regime.[96] By using the mechanism of constitutional avoidance, courts are able to strike a compromise by granting greater local control over immigration regulation without formally disrupting the established constitutional doctrine of federal control over immigration.

This would help to explain why the savings clause has resulted in differing outcomes. Further, it might help explain why the opinions in the E-Verify cases are so complex despite the existence of an express preemption clause and exception. For example, *CPLC* and *Gray* rely on the narrow definition of immigration in *De Canas* despite the existence of IRCA, and they characterize the challenged regulations as being outside of immigration regulation in areas that are traditionally under state control.[97] These outcomes

93. *See* Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953).

94. *See id*. at 215 (finding that despite Ignatz Mezei's inability to obtain entrance into any other country, his resulting de facto indefinite detention at Ellis Island did not violate any of his rights).

95. For example, consider zoning laws and the strong police power deference they receive. While most of these permissions do not grant any direct authority over immigration matters, they essentially can serve as tools by which local governments can control the type of people that can come into the community through housing costs, minimum lot sizes, and so forth.

96. *See supra* note 9.

97. *See* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976, 983 (9th Cir. 2008) (relying on *De Canas* to find that the state law dealt in areas that were traditionally reserved to the states), *aff'd sub nom*. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011); Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238, at *25 (E.D. Mo. Jan. 31, 2008) ("The Ordinance in question does not address the question of who may or may not enter the United States, and therefore

reflect the policy decision that state and local governments are better suited to address questions concerning undocumented workers, or at least deserve stronger control in such areas. But the federal exclusivity principle could make such control impermissible. Thus, interpretation of the savings clause serves as a vehicle to accomplish these objectives without raising constitutional questions of the federal–subfederal relationship.

C. A Comprehensive Reading of the E-Verify Cases

A complete reading of the E-Verify cases in light of Motomura's phantom-norms argument reveals several important threads prevalent in all these cases. First, despite having facts that are virtually indistinguishable on their face, courts are reaching divergent outcomes using the same analytical tools. Embedded in these decisions is the recognition that different subfederal entities will have different interests at stake. The problem with incompatible state and federal balances regarding immigration also highlights some of the problems of having a purely federal immigration system and provides context for the rise of state and local governments legislating in this area. Finally, despite the de facto tolerance of subfederal involvement in immigration regulation, the courts are still unwilling to expressly recognize these rationales as justifications for allowing subfederal regulation.

The *De Canas* Court's definition of immigration regulation in the E-Verify cases, when considered alongside IRCA, accentuates the tension between federal and subfederal immigration regulation. As it stands, it is impossible to predict when regulations will be preempted for engaging in immigration regulation or saved because they only indirectly touch on immigration. The result is an ineffective system that fails to adequately incorporate both the federal and subfederal needs, and a complete absence of any formal realizability.[98] It should come as no surprise that in addressing employment of unauthorized workers under *De Canas* and IRCA, courts have come down divided on the issue despite the presence of an express preemption clause. While these cases turn largely on the courts' respective interpretations of IRCA's savings clause exempting state "licensing and similar laws" from preemption,[99] it is also apparent that the opinions differ in their reliance on *De Canas* for their preemption

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the Court concludes that the Ordinance is a regulation on business licenses, an area historically occupied by the states."), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009).

98. Formal realizability is defined as "the facility and certainty of applying the abstract rule to concrete cases." Robert Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced*, 38 U. RICH. L. REV. 381, 470 (2004).

99. 8 U.S.C. § 1324a(h)(2) (2006).

analyses, and this reliance is often determinative.[100] Certainly, *De Canas* is a primary consideration in these cases as it is considered "[a] leading case involving the employment of illegal aliens."[101] As discussed above, however, the courts may simply be relying on these subconstitutional arguments to reach outcomes allowing subfederal presence in immigration regulation.

Both the *Lozano* and *Gray* opinions relied on the preemption test as laid out by *De Canas* and both relied on the definition of immigration regulation as determining who can or cannot be admitted to the country and the conditions under which they can remain.[102] Facially, the opinions diverge in their interpretations of the savings clause.[103] Where *Lozano* found that the savings clause should not apply because the results would run afoul of the overarching purpose of IRCA, *Gray* found the challenged ordinance to fall squarely inside of the savings clause and thus outside the scope of preemption.[104] As noted, the legislative history behind the savings clause is somewhat ambiguous and the reach of the clause is unclear. It is clear, however, that regulations that do not fit into this exception are expressly preempted by IRCA. Yet a broad reading of the savings clause would carve out a very large exception to the preemption provision, and arguments that Congress did not intend to occupy the field entirely could be made to find no implied preemption. In sum, these cases help to illuminate how courts can reach divergent outcomes while interpreting the same clause based on policy considerations.

Accepting this recognition, we can evaluate some of the logic in the arguments behind federal and subfederal regulations. The *Lozano* court frames the different balances between federal and subfederal governments in these cases.[105] While efficiency and uniformity may dictate the need for federal supremacy, there remains a compelling argument that local government is being better suited to reach the proper balance. It is clear that different communities

100. The conflict is accurately captured by the framing of E-Verify in *Gray*: "The Ordinance in question does not address the question of who may or may not enter the United States, and therefore the Court concludes that the Ordinance is a regulation on business licenses, an area historically occupied by the states." *Gray*, 2008 U.S. Dist. LEXIS 7238, at *25. Inherent in this statement is the recognition that regulation of business licenses is an area traditionally left to state control because of the necessity and convenience of responding to the specific local needs and requirements. But embedded in the first part of the rationale is a qualification that the ordinance does not fall under the *De Canas* definition of immigration regulation that would render the ordinance vulnerable to federal preemption.

101. *CPLC*, 544 F.3d at 983.

102. *See supra* note 97 and accompanying text.

103. *See supra* note 97 and accompanying text.

104. While this Comment argues primarily based on the preemption analysis, it is important to note that the preemption and savings clause analyses are independent but interconnected at the same time.

105. *See supra* note 63 and accompanying text.

are impacted differently and face different pressures from immigration. For example, the revival in the North Carolina economy has been attributed to the influx of immigrant workers.[106] As a result, one would expect North Carolina to be more receptive to immigrants than other states that face higher traffic and do not have the same labor needs.[107] There are certainly risks of discrimination, racial profiling, and displacing externalities onto neighboring communities in granting broader subfederal power. But to the extent that the proposed laws in these cases rely on federal programs and determinations, that risk can be mitigated to a degree. In fact, it is the frustration of local governments with the perceived failure of the federal government to adequately regulate immigration that leads to this type of lawmaking.[108]

The conflict highlighted by *CPLC* and its brethren is just one example of how the federal immigration scheme fails to adequately address the needs of states and localities. Even with guidance from the Supreme Court via *De Canas* and Congress through IRCA, the courts are still not clear how cases involving the employment of undocumented workers should come out, as demonstrated by the E-Verify cases. Though the Supreme Court has subsequently intervened on this issue, the emphasis on the savings clause in the decision will limit the opinion's impact on the broader issue of federal preemption.[109] Still, the 5–3 split demonstrates the division regarding the role envisioned for subfederal governments. It is baffling that this conflict does not reflect fundamental differences in political ideology at the judicial level, but rather stems from divergent interpretations of an ambiguous legislative history. Further, the confusion surrounds a question of the extent to which states and localities may rely on and institute federal rules and procedures. None of these cases features a departure from the federal procedure. In fact, all of the challenged ordinances were challenged on the basis that they go too far in enforcing the federal system. The outcomes of these cases reflect decisions that move immigration law in favor of or against subfederal involvement.

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106. North Carolina's tech-rich economy was largely in need of labor, which was found in the form of immigrants. *See* Marcia A. Yablon-Zug & Danielle R. Holley Walker, *Not Very Collegial: Exploring Bans on Undocumented Immigrant Admissions to State Colleges and Universities*, 3 CHARLESTON L. REV. 421, 431–32 (2009). Looking to the actual financial statistics, one report determined that North Carolina's Latino population, 45 percent of which is undocumented, was responsible for contributing more than 9 billion dollars to the state while only costing approximately 61 million dollars in state funds. *See id.* at 434.

107. Consider the strict legislation passed in Arizona seeking to restrict and, in some cases, criminalize undocumented immigration. Being on the border of Mexico, Arizona is one of the main points of entry and thus faces much greater influxes of undocumented immigration.

108. *See supra* note 9 and accompanying text.

109. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

For example, the *Lozano* court, in finding that preemption applies, noted that the city ordinance would simply conflict with the federal balance between not overburdening the rights of authorized workers and curtailing undocumented workers.[110] This balancing process is undoubtedly a prominent feature of immigration law and at stake in these cases is whether local or federal government should be responsible for this balance. Curiously missing from all of the opinions is any sort of claim that the local governments are simply in a better position to strike that balance in their communities. The state police power's presumption against preemption effectively stands as a proxy for this argument. Because the local communities will have to deal exclusively with the costs and effects of an undocumented population, local governments can best balance the interests of all parties involved to achieve the most favorable outcome.

The *Gray* and *CPLC* decisions attempt to make a policy shift by extending the constitutional power to regulate employment of undocumented workers to subfederal governments. By framing the holdings as concerning the savings clause and by characterizing the enactments as outside of immigration regulation, these opinions seek to make that change at a subconstitutional level. One consequence is that this system has created a visage of formal categories discerning between direct and indirect immigration regulation, when the reality is that courts are simply making policy decisions based on practicality and efficiency. If the shift in power to subfederal governments does not root in more firmly established doctrine, then these types of problems with consistency and predictability will continue to arise. In that vein, this Comment proposes an approach that courts can apply directly to these questions without departing too far from established norms of constitutional immigration law.

In order to accomplish this goal, a fuller examination of the federal immigration power is required. Historically, subfederal entities played a large role in regulating the movement of individuals. Understanding the subfederal role in immigration is important because it provides a frame to imagine a subfederal immigration power and pushes back against the perceived necessity of federal supremacy in the immigration context. Furthermore, the federal immigration power's legitimacy and neutrality is challenged based on its racially motivated origins. Part II thus seeks to create space for a subfederal role in immigration regulation by using the history of immigration law in the United States to push back against the idea of a traditional, objective federal immigration power.

110. *See supra* note 63 and accompanying text.

II. THE HISTORY AND DEVELOPMENT OF IMMIGRATION LAWS

It is important to begin by noting that there is no express grant of immigration authority in the Constitution.[111] The broad federal immigration power is often justified on the basis that it has been a longstanding principle of this country's history. But a closer examination of that history reveals that the ability to regulate immigration has not always been exclusively a federal power. Prior to 1875, there was a considerable number of subfederal laws regulating the movement of people.[112] Many of these laws declined to draw distinctions between citizens and noncitizens and instead applied to all people.[113] In this sense, they do not fit within our contemporary understanding of what constitutes immigration regulation.[114] However, recalling the evolution of state migration controls brings into question the idea that immigration has always been an exclusively federal issue. In reality, the Court often left these areas free from federal interference because they were legal exercises of the states' police power.[115]

Attempting to truly reconcile the federal exclusivity principle with our current de facto system of subfederal enforcement, an eye to the past is beneficial as it provides a historical context in which courts allowed and encouraged subfederal regulation. Looking at the history of state migratory controls can help us reimagine a regulatory system in which the states retain the ability to regulate certain areas of migration under their police power authority. Further, looking at the contextual evolution of the federal immigration power disrupts the notion that the federal power to regulate immigration has always been neutral and apolitical. A more scrutinizing examination of this country's immigration regulations invites a more robust debate over uniform,

111. *See, e.g.*, Michael J. Winshie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532 (2001) ("The power to regulate immigration is not enumerated in the Constitution. Over the years, the Supreme Court has located the power as deriving 'from various sources'" (citation omitted)).

112. *See* Motomura, *supra* note 13, at 2056–57; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

113. *See* Motomura, *supra* note 13, at 2056 (referring to quarantine ordinances, criminal bars, and restrictions against the poor that "governed citizens and noncitizens alike").

114. *See supra* note 29 and accompanying text.

115. *See* Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283, 385 (1849) (suggesting that the state retained the authority to justify exclusion of certain classes of people, such as those dangerous to public health and safety); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842) (reserving a state's right to exclude runaway slaves as well as "idlers, vagabonds, and paupers"); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 142–43 (1837) (finding precautionary measures against "paupers, vagabonds, and possibly convicts" to be within the state police power); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (stating that health and quarantine laws remained in the realm of state control).

federal control versus deference to the states' police powers. By pushing back against a presumption that the federal government should oversee immigration regulation, the analytical space is created to determine how to create the most effective judicial approach to immigration regulation.

A. Pre-1875 State Immigration Regulations

Until 1875, the United States did not have an official, uniform federal immigration policy. Historical accounts of immigration before 1875 suggest that this was a feature of open borders and a generally pro-expansionist policy, but this is an inaccurate portrayal of the United States's legal policy.[116] Gerald L. Neuman suggests that this very sentiment can be found written on the Statue of Liberty, which "welcomed the 'tired and poor' and the 'wretched refuse' of teeming shores."[117] In reality, most states controlled their borders by regulating areas such as the movement of criminals, movement of the poor, public health, and slavery.[118] These laws were not aimed purely at preventing the movement of noncitizens; they were intended to control the movement of unwanted people generally and thus do not fit under the traditional definition of immigration regulation.[119] This type of legislation gave communities a stronger ability to shape their identities and to avoid absorption of the external costs associated with integration and sustainment of unwanted people. Many contemporary examples of immigration regulation reflect these very same principles, but this is no longer accepted as a justification for a broader subfederal immigration power. It is thus appropriate to examine the history of subfederal regulation for the purpose of evaluating the ability of states and localities to balance the interests implicated in immigration regulation. Specifically, this section looks at pre-1875 state regulations concerning movement of criminals, movement of the poor, and public health.

Regulation of the movement of criminals began as early as the colonial period when colonies resisted the shipment of felons to America.[120] After the Revolutionary War, the states finally had the power to exercise their sovereignty and prohibit the entrance of certain classes of people. In 1788, the Congress of the Confederation adopted a resolution recommending that the states pass

116. *See* Neuman, *supra* note 112, at 1833–34; *see also* Kleindienst v. Mandel, 408 U.S. 753, 761 (1972) ("Until 1875 alien migration to the United States was unrestricted.").

117. *See* Neuman, *supra* note 112, at 1835 n.8 (citing JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN THE URBAN AMERICA 71–80 (rev. ed. 1984)).

118. *See id.* at 1841.

119. *See* Motomura, *supra* note 13, at 2056 (finding that "[m]any of these early laws do not fit our modern conception of immigration law because they governed citizens and noncitizens alike").

120. *See* Neuman, *supra* note 112, at 1841.

laws preventing the entrance of foreign nationals convicted of crimes into the United States.[121] Connecticut, Massachusetts, Pennsylvania, South Carolina, and Virginia all passed such legislation within a year, which paved the way for many subsequent states to pass similar legislation.[122] In 1875, a prohibition against persons with criminal convictions was included in a federal statute restricting immigration.[123] Nevertheless, it is important to note that at the outset, the Congress of the Confederation only recommended that the states pass these immigration bans on criminals entering into the United States.

This reflects two underlying themes. First, the recognition that it was in the country's best interest for all the states to uniformly adopt this ban on convicts as a matter of national policy. Second, that the inherent power of sovereignty to exclude these convicts rested in the hands of the states.[124] In the context of admission of criminals, the government formally advocated for a uniform policy but chose to leave regulation and enactment to the states themselves. Congress did nothing to amend this until nearly ninety years later in 1875. At minimum, it appears that prior to *The Chinese Exclusion Case*'s announcement of a strong federal immigration power,[125] state engagement in immigration regulation was encouraged, and perhaps even protected as a state police power. So while cases like *CPLC* might seem like a departure from contemporary norms, the rationale of granting limited subfederal power to regulate immigration is not a new one. Removing the presumption of federal supremacy raises the question of which approach might address these issues best and how the ideology behind current jurisprudence in immigration law has changed since the pre-1875 immigration era.

Another area in which there has been considerable subfederal regulation is the right of the poor to move between communities. The United States continued the heritage of the English Poor Laws, making care of the poor the responsibility of the community where they were legally "settled."[126] The limitation on the rights of the poor was made explicit in Article IV of the Articles

121. 13 J. CONG. 105–06 (Sept. 16, 1788).

122. *See* Act of Oct. 1788, 1788 Conn. Acts & Laws 368; Act of Feb. 14, 1789, ch. 61, § 7, 1789 Mass. Acts 98, 100–01; Act of Mar. 27, 1789, ch. 463, 1788–89 Pa. Acts 692; Act of Nov. 4, 1788, No. 1542, 1788 S.C. Acts 5; Act of Nov. 13, 1788, ch. 12, 1788 Va. Acts 9.

123. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477.

124. In that vein, some of the states extended the ban against convicts to include persons coming from other states. *See* Mass. Act of Feb. 14, 1789, ch. 61, § 7.

125. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

126. This was accomplished by mechanisms including placing financial obligations on the community of legal settlement and allowing for removal of individuals to their place of legal settlement. *See* Neuman, *supra* note 112, at 1846 (citing DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 20–25, 46–48 (1971)).

of Confederation,[127] but the exception against the poor was omitted from the Constitution's Privileges and Immunities Clause.[128] States and localities continued to control the movement of the poor by preventing the settlement of persons expected to become public charges and by removing them from where they were legally settled.[129] For example, Massachusetts enacted legislation that allowed newly arriving persons to become settled inhabitants of a town only if they met certain statutory criteria or received express permission to settle.[130] Towns that took care of poor people could seek reimbursement from the town where the person was legally settled, or from Massachusetts if the person was not legally settled somewhere in the state.[131] The legislation also included measures to try to prevent the poor from entering Massachusetts entirely by establishing penalties for parties who knowingly brought such people into the state, charging bonds to masters of vessels for people who were likely to become public charges, and eventually establishing mandatory bonds for all entering nonresidents.[132]

The rationale behind these forms of legislation was based on a theory of the communities' fiduciary duties to the poor. The poor were seen as a group with limited rights that placed a burden on any receiving community. As a result, the community had a justified interest in regulating the movement of such people. This is visible in Massachusetts' legislation that sought to hold communities financially responsible for any poor person legally settled within its borders while externally encouraging a system that sought to exclude these classes of people.

A similar thread can be traced in contemporary arguments advocating for broader state and local power in the field of immigration. Supporters of state and local control often reiterate the idea that subfederal regulation is more adept at responding to the effects of immigration that are felt primarily at the local level. At the level of the judiciary, courts have expressly recognized that federal and subfederal governments balance different interests to varying

127. *See id.* at 1846–47 (explaining that the Articles of Confederation excepted "'paupers, vagabonds and fugitives from justice' from the equal enjoyment of the privileges and immunities of citizens" (citation omitted)).

128. *See* U.S. CONST. art. IV, § 2, cl. 1; Neuman, *supra* note 112, at 1847.

129. *See* Neuman, *supra* note 112, at 1846.

130. *See* Act of Feb. 11, 1794, ch. 8, § 2, 1794 Mass. Acts & Laws 347.

131. *See* Act of Feb. 26, 1794, ch. 32, §§ 9, 13, 1794 Mass. Acts & Laws 375, 379, 383.

132. *See id.* § 15; Act of Feb. 25, 1820, ch. 290, 1820 Mass. Laws 428; Act of Mar. 20, 1850, ch. 105, § 1, 1850 Mass. Acts & Resolves 338, 339. *But see* Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283 (1849) (invalidating a two-dollar payment as an impermissible head tax and thus bringing into question the constitutional validity of some of these measures).

extents in the immigration context.[133] On its face, it might be said that the same pressures that justified reserving the states' right to regulate movement of the poor are prevalent in the contemporary justification for allowing de facto subfederal enforcement of direct and indirect immigration regulation.

The field of public health has also historically been reserved to the states' police powers, despite its direct effect on immigration. This was primarily achieved through the quarantine system, which retained its force even after the federal government adopted immigration provisions on public health.[134] In fact, state authority over quarantine legislation often enjoyed the endorsement of Congress.[135] Additionally, the idea that quarantine and health-related grounds are immune from federal preemption in the courts is well established.[136] Even when the country moved to a national quarantine enforcement system, the legislation did not preempt the preexisting state laws. Instead, the states were invited to make voluntary transfers of their quarantine establishments to the federal government.[137] The federal government could have assumed plenary control in this arena. Instead, it deferred to the states' power and implicitly acknowledged that the states were best suited to make determinations concerning quarantine and its relationship to public health. In that sense, the decisions reached in the E-Verify cases are actually fairly consistent with the immigration regime as seen in the initial transition toward a strong federal power.

By placing immigration power in subfederal governments, localities had authority to determine who had a right to join the community. Contextually, this was based on the idea that these communities would be held responsible for the health, safety, and welfare of their members. Accordingly, they were afforded the right to deny membership to individuals deemed to be detrimental to the community. Essentially, determining who could be a part of the local community might have been thought of as being inherent to the sovereignty of the states and localities. This same logic was used to justify the denial of

133. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527–28 (M.D. Pa. 2007) (discussing the inherent differences in factors used to balance the interests at the federal and subfederal level), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3370 (U.S. June 6, 2011) (No. 10-772).

134. *See* Neuman, *supra* note 112, at 1860 (citing Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 396 (1902)).

135. When a bill was proposed in 1796 to give the President power to regulate the quarantine of foreign vessels arriving in United States ports, it provoked debates over whether this should be a federal power on the grounds of regulating commerce or a state policing power. The bill ultimately was rejected by a large majority of votes. *See* 5 ANNALS OF CONG. 1227, 1347–59, 1348, 1358, 1359 (1796).

136. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (stating that "quarantine laws [and] health laws of every description" form part of the "immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government").

137. *See* Neuman, *supra* note 112, at 1865.

admission in *The Chinese Exclusion Case* discussed later.[138] One might at least consider extending, based on ideas of sovereignty, the right to determine admission to the individual states. This is especially resonant given that the most immediately visible effects of immigration impact education, healthcare, public services, and other programs that are promulgated in pursuit of the states' police power interests in protecting public safety, health, and general welfare. Admittedly, it would be difficult to fathom complete decentralization of immigration admissions succeeding on a practical level.[139] Looking to the past at least raises the question of why the federal government should have presumed control in the field of immigration rather than finding a balance between the interests of states and the federal government. Cases like *CPLC* reflect a motivation to move toward granting state powers in certain areas of immigration regulation. As discussed above, it may be the case that the courts are using subconstitutional mechanisms to accomplish the shift towards subfederal regulation in order to circumvent difficult constitutional questions of the validity of such a move. Undoubtedly, the states' police powers will be a strong and obvious component in articulating any attempt to accomplish such a shift.

B. The End of Slavery and the Rise of the Federal Immigration Power as a Mechanism of Racial Domination

It is important to note that the absence of any formal federal immigration laws before 1875 may very well have been because the federal government wanted to avoid questions concerning slavery.[140] From the Constitution to the cases dealing with slavery, it is clear that the federal government was reluctant to address this question directly.[141] Since immigration deals with the movement of people in and out of the country, federal laws would have definitely implicated the slave trade, which would have forced the federal government to address

138. 130 U.S. 581, 609 (1889) (describing the power of exclusion as being "incident to sovereignty").

139. For example, Rodríguez argues that a strong and unified federal immigration system is necessary for the sake of efficiency. *See* Rodríguez, *supra* note 9, at 572.

140. *See, e.g.*, Renee C. Redman, *From Importation of Slaves to Migration of Laborers: The Struggle to Outlaw American Participation in the Chinese Coolie Trade and the Seeds of United States Immigration Law*, 3 ALB. GOV'T L. REV. 1, 55 (2010) ("It has been noted that federal control over immigration became possible only after slavery was abolished and because the federal government sought to limit the immigration of Chinese laborers.").

141. Consider that slavery is never explicitly mentioned in the Constitution. The most direct reference is the Three-Fifths Clause. As a result, there is the Fugitive Slave Act, but there was no constitutional power to enforce it until the *Prigg* Court read it in as an implied power. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (finding the Supremacy Clause to demand enforcement of the Fugitive Slave Act despite the state law forbidding such action).

some very difficult questions.[142] With slavery coming to a formal end with the passage of the Thirteenth Amendment in 1865, the temporal alignment with the rise of the federal immigration power certainly suggests a connection. When read in conjunction with the existence of subfederal regulations in the pre-1875 period, it can be inferred that the federal government had contemplated a strong, inherent immigration power but deferred to local control due to the political pressures to maintain slavery. Following the slavery-induced silence on federal immigration power, it is then striking that many of the first federal immigration laws were enacted in an effort to exclude Chinese nationals from entering the country.[143]

The plenary power doctrine, a central principle in immigration law affording strong deference to executive and legislative decisionmaking, was first announced by the Supreme Court in *The Chinese Exclusion Case* when it upheld a statute barring Chinese laborers from entering the country.[144] Since then, the Court has taken the position that the judicial branch should generally not interfere in the constitutional aspects of immigration cases. The logic behind the plenary power doctrine was that the power to exclude foreigners was an "incident of sovereignty belonging to the United States."[145] Even accepting that sovereign nations have inherent authority to exclude individuals, there still remains a question as to why state governments should not have that same power.

When the development of our current immigration system is read in the context of the history of subfederal governance over admissions, the desire to avoid the slavery issue, and the exclusion of Chinese nationals, the immigration power loses its objective, nondiscriminatory image. While it may be true that the ideology supporting this power stems from the nature of sovereignty, it is important to recognize that much of the underlying logic had an undeniably racist and political component. Rather than simply relying on the establishment of this broad federal power, we should evaluate the political interests present in the construction of that power. To be sure, legal precedent and practicality still dictate that the power to control immigration is a natural

142. For example, to circumvent immigration laws, there would have to be either an express exception for the slave trade, which would have represented official state approval of the practice, or some implication that slaves were not people and therefore the immigration laws were completely inapplicable.

143. *See, e.g.*, Redman, *supra* note 140, at 4 ("The Act's distinction between slave and free labor demonstrates that it was not accidental that Chinese migrants were the first targets of racially-discriminatory federal immigration laws.").

144. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609–11 (1889).

145. *Id.* at 609.

product of sovereignty. However, it is less clear why that power must be vested exclusively in the federal government.[146]

This argument is not advanced to advocate for the overturning of over a century of jurisprudence in the immigration context. Rather, it is made to recognize that the federal immigration power was a politicized tool employed by the Supreme Court to construct an exclusionary mechanism with intent to deploy it in a racist manner. When the immigration power is viewed through this historical and contextual lens, the rationalization of continuing to operate under a presumption of federal control seems less justified. If the development of federal exclusivity is instead seen as furthering a political agenda centered around avoiding the slavery question and excluding Chinese nationals, it makes less sense to defer to this power when there is obvious frustration and dissatisfaction with this system. The relevance of such a system must be evaluated on its own merits for its legitimacy and rationale.

Looking at the past also helps expose the fallacy that immigration law has always been an exclusively federal power. Recognition that immigration regulation was heavily engaged in at the subfederal level for a significant portion of United States history provides an alternative account of how the immigration power might be viewed. The state laws discussed in this section were as much a product of necessity and functionality as federal admission categories are today. In that light, exploration of pre-1875 subfederal regulations and their rationales can provide invaluable insight into the kinds of roles states and localities could and should play in an immigration regime that expressly carves out space for subfederal regulation. This also suggests that the move being made in the E-Verify cases is not an entirely new one. An emerging sentiment that states and localities may be better suited to address certain aspects in immigration regulation can actually be reconciled with the logic behind state-controlled immigration regulations from the past.

The federal government's express support of quarantine laws and regulations on the mobility of the poor suggests that immigration policy had long been imagined as a system that tolerated, and sometimes encouraged subfederal regulation via the states' police powers. Applying this in a contemporary manner is much more complicated than it might seem, however. Drawing back on the E-Verify cases, for example, demonstrates that the line between immigration regulation and state police power is no longer demarcated along such clear boundaries. Since presumably all forms of immigration regulation can be advanced along a state police power rationale like public welfare, the definition of what constitutes immigration regulation can be determinative. In fact,

146. *See supra* notes 138–139 and accompanying text.

this may be the very tension that opened a seam for widespread subfederal engagement in immigration regulation. The challenge is to determine how the federal government should interact with these subfederal regulations. A thorough examination of the history and development of this country's immigrations laws casts a shadow on presumed federal supremacy, which is often an afterthought in immigration cases. This Comment argues that we should work toward a more pragmatic approach that balances federal interests in controlling substantive admissions categories with the local communities' interests in promoting the public good.

III. VISIONS OF CONTEMPORARY SUBFEDERAL IMMIGRATION REGULATIONS

Scholars have recognized that states and localities already play a significant role in the current immigration regime, which has increasingly created space for subfederal immigration regulation.[147] In 2010, legislators in forty-six states and the District of Columbia combined to consider more than 1400 immigration-related bills.[148] In total, 208 laws were enacted and 138 resolutions were adopted for a total of 346 laws and resolutions nationwide.[149] The prevalence of immigration-related legislation illustrates subfederal dissatisfaction with the current federal regime's inability to address the local interests involved in immigration regulation. Most of these recent state legislative proposals and resolutions have focused on law enforcement, education, employment, health, public benefits, and identification documents.[150]

Courts have supplemented this legislation by categorizing immigration motivated legislation as either immigration regulations presumptively controlled by federal authority,[151] or legislation that does not directly engage in immigration regulation and is considered permissible.[152] This characterization ignores the

147. *See generally* Motomura, *supra* note 13; Rodríguez, *supra* note 9; Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1634 (2008); Su, *supra* note 17.

148. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 6, at 1. The four states not included in this figure are Montana, Nevada, North Dakota, and Texas, as they were not in regular session in 2010. *Id.*

149. *See id.*

150. *See supra* note 15.

151. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 525 (M.D. Pa. 2007) ("Congress has in fact enacted a comprehensive legislative scheme with regard to the employment of unauthorized aliens and occupies the field to the exclusion of state law."), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted*, 79 U.S.L.W. 3370 (U.S. June 6, 2011) (No. 10-772).

152. *See* De Canas v. Bica, 424 U.S. 351, 355–56 (1976) ("[E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.").

intentions and impacts of such legislation and has allowed subconstitutional reasoning to expand the scope of subfederal control over immigration matters.[153] But reaching an acceptable balance between federal and subfederal control over immigration remains the fundamental issue. Unpredictability in the courts only exacerbates local frustrations with a federal immigration system already considered unsatisfactory.

Adding to the problem is the fact that it is not always clear what the intent of the subfederal laws are or what role subfederal governments are to play. Under the current regime, immigration regulation presupposes federal supremacy in cases of direct control of admissions, but in practice that control is complemented by subfederal legislation that touches upon immigration. Cristina M. Rodríguez argues that this system greatly relies on states and localities to respond to the economic and social consequences of the federally controlled immigration policy.[154] When people complain that the immigration system is broken or inadequate, this relationship is likely the main cause of frustration. Due to the federal exclusivity principle and the threat of preemption, these subfederal efforts are necessarily framed as outside the definition of immigration regulation, allowing for subfederal involvement. But as discussed above, these legal conclusions are a result of the application of subconstitutional norms. This relationship runs deeper than states and localities using their police powers. The boundaries are not always cleanly delineated, and there is often a gray area regarding where the regulation falls. Lawmakers thus must be able to engage in a delicate balance of responding to the practical realities of immigration without venturing into the arena of immigration regulation.

Essentially, the tolerance afforded subfederal governments in immigration enforcement and in controlling the mechanisms of integrating immigrants into the community implicitly recognize that purely federal regulation does not and cannot fully address all of the accompanying social and economic pressures associated with immigration. The failure of the federal government to do enough combined with near-uniform dissatisfaction with the status quo is alone sufficient to suggest that there should be greater tolerance for subfederal

153. I argue in this Comment that the courts in *CPLC* and *Gray* essentially used statutory interpretation of IRCA's savings clause in order to accomplish the broader goal of increasing local governments' role in immigration, while at the same time avoiding the constitutional implications of such an expansion of power. *See supra* Part I.B.

154. Rodríguez argues that states and localities play a major role in the integration process for immigrants, authorized and unauthorized alike. In many ways, the role that states and localities play is a practical response to the effects of federal enforcement policy. The actual mechanisms that result in order to integrate immigrants into the communities sometimes resemble immigration control or enforcement. As a result, successful integration of immigrants into society requires flexibility and tolerance of policies that are often in conflict. *See* Rodríguez, *supra* note 9, at 609–10.

involvement. However, having scrutinized the historical rationale for greater local involvement and the limited existing tolerance articulated along the lines of state police powers, it appears that states and localities may indeed be better suited to try and tackle these problems. It is necessary, as a practical matter, to reshape our immigration law to be able to address these needs without the concerns over conflict or preemption. The ways in which our current system engages in this type of legislation will help reveal the specific ways in which subfederal regulation and enforcement can supplement the existing federal laws.

There are many ways in which states and localities already engage in immigration regulation, and they can be roughly broken down into three conceptually different categories: (1) regulations which do not explicitly rely on federal immigration laws but appear to be measures aimed at the immigrant community; (2) direct regulation; and (3) indirect regulation that incorporates the federal immigration scheme in some fashion.[155] The three categories are fluid in that they all seek to exert some degree of control over immigration. They differ, however, in that the courts sometimes treat the categories as being drawn along clear lines and the classification can be determinative. As shown by the E-Verify cases, these lines are anything but clear and the distinctions may be the product of normative decisionmaking. But if the ultimate goals and desired outcomes are the same, then it remains worthwhile to explore the differing rationales and articulations of these categories.

A. "Neutral" Regulations With an Impact on Immigration

One form of local response to immigration can be seen in what Rick Su refers to as "neutral regulations on immigration."[156] These types of regulations do not involve federal immigration laws or statuses but tend to have a disproportionately strong effect on immigrants. In some cases, these regulations are enacted for the very purpose of affecting immigrants and discouraging them from moving or remaining in the community.[157] A prominent example is the application of the San Francisco ordinance during the 1880s in *Yick Wo v. Hopkins*.[158] In *Yick Wo*, the Court evaluating the application of an ordinance requiring permits for the purposes of operating a laundry business in a wooden

155. *See* Su, *supra* note 147, at 1633.

156. *See id.* at 1649.

157. Consider the Texas law challenged in *Martinez v. Bynum* that restricted eligibility for tuition-free education to bona fide residents and had the practical effect of denying education to certain classes of undocumented immigrants. 461 U.S. 321 (1983). Given the importance of education in child development, this denial of education essentially may be viewed as de facto deportation.

158. 118 U.S. 356 (1886).

building.[159] While the ordinance was neutral on its face, permits were denied to virtually all Chinese applicants, while granted to most non-Chinese applicants.[160] The ordinance was ultimately struck down on equal protection grounds, but *Yick Wo* represents a sparse collection of cases where the Court has found such regulations to be "with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners."[161] But most instances of neutral laws being used to regulate immigration will not yield such extreme results despite presumptively being used for discriminatory purposes.

Barring facts demonstrating extremely prejudicial application like those found in *Yick Wo*, the traditional approach to determining the constitutionality of a facially neutral law with a disparate impact is the intent doctrine as articulated in *Washington v. Davis*.[162] Under the *Washington v. Davis* rule, a finding that a facially neutral law engages in unconstitutional discrimination must contain two elements: (1) a disparate impact upon the specific group, and (2) a discriminatory intent on the part of the actor.[163] Plaintiffs challenging a law that has no explicit mention of immigration status but has a discriminatory impact on unauthorized immigrants would have to show that the law was drafted with an intent to discriminate against unauthorized immigrants as a class. Furthermore, that showing alone may not require the government to show anything beyond a rational reason for enacting the law since the Court in *Plyler v. Doe*[164] determined that undocumented status is not a suspect classification that triggers strict scrutiny.[165] It is not hard to imagine that most of these laws would have some rational basis for their enactment, especially considering that many of these regulations deal with areas such as land use or other areas implicating local resources. Even if it did not have a legitimate purpose to begin with, the law will be upheld so long as there is any reasonably conceivable legitimate purpose for the law.[166] The upshot is that states and localities can

159. *See id.* at 366–68.

160. The Court pointed to the fact that over two hundred Chinese launderers were denied permits while the eighty non-Chinese applicants were all granted permits. *Id.* at 374.

161. *Id.* at 373.

162. 426 U.S. 229 (1976).

163. *See id.* at 239–40.

164. 457 U.S. 202 (1982).

165. *Id.* at 223.

166. The rationale behind this is that once a law is struck down for lack of an adequate actual purpose, Congress simply could reenact the law and assert a permissible legitimate purpose. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature

enact laws with the purpose of influencing immigration and, so long as they have conceivably legitimate purposes and do not directly implicate the federal immigration power, the laws will be upheld by the Court.[167]

This type of subfederal legislation is explored in the following Subparts by examining (1) the role that community plays in immigration law, and (2) the federal immigration power in connection with local zoning powers. Both of these areas provide examples in which federal interests sometimes yield to subfederal interests. As such, understanding the reasons why subfederal interests are incorporated in these contexts is an important step in thinking about the rationale and costs and benefits of allowing for subfederal involvement.

1. The Role of Community in Immigration Law

One possible reading of federal immigration law centers on whether, and to what extent, Americans are willing to accept immigrants in their lives.[168] The role of community in immigration admission is a particularly strong example of state and local entities affecting federal policy. While social belonging is not an explicit requirement for admission, it is contemplated in the form of economic and familial tie requirements in immigration law. This seems to be based on a theory that the subfederal need to protect the community is already satisfactorily balanced against the immigrant's desire to enter the community. In that sense, because the local government will have implicitly consented to the admission, the federal admission will not adversely impact the local entity. In a sense, the built-in federal consideration of the role of the local community in admissions is impliedly consistent with allowing subfederal entities to engage in neutral regulation. This is because both forms of tolerance emphasize the power of self-definition and preserve local power to control certain areas related to this power.

Reinforcing this role of community in immigration law is the treatment of immigrants' rights in cases of constitutional protection.[169] The courts have

must necessarily engage in a process of line-drawing." (citation omitted)). Generally, any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 681 (3d ed. 2006) (citing Berman v. Parker, 348 U.S. 26, 32 (1954)).

167. *See, e.g.*, *infra* notes 207–210 and accompanying text.

168. *See* Su, *supra* note 17, at 393 (referring to findings in a Senate Judiciary Committee report from 1983).

169. Hiroshi Motomura has explained that current jurisprudence concerning constitutional protection of immigrants generally depends on (1) whether the plaintiffs are considered constitutionally "here" or "there" and (2) whether the claim is challenging the procedures granted or the substantive categories identified in the laws. But also factoring into the equation are community

generally been reluctant to grant a great deal of constitutional protections to noncitizen litigants, but when they have granted protection, ties to the United States have often been considered.[170] This has played a role in courts' application of the *Mathews v. Eldridge*[171] test, which balances: (1) the interest of the individual seeking admission or fighting removal; (2) the interest of the government; and (3) the added protection or accuracy the procedure will bring.[172] Specifically, when evaluating the individual's interests, the strength of the individual's ties to the country, as well as the extent to which the individual has established a settled life here are critical factors.[173] It is also important to realize that the immigration statutes have explicitly incorporated statutory requirements regarding connections to the country. For example, cancellation of removal,[174] naturalization,[175] adjustment of status,[176] family-based immigration categories,[177] and other parts of the immigration statute require connections via residency or family ties. In addition, there are several exceptions to the normal rules of naturalization, exclusion, and removal whereby discretionary waivers can be granted upon a showing of great hardship against the alien's citizen or lawful permanent resident (LPR) family member.[178] If our

ties. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 102 (2006).

170. *Compare* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (finding that the Attorney General did not have authority to deny the alien, a returning lawful permanent resident (LPR), an opportunity to be heard in opposition to an order for his permanent exclusion and consequent deportation), *with* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (permitting the exclusion of the alien residing in another country, the wife of a U.S. citizen, on the basis of confidential, undisclosed information).

171. 424 U.S. 319 (1976).

172. *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982).

173. *See id.* (finding Plasencia's interest to be "without question, a weighty one" on the basis that "she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual").

174. To apply for cancellation of removal as an LPR, there is a residency requirement of seven years, five of which must be as an LPR. Immigration and Nationality Act (INA) § 240(a) (2006).

175. Naturalization generally requires five years of residency with half that time spent physically present inside of the country. *Id.* § 316(a)(1). This requirement is reduced for applicants who have been married to a U.S. citizen for at least three years. *See id.* § 319.

176. When considering an application for adjustment of status, the secretary of DHS will generally consider factors such as family ties, hardship in traveling abroad, length of residence, and preconceived intent to remain. *See id.* § 245.

177. Of the three ways to obtain an immigrant visa, one is pure lottery, one requires various showings of employment eligibility and actual job availability, and the last requires actual familial ties. The categories are limited to sons, daughters, parents, and siblings. *See id.* §§ 201(b)(2)(a), 203(a).

178. *See, e.g.*, *id.* § 212(h)(1) (permitting a discretionary waiver of the requirement that the alien has committed no crime involving moral turpitude for purposes of naturalization if the alien shows that removal would result in extreme hardship to the alien's citizen or LPR spouse, parent, son, or daughter); *id.* § 212(i) (permitting a discretionary waiver of inadmissibility on the grounds of immigration fraud or misrepresentation with a showing that the alien's removal would result in

immigration policy has built in an evaluation of community ties, it seems clear that this is intended to protect the U.S. citizen or LPR. In essence, the immigrant has implicit consent to join the community as a result of the connection they have to an existing member of the community. This is consistent with the policy of requiring an affidavit of support for immigrants who obtain their status through the family-based preferences.[179] Under this requirement, the relative citizen or LPR is legally bound to provide for the immigrant financially.

An argument can be made that this form of community acceptance is based on the insurance against community costs for the immigrant. Along that rationale, moving toward a federalist system resonates with the desire to minimize the costs of immigration imposed on receiving communities. In many respects, the role that community plays in the federal immigration laws is similar to the English Poor Laws that restricted movement in the pre-1875 era of immigration law. Our immigration system should have more space for state and local control given that community acceptance plays such a large role in the admissions procedure.

2. The Federal Immigration Power in Conjunction With Local Zoning Powers

a. Modern-Day Examples

Since most of these neutral regulations have conceivably legitimate purposes, the commonality among these types of regulations is difficult to grasp without further, extensive research. When communities do enact these regulations, they will typically be linked to areas that fall under the state police power.[180] For instance, it is a generally accepted proposition of zoning and immigration law that there is an inherent right to control entrance of nonmembers into the community.[181] One need not look any further than the

extreme hardship to the alien's citizen or LPR spouse or parent); *id.* § 212(a)(9)(B)(v) (permitting a discretionary waiver of inadmissibility on the grounds of unlawful presence with a showing that the alien's removal would result in extreme hardship to the alien's citizen or LPR spouse or parent); *id.* § 240A(b) (permitting discretionary cancellation of removal for noncitizens with a showing of exceptional and extremely unusual hardship to the alien's citizen or LPR spouse, parent, or child upon removal).

179. Immigrants in the family-based preference categories must have a sponsor who can support them financially. *See id.* § 213A.

180. Taxes, quality of life, and access to various services like education and health care are often connected to community citizenship. *See* Su, *supra* note 17, at 396; *see also* Martinez v. Bynum, 461 U.S. 321 (1983) (permitting the exclusion of a U.S. citizen from a school district because he failed to meet the district's residency requirements).

181. *See, e.g.*, Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889) (stating that the right of exclusion from admission is an incident of sovereignty).

suburbanization of American cities following World War II. When services like public education and policing came under control of cities, suburban residents sought to separate themselves from the cities and insulate their suburban communities from sharing the costs of the cities' social programs.[182] Similar practices are present today, and communities commonly filter potential entrants using ordinances like minimum lot sizes, zoning restrictions against multifamily housing units, anti-loitering statutes, and so forth.[183]

b. Historical Development of the Zoning and Immigration Powers

One way that local governments might be able to achieve immigration-related goals is through zoning regulations. Regulation over the movement of people in the pre-1875 era discussed above might be viewed analogously to modern-day zoning efforts. They are both thought to function as mechanisms of self-definition and identification for local communities.[184] But while local communities' zoning power is given great deference and flexibility, direct immigration regulation at the local level is impermissible. If subfederal governments can obtain their immigration goals through state powers like zoning, then these governments can circumvent the federal immigration power altogether. Since zoning and immigration admissions controls roughly parallel each other in their development and purpose, it is puzzling that zoning is presumptively valid under the police power doctrine, but immigration-related regulations can be preempted by the federal immigration scheme. Both mechanisms can be articulated under the rationale of local autonomy, control, and safety. In fact, many of the pre-1875 laws were enacted on the basis of the states' police powers. The rationale for having a federally exclusive immigration system seems to be frustrated and undermined by the fact that local governments are able to achieve these ends using alternative routes. Cases allowing for broader state and local participation in immigration regulation may be a reflection of the courts' implied acknowledgment that the local governments should, and might already have, the power to engage in such forms of regulation.[185]

182. *See generally* ALAN RABINOWITZ, URBAN ECONOMICS AND LAND USE IN AMERICA (2004).

183. *See* Su, *supra* note 17, at 380.

184. For an in-depth analysis of the relationship between federal immigration laws and local land ordinances, see generally *id*.

185. Consider how the court in *CPLC* rejects a U.S. Supreme Court statement from *Hoffman* that employment of unauthorized workers was within the scope of federal immigration law in order to declare the power to regulate the employment of unauthorized workers as within the state police power. Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976, 983–84 (9th Cir. 2008), *aff'd sub nom*. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

Under the state police power doctrine, states retain "powers not delegated to the United States by the Constitution, nor prohibited by it to the states."[186] The police powers are often commonly described as encompassing public welfare, security, health, and safety. In the context of community organization, these powers allow states and localities to enact zoning laws and set spatial controls.[187] While the courts have found a host of reasons to legitimize the practice of zoning,[188] it is undoubtedly true that zoning reflects a desire to exert control over the quality and character of the community. Many authors have consequently drawn parallels between local land controls like zoning and federal admissions regulation in that both are designed to keep certain people out.[189] Recall that the first federal immigration regimes did not enter the picture until around 1875,[190] and zoning regulations did not gain popularity until around the 1920s.[191] The country was involved in western settlement and urbanization during these times. The country was balancing promoting growth via migration and settlement into the western part of the country, while at the same time trying to exert control over the organization of the new communities. As a result of these concurrent debates, many people viewed the battles over local community organization and federal admissions controls as inseparable.[192] Moreover, local spatial controls may have been viewed as a means to complement federal immigration by extending federal admissions objectives into the local context.[193] This is contrasted with the contemporary view that immigration is a field left exclusively to the federal government. Reimagining the federal–local relationship as cooperative rather than oppositional speaks to a possible resolution to the current problems in the immigration regulation scheme. Namely, the costs and pressures imposed on local communities by the emergence of large immigrant communities.

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186. U.S. CONST. amend. X.

187. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

188. *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (justifying the zoning power based on a commitment to single-family homes); Young v. Am. Mini Theatres, 427 U.S. 50 (1976) (justifying the zoning power based on the need to protect neighborhoods from the deterioration that accompanies adult use businesses); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (justifying the zoning power based on the importance of creating zones with family values and youth values).

189. *See, e.g.*, Su, *supra* note 17, at 372.

190. The first restrictive federal immigration law in the United States was the Page Act of 1875. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346 (2008).

191. *See generally Euclid*, 272 U.S. 365.

192. *See* Su, *supra* note 17, at 384.

193. *See id.* ("[T]he immigration dilemmas of the day were not being discussed solely through the lens of federal immigration restrictions; reformers looked to local spatial controls as well, and often conceived of the national and local components as parts of a comprehensive regulatory regime.").

Many of the first attempts to regulate immigration at the federal level began with restrictions on the immigration of Chinese nationals. This is a particularly salient example of the federal–subfederal relationship because, in large part, the introduction of the Chinese Exclusion Act[194] was a response to the severe backlash against the Chinese community in the western states. In fact, there is some evidence that California placed pressure on the federal government to address the perceived threat of Chinese migrant workers because the state realized it did not have the legal abilities necessary to accomplish its goals.[195] If Chinese exclusion was the federal response, then ordinances such as the permit requirement in *Yick Wo* were the local attempts to interface with the federal anti-Chinese sentiment. As Sam Warner observed, "The standard zoning ordinance of American cities was originally conceived from a union of two fears—fear of the Chinese and fear of skyscrapers."[196] Additionally, there were other efforts to stunt the growth of the Chinese community such as the prohibition on operating laundries in certain districts or constraining Chinese residential and business operations to designated districts.[197] Read together, these regulations form a narrative of a cooperative system directed toward achieving the same goal. While certainly the history of anti-Chinese legal treatment is neither celebrated nor viewed as constitutional, the various laws and schemes in place were considered perfectly legal when they were enacted. In that vein, the federal Chinese Exclusion Act read in conjunction with the various subfederal efforts to control the population of Chinese residents illustrates a system that historically represented a federalist approach.

Recognizing the role that local communities already play via zoning unveils some of the arguments supporting local governments' involvement in immigration regulation. By understanding that in the past zoning might have been used to complement federal immigration regulation, it is possible to identify the space where local governments can participate in regulatory efforts. But if the rationale is to afford local governments a certain degree of autonomy and self-definition, then the line drawn between zoning and indirect regulation seems to be a rather tenuous one. If the intentions and end results are fairly similar, then where do we limit local government intervention and under what rationale?

194. Act of May 6, 1882, 22 Stat. 58.
195. *See* MOTOMURA, *supra* note 169, at 23–25.
196. SAM BASS WARNER, JR., THE URBAN WILDERNESS: A HISTORY OF THE AMERICAN CITY 28 (1972).
197. *See* Su, *supra* note 17, at 386.

B. "Direct" Subfederal Regulation

Although it is well settled that the federal government formally has exclusive power in the field of immigration, some states and localities have made affirmative efforts to help or frustrate enforcement of federal law.[198] These types of direct measures are relatively uncommon because of their arguable unconstitutionality. However, it is precisely this constitutional uncertainty that makes these drastic regulations the most illustrative of local concerns.[199] Proposals and enactments of these types of laws demonstrate that cities and towns have "begun considering what direct role, if any, they should assume in the federal government's immigration enforcement efforts."[200] Part of this confusion stems from the lack of clarity from the federal government itself. For example, a 1996 Department of Justice (DOJ) memorandum concluding that state and local police "lack recognized legal authority to arrest or detain aliens solely for purposes of civil deportation proceedings"[201] was expressly overruled by a 2002 memorandum finding that "[t]he Office's 1996 advice that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken."[202]

These memoranda almost certainly pertain to section 287(g) of the INA.[203] Under section 287(g), state and local governments can enter into agreements with the Department of Homeland Security to obtain express authorization to enforce federal immigration laws. While only a small number

198. *Compare* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976 (9th Cir. 2008) (upholding Arizona state law requiring mandatory participation in E-Verify in a way that was considered participation in immigration regulation in the *Lozano* case), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011), *with* Rodríguez, *supra* note 9, at 591 (explaining that local government concerns have in some cases led to adoption of noncooperation laws, which can be "characterized as facilitating illegal immigration and thus as inconsistent with federal policy").

199. *See* Su, *supra* note 147, at 1634; *see also* Rodríguez, *supra* note 9, at 594 ("Whether the issue is day laborers congregating on street corners, the perception of overburdened public hospitals, or the dramatic rise of non-English-speaking students in local schools, localities are reaching for ways to handle what many people perceive to be threats to their way of life.").

200. *See* Su, *supra* note 147, at 1634.

201. Memorandum From Teresa Wynn Roseborough, Deputy Assistant Att'y Gen., Office of Legal Counsel, to U.S. Att'y for S. Dist. Cal. on Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), *available at* http://www.justice.gov/olc/immstopo1a.htm.

202. Memorandum From Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen. on 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.

203. Congress passed a series of measures in 1996 to enable and encourage more local participation in federal enforcement efforts, the most prominent of which was section 287(g). The section was largely ignored in the years after its passage, until Florida reached an agreement in 2002. Since then, more than forty states and localities have entered into a 287(g) agreement. *See* Su, *supra* note 147, at 1635.

of governments have entered into such agreements,[204] their mere existence has sent a message of federal invitation and encouragement of local participation in immigration regulation. When section 287(g) is read in conjunction with the 2002 DOJ memorandum, there is an even stronger case for federal recognition of the presumed validity of subfederal enforcement. Following that line of thought, some local police agencies have engaged in federal enforcement absent such agreements, perhaps on the basis that the existence of 287(g) agreements implies an inherent authority for local immigration enforcement.[205]

On the opposite end of the spectrum, noncooperation policies and sanctuary laws may be seen as the foil to direct local enforcement. In 1996, Congress prohibited local governments from enacting ordinances that barred the conveyance of information regarding immigration status.[206] The federal government sought to remove these types of ordinances because they hindered federal enforcement of immigration laws.[207] However, the cities affected by this legislation maintained that federal preemption would be an unconstitutional intrusion into the cities' sovereign powers.[208] The courts suggested that cities could adopt generally applicable confidentiality policies that could avoid federal preemption on the grounds that they were enacted in furtherance of legitimate municipal functions,[209] and ultimately New York City adopted such a policy.[210] The tension between the 1996 federal reforms and city noncooperation ordinances illustrates how the federal government strives to limit local interference with federal enforcement while the local governments try to promote policies beneficial to the general community. The ruling on New York

204. *See* Motomura, *supra* note 13, at 2058 n.98 (stating that as of February 2008, thirty-seven state and local governments had entered into 287(g) agreements).

205. For example, Sheriff Joe Arpaio vowed to arrest individuals present in the United States outside of the law whether or not he was acting under the authority of a 287(g) agreement. *See* Penny Starr, *Arizona Sherriff Vows to Enforce Immigration Law Whether 'Feds' Like It or Not*, CSN NEWS, Oct. 08, 2009, http://cnsnews.com/node/55199.

206. *See* Welfare Reform Act § 434, 8 U.S.C. § 1644 (2006); Illegal Immigration Reform and Immigrant Responsibility Act § 642, 8 U.S.C. § 1373.

207. *See* Rodríguez, *supra* note 9, at 601–02.

208. In response to the federal reforms, New York City and Mayor Rudolph Giuliani filed a suit claiming that the provisions violated the Tenth Amendment and the Guarantee Clause of the Constitution by infringing on the city's right to pass laws and otherwise determine city policy and usurping the administration of core local government functions such as regulation of the workforce and police protection. *See* City of New York v. United States, 971 F. Supp. 789 (S.D.N.Y. 1997) (holding that the federal statutes' interference with the city's Executive Order is permissible and does not alter the form of New York City's government), *aff'd*, 179 F.3d 29 (2d Cir. 1999).

209. *See City of New York*, 179 F.3d at 37 ("Whether these Sections would survive a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status is not before us and we offer no opinion on that question.").

210. *See* Rodríguez, *supra* note 9, at 604.

City's policy exemplifies that courts are more concerned with the formal means used to accomplish these regulations rather than their functional effects. In that sense, the subconstitutional approach is a way out of balancing federal and subfederal interests. The result is that policies like sanctuary laws might be seen as attempts to directly frustrate federal enforcement of its immigration policy, but they can survive preemption if they are justified on alternative grounds related to areas traditionally occupied by local governments. This is just one of many loopholes in our current system that illustrates the disconnected nature of our immigration system. Behind these legislative efforts is a belief that the current immigration system cannot meet the needs of the local communities, making subfederal intervention necessary. These problems are inevitable because subfederal regulation will continue to play a role in our immigration policy as long as the federal scheme fails to address the functional necessities of integration and participation of immigrant communities at the local level.[211]

Also reflected in these attempts of direct regulation is the desire to have autonomy over the makeup of the community. Clearly, different communities imagine different roles for immigrants. The juxtaposition of 287(g) agreements with sanctuary cities illustrates the potential problems of uniformity and consistency with complete localization of immigration regulation. Factors such as the need for immigrant labor and the existing concentration of immigrants in the community will affect the policies that will emerge in different areas of the country.[212] To draw back on Arizona's SB 1070, for example, Arizona is one of the main points of entry along the U.S.–Mexico border and will necessarily face different immigration issues than a state like Minnesota.[213] Clearly, the effects of immigration are felt unevenly across the nation and are likely to evoke different responses. Consider that there are those who are fervently in favor of strict enforcement of federal immigration laws,[214] and there are also

211. Also consider the argument that direct participation through cooperation agreements could be a more effective tool for balancing the needs of the community and the enforcement interests of the federal government. Either way, it seems that there is direct subfederal involvement adapting to the community needs. *See* Su, *supra* note 147, at 1640.

212. *See* Rodríguez, *supra* note 9, at 577.

213. The number of undocumented immigrants in Arizona is around 400,000, and the state suffers from the presence of many drug smugglers and human traffickers. *See* Christie, *supra* note 6.

214. One prominent example is Sherriff Joe Arpaio of Maricopa County, Arizona, who has gained the reputation as the "toughest sheriff in America." Arpaio entered into a 287(g) agreement with the federal government and has gained national attention for his hardline stance on immigration control. Arpaio has since had his power revoked by the federal government because of possible discrimination. Nevertheless, the voters of Maricopa County have demonstrated their approval, as Arpaio was reelected in 1996, 2000, 2004, and 2008. *See, e.g.*, Randy James, *Sheriff Joe Arpaio*, TIME, Oct. 13, 2009, http://www.time.com/time/nation/article/0,8599,1929920,00.html.

communities staunchly in support of protecting immigrants.[215] One can imagine that such a strong difference in opinion, when extended to a nationwide issue, would lead to a fractured, incomprehensible immigration system. In addition, since there really is no uniform opinion on the role of unauthorized immigrants in the community, a uniform federal policy is an incongruous fit.

C. "Indirect" Subfederal Regulations That Implicate the Federal Immigration Scheme

To try and circumvent the preemption issue, localities have also enacted regulations that rely on federal immigration statuses and laws but do not directly deal with federal enforcement efforts. Recall that much of the recently enacted subfederal legislation deals with areas of state control.[216] If legislation is aimed at regulating areas traditionally reserved for state control, courts are likely to find that the regulation falls under the police power of public welfare and to adopt a presumption against preemption.[217] Nevertheless, the ultimate goal still remains exerting local control over immigration.[218] The difference between direct and indirect regulations may be more a matter of name than a matter of function. In the end, the courts are essentially making decisions about how much power localities should be granted and where that line should be drawn. Rather than explicitly recognizing this decision, the courts must use indirect methods to find that these regulations do not deal with immigration directly such that federal law preempts them.

Indirect regulations are advantageous for subfederal entities as compared to direct regulations because they are often designed to promote noncitizen self-removal by depriving them access to valuable or necessary community resources.[219] Rather than expending the costs to obtain physical removal by force, communities can target specific groups of individuals they wish to discourage from remaining in the community by denying them certain benefits

215. For example, the cities of New Haven and San Francisco have adopted plans to create a city identification card that would essentially grant certain benefits and protections to noncitizens as well as citizens in order to improve the overall community's quality of life. *See* Motomura, *supra* note 13, at 2078–79.

216. *See supra* note 15.

217. This is apparent even in cases such as *CPLC*, where the legislation is aimed at areas directly involving immigration as a result of the emphasis on the areas traditionally left to state control. Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom*. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

218. Recall the New York sanctuary policy discussed above that survived when justified along the lines of municipal functions rather than immigration status. *See supra* notes 208–210 and accompanying text.

219. *See* Su, *supra* note 147, at 1644.

and protections.[220] Communities are thus able to disincentivize unwanted individuals from moving or remaining in the community, presumably with the added bonus of reaping the benefits of the labor of those who are deemed acceptable. This gives local governments a way to address the perceived costs of immigration without being confined by the limits of federal immigration standards.

These types of regulations are perhaps the crux of the battle between federal and subfederal powers. Unlike their neutral or direct counterparts, these regulations are not as clearly associated or dissociated from the federal immigration power. They implicate the immigration regime, but they reflect a mixed motive on the surface. By exercising control in legitimate areas of state and local interests, subfederal entities can exert control over immigration using causal links to achieve their desired outcomes.

1. Immigration Regulation Through Education Regulation

One prominent example of states' attempts to indirectly regulate immigration is in the field of education.[221] Education is clearly correlative to the future prospects of success in this country, so denial of public education could essentially amount to a de facto deportation. The right to receive an education is not considered a fundamental right,[222] but is still recognized as a very strong one. But because education is paid for via state funding, it is also logical to conclude that states deserve a fair degree of latitude in determining the substantive content and terms for granting public education.

In 1975, Texas passed legislation allowing school districts to deny public schools enrollment to children not legally admitted into the country.[223] In a 1982 Supreme Court case, *Plyler v. Doe*,[224] the Court held that Texas could not use immigration status as a basis to deny a public school education to children located within that state's borders.[225] While the Court paid much attention to the idea that the Texas statute relied on federal immigration status,

220. *See id.*

221. Though this Subpart focuses on children's education, the debate surrounding educational rights of undocumented immigrants has extended into higher education as well. For example, there are many points of view concerning the DREAM Act and the availability of in-state tuition for undocumented immigrants.

222. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (finding that education is not a fundamental right in upholding state funding law).

223. *See* TEX. EDUC. CODE ANN. § 21.031 (West Supp. 1981).

224. 457 U.S. 202 (1982).

225. *See id.* at 230.

the Court explicitly avoided addressing the preemption issue in the case.[226] The avoidance of the preemption analysis most likely reflects the Court's recognition that denying access to public schools would have the practical effect of crippling the children's futures in the country. At the same time, the Court tried to ensure that proper weight was given to state control over the operation of schools.[227]

In *Martinez v. Bynum*,[228] a case decided one year after *Plyler*, the Court held that the Constitution permits a state to restrict public education to its bona fide residents.[229] In *Bynum*, a U.S. citizen born in Texas to immigrant parents was denied enrollment in a local school.[230] The Court justified its decision on the basis that the school district required a bona fide residency requirement and that localities were explicitly allowed to give preference to their own residents.[231] Because he did not live with his legal guardian, the petitioner in *Bynum* failed to meet the residency requirement, as he was deemed to be present in the school district for the primary purpose of attending public schools in the United States.[232] Denying a citizen access to a public education was permissible in spite of the fact that "[a]t least one of the legislative purposes behind [the relevant section of the statute] was to inhibit the migration of persons residing in Mexico to attend schools in the United States."[233]

By deciding *Bynum* on the heels of *Plyler*, the Court essentially limited the *Plyler* decision to its constitutional equal protection grounds. Where *Plyler* stood for the proposition that federal immigration status was not a legitimate reason to punish innocent children, *Bynum* pushed back by asserting that national citizenship does not grant a guarantee to a public education. Rather, access to education is dependent upon the local ordinances because education is an area traditionally left to subfederal control. In the context of *Plyler*, local laws that discriminate on the basis of immigration status are unjustified

226. *See id.* at 210 n.8; Motomura, *supra* note 13, at 2042 ("Although the Court's equal protection analysis relied heavily on the distinction between state and federal statutes, in a footnote the Court declined to address whether the Texas statute was preempted by federal law.").

227. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

228. 461 U.S. 321 (1983).

229. *See id.* at 333 (finding the statute permissible because it could be satisfied so long as it was not the sole purpose of the child's residency to attend school).

230. *Id.* at 322–23.

231. *See id.* at 332–33.

232. *Id.* at 323–24.

233. *See* Arredondo v. Brockette, 482 F. Supp. 212, 216 (S.D. Tex. 1979); *see also* Su, *supra* note 17, at 420–21.

because they do not advance a substantial state interest. But *Bynum*, while not directly on the issue of federal immigration status, is an affirmation that states and localities can still indirectly influence immigration policies so long as the criteria used does not violate equal protection. Thus, if *Plyler* and *Bynum* are thought to be striving to reach similar goals, the Court's decisions in the cases illustrate that the goal is legitimate, it is only the form used to reach that end that concerns the Court.

D. Understanding Our System as an Integration of Federal and Subfederal Powers

Through the use of regulations, it is clear that states and localities are moving toward an express incorporation of immigration issues into their decisions. Whatever the criticism, it is clear that subfederal regulatory schemes have arisen as a result of the social and economic pressures placed on the immigrant-receiving communities. Indeed, states and localities do have some flexibility to deal with these pressures through the police power. And as discussed above, most of these ordinances will be able to successfully withstand constitutional challenges. Nevertheless, there is still a question as to the extent to which states and localities can rely on and enforce federal immigration standards.

There is already a built-in tolerance for subfederal immigration controls in our current system. But this tolerance seems to reflect the courts' rationalization that granting local governments the authority to engage in immigration control is necessary. In moving forward, it is helpful to think about how the three regulatory categories are conceptually distinct from each another and how the different rationales of allowing or disallowing those types of regulations can play a role in setting up a more coherent analytical model. At the same time, the fluidity between the categories also exemplifies the problems with the current judicial approach. Rather than establishing a policy that strikes a balance between federal and subfederal powers, courts are using subconstitutional arguments to achieve temporary fixes to the overarching problem. What is left over is a broken system that yields no predictability and in practice makes arbitrary distinctions between regulations that share similar goals. The increasing amount of subfederal legislation dealing with immigration and a growing dissatisfaction with the federal immigration system demands a solution to the problem.

IV. A NEW ANALYTICAL FRAMEWORK

This Comment illustrates the conflict by identifying the consequences of the current immigration setup, tracking the evolution of immigration law from a local power to the federal regime we have today, and examining the reemergence of subfederal regulations. All of this points to a narrative that departs from the traditional system of presumed federal supremacy over immigration regulation. Examination of the rich history of immigration laws in this country reveals that a rationale favoring subfederal control was once the norm. This is especially pertinent because the articulation of subfederal control has often been associated with ideas of community identity and the state police power. While much has changed in the ensuing century, these two concepts are still relevant today and are often used as justifications for allowing indirect and neutral immigration regulations. The recent E-Verify cases exemplify this judicial move as well, as it appears that the courts are relying on subconstitutional mechanisms to uphold subfederal regulation.

This Part argues for a modified system that better addresses the real costs that local communities face when receiving immigrants. Regardless of political views and agendas, it remains clear that there is no consensus on how to approach immigration regulation and what role unauthorized immigrants should play in the community.[234] Because most of the immigration pressures are felt at the local level, lawmakers are forced to engage in a delicate balancing act—responding to these pressures without encroaching upon the realm of federal exclusivity. There also remains the argument that local controls are a critical part of how we have historically balanced the competing interests of immigration, and they may have made our immigration regime acceptable and workable.[235] Thus, this Comment argues that not only is there room for federalism in the immigration context, a federalist approach is necessary. The challenge is to define the scope of the power delegated to each side.

As shown by the employment of unauthorized workers, a vital starting point is defining the scope of what constitutes immigration regulation. To do this, we first need to answer the more fundamental question of what is at stake for the parties involved. The federal interest in control over immigration regulation can essentially be boiled down to making substantive determinations of who may and may not be admitted to the country. As Christina Rodríguez points out, efficiency and uniformity require federal control over the formal

234. Contrast the enactment of sanctuary laws with 287(g) enforcement agreements. *See supra* Part III.B.

235. *See* Su, *supra* note 17, at 430.

admissions and removal process.[236] On the subfederal side, local governments have an interest in finding an optimal balance between the benefits and consequences of an immigrant's presence in the community. To the extent that striking this balance can result in discriminatory practices or place undue externalities onto neighboring communities, the federal government also has an interest in mitigating these consequences. It is for these reasons that this Comment advocates adopting the *De Canas* definition of immigration regulation as a formal determination of who may be admitted and who may remain in the country.[237] Regulations that fall under this category should be presumed to be preempted by federal laws.

The advantage to this approach is that it adheres to Supreme Court precedent without making any dramatic modifications of the well-established rules of immigration. It provides a narrow scope for the category of regulations that would be presumptively preempted. In this vein, this Comment argues that the political branches' plenary authority should be limited to determinations of admissions. This would remove the ambiguity concerning whether preemption should apply to indirect or neutral regulations and would theoretically create space for subfederal regulations within the immigration regime. This approach would preserve the federal interest in making substantive decisions on admission. Having a narrow definition of immigration regulation would also allow local governments to enact legislation to exercise their rights of self-determination, and strike the communities' desired balance between the benefits and consequences of an undocumented presence. The question would then turn to what extent local governments would be limited in their engagement with immigration regulation.

With the plenary power limited to the *De Canas* definition of immigration regulation, space would open for states to operate under their police power. States that promulgated rules in pursuit of their traditional police powers should be bolstered with a presumption against preemption. Since most regulations will be able to put forth justifications based on public welfare, most forms of subfederal regulation will fall under the state police power. Given that there is no express immigration power found in the Constitution, it is even arguable that immigration should be viewed as a power reserved to the states. This Comment does not go that far. But the Tenth Amendment argument coupled with the historical pre-1875 state immigration controls and the racially driven

236. *See* Rodríguez, *supra* note 9, at 572.

237. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." De Canas v. Bica, 424 U.S. 351, 355 (1976).

history of the evolution of the federal immigration power help push back against the idea that the federal government's immigration power is inherently broad and expansive. In applying this framework to immigration regulation analyses, the courts would not be required to depart from their normal approach to questions of preemption. Rather, the delineation between what is immigration regulation and presumptively federally controlled is made clearer. Regulations that can be identified under areas of traditional state control would no longer fall in between federal and subfederal control but rather be maintained as an area of state control. This reflects the same rationale found in the cases preserving the state quarantine and public health laws[238] and is also essentially the argument present in the pro-localization E-Verify decisions.[239]

The presumption against preemption will grant greater latitude to subfederal governments seeking to address problems at the local level. Subfederal governments would have the ability and the authority to strike their own balances between the costs and benefits of immigration. Because the political branches will still retain plenary authority over the substantive categories of admission and removal, subfederal regulations will only be able to control areas found to fit under the state's police power. However, as the presumption against preemption would grant a great degree of power to local governments, there must be additional safeguards to combat against discriminatory regulations and displacement of externalities. As Rick Su points out, any approach to fragmentation of the immigration regime will ultimately lie in the details. We have to be cognizant about how we address the exclusionary consequences while enabling communities the right of distinction and self-determination.[240] We must be aware of what weight we give to efficiency and proficiency when it potentially comes at the cost of a genuine commitment to participatory democracy.[241]

In the context of this discussion, one might wonder why a purely local system is not ideal. To start, a strong federal immigration regime is necessary for the sake of efficiency and uniformity.[242] Also weighing against localized control are fears of discrimination[243] and placement of externalities on neighboring

238. *See supra* notes 134–137 and accompanying text.

239. *See* Chicanos Por La Causa, Inc. v. Napolitano (*CPLC*), 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011); Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 2009 U.S. App. Lexis 12075 (8th Cir. June 5, 2009).

240. *See* Su, *supra* note 17, at 433–34.

241. *See id.* at 434.

242. *See supra* notes 105–108 and accompanying text.

243. As previously discussed in note 214 *supra*, Sheriff Arpaio had his 287(g) agreement revoked and was placed under investigation by Congress for allegations of racial discrimination in over-targeting

communities.[244] A system that relies purely on local enforcement and regulation would not be practicable for many reasons, but as demonstrated by 287(g) agreements and sanctuary laws, there is definitely space for such controls. Additionally, one might expect that without a federal baseline, neighboring communities might participate in a race to the bottom, whereby each community will try to displace their burdens on outside actors by passing overly restrictive laws.

In order to protect against the dangers of discrimination and externalities, the courts should then adopt a pretext inquiry,[245] specifically tailored to the immigration context to ensure that equal protection is not violated. For example, Arizona's SB 1070 is problematic because of the potential racial profiling component of the law. Plaintiffs could create a prima facie case by offering evidence that there was a disparate impact on either immigrants or specific racial groups. The burden would then be placed on the enacting government to rebut this showing. In the context of SB 1070, the disparate impact is clear because it opens the door to use skin color as a proxy for probable cause.[246] Also, when read in conjunction with the accompanying measures passed in Arizona, a discriminatory intent can be inferred in the aggregate.[247]

While the impacted class would affect the level of scrutiny, the baseline scrutiny should be intermediate. Intermediate scrutiny is appropriate because it best reflects the policy rationale of striking a balance between local and national interests.[248] Consider that most purposes behind immigration regulation could pass rational basis, in that they preserve the public safety, health, and general

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Latinos. *See* Press Release, House Judiciary Comm., Judiciary Committee Members Call for Investigation of Sheriff Arpaio's Disregard for Rights of Hispanic Residents (Feb. 13, 2009), *available at* http://judiciary.house.gov/news/090212.html.

244. For example, in order to combat this, the New Jersey Supreme Court announced the Mount Laurel Doctrine, which requires that municipalities use their zoning powers in an affirmative manner to provide a realistic opportunity for the production of housing affordable to low- and moderate-income households. S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975).

245. The use of a "pretext inquiry" in this Comment refers to a process whereby courts would look behind the purported reasons despite their ability to make a prima facie showing that they were related to legitimate and legal goals.

246. *But see* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (allowing the use of skin color as a basis to pull individuals over when close enough to the border).

247. In the days following SB 1070, Arizona adopted an educational policy that banned ethnic studies classes and restricted the teaching of English classes on the basis of accent. *Arizona Ethnic Studies Classes Banned, Teachers With Accents Can No Longer Teach English*, HUFFINGTON POST, June 30, 2010, http://www.huffingtonpost.com/2010/04/30/arizona-ethnic-studies-cl_n_558731.html.

248. This Comment recognizes the rare use of intermediate scrutiny but proposes this standard anyway for the pragmatic utility of such an approach, as opposed to basing the point of intervention on protected classes.

welfare, thus resulting in too strong of a local power.[249] Alternatively, most ordinances would likely be unable to meet the narrowly tailored and least restrictive means standards, and thus be overly restrictive on subfederal power. In this sense, intermediate scrutiny may be the best way to allow for a proper weighing of issues without finding the laws presumptively valid or invalid. Intermediate scrutiny is also appropriate given that immigrant communities may properly be viewed as a class that should be protected, but the courts have refused to recognize them as a protected class deserving of strict scrutiny.[250]

In order to survive, it must be shown that the law or policy being challenged furthers an important government interest in a way that is substantially related to that interest.[251] This level of scrutiny is appropriate because the government interest should surpass the threshold of being important and the substantial relation will demonstrate that the purported purpose is actually being advanced, and not being merely offered as a pretext to discriminate. The elevated level of scrutiny would also require a purpose and relationship that would essentially justify the resulting externalities, since there is an overriding important governmental interest at stake. For SB 1070, the articulated interests might be prevention of crime such as drug and human trafficking. However, it would be difficult to show that all of the provisions are substantially related to that interest. Certainly, at least the parts of SB 1070 that allow police to verify immigration status on the basis of race are both overinclusive and underinclusive at the same time. On the one hand, it will necessarily implicate all identifiable racial minorities of Latino descent and trample on countless citizens' and LPRs' rights. At the same time, it could largely result in the exclusion of groups of undocumented immigrants from parts of the world such as Eastern Europe or individuals of Latino descent who can pass as white. In this regard, the proposed judicial approach would be able to filter out the parts of the law that result in discriminatory application and treatment.

There still remains a question as to why this cannot be accomplished more neatly through the legislative process. Christina Rodríguez, for example, proposes a framework that calls for federal and state lawmakers to restrain their impulses to preempt legislation by lower levels of government that can be obtained by creating incentives for cooperative ventures in regulation.[252] Under Rodríguez's proposal, Congress should recognize states' interest in adopting a range of integration measures that help states and local communities deal with

249. *See supra* notes 134–137.

250. *See* Plyler v. Doe, 457 U.S. 202 (1982).

251. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications . . . must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

252. *See* Rodríguez, *supra* note 9, at 568.

the practical and human implications of immigration, and she points to employer sanctions as an example of how the INA already reflects a willingness to allow this. While Rodríguez's proposed framework would certainly help clarify the legislative context, it could still lead to conflicts in the court as demonstrated by the E-Verify cases. Further, cases like *CPLC* and *Gray* show that courts have already elected to use subconstitutional approaches to broaden local control. While it is an important first step for the legislative branch to recognize that the federal interests in immigration differ from the states' interests, it is imperative to resolve this tension in a way that is clear enough for the judiciary to apply. A narrow definition of immigration regulation and a system slanted in the direction of the state police power will at minimum allow for greater judicial clarity. But beyond that, it allows for the local governments to start reaching their own balances in efficient and responsible ways.

Finally, one might question whether this proposed system truly protects against discrimination and is a better alternative to the current framework. Shifting the balance to grant more express areas available for subfederal involvement increases the risk of laws similar to SB 1070 or possibly worse. The answer is that with subfederal governments already engaging in such a heavy amount of immigration regulation, this risk is already present. In this system, it is important that the pretext inquiry be applied strongly to monitor discriminatory action. Laws that encroach upon the area of admissions determinations could still be subjected to preemption and laws enacted for the purpose of discriminating against immigrants would have to pass intermediate scrutiny. However, subfederal entities would be permitted to design policies impacting the public health, safety, and welfare as opposed to the movement of individuals. In that regard, this system emphasizes practicality and places the onus of integration rather than admission on subfederal governments.

CONCLUSION

Despite the federal government's presumed exclusive power over immigration enforcement and regulation, subfederal governments engage in immigration as a matter of function. The federal and subfederal entities together form an integrated structure that regulates immigration to deal with the real economic and social consequences of immigrant flows.[253] Pragmatically, localities are best equipped to address the issue of integration and local immigration regulations represent a "natural extension of how the incentive structure of localism

253. *Id.* at 571.

channels local action."[254] As a result, subfederal legislation engages in both direct and indirect methods of enforcement and regulation.[255] The courts do not have the tools necessary to address these problems and subsequently have found ways of framing the issues as outside of immigration to reach certain outcomes.

With immigration issues becoming increasingly central to the political agenda in the country, it is likely that we will only continue to see heavy involvement of local governments in immigration. There is widespread dissatisfaction with the current federal immigration system and the time is ripe to consider what role subfederal governments should play in this system. In contemplating this role, it is appropriate that we think about the fundamental principles in play—the federal interest in having a uniform immigration system versus the subfederal interest in public costs and self-identification.

It is important to recognize that this system of presumed federal exclusivity was created to carry out racially discriminatory political motives. Complete analysis of this country's history of immigration regulation reveals that the states have at times been granted powers to regulate the movement of people on the basis of the police power. In fact, much of the subfederal legislation that impacts immigration today is justified by the states' police power. Local governments are already finding ways to enact laws touching upon immigration and courts are finding ways to allow this type of legislation. In moving forward, it is important for the sake of clarity and consistency that the courts refrain from avoiding the issue and make fundamental changes to the way we approach these questions. The proposed approach is certainly no panacea to the fractured immigration system we currently have, but it is a step in the right direction toward finding an optimal balance between the costs and benefits of immigration.

254. Su, *supra* note 147, at 1633.

255. Rick Su, in his article, discusses how legislation that operates on immigration appears in three different forms: direct, indirect, and neutral. *See* Su, *supra* note 17.