

Article

Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders

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I. INTRODUCTION

Comprehensive reform to U.S. immigration law and policy appears to be imminent. On June 27, 2013, the Senate passed S. 744, the “Border Security, Economic Opportunity, and Immigration Modernization Act.”¹ This bill was written by a bipartisan group of eight senators and is designed to streamline the admission of “desirable” immigrants while addressing the challenges posed by

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1. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2103 (2013) (as passed by Senate, June 27, 2013).

approximately 11.2 million undocumented migrants.² Lawmakers, scholars, and commentators are now waiting to see what action, if any, the House of Representatives will take. Whatever the eventual outcome in Congress, it is clear that the engagement by national, state, and local governmental actors in immigration regulation is in flux. Until the summer of 2012, state governments were often at the forefront of efforts to influence the reform of immigration law and policy.³ That changed on June 25, 2012, when the United States Supreme Court issued its pivotal decision in *Arizona v. United States*,⁴ reasserting the federal government's primacy in the immigration arena and curtailing federal, state, and local rulemaking pertaining to immigration enforcement and immigration-related criminal sanctions. As the likelihood of federal immigration reform increases, some scholars suggest that the *Arizona* decision signals the demise of state and local involvement in immigration regulation,⁵ but I disagree.

I have argued elsewhere that *Arizona* transformed the traditional notion of "immigration federalism," limiting states' roles with regard to immigration enforcement while reinvigorating the ability of states and localities to participate creatively in the vast array of policies designed to include, acculturate, and normalize the experiences of immigrants, documented and otherwise, in the United States.⁶ In this Article, I propose that comparative legal analysis clearly demonstrates that, irrespective of whether Congress passes comprehensive immigration reform, *Arizona* need not mark the end of state and local engagement in immigration regulation, particularly in the sphere of immigrant integration. This engagement by state and local governments is crucial because they serve as the primary point of contact between immigrants and government. As such, they principally bear the costs of service provision to immigrant communities, including those additional costs imposed when immigrants experience difficulties integrating into their local communities.⁷ Indeed, early analyses of post-*Arizona* state and local immigration rulemaking suggest that state and local governments have recognized this reality to such an extent that, contrary to many scholars' expectations, state and local immigrant-inclusionary rulemak-

2. *Id.*; see also Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES, June 28, 2013, at A1 (describing support for and content of the Senate bill).

3. In 2010, for example, 346 separate bills pertaining to immigration and alienage were enacted by state governments. In 2012, the number of new state laws pertaining to immigration was reduced to 267. See Allison Johnston & Ann Morse, *2012 Immigration-Related Laws and Resolutions in the States (Jan. 1 - Dec. 31, 2012)*, NAT'L CONF. ST. LEGISLATURES (Jan. 2013), <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-jan-december-2012.aspx>.

4. 132 S. Ct. 2492 (2012).

5. See, e.g., Kit Johnson & Peter Spiro, Debate, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100, 105 (2012); Andrew Pincus, *Online Symposium: A Win for the Government and the S.G.*, SCOTUSBLOG (June 26, 2012, 4:56 PM), <http://www.scotusblog.com/?p=147688> ("[T]his is a big win for the United States."); Margaret Stock, *Online Symposium: The Court Throws Arizona a Tough Bone to Chew*, SCOTUSBLOG (June 27, 2012, 4:51 PM), <http://www.scotusblog.com/?p=147811> ("The Court's five-to-three decision in *Arizona v. United States* appears to be a resounding victory for the Obama Administration—legally and politically.")

6. See Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. (forthcoming 2013).

7. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 80 (2007).

ing is now outstripping immigrant-exclusionary measures in the United States.⁸ In light of this recent development, there is much that local lawmakers can learn from other federal nations' experience of state and local engagement in immigration regulation. This Article's comparative analysis of the frameworks of immigration law and policy employed by other federal nations over the last decade demonstrates the extent to which an alternative approach to immigration regulation, predicated upon state and local involvement in immigrant selection, combined with state and local lawmaking designed to foster immigrant inclusion, may be both feasible and desirable in the long-term.

The nature and form of recent immigration law developments in the United States, grounded in the Supreme Court's immigration preemption jurisprudence, are intrinsically American. But the trend toward greater state and local engagement in immigration regulation is not a uniquely American phenomenon. Immigration law is, by its very nature, interjurisdictional and transnational, and yet, thus far, American immigration scholarship has paid only limited attention to the development of immigration regulation, including immigration federalism, elsewhere. This Article endeavors to fill that gap.

In recent years, three other federal nations—Germany, Australia, and Canada—have, like the United States, encountered similar immigration-related challenges and have realigned their approaches to national, state, and local engagement in immigration regulation. The fundamental similarities and differences between and among these countries' immigration regimes make them particularly rich points of comparison with the United States. Like the United States, each of these nations is a mature, federal democracy with experience in the selection, admission, and integration of immigrants.⁹ As in the United States, each of these countries has a jurisprudential tradition grounded in civil liberties, due process, and the rule of law.¹⁰ Furthermore, as in the United States, each of these countries has promulgated new laws and regulations to create a multitiered, multigovernmental system of immigration regulation and has done so within a context that is deeply infused with political, ideological, and cultural concerns that are broadly similar to those now at issue in the United States.¹¹

In Germany, where individual states previously enjoyed a remarkable de-

8. See, e.g., Tanya Broder et al., *Inclusive Policies Advance Dramatically in the States: Immigrants' Access to Driver's Licenses, Higher Education, Workers' Rights, and Community Policing*, NAT'L IMMIGR. L. CENTER (Oct. 2013), <http://www.nilc.org/document.html?id=963.pdf>.

9. See, e.g., Kevin Tessier, *Immigration and the Crisis in Federalism: A Comparison of the United States and Canada*, 3 IND. J. GLOBAL LEGAL STUD. 211 (1995) (discussing commonalities and differences in the United States' and Canada's approach to immigration); Ty S. Twibell, *Immigrant Nations: A Comparison of the Immigration Law of Australia and the United States*, 19 U. TAS. L. REV. 57 (2000) (discussing similarities and differences in the immigration regimes of the United States and Australia). Although Germany has a very different history in its treatment of immigrants and migrants, it has, since the 1950s, promulgated a range of laws and policies with respect to noncitizen residents and newcomers. See, e.g., Christian Joppke, *Exclusion in the Liberal State: The Case of Immigration and Citizenship Policy*, 8 EUR. J. SOC. THEORY 43, 52 (2005) (describing the history of Germany's approach to immigrant selection, admission, and integration).

10. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 930-77 (2006).

11. See *infra* Part IV.

gree of autonomy in the arena of immigration regulation, responsibility for immigration-related lawmaking and implementation is now shared concurrently between state agencies and the Federal Office for Immigration and Refugees.¹² In Australia, where immigration regulation was traditionally heavily centralized, some powers have now been devolved partially to the states through state-administered immigrant integration programs and through a new State Specific and Regional Migration Program.¹³ In Canada, where the role of the federal government and that of individual provinces previously varied significantly between provinces, a stronger provincial role has recently emerged throughout the country, in part because of new Provincial Nominee Programs, which allow provinces to support certain potential immigrants' applications for admission to the country, and in part because of greater provincial engagement in immigrant-integration-related rulemaking and rule implementation.¹⁴

The challenges that legislators and, to a certain extent, courts face in delineating the boundaries of national, state, and local engagement with immigration regulation are undoubtedly complex. Although there are meaningful limits to institutional translation in any transnational comparative analysis, insight into the ways in which other nations have attempted to resolve immigration-related challenges, and the uniting factors in their various approaches to immigration federalism, can nonetheless be useful and valuable for American lawmakers, jurists, and scholars. This Article therefore suggests how the current debate about comprehensive immigration reform in the United States might be informed by the outcomes of immigration law and policy reforms overseas.

This Article discusses the potential for regulatory reform at the national, state, and local levels—in other words, reforms to the current framework of immigration federalism. Part II of the Article contends that “immigration federalism,” a term that has been narrowly defined in the United States, should, when viewed in a comparative context, be defined as broadly as possible. This broad definition encompasses all multigovernmental rulemaking pertaining to immigrants and immigration, whether such rulemaking is designed to further immigrant exclusion or to foster immigrant inclusion, and whether it is done by various government entities acting in cooperation with or in opposition to one another. Part III describes recent developments in American federal, state, and local laws pertaining to immigration regulation. It briefly explains how, in light of the Supreme Court's recent ruling in *Arizona v. United States*, states and localities may no longer promulgate laws designed to directly or indirectly enforce federal immigration laws, although they remain able to engage in immi-

12. This new federal office was created under Section 75 of Germany's Residence Act of 2004. See Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthaltes und der Integration von Unionsbürgern und Ausländern [Zuwanderungsgesetz] [Law to Manage and Limit Immigration and to Regulate the Residence and Integration of Union Citizens and Foreigners], July 30, 2004, BUNDESGESETZBLATT, Teil I [BGBL. I] at 1950, § 75 (Ger.).

13. See Lesleyanne Hawthorne, *Picking Winners: The Recent Transformation of Australia's Skilled Migration Policy*, 3 INT'L MIGRATION REV. 663, 667 (2005) (describing the traditional approach and its limited success in achieving immigrant integration).

14. See Myer Siemiatycki & Triadafilos Triadafilopoulos, *International Perspectives on Immigrant Service Provision*, MOWAT CENTRE FOR POL'Y INNOVATION 3 (May 2010), <http://www.mowatcentre.ca/pdfs/mowatResearch/13.pdf>.

grant-inclusionary lawmaking.

Part IV of the Article discusses the evolution of immigration federalism in Germany, Australia, and Canada. In each instance, the development of such a system—roughly analogous in each case to the new framework of immigration federalism that is emerging in the United States—occurred in response to immigration-related challenges similar to those currently faced in the United States. The Article demonstrates that in each of these countries a system of immigration regulation has emerged wherein states and localities have broad power to promulgate immigrant-inclusionary regulations and extremely limited power to engage in immigrant-exclusionary lawmaking.

The Article then considers, in Part V, the potential lessons that American lawmakers and scholars pondering the future direction of immigration regulation in the United States might draw from this comparative analysis of different systems of immigration regulation. The Article analyzes the commonalities and differences between the various immigration federalism frameworks surveyed in three broad areas of immigration-related lawmaking: immigrant selection and admission, immigration enforcement, and immigrant integration. The Article proposes that the different models of immigration federalism in Germany, Australia, and Canada illustrate the conceptual coherence and desirability of a system of immigration regulation wherein states and localities are permitted great flexibility to engage with the initial selection of new migrants and to develop laws designed to welcome and include immigrants, while enjoying little or no opportunity to promulgate anti-immigrant legislation. The U.S. Supreme Court's *Arizona* decision has laid the doctrinal groundwork for American policymakers to promote such a framework of immigration regulation, and the German, Australian, and Canadian examples suggest that, both jurisprudentially and as a matter of policy, there is much to be gained from doing so.

II. "IMMIGRATION FEDERALISM" IN COMPARATIVE CONTEXT

This Article considers potential models for the reform of immigration regulation at the national, state, and local levels. Immigration scholars use the term "immigration federalism" to describe the relationships between different governmental actors in their administration of immigration-related laws and regulations.¹⁵ In a comparative context, the term "immigration federalism" encompasses involvement by multiple tiers of government, at the federal, state, and local levels, in the promulgation of laws and regulations concerning immigration and immigrants—laws and regulations that may pertain to either immigrant exclusion or immigrant inclusion.

Although American scholars have previously defined the term "immigration federalism" in a variety of ways,¹⁶ including adopting narrow definitions that imply that "immigration federalism" might be synonymous with "immigra-

15. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 788 (2007); Schuck, *supra* note 7, at 58-60; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635-36 (1997).

16. See Huntington, *supra* note 15; Schuck, *supra* note 7; Spiro, *supra* note 15.

tion enforcement federalism,”¹⁷ a broader definition is necessary to fully capture the range of federal, state, and local lawmaking found in different federal systems. I have written elsewhere of the importance of redefining “immigration federalism” in the United States to adequately reflect the diverse approaches taken by different governmental actors in a purely domestic context.¹⁸ Such a broad definition is even more important when considering the vesting of power to regulate aspects of migration at the local, national, and transnational levels by different nation states.¹⁹

As Peter Schuck has explained, state participation within a framework of “immigration federalism” can take many forms.²⁰ In this respect, this Article adopts Professor Schuck’s argument that “immigration federalism” is not a species of federalism that is defined by state sovereignty or autonomy—although it may be influenced by understandings of constitutionalism in this context.²¹ In the United States and each of the other countries discussed in this

17. As a consequence of such narrow definitions, those scholars who were most concerned with discrimination against immigrants have been perceived as being opposed to “immigration federalism.” See for example, Huntington, *supra* note 15, at 789 n.7, which characterizes an article by Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 515-18, 527-28 (2001), as “describing discriminatory state laws passed pursuant to a federal law permitting states to determine eligibility of non-citizens for public benefits and anticipating more such laws in the next economic downturn.” Such commentators have argued persuasively that devolving authority, particularly in the sphere of immigration enforcement, to state and local authorities could have a profoundly detrimental effect on immigrant communities. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1400-01 (2006) (arguing that police will discriminate because “local authorities [who] start enforcing immigration laws without proper training . . . are prone to engage in racial profiling or other abuses of authority.”); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088-95, 1102-15 (2004) (arguing that state and local police have no “inherent authority” to enforce federal immigration laws and that any enforcement authority they may have has been preempted by federal law; describing concern of racial profiling with increased use of state and local enforcement of federal immigration law). Other scholars have argued that it could also discourage immigrant victims of crime from coming forward. See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1450-55 (2006) (describing disincentives for unauthorized migrants to report crimes to the police). By contrast, commentators who have advocated for tighter control of migration and more aggressive enforcement of immigration laws have often been perceived as being in favor of “immigration federalism.” See Huntington, *supra* note 15, at 789 n.10, which describes Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 183-99 (2006), as listing situations in which immigration-based arrests by state and local officials have been crucial; and Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323, 327-29 (2005) as describing the need for state and local enforcement of federal immigration law.

18. See Elias, *supra* note 6, at 4-6.

19. See generally Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (describing the consequences of overlapping jurisdictions).

20. Schuck, *supra* note 7, at 65 (“This state participation can take many different forms: administration and/or enforcement of federally-established rules and policies; policy development and implementation within parameters (more or less constraining) set by federal policymakers; federal funding of states to develop their own policies; and many other collaborative (though inevitably conflicting) arrangements.”).

21. *Id.* In particular, the “anti-commandeering” federalism and Article II-based principles articulated in *Printz v. United States*, 521 U.S. 898 (1997), should inform immigration scholars’ understanding of the limits on the federal government’s power to compel state law enforcement officials to participate in immigration enforcement operations. The Article II-based argument is that state executive officials cannot be conscripted to enforce federal law because they lack constitutionally required federal executive oversight. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the*

Article, immigration rulemaking, as well as the enforcement and dissent from those rules, involves an increasingly complicated patchwork of federal-state, state-local, and, in some instances, even federal-local or federal-state-local relationships.

An expansive and flexible definition of immigration federalism is essential when considering different countries' differing approaches to immigration regulation in a comparative context. Each of the nations surveyed in this Article—the United States, Germany, Australia, and Canada—has its own unique federal system, its own long-standing constitutional jurisprudence, and its own body of doctrine governing cooperation between different tiers of government. Perhaps as a consequence, each country has developed a very different system of immigration regulation. As I discuss in Part IV, however, each country's system shares certain attributes with each of the other nations surveyed that are reflected accurately in an expansive definition of "immigration federalism." In each country surveyed, national, state, and local government actors are engaged in promulgating and implementing laws pertaining to immigrants and immigration.²² In each case, multiple tiers of government are able to act, sometimes in cooperation with one another, and at other times not.²³ In each case, the federal government and state and local governments may implement schemes pertaining to immigrants that either overlap or stand alone.²⁴ In each case, there is room for state and local rulemaking that is concurrent with or even competes with certain federal schemes²⁵—suggesting that such an attribute may be a part of "immigration federalism," not an exception to it.

It is important, however, to recognize the potential limitations of this Article's definition of "immigration federalism" and of its descriptions of the local, national, and transnational actors involved. Each of the countries surveyed in this Article has a different form of "federalism," grounded in different constitutional principles and legal traditions, and this Article's use of the term "immigration federalism" with respect to the different federalist structures and traditions of the nations surveyed is not intended to elide these essential differences.²⁶ Furthermore, this Article describes federal/national governmental actors and subnational entities such as state or municipal governments in four different national contexts, which necessarily involves a level of generality that

National Legislative Process, 82 N.Y.U. L. REV. 1 (2007) (arguing that state and local governments should be permitted to engage with controversial topics that potentially put them at odds with the federal government to encourage more robust political discourse); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 188 (2005) (positing that subnational legislatures acting independently are "more likely to promote democratically accountable local autonomy than national legislatures"); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 915 (1998) (concluding that state and local governments "ought to enjoy an entitlement to withhold their voice and refuse to implement federal policies enacted by Congress").

22. See *infra* Part IV.

23. See *id.*

24. See *id.*

25. See *id.*

26. See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272 (2001) (describing the potential limits of comparison between different federalism structures).

belies the meaningful international, intranational, and intrastate differences between such actors.²⁷ States and cities are not monolithic blocs, and their constitutions, compositions, communities, and aspirations vary tremendously.²⁸ This Article endeavors to avoid essentializing the roles of different subnational institutional actors in different national contexts.

The next two Parts of this Article explore immigration regulation first in the United States (in Part III) and then abroad (in Part IV). The discussion that follows demonstrates that in the United States, the engagement by national, state, and local governmental actors in immigration regulation does not necessarily involve state and local authorities acting in cooperation and coordination with the federal government.²⁹ Instead, in the United States, immigration federalism frequently involves dissenting or uncooperative rulemaking by states and localities, whether with respect to immigrant-exclusionary measures such as Arizona's controversial Senate Bill 1070, which directs local police officers to question individuals about their immigration status,³⁰ or immigrant-inclusionary measures such as the sanctuary movement or state DREAM Act legislation.³¹ In contrast, in the other countries surveyed, engagement by national, state, and local governmental actors in immigration regulation appears overwhelmingly to involve cooperation between the federal government and subnational units³²—although there is at least some room for dissent. In all cases, however, the overarching framework of immigration lawmaking falls within the broad definition of “immigration federalism.”

III. IMMIGRATION REGULATION IN THE UNITED STATES

According to long-standing U.S. Supreme Court doctrine, the federal government enjoys broad “plenary” power over all aspects of immigration regulation. Although the Constitution does not expressly define the scope of the federal government's power over immigration,³³ it is a settled principle of American constitutional law that the powers to select, admit, and exclude non-citizens enshrined in the federal Immigration and Nationality Act³⁴ belong ex-

27. See Cover, *supra* note 19 (discussing the jurisdictional complexities of the U.S. courts).

28. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 622 (2001) (“Categories are endemic, in law as elsewhere, but what fills categories and their contours varies with context.”).

29. The exception to this rule are 287(g) agreements between Immigration and Customs Enforcement and state and local police, which are discussed in Part III.

30. S.B. 1070, 49th Leg., 2nd Reg. Sess., ch. 113 (Ariz. 2010).

31. State enforcement of immigration laws, state promulgation of sanctuary laws, and state DREAM Acts are all discussed in Part III.

32. See *infra* Section IV.C (discussing Toronto's sanctuary city ordinance and the concurrent Canada-Ontario-Toronto formal accord).

33. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81, 83 (2002) (describing the Naturalization Clause, the Migration Clause, the Taxation Clause, and the treaty, foreign commerce, and war powers as plausible enumerated sources of the federal government's immigration powers).

34. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.); see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (defining immigration law as concerning “what aliens shall be admitted to the United States,

clusively to the federal government.³⁵ During the last fifteen years, however, state and local governments throughout the United States have passed a record number of immigration-related laws.³⁶ Thirty-seven such bills pertained to state participation in immigration enforcement operations.³⁷ Some of these laws mandated the direct enforcement of federal immigration laws by state police, either under so-called 287(g) delegated action agreements with the Department of Homeland Security's Immigration and Customs Enforcement Branch,³⁸ or under independent state initiatives such as Arizona's Senate Bill 1070 passed in 2010.³⁹ Other laws, such as the municipal Illegal Immigrant Relief Act passed in Hazleton, Pennsylvania in 2006,⁴⁰ limited immigrants' access to housing, employment, or language, effectively serving an indirect enforcement function.⁴¹ Yet other laws took an opposite approach, with legislation designed to foster the inclusion and integration of all immigrants into their local communities.⁴² So-called "sanctuary laws" were, for example, passed in a number of different locales.⁴³ These laws designated areas (usually cities, but

the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization"). Typical "immigration" laws include Section 212 of the Immigration and Nationality Act, which sets forth the "Classes of aliens ineligible to receive visas or admission," 8 U.S.C. § 1182(a) (2012), and the Refugee Act of 1980, which provides permanent admission procedures for refugees of special humanitarian concern to the United States, Pub. L. No. 96-212, 94 Stat. 102.

35. On the unique usage of the term "plenary power" in the immigration context, see generally STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 177-222 (1987); and Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

36. See *State Laws Related to Immigration and Immigrants*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> (last updated Oct. 3, 2013).

37. See Gillian Johnston & Ann Morse, *2010 Immigration-Related Laws and Resolutions in the States (January 1 – December, 31 2010)*, NAT'L CONF. ST. LEGISLATURES 1 (Jan. 5, 2011), <http://www.ncsl.org/documents/immig/2010ImmigrationReport.pdf> ("State legislatures enacted a record number of laws and resolutions addressing immigration issues in 2010"); *id.* at 5 ("Thirty-seven [law-enforcement-related] laws passed in 19 states: Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Michigan, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Wyoming. . . . These laws generally deal with collaboration with federal law enforcement agencies, processes for immigrant detention, prevention of child abduction, and responsibilities of law enforcement officers.").

38. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1357(g) (2012) (adding section 287(g) to the Immigration and Nationality Act).

39. See Nicholas D. Michaud, *From 287(g) to S.B. 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1086 (2010).

40. Hazleton, Pa., Ordinance 2006-18 §§ 5, 7.B (Sept. 8, 2006).

41. See generally Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 251 (2011) (describing the relationship between such "nuisance" regulations and indirect immigration enforcement).

42. Peter Schuck suggests that this aspect of immigration-federalism is often overlooked by commentators. See Peter Schuck, *The Disconnect Between Public Attitudes and Policy Outcomes in Immigration*, in *DEBATING IMMIGRATION* 17 (Carol Swain ed., 2007); see also Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in *IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE* 181, 183 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008) ("[N]on-U.S. citizens are . . . in some instances . . . finding greater concern [for the protection of] rights and liberties in [state capitals and local city halls] than they have in Washington.").

43. See, e.g., S.F., CAL., ADMIN. CODE § 12H.2(c) (2005) (approved Oct. 24, 1989); L.A., Cal., Special Order 40 (Nov. 27, 1979).

sometimes entire states) as “sanctuaries” from immigration enforcement.⁴⁴ Another popular area of immigrant-inclusionary rulemaking during this period was in-state tuition legislation. Known as state Development, Relief, and Education for Alien Minors or “DREAM” Acts, named after the succession of failed federal bills of the same name,⁴⁵ such bills were designed to provide undocumented immigrant youth with equal access to higher education.⁴⁶

This patchwork of innovative rulemaking at the state and local levels, and the widely differing responses of different local communities to the arrival of new immigrants or the burgeoning of existing immigrant communities, is partially attributable to striking demographic changes during the same period. During the mid-1990s and early 2000s there was a huge influx of immigrants to the United States, posing considerable challenges for receiving states and localities seeking to integrate those migrants into their local communities. Although between 2007 and 2009 the population of undocumented immigrants living in the United States shrank by eight percent,⁴⁷ and the number of undocumented immigrants has stagnated since then,⁴⁸ the number of such immigrants in the United States remains considerably higher than it was at the start of this period. In 2009, for example, according to the U.S. Census Bureau, there were an estimated 36.7 million foreign-born individuals residing within the country’s borders,⁴⁹ approximately 11.2 million of whom were undocumented—a threefold increase in net migration since 1990.⁵⁰

44. See Pratheen Gulasekeram & Rose Cuison Villazor, *Sanctuary Policies and Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683 (2009); Rose Cuison Villazor, *What Is a “Sanctuary?”*, 61 SMU L. REV. 133 (2008).

45. See Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong. (2009); see also Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623 (2011) (stating that the DREAM Act was one of many unsuccessful attempts to provide a clear path to citizenship for immigrants).

46. See *In-State Tuition and Unauthorized Immigrant Students*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/immigration/in-state-tuition-and-unauthorized-immigrants.aspx> (last modified Nov. 28, 2012) (These states include: “Texas (HB1403) [in 2001] . . . California (AB540), Utah (HB144), and New York (SB7784) in 2001-2002; Washington (HB1079), Oklahoma (SB596) and Illinois (HB60) in 2003; Kansas (HB2145) in 2004; New Mexico (SB582) in 2005; Nebraska (LB239) in 2006; and Wisconsin (A75) in 2009 . . .”).

47. Jeffrey S. Passel & D’Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISP. CENTER 9 (Feb. 1, 2011), <http://pewhispanic.org/files/reports/133.pdf>; see also Jill H. Wilson & Audrey Singer, *How the Recession’s Affecting Immigration*, BROOKINGS INST. UPFRONT BLOG (Nov. 19, 2009, 11:29 AM), <http://www.brookings.edu/blogs/up-front/posts/2009/11/18-immigration-singer-wilson> (“[W]hen the Census Bureau released data from its 2008 American Community Survey this September, immigrant numbers made headlines, as they often do, but this time the stories were about the numbers’ leveling off rather than climbing up.”). The Department of Homeland Security also measured a nearly one-million-person drop in the population of unauthorized immigrants in the United States between January 2008 and January 2009. Michael Hofer, Nancy Rytina & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, U.S. DEP’T HOMELAND SECURITY 1 (Jan. 2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

48. See Julia Preston, *Immigration Decreases, but Tension Remains High*, N.Y. TIMES, Mar. 10, 2012, at A15.

49. *Current Population Survey, Annual Social and Economic Supplement*, U.S. CENSUS BUREAU (2009), <http://www.census.gov/prod/techdoc/cps/cpsmar09.pdf>.

50. See Passel & Cohn, *supra* note 47, at 1-2. Although the number of undocumented migrants has tripled since 1990, the number of undocumented workers in the United States peaked in 2007 at twelve million and has since declined. *Id.* Some commentators suggest that this is a consequence of increased nativism during the recession. See, e.g., Rakesh Kochhar, C. Soledad Espinoza & Rebecca

The geographic distribution of the wave of migrants, both documented and undocumented, who entered the United States in the 1990s and early 2000s also diversified during the same period, with declines in the number of immigrants living in traditional “gateway” states,⁵¹ such as Florida and New York, and increases in the number of immigrants living in non-“gateway” states such as Georgia and Nevada.⁵² Significant immigrant populations and communities of immigrant descent continue to reside in major American cities such as Chicago, Houston, Los Angeles, Miami, New York, and San Francisco, but first-generation immigrants are also increasingly found outside of major urban centers,⁵³ particularly in the Southeast and the Mountain West states.⁵⁴ As a consequence, during the first decade of the twenty-first century, laws designed to intensify immigration enforcement were passed by state legislatures in Arizona,⁵⁵ Utah,⁵⁶ Indiana,⁵⁷ Georgia,⁵⁸ Alabama,⁵⁹ and South Carolina,⁶⁰ and laws designed to limit immigrants’ access to local government services were promulgated in communities in California,⁶¹ Texas,⁶² Georgia,⁶³ and Pennsylvania.⁶⁴ At the same time, legislation designed to foster and support new immigrants was passed in major urban centers, such as Los Angeles and New York, and in smaller towns like Aztec, New Mexico;⁶⁵ Durango, Colorado;⁶⁶

Hinze-Pifer, *After the Great Recession: Foreign Born Gain Jobs; Native Born Lose Jobs*, PEW HISP. CENTER (Oct. 29, 2010), <http://www.pewhispanic.org/files/reports/129.pdf>; Passel & Cohn, *supra* note 47.

51. Prior to 1995, three-quarters of immigrants to the United States remained in six states: California, Texas, New York, Florida, New Jersey, and Illinois. See Greg Anrig, Jr. & Tova Andrea Wang, *Introduction*, in *IMMIGRATION’S NEW FRONTIERS: EXPERIENCES FROM THE EMERGING GATEWAY STATES* 1, 1 (Greg Anrig, Jr. & Tova Andrea Wong eds. 2006).

52. Doris Meissner et al., *Immigration and America’s Future: A New Chapter*, MIGRATION POL’Y INST. 25 (Sept. 2006), <http://www.migrationpolicy.org/itfiaf/finalreport.pdf>.

53. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 1 (2005) (describing the movement of immigrant groups from cities to suburbs).

54. See Passel & Cohn, *supra* note 47.

55. Ariz. S.B. 1070.; see also H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

56. H.B. 497, 2011 Leg., 59th Gen. Sess. (Utah 2011).

57. S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

58. H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

59. H.B. 56, 2011 Leg., 2011 Reg. Sess. (Ala. 2011).

60. H. 4919, 2010 Gen. Assemb., 118th Sess. (S.C. 2010).

61. Escondido, Cal., Ordinance 2006-38 R § 3 (Oct. 18, 2006) (declaring it unlawful for the owner of a dwelling unit to “harbor” an “illegal alien,” and defining “harboring” as “to let, lease, or rent a dwelling unit to an illegal alien” or “[t]o suffer or permit the occupancy of the dwelling unit by an illegal alien”).

62. Farmers Branch, Tex., Ordinance 2903 (May 12, 2007) (“The owner and/or property manager shall require as a prerequisite to entering into any lease or rental arrangement, including any lease or rental renewals or extensions, the submission of evidence of citizenship or eligible immigration status for each tenant family . . .”).

63. Cherokee County, Ga., Ordinance 2006-003 (Dec. 5, 2006) (stating that “to let, lease, or rent” or “suffer or permit the occupancy of [a] dwelling unit” by an “illegal alien” is prohibited and “shall also be deemed to constitute harboring”).

64. See Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006) (prohibiting landlords from harboring unlawful immigrants).

65. See LISA M. SEGHETTI, STEPHEN R. VINA & KARMA ESTER, CONG. RESEARCH SERV., RL32270, *ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT* 30 n.85 (2006); see also Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567 (2009) (describing the growth of sanctuary laws).

and Ashland, Oregon.⁶⁷

For several years, despite its acknowledged primacy in the immigration arena, the federal government did not interfere with this panoply of state and local immigrant-exclusionary or immigrant-inclusionary lawmaking, allowing interested communities and individuals to bring challenges to these laws in the lower federal courts. But the passage of Arizona's controversial Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070)⁶⁸ and a number of similar bills in Utah,⁶⁹ Indiana,⁷⁰ Georgia,⁷¹ Alabama,⁷² and South Carolina,⁷³ finally prompted the federal government to intervene. S.B. 1070 and its progeny represented a thoroughgoing attempt at immigration-related lawmaking by state legislatures concerned that the federal government had not adopted a sufficiently aggressive approach to immigration enforcement and immigrant deportation.⁷⁴ Each law created new state crimes for federal civil immigration violations and required state police officers, acting without federal supervision, to investigate suspected violations of federal immigration law. In 2010, the Obama administration brought suit to enjoin the entry into force of the Arizona law and the other similar state laws, on the grounds that these laws impermissibly intruded on a field occupied by the federal government. That suit reached the U.S. Supreme Court during the October 2011 Term, and the Court's subsequent ruling in the case marked a turning point in American immigration federalism.

On June 25, 2012, the Supreme Court published its opinion in *Arizona v. United States*,⁷⁵ which held that three of four contested provisions in S.B. 1070⁷⁶ were preempted by federal law. In striking down the provisions of the Arizona law, the Court underscored the enduring relationship between immigration law, international law, and foreign policy. The Court's opinion in *Arizona* emphasizes the federal government's "broad, undoubted . . . fundamental . . . extensive and complex" power over immigration regulation and its inherent power as the national sovereign to control and conduct foreign relations.⁷⁷ The opinion stresses the "fundamental" importance, on foreign policy grounds, of a unified national immigration policy under federal control that enables foreign

66. A Resolution Declaring the Policy of the City of Durango, Colorado with Respect to Non-Citizen Residents, City Council Resolution No. 2004-40 (Durango, Colo., July 6, 2004).

67. See Sullivan, *supra* note 65.

68. Ariz. S.B. 1070.

69. Utah H.B. 497.

70. Ind. S.B. 590.

71. Ga. H.B. 87.

72. Ala. H.B. 56.

73. S.C. H. 4919.

74. This is particularly puzzling because under the Obama administration, federal immigration authorities have carried out record numbers of deportations, with over 400,000 immigrants removed from the United States in 2009 and 2010, and with the Department of Homeland Security set to deport two million immigrants by 2014—approximately the same number of immigrants who were deported in the 105 years from 1892 to 1997. See Michael Shear, *Seeing Citizenship Path Near, Activists Push Obama to Slow Deportations*, N.Y. TIMES, Feb. 22, 2013, at A12.

75. 132 S. Ct. 2492 (2012).

76. Ariz. S.B. 1070., ch. 113.

77. See *Arizona*, 132 S. Ct. at 2498-99 (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982)).

countries to communicate with one national government about immigration issues.⁷⁸ The opinion notes that this uniformity is particularly important with respect to immigration enforcement regulations and policies because “[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.”⁷⁹ Hence, the Court holds, the federal government enjoys “broad discretion” in determining whether and how to enforce immigration laws pertaining to immigrant selection, admission, and removal.⁸⁰

The *Arizona* opinion states unambiguously that any attempts by states to create new immigrant-exclusionary laws are preempted by the existing federal regulatory scheme. Hence, Section 3 of S.B. 1070, which creates a new state misdemeanor for failure to carry a federal alien registration document, is preempted, as is Section 5(C), which creates a new state misdemeanor for undocumented immigrants who “apply for work, solicit work in a public place or perform work as an employee or independent contractor,”⁸¹ and as is Section 6, which permits a state police officer to arrest, without a warrant, any individual whom the officer has probable cause to believe is removable.⁸² In each instance, the Court holds that Arizona’s attempt at additional immigrant-exclusionary rulemaking, above and beyond the mandate in the federal Immigration and Nationality Act, violates the principle that immigration enforcement and the deportation/removal process is entrusted to the discretion of the federal government.⁸³

The only provision of the Arizona law that the Supreme Court did not find unconstitutional on its face is Section 2(B), the so-called “show me your papers” provision. Under Section 2(B), Arizona police officers who arrest an individual on other grounds, but have “reasonable suspicion” to believe that the individual is an undocumented immigrant, are required to detain that individual until they can check his immigration status.⁸⁴ The Court held that the text of the law is neither in conflict with nor an obstacle to federal law,⁸⁵ but added that such a holding does not bar any potential “as applied” challenges that might be made in the future after the revised law goes into effect.⁸⁶

Reactions to the Court’s *Arizona* ruling have been mixed. Some scholars read the opinion as a victory for the federal government, believing that it sig-

78. See *Arizona*, 132 S. Ct. at 2498 (citing *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1876)).

79. *Id.* at 2499. Justice Scalia alone made an argument that states have the same power the national government does to use their borders as barriers to entry of unwanted individuals. *Id.* at 2511.

80. *Id.* at 2499.

81. *Id.* at 2503.

82. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (West Supp. 2011).

83. *Arizona*, 132 S. Ct. at 2506 (2012).

84. *Id.* at 2509.

85. *Id.*

86. In so ruling, the Court noted that because the provision has not yet entered into practical operation, state courts have yet to interpret its scope. *Id.* at 2510. Pointing to language in the Act prohibiting police officers from considering race or national origin in enforcing the law, the Court suggested that racial profiling might not occur. *Id.* at 2497.

nals the end of state and local engagement in immigration enforcement.⁸⁷ Others interpret the Court's ruling as permitting or even implicitly encouraging state police personnel to question immigrants about their legal status.⁸⁸ I have argued elsewhere that *Arizona* is a resounding endorsement of the federal government's plenary occupation of the immigration field, and that the Court's post-*Arizona* immigration preemption doctrine firmly limits any independent state rulemaking pertaining to immigration enforcement.⁸⁹ Consistent with this theory, the federal courts of appeal that have considered post-*Arizona* challenges to immigrant-exclusionary state and local regulations have uniformly found such measures to be constitutionally impermissible.⁹⁰ There is no denying, however, that the *Arizona* opinion leaves open the possibility for expressly delegated action by state law enforcement personnel acting under federal supervision. Most importantly, *Arizona* is silent as to (and therefore in no way limits) the potential opportunities for state and local governments to engage in rulemaking pertaining to immigrant inclusion. These opportunities are clearly the greatest potential growth area for state and local involvement in some aspects of immigration regulation. Indeed, in the year since *Arizona*, many states have successfully engaged in a variety of different immigrant-inclusionary actions, including issuing driver's licenses to immigrants without regard to their status, improving access to higher education for all immigrants, and strengthening workplace protections for all immigrants.⁹¹

The Supreme Court's ruling in *Arizona* has thus turned out to be a watershed not only for jurisprudence but also for policymaking at the federal, state, and local levels. In the weeks following the publication of the *Arizona* opinion, the Governors and Attorneys General of Arizona, Alabama, Utah, Indiana, Georgia, and South Carolina emphasized their continued commitment to "attrition through enforcement" measures.⁹² While conceding that state governments were now precluded from engaging in independent immigrant-exclusionary rulemaking, these state-level actors announced their intention to

87. See, e.g., David A. Martin, *Reading Arizona*, 98 VA. L. REV. BRIEF 41 (2012) (describing various reactions to the case); Pincus, *supra* note 5 ("[T]his is a big win for the United States."); Stock, *supra* note 5 ("The Court's five-to-three decision in *Arizona v. United States* appears to be a resounding victory for the Obama Administration—legally and politically.").

88. See Richard Samp, *A Defeat for the Obama Administration*, SCOTUSBLOG (Jun. 25, 2012, 7:56 PM), <http://www.scotusblog.com/?p=147574> ("The decision to uphold Sec. 2(B) is a strong affirmation of the right of state and local governments to adopt measures to assist in the enforcement of federal immigration law."); Jay Sekulow, *SCOTUS on AZ Immigration: State Sovereignty Is the Issue*, SCOTUSBLOG (Jun. 25, 2012, 4:42 PM), <http://www.scotusblog.com/?p=147521> ("The Court's decision to uphold the immigration status check provision is a big win for state sovereignty.").

89. See Elias, *supra* note 6 (manuscript at 32) (on file with author).

90. See, e.g., *Lozano v. City of Hazleton*, No. 07-3531, slip op. at 6 (3d Cir. Aug. 15, 2012); *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, slip op. at 6 (5th Cir. July 22, 2013).

91. Tanya Broder et al., *supra* note 8.

92. See, e.g., *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-401, 2011 WL 7143098 (D. Utah May 11, 2011) (showing Utah's continued opposition to the TRO staying H.B. 497 and preparations for oral argument to prevent the law being temporarily enjoined); see also David Montero, *Shurtleff: Utah Immigration Law Won't Survive Intact*, SALT LAKE TRIB., July 3, 2012, at A1 (reporting comments that State Attorney General Shurtleff and Assistant Attorney General Philip Lott made at the Utah Immigration and Migration Commission meeting while briefing the twenty-seven-member board on the status of H.B. 497).

leverage their use of “show me your papers” provisions to the greatest extent possible.⁹³ During the same period, the Mayor of Chicago, Rahm Emanuel, announced a citywide sanctuary ordinance barring Chicago police officers from turning over undocumented immigrants to federal agents,⁹⁴ and Charlie Beck, the Los Angeles Police Chief, announced that the city would no longer honor requests from Immigration and Customs Enforcement (ICE) to turn over non-violent immigrant offenders with minor criminal records.⁹⁵ Interestingly, while the federal government immediately condemned the immigrant-exclusionary statements by the “anti-immigrant” states, it did not critique the Chicago and Los Angeles “pro-immigrant” initiatives, reflecting the administration’s stated position that “[t]here is a big difference between a state or locality saying they are not going to use their resources to enforce a federal law, as so-called sanctuary cities have done, and a state passing its own immigration policy that actively interferes with federal law.”⁹⁶

In tacit recognition of this differentiation between impermissible immigrant-exclusionary measures and permissible immigrant inclusionary-measures, there has been a marked shift in state and local rulemaking pertaining to immigrants since the Supreme Court issued its *Arizona* ruling. According to the National Conference of State Legislatures, this change was both a reflection of the influence of *Arizona* and a positive response to the federal government’s seemingly immigrant-friendly initiatives such as Deferred Action for Childhood Arrivals.⁹⁷ As a consequence, a large number of immigrant-inclusionary state laws were passed in early 2013, and very few immigrant-exclusionary measures were contemplated during the same period.⁹⁸ For example, legislation intended to expand access to driver’s licenses for all immigrants was introduced in at least nineteen states, as well as in the District of Columbia and Puerto Rico.⁹⁹ Bills designed to provide access to in-state tuition rates for students regardless of their immigration status, so-called “State DREAM Acts,” were introduced in at least sixteen states, and proposals for greater access to scholarships and financial aid for immigrant students were considered in several states.¹⁰⁰ During the same period, five state legislatures debated new

93. See Montero, *supra* note 92.

94. Julia Preston & Steve Yaccino, *Obama Policy on Immigrants Is Challenged by Chicago*, N.Y. TIMES, July 10, 2012, <http://www.nytimes.com/2012/07/11/us/obama-policy-on-illegal-immigrants-is-challenged-by-chicago.html> (“‘If you have no criminal record, being part of a community is not a problem for you,’ Mr. Emanuel said, speaking at a high school library in Little Village, a Latino neighborhood. ‘We want to welcome you to the city of Chicago.’”).

95. See Ian Lovett, *Los Angeles to Cease Transferring Some Immigrants*, N.Y. TIMES, Oct. 4, 2012, at A14.

96. Stephen Dinan & Kara Rowland, *Justice: Sanctuary Cities Safe from Law*, WASH. TIMES, July 15, 2010, at A1 (quoting Department of Justice spokesperson Tracy Schmalzer).

97. See Chau Wing Lam, Emily German & Ann Morse, *Immigrant Policy Project*, NAT’L. CONF. ST. LEGISLATURES (Sept. 6, 2013), http://www.ncsl.org/documents/statefed/immigrationreport_august2013.pdf.

98. *Id.*

99. At the start of the 2013 legislative session, Washington, New Mexico, and Utah issued driver’s licenses irrespective of immigration status. Now Illinois, California, Maryland, Oregon, Nevada, Colorado, Vermont, Connecticut, and Puerto Rico issue licenses to all residents, and similar bills are pending in Washington, D.C., Minnesota, Kentucky, and Iowa. See Tanya Broder et al., *supra* note 8.

100. See *id.*

measures to provide greater workplace protections to immigrant domestic workers.¹⁰¹ In contrast, just eleven percent of all state laws passed during this period pertained to immigrant-exclusionary law enforcement measures.¹⁰² This recent flurry of immigrant-inclusionary rulemaking by states and localities underscores the important light that comparative analysis can shed on potential future developments in the United States. As states begin to develop a more immigrant-inclusionary legislative agenda, there is much that they can learn from the experiences of other federal nations about the longer-term implications of a variety of different law and policy choices that are now being contemplated for the first time in the United States.

Other federal nations' experiences of state and local immigration-related rulemaking is particularly salient as state and local initiatives, such as those described above, continue to profoundly influence the ongoing national debate about immigration reform. Indeed, every proposal for comprehensive national immigration reform in the United States—including the “Gang of Eight’s” Bipartisan Framework for Immigration Reform,¹⁰³ which provided the framework for S.744—has drawn upon immigrant-inclusionary measures first drafted by state and local governments, such as state education access initiatives for immigrant youth or local policies for the nonreporting of nonviolent immigrants who commit misdemeanors offenses.¹⁰⁴ Clearly, as the House of Representatives contemplates different options for comprehensive immigration reform, the potential continued contribution of states and localities will be central. The key question going forward is how best to reconcile the Court’s *Arizona* holding that states and localities may not promulgate immigrant-exclusionary laws with the countervailing continuing impetus for meaningful state and local involvement in immigration regulation. A close analysis of how other federal nations have balanced similar concerns illuminates a range of options available to United States lawmakers.

IV. IMMIGRATION REGULATION BEYOND OUR BORDERS

A comparative analysis of key features of the immigration regimes of other federal nations can shed fresh light on the United States’ system of immigration regulation and can help inform thinking by American lawmakers and scholars about the potential costs and benefits of adopting a particular approach to immigration federalism as part of comprehensive immigration reform. This Part of the Article therefore describes the various iterations of immigration federalism that exist currently in Germany, Canada, and Australia. There are, of course, limits to the utility and applicability of any comparative analysis—the immigration-federalism framework of each of the countries surveyed is a prod-

101. *See id.*

102. *See* Lam et al., *supra* note 97, at 2.

103. Statement, Senators Charles E. Schumer, John McCain, Richard J. Durbin, Lindsey Graham, Robert Menendez, Marco Rubio, Michael Bennet & Jeff Flake, Bipartisan Framework for Immigration Reform (Jan. 28, 2013), *available at* http://s3.documentcloud.org/documents/562528/reform0128principles_senatefinal.pdf.

104. *See id.*

uct of that country's unique legal landscape, including that country's own unique federalist structure, and the United States cannot and should not import wholesale the approach of any of the nations surveyed.¹⁰⁵ Moreover, the development of immigration-federalism regimes in Germany, Australia, and Canada is a recent phenomenon, and the regimes themselves are still evolving. It is thus too soon to regard any system as a paradigmatic, well-established, and successful alternative to the current American model. Nonetheless, in the particularly dynamic sphere of immigration regulation, Germany, Australia, and Canada's differing immigration schemes do provide illustrative, alternative models of how a formal scheme of immigration-federalism might be constituted, which may be of interest to American legislators and scholars. These three countries provide particularly helpful examples of different potential approaches to immigration-federalism because, despite their many differences, they have encountered and addressed very similar issues to those currently apparent in the United States. Moreover, despite their differences, they appear to be approaching some degree of convergence and consensus in their approach to state and local engagement in immigration law and policy.

To be sure, Germany, Australia, and Canada are very different nations from one another and from the United States—each country has its own unique legal, governmental, historical, economic, ideological, and sociocultural environment. Germany is a European country with a rich civil law tradition, a complex constitutional framework, and a central role within the European Union.¹⁰⁶ Australia is an island continent that was settled as a penal colony in 1788 by Great Britain, from which it adopted the Westminster style of parliamentary government and common law legal system.¹⁰⁷ Canada is, like Australia, a Commonwealth nation with a parliamentary system of government, but it has a hybrid system of civil law in Quebec (for private law only) and common law in its other provinces.¹⁰⁸

Yet, despite these and other fundamental and far-reaching differences, there are also important similarities between and among Germany, Australia, Canada, and the United States. Each of the nations surveyed has a federal system of government that divides authority between the national federal government and subnational state governments (albeit in different ways), and each, at least notionally, allows its citizens both national and state citizenship.¹⁰⁹ Noncitizens in these jurisdictions, as in the United States, also encounter both state and federal governmental entities.¹¹⁰ Like the United States, each of these

105. See BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* (1990); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974); Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 *NW. U. L. REV.* 198, 203 (1977) (discussing the limitations of “transplanting” other nations’ laws).

106. See NIGEL G. FOSTER, *GERMAN LAW AND LEGAL SYSTEM* 2, 106-8 (1993).

107. See FRANK WELSH, *AUSTRALIA: A NEW HISTORY OF THE GREAT SOUTHERN LAND* 328 (2008).

108. See GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 30 (2004).

109. For a more detailed definition of comparative federalism and different definitions of sovereignty in the federal context, see Peter H. Schuck, *Citizenship in Federal Systems*, 48 *AM. J. COMP. L.* 195, 199-200, 211 (2000).

110. See *id.* at 210-25.

nations is a mature, federal democracy that has experience with the selection, admission, and integration of migrants.¹¹¹ Furthermore, as is true in the United States, each of these countries has considered how best to develop immigration and alienage laws appropriate to a pluralist and multicultural society within a legal tradition grounded in civil liberties, due process, and rule of law.

Most interestingly, before redefining their formal frameworks of immigration-federalism, Germany, Australia, and Canada confronted challenges to their preexisting immigration law and policies markedly similar to those currently faced in the United States. These include (1) a marked upswing in immigration (both documented and undocumented) from the mid-1990s to the early 2000s; (2) heightened concerns about terrorism and national security; (3) concentrations of immigrants in “gateway” cities; and (4) a proliferation of independent initiatives by states and municipalities to either integrate or exclude immigrant groups. In response to these pressures, in recent years, the federal government of each of the countries surveyed adopted a particular framework of immigration-federalism—with differing, and yet in some ways similar, results in each instance. Although these nations had previously adopted widely divergent approaches to immigration law, the response in the last decade in each of these countries—as in the United States—has been a multitiered, multigovernmental system of immigration-federalism, with a sharp division between immigrant-inclusionary rulemaking by states and localities and immigrant-inclusionary lawmaking by the federal government.

Germany, the first country discussed in this Part, has moved away from a system in which the individual states (*Länder*) enjoyed a remarkable degree of autonomy in some aspects of immigration regulation to a more centralized system of power-sharing concurrent with the Federal Office for Immigration and Refugees (*Bundesamt für Migration und Flüchtlinge*). In Australia, the second nation surveyed, all aspects of immigration regulation have long been heavily centralized by the federal government, but have now been devolved partially through state-administered immigrant integration programs and the State Specific and Regional Migration Program. In Canada, the third nation surveyed, the role of the federal government and that of individual provinces varied significantly in each province, but a stronger provincial role has recently emerged throughout the country, in part because of Provincial Nominee Programs and in part because of greater provincial engagement in immigrant-integration rulemaking and rule implementation. A comparative analysis of the engagement by national, state, and local governmental actors in immigration regulation in Germany, Australia, and Canada therefore provides potentially illustrative suggestions for lawmakers pondering the future direction of federal, state, and local immigration rulemaking in the United States.¹¹²

111. See, e.g., Joppke, *supra* note 9 (describing the history of Germany’s approach to immigrant selection, admission, and integration); Tessier, *supra* note 9, at 211-32 (discussing commonalities and differences in the U.S. and Canada’s approach to immigration); Twibell, *supra* note 9, at 58-69 (discussing similarities and differences in the immigration regimes of the United States and Australia).

112. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 3-4 (1991).

A. *The German Model*

Germany's system of immigration-federalism, and the history of that system, provides a particularly interesting counterpoint to recent American experience. Before 2005, German immigration regulation incorporated a high degree of delegated responsibility to the states, but in that year, with the entry into force of the first-ever federal Immigration Act,¹¹³ the country adopted a more centralized legal regime with respect to selection, admission, and enforcement and established a formal legal framework setting forth federal and state responsibilities for immigrant inclusion and integration.¹¹⁴

There are many similarities between the immigration challenges faced by German federal and state governments in the years before they implemented immigration reforms and those currently facing their American counterparts. As is the case in the United States, there has been a great influx of immigrants to Germany in recent years, and the percentage of Germany's population with a "migration background"—individuals who are immigrants or are the second or third-generation descendants of immigrants—is approximately twenty percent (16.4 million of 82 million).¹¹⁵ Moreover, as in the United States, immigrant groups cluster predominantly in "gateway" cities, such as Berlin, Frankfurt, Hamburg, Munich, and Stuttgart.¹¹⁶ In the aftermath of September 11, 2001, and the Madrid bombings of March 11, 2004, the German federal and state governments, like their American counterparts, were increasingly concerned about national security and the threat of terrorist attacks.¹¹⁷ At the same time, a number of states introduced immigration laws and policies that were widely perceived to be hostile to migrants.¹¹⁸ Germany responded to these challenges by developing a regulatory framework that permits states to promulgate immigrant-inclusionary regulations to facilitate the integration of newcomers, but limits states' and localities' abilities to enact discriminatory or otherwise immigrant-exclusionary measures—a response that may be of interest to U.S. lawmakers as they determine how best to address the same issues in an American context.

113. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthaltes und der Integration von Unionsbürgern und Ausländern [Zuwanderungsgesetz] [Law to Manage and Limit Immigration and to Regulate the Residence and Integration of Union Citizens and Foreigners], July 30, 2004, BGBl. I at 1950, § 75 (Ger.).

114. See Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and Germany*, 24 BERKELEY J. INT'L L. 330, 388-89 (2006); James D. Ingram & Triadafilos Triadafilopoulos, *Rights, Norms, and Politics: The Case of German Citizenship Reform*, 77 SOC. RES.: AN INT'L Q. 353, 356 (2010).

115. See Iris Hossman & Margret Karscha, *Germany's Integration Policy*, BERLIN INST. (July, 2011), <http://www.berlin-institut.org/online-handbookdemography/germanys-integration-policy.html>.

116. See Simon Green, *Immigration and Integration Policy: Between Incrementalism and Non-Decisions*, in GOVERNANCE IN CONTEMPORARY GERMANY: THE SEMISOVEREIGN STATE REVISITED 190, 193 (Simon Green & William E. Patterson eds., 2005) (describing the population of Frankfurt as thirty percent foreign-born, and that of Stuttgart as twenty-four percent foreign-born).

117. See Ray Furlong, *Bundestag Backs Immigration Bill*, BBC NEWS (Jul. 1, 2004, 6:15 AM), <http://news.bbc.co.uk/2/hi/europe/3857847.stm> ("The issue of terrorism came to dominate the debate over the bill, particularly after the Madrid bombings in March.")

118. See Cem Özdemir, *Germany's Integration Challenge*, 30 FLETCHER F. WORLD AFF. 221 (2006).

Germany's federal structure consists of a central federal government (*Bundesregierung*) and sixteen federated states (*Bundesländer* or, more colloquially, *Länder*). As in the United States, the federal government and the *Länder* governments have three branches: the legislative, the executive, and the judiciary. Under the German Basic Law (*Grundgesetz*), the federal government and the *Länder* are on an equal level: both have state or sovereign qualities within their spheres and thus also have the same constitutional status.¹¹⁹ In contrast to the United States, however, the German federal system is not based on two entirely separate, parallel, governmental systems, but instead functions as a cooperative system wherein many legislative functions are concentrated at the federal level and administrative functions are concentrated at the state level.¹²⁰ As a consequence, the *Länder* frequently implement and administer both their own statutes *and* federal law, and the federal government exercises a degree of legal control over how the *Länder* execute federal laws.¹²¹ The German judiciary is also organized as an integrated hierarchical system, with the lower and middle courts generally under the jurisdiction of the *Länder*, and the higher courts under the jurisdiction of the federal government.¹²²

The Basic Law (*Grundgesetz*) lays out which issues fall within the ambit of the federal government and which devolve to the states.¹²³ Under Article 73 of the Basic Law ("Subjects of exclusive legislative power"), the federal government "shall have exclusive power to legislate with respect to . . . citizenship in the Federation [and] freedom of movement, passports, immigration, emigration, and extradition."¹²⁴ Article 74 ("Subjects of concurrent legislation"), however, states that "[c]oncurrent legislative powers shall extend to the following subjects . . . the law relating to residence and establishment of aliens . . . matters concerning refugees and expellees."¹²⁵ Until 2005, in accordance with their "concurrent legislative powers" over the "residence and establishment of aliens" and "matters concerning refugees and expellees," individual *Länder* pursued a patchwork of different policies and promulgated a range of varying laws involving immigration and emigration, with very little federal oversight.¹²⁶ Some of these laws and policies were widely perceived to be hostile

119. See DAVID CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 33-34 (1994).

120. *Id.* at 74-76.

121. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 83 (Ger.). From a U.S. perspective, this relationship might be described as requiring state implementation of federal law on a mandatory or "commandeered" basis. In practice, however, this is moderated by cooperative patterns of action arising from the approximately 900 working groups and ministerial forums common to the federal government and the *Länder*.

122. See CURRIE, *supra* note 119 at 74-76.

123. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] BGBl. I, art. 30 ("Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*."); *id.* at art. 70 (same for legislation); *id.* at art. 83 (same for general administration); *id.* at art. 92 (same for administration of justice).

124. *Id.* at art. 73(2)-(3).

125. *Id.* at art. 74(4), 74(6).

126. See YASEMIN NUHOĞLU SOYSAL, LIMITS TO CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 77 (1994) ("[N]o federal agencies [were] specifically designed to administer migrant-related tasks."); see also KAREN SCHÖNWÄLDER, EINWANDERUNG UND ETHNISCHE

to immigrants or designed to exclude them.¹²⁷

During the 1970s, 1980s, and 1990s, this lack of national uniformity and clarity was justified, in part, by successive national governments' statements that immigration regulation was a low priority for them because "Germany [was] not a country of immigrants."¹²⁸ This changed in the late 1990s, when then-Chancellor Gerhard Schröder's cabinet acknowledged the important role played by millions of foreign temporary workers (who had become de facto migrants) and other foreign settlers to Germany.¹²⁹ The 1999 reform of the Nationality Law (*Staatsangehörigkeitsgesetz*),¹³⁰ which entered into force in 2000, introduced (for the first time) the concept of *jus soli*, granting citizenship to children born in the country to legally resident foreigners.¹³¹ In the aftermath of the enactment of the new Nationality Law, an acrimonious debate began about the need for comprehensive immigration reform.¹³² The debate was strongly influenced by the terrorist attacks of September 11, 2001, in New York, and March 11, 2004, in Madrid, as many German legislators argued that immigrant selection and admission, as well as immigrant enforcement, needed to be centralized, or at the very least centrally monitored.¹³³

The passage of the Immigration Act of 2004¹³⁴ marked the culmination of four years of intense struggle between conservatives and progressives, and

PLURALITÄT: POLITISCHE ENTSCHEIDUNGEN UND ÖFFENTLICHE DEBATTEN IN GROSSBRITANNIEN UND DER BUNDESREPUBLIK VON DEN 1950ER BIS ZU 1970ER JAHREN (2001) (describing German hostility to multiculturalism during this period); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity, and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 381 (1996) (describing the control of *Länder* over immigration and emigration).

127. One *Land*, Baden-Württemberg, employed a discriminatory naturalization questionnaire, ostensibly designed to ascertain whether the views and values of candidates for naturalization were compatible with the German Basic Law. This questionnaire, which inter alia asks pointed questions about religion, gender relations, and homosexuality, offended Germany's Muslim population in particular, and caused general uproar across the political spectrum. See *Gejohle und Zwischenrufe* [Hoots and Cat Calls], KÖLNER STADT-ANZEIGER, Jan. 20, 2006, <http://www.ksta.de/politik/gejohle-und-zwischenrufe,15187246,13732134.html> (describing the atmosphere in the Bundestag during debates over the 'Stuttgart Directive'); Hartnell *supra* note 114, at 397. Public opinion data from Turkish residents in Germany in the year 2000 revealed that ninety-one percent of the persons surveyed viewed state and local intolerance of foreigners (*Ausländerfeindlichkeit*) as the most important problem that German federal politicians should address. *Id.* at 395.

128. See Özdemir, *supra* note 118, at 221 (describing the political salience of the mantra "*Deutschland ist kein Einwanderungsland*").

129. See RITA CHIN, THE GUEST WORKER QUESTION IN POSTWAR GERMANY 262 (2007); SOYSAL, *supra* note 126.

130. Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, REICHSGESETZBLATT [RGL.] at 583, last amended by Gesetz [G], Feb. 5, 2009, BGBL. I at 1970.

131. See ELI NATHANS, THE POLITICS OF CITIZENSHIP IN GERMANY: ETHNICITY, UTILITY AND NATIONALISM 249 (2004); Michael Minkenberg, *The Politics of Citizenship in the New Republic, in GERMANY: BEYOND THE STABLE STATE* 210, 219, 221-22 (Herbert Kitschelt & Wolfgang Streeck eds., 2004)..

132. See Rainer Munz, *New German Law Skirts Comprehensive Immigration Reform*, MIGRATION INFO. SOURCE (Aug. 2004), <http://www.migrationinformation.org/feature/display.cfm?ID=241>.

133. See Furlong, *supra* note 117.

134. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthaltes und der Integration von Unionsbürgern und Ausländern [Zuwanderungsgesetz] [Law to Manage and Limit Immigration and to Regulate the Residence and Integration of Union Citizens and Foreigners], July 30, 2004, BGBL. I at 1950, § 75 (Ger.).

between the federal government and the governments of several *Länder*.¹³⁵ The Immigration Act was initially passed into law in June 2002.¹³⁶ Shortly thereafter, six “opposition-ruled state governments” brought a case to the German Constitutional Court (*Bundesverfassungsgericht*), arguing that “the law should be declared invalid because of the unorthodox voting procedures by which it had been passed.”¹³⁷ The Court declared the Immigration Act invalid in December 2002, shortly before it was due to enter into force on January 1, 2003,¹³⁸ prompting another round of revisions.¹³⁹

The final version of the omnibus Immigration Act, as it entered into force in 2005, introduced a number of significant reforms and innovations. Perhaps the most significant of the 2005 laws is the Residence Act (*Aufenthaltsgesetz*),¹⁴⁰ which replaced the former Foreigners Act (*Ausländergesetz*).¹⁴¹ The Residence Act fundamentally altered the German framework of immigration-federalism by including provisions designed to increase centralized federal control over immigrant exclusion and provisions that promoted state-level innovation in immigrant inclusionary lawmaking. The Act streamlined the former complex system of five “residence titles” for non-European¹⁴² migrants into just two: the limited-term residence permit (*Aufenthaltserlaubnis*)¹⁴³ and the unlimited-term settlement permit (*Niederlassungserlaubnis*),¹⁴⁴ both of which are functionally linked to the “recognized purposes of residence in Germany”—education, employment, family reunification, and humanitarian considerations.¹⁴⁵ Applications for either form of residence permit are still processed by each *Land*’s resident registration office (*Landeseinwohneramt*), but that processing involves more rigorously monitored application of the federal law and nationally applicable standards.¹⁴⁶

With respect to the new federal standards for immigrant exclusion, the Residence Act introduced the possibility of deporting a foreigner with immedi-

135. See Furlong, *supra* note 117.

136. See Imke Kruse, Heny Oren & Stephan Angenendt, *The Failure of Immigration Reform in Germany*, 12 GERMAN POL. 129, 134 (2003); Munz, *supra* note 132.

137. Kruse et al., *supra* note 136, at 134.

138. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Dec. 18, 2002, 37 ENTScheidungen des Bundesverfassungsgerichts [BVERFGE] 271.

139. Munz, *supra* note 132.

140. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [AufenthG] [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], Jan. 1, 2005, BUNDESGESETZBLATT, Teil I [BGBl. I].

141. Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet [AuslG] [Law on Entry and Stay by Foreigners in Federal Territory], July 9, 1990, BUNDESGESETZBLATT, Teil I [BGBl. I] at 1354, 1356.

142. Under Germany’s treaty commitments, European citizens automatically qualify for a free movement permit (*Freizügigkeitsbescheinigung*).

143. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [AufenthG] [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], Jan. 1, 2005, BGBl. I at § 7.

144. *Id.* § 9.

145. *Id.* The Residence Act also introduced a procedure under which students are permitted to remain in Germany for up to one year after completing their studies, in order to gain work experience. *Id.* § 16(4).

146. See Ingram & Triadafilopoulos, *supra* note 114, at 361.

ate effect “on the basis of a prognosis based on facts, in order to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat.”¹⁴⁷ A deportation order on these grounds can be issued by either the *Länder* authorities or the federal government.¹⁴⁸ Only a single avenue of appeal, to the Federal Administrative Court in Leipzig, is available in such cases.¹⁴⁹ In addition, Sections 54 and 55 of the Residence Act provide a broad range of bases for ordinary or discretionary expulsion of foreigners by federal or state authorities, including anyone who (1) belongs to an organization that supports terrorism or supports or has supported such an organization;¹⁵⁰ (2) endangers the free democratic basic order or the security of the Federal Republic, participates in acts of violence, or publicly incites to violence in pursuit of political objectives or threats of the use of violence;¹⁵¹ (3) belongs to the leadership of a banned organization;¹⁵² or (4) (a) publicly, at a meeting or by disseminating literature, endorses or promotes a crime against peace, a war crime, a crime against humanity, or terrorist acts of comparable importance in a manner conducive to disturbing public safety and order, or (b) incites hate against sections of the population or calls for violence or arbitrary measures against the same in a manner conducive to disturbing public safety and order or attacks the human dignity of others by insulting, maliciously disparaging, or slandering sections of the population.¹⁵³

The Residence Act also created a new Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) (BAMF) — which assumed the preexisting responsibilities of the former Federal Office for the Recognition of Foreign Refugees¹⁵⁴ — and undertook a variety of new centralized immigration regulation functions. Under the Act, BAMF has responsibilities pertaining to both immigrant exclusion and immigrant inclusion. Its immigrant-exclusionary remit includes organizing and coordinating “voluntary returns” of third-country nationals.¹⁵⁵ Its immigrant-inclusionary mandate includes maintaining a central registry of “resident aliens,” collecting data relating to migration patterns, and coordinating with the *Länder* to implement the mandatory integration programs.¹⁵⁶ The latter requirement has had a profound

147. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [AufenthG] [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], Jan. 1, 2005, BGBl. I at § 54(5).

148. *Id.*

149. *Id.*

150. *Id.* § 54(5a).

151. *Id.* § 54(7).

152. *Id.* § 55(2)(8).

153. *Id.*

154. *Id.* § 75.

155. *German Policy Report 2010*, BUNDESAMT FÜR MIGRATION UND FLÜCHTLINGE (Mar. 29, 2011), <http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/emn-policy-report-2010-en.html> (describing the “Reintegration and Emigration Programme for Asylum-Seekers in Germany” and “Government Assisted Repatriation Programme”).

156. *Id.* BAMF also plays a central role in regard to asylum. In particular, it decides asylum petitions and carries out the asylum-related provisions of the Schengen regime. BAMF, which is an agency of the Federal Ministry of the Interior, does not replace the independent Federal Commissioner for Migration, Refugees and Integration (*Beauftragte für Flüchtlinge und Integration*), who since late 2005 has had cabinet status as Minister for Integration. See Indep. Comm’n on Migration to Ger.

influence on the development of the immigration-federalism framework in twenty-first century Germany.

With respect to state and local engagement with immigrant inclusion, the Residence Act requires that the federal government join with the *Länder* and municipal governments to develop integration programs designed to impart language competence¹⁵⁷ and basic familiarity with history, culture, and the legal system, as well as to offer “migration-specific counseling services.”¹⁵⁸ The Act called for the development of a nationwide integration plan that would systematically bring together all existing integration measures being carried out by all levels of government and nongovernmental organizations. The result was the National Integration Plan, a two-hundred-page document containing four hundred separate recommendations, which was released in 2007.¹⁵⁹ It sets forth, in detail, the responsibilities of federal, state, and local governmental actors to implement a coordinated approach to immigrant integration.¹⁶⁰

In December 2010, in accordance with the National Integration Plan, Berlin was the first German *Land* to pass its own Integration Act, the Act on Participation and Integration in Berlin (*Gesetz zur Regelung von Partizipation und Integration in Berlin*).¹⁶¹ Under the new Act, immigrant integration is an obligatory task for the Berlin government, which undertakes to provide immi-

Structuring Immigration – Fostering Integration, FED. MINISTRY INTERIOR (JULY 4, 2001), http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschueren/Structuring_Immigration_-_Fostering_Id_14625_en.pdf.

157. Language competency plays a crucial role in Germany’s immigration and naturalization laws. In the naturalization context, for example, Article 11 of the Citizenship Act makes clear that the right to citizenship is not available if the applicant lacks sufficient knowledge of the German language. The language requirements are spelled out in detail in the Citizenship Regulations (StAR-VwV), which demand the ability not only to speak in daily life, but also to communicate with authorities in a manner appropriate to one’s age and education. Allgemeine Verwaltungsvorschrift zum Staatsangehörigkeitsrecht [StAR-VwV] [Citizenship Act], Dec. 13, 2000, GMBL at 2001, 122.

158. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [AufenthG] [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], Jan. 1, 2005, BGBl. I at § 75.

159. *Der Nationale Integrationsplan: Neue Wege — Neue Chancen* [The National Integration Plan: New Ways — New Chances], DIE BUNDESREGIERUNG (2007), <http://www.bundesregierung.de/Content/DE/Archiv16/Artikel/2007/07/Anlage/2007-07-12-nationaler-integrationsplan.pdf>. [hereinafter *Der Nationale Integrationsplan*].

160. *Id.* Under the plan, the federal government’s obligations include (1) improving the content and range of mandatory integration courses, with an eye to better tailoring them to meet the needs of particular clienteles, such as youth, mothers of young children, and illiterate participants; (2) increasing the number of “full-day” schools and childcare options available to immigrants through consultations with the state governments and local authorities; (3) reducing the drop-out rate of students with a migration background; and (4) providing expanded opportunities for vocational training through programs developed in conjunction with private firms to young people with a migration background. The *Länder*’s responsibilities include: (1) providing more opportunities for German-language learning for school-age children; (2) recruiting more teachers with a migration background; (3) offering special support for employment-related language courses at vocational schools; (4) improving migrants’ access to health and social services; and (5) increasing funding for schools with large numbers of migrant students. Municipalities responsibilities include: (1) making integration a cross-cutting, interdepartmental responsibility; (2) enacting policies of “intercultural opening” by hiring more staff with a migration background and adapting services to meet the special needs of immigrant residents; (3) enhancing the participation of migrant organizations in municipal-level policy formulation and implementation through consistent and meaningful consultation; and (4) creating targeted programs for neighborhoods with particularly pressing needs. *Id.*

161. Gesetz zur Regelung von Partizipation und Integration in Berlin [PartIntG] [Act on Participation and Integration in Berlin], Dec. 9, 2010, Gesetz- und Verordnungsblatt für Berlin [BLN] (Ger.).

grants in the *Land* with an opportunity for equal participation in all areas of social life and to abolish any and all discrimination against them.¹⁶² The Act amends a number of existing state laws in a variety of ways,¹⁶³ and formally establishes new *Land* institutions designed to foster immigrant integration, including a *Land* advisory council on integration and migration and integration commissioners for the district administrations and the Berlin Senate.¹⁶⁴ Another *Land*, North-Rhine Westphalia (*Nordrhein-Westfalen*) passed similar legislation, the Participation and Integration Act of July 2011 (*Gesetz zur Förderung der gesellschaftlichen Teilhabe und Integration in Nordrhein-Westfalen*),¹⁶⁵ which entered into force in January 2012.¹⁶⁶ BAMF anticipates that other *Länder* will soon follow suit.¹⁶⁷ It is, however, important to note that the National Integration plan and related state statutes supplement, but do not replace, a number of preexisting state laws and municipal ordinances designed to foster immigrant inclusion and integration.¹⁶⁸ For example, a number of German cities have adopted measures to further integrate immigrant communities under the auspices of Germany's "Socially Integrative Cities" Program, which was launched in 1999 to "counteract the widening socio-spatial rifts in the cities."¹⁶⁹

Initial assessments of the effectiveness of the German model of immigration-federalism have been tentatively optimistic — although the new formal framework is too short-lived for rigorous or definitive analyses along multiple metrics. In 2008 the German federal government began monitoring the success of its integration initiatives using seventeen criteria.¹⁷⁰ In June 2009, *Länder* integration ministers and senators adopted the same criteria and, in February

162. *Id.* §§ 1(1)-(2).

163. For example, the Burial Act was amended so that shroud burials are permitted in Berlin, *see id.* at 10, art. 10, and in the Holiday Act the term "church" holidays was replaced by "religious" holidays, *see id.* at 8, art. 6, § 2(1).

164. *Id.* §§ 1(1)-(2).

165. Gesetz zur Förderung der gesellschaftlichen Teilhabe und Integration in Nordrhein-Westfalen Teilhabe und Integrationsgesetz [Teilhabe- und Integrationsgesetz] [Participation and Integration Act], Feb. 14, 2012, Gesetz- und Verordnungsblatt für Nordrhein-Westfalen [GV. NRW.] An overview of the key provisions of the Act is available (in German) online. *See Geltende Gesetze und Verordnungen (SGV. NRW.)*, MINISTERIUMS FÜR INNERES UND KOMMUNALES, https://recht.nrw.de/lmi/owa/br_bes_text?anw_nr=2&gld_nr=2&ugl_nr=24&bes_id=19764&aufgehoben=N&menu=1&sg=0 (last visited Dec. 7, 2013).

166. *Id.*

167. *See* Ger. Nat'l Contact Point for the Eur. Migration Network, *Annual Policy Initiative Report 2010*, FED. OFF. MIGRATION & REFUGEES (Mar. 29, 2011), <http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Nationale-Berichte/emn-policy-report-2010-germany-en.pdf>.

168. *See* FED. OFFICE FOR MIGRATION & REFUGEES, INTEGRATION IN GERMANY: ANNUAL REPORT 2008 (2009); Andreas Damelang & Max Steinhardt, *Integration Policy at a Regional Level in Germany*, FOCUS MIGRATION POL'Y BRIEF (May 2008), <http://www.bpb.de/files/HEJLVH.pdf>; Bettina Reimann & Ulla Schuleri-Hartje, *Integration von Migrantinnen und Migranten im Stadtteil*, SOZIALE STADT, Sept. 2005, at 2.

169. *Soziale Stadt - Investitionem im Quartier*, BUNDESMINISTERIUM FÜR VERKEHR, BAU, UND STATTDENTWICKLUNG, http://www.staedtebaufoerderung.info/StBauF/DE/SozialeStadt/soziale__stadt__node.html (last visited Dec. 7, 2013) (describing the "Socially Integrative City" initiative involving the federal, *Länder*, and city governments) [*hereinafter Soziale Stadt - Investitionem im Quartier*].

170. Jan Schneider & Bernd Parusel, *Policy Report 2008*, FED. OFF. MIGRATION & REFUGEES 34 (July 2009), <http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Nationale-Berichte/emn-policy-report-2008-germany-en.pdf>.

2010, they began their own pilot project to monitor immigrant integration in Bavaria, Berlin, Brandenburg, Hessen, Lower Saxony, North Rhine-Westphalia, and Rhineland-Palatinate. Early federal and *Land* reports suggest that these immigrant integration programs have enjoyed moderate success to date.¹⁷¹ Research presented in 2012 to the Forum on Federations, an international nonprofit organization that is supported by the governments of ten federal democracies,¹⁷² is also broadly positive in its assessment of the German system of immigration-federalism.¹⁷³ In particular, the researchers highlighted the high level of commitment to the federal-state National Integration Plan by all tiers of government and the proliferation of a variety of immigrant integration schemes administered by state and municipal governments.¹⁷⁴ The German regulatory scheme, involving overlapping and complementary approaches to immigrant inclusion and integration, may therefore provide a particularly helpful model for American lawmakers contemplating possible roles for states and localities within the broader context of comprehensive immigration reform.

B. *The Australian Model*

Australia provides an alternative, but equally instructive, model of immigration-federalism. The Australian framework begins with highly centralized federal control over immigration law and policy that has incrementally relaxed over the past decade to allow states and localities a small role in implementing immigrant-inclusionary measures. Once again, there are many similarities between the immigration challenges faced by the Australian federal and state governments in the years before they introduced reforms and those currently facing American lawmakers. As is currently the case in the United States, there was an upsurge in immigration in the years before the reforms were introduced in Australia.¹⁷⁵ As in the United States, immigrant communities in Australia settled in key “gateway” destinations, predominantly Sydney and Melbourne.¹⁷⁶ As in the United States today, concerns about national security and law and order informed immigration lawmaking in Australia, particularly in light of the terrorist attacks in the United States of September 11, 2001, the London bombings of July 7, 2005, and race-related rioting that took place in Sydney in 2005.¹⁷⁷ And as in the United States before the Supreme Court’s *Arizona* decision, before nationwide reforms were introduced in Australia, indi-

171. See Ger. Nat’l Contact Point for the Eur. Migration Network, *supra* note 167.

172. See *About Us*, F. ON FEDERATION: GLOBAL NETWORK ON FEDERALISM, <http://www.forumfed.org/en/about/index.php> (last visited Dec. 8, 2013) (describing the Forum as “concerned with the contribution that multi-level government can make to democracy building and democratic consolidation”).

173. See Siemiatycki & Triadafilopoulos, *supra* note 14 (analyzing the strengths and weaknesses of the German system).

174. *Id.*

175. See Ross Garnaut, Rana Ganguly & Jongsoo Kang, *Migration to Australia and Comparisons with the United States: Who Benefits?*, DEP’T IMMIGR. & MULTICULTURAL & INDIGENOUS AFF. (May 2003), http://www.immi.gov.au/media/publications/pdf/mig_aust_us_compare.pdf.

176. *Id.*

177. See James Jupp, *Terrorism, Multiculturalism and Immigration: The Australian Experience*, 61 INT’L J. 699 (2006).

vidual states lobbied the federal government for immigrant reforms, particularly with respect to the admission of foreign workers.¹⁷⁸ Furthermore, before reforms were introduced in Australia there was widespread concern, as there is now in the United States, about the integration of immigrants in light of cultural and linguistic differences between them and the preexisting population.¹⁷⁹ The response of the Australian federal government to these challenges was to develop a coherent regulatory framework, delegating limited authority to the states in some areas—an approach that may well be attractive to lawmakers in the United States.

Australia's federal structure consists of a Commonwealth (federal) government and the country's six states, two mainland territories, and seven off-shore territories. As in the United States and Germany, the federal and state governments have their own constitutions that apportion powers between the three branches of government: legislature, executive, and judiciary. The six state parliaments are permitted to pass laws related to any matter that is not controlled by the Commonwealth under Section 51 of the Australian Constitution.¹⁸⁰ The principle of federal supremacy is established in the constitution, which states that if the laws of a state conflict with the laws of the Commonwealth, federal law is to be followed.¹⁸¹ Moreover, the federal judiciary may also have the power to review decisions by a state judiciary.¹⁸² The country's constitution defines immigration, naturalization, and citizenship as exclusive federal powers.¹⁸³ While immigrant settlement is not explicitly mentioned in the constitution, the federal government has traditionally played the dominant role in this area.¹⁸⁴ The Commonwealth Department of Immigration and Border Protection is formally responsible for immigrant selection, refugee policy, multiculturalism, and settlement.¹⁸⁵

Australia, much like the United States, has a long history as a major center of immigration.¹⁸⁶ Indeed, of the four countries surveyed in this Article,

178. See Hawthorne, *supra* note 13.

179. See Siemiatycki & Triadafilopoulos, *supra* note 14 (describing the provision of English language to new migrants in response to widespread concerns about language facilities).

180. AUSTRALIAN CONSTITUTION SS 51, 107.

181. *Id.* s 109 (“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”).

182. See Tina Hunter Schulz, *Rule of Law, Separation of Powers and Judicial Decision Making in Australia: Part 1*, 11 NAT'L LEGAL EAGLE 12, 15 (2005).

183. AUSTRALIAN CONSTITUTION S 51 (“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . naturalization and aliens.”).

184. MARY CROCK, IMMIGRATION AND REFUGEE LAW IN AUSTRALIA 1-11 (1998).

185. The purpose of the Department of Immigration and Border Protection (DIBP) is to “build Australia's future through the well-managed movement and settlement of people.” The Department's Strategic Plans for 2011 to 2012 states that key objectives are to (1) manage the lawful and orderly entry and stay of people in Australia, including through effective border security, and (2) promote a society that values Australian citizenship, appreciates cultural diversity, and enables migrants to participate equitably. *Who We Are*, DEP'T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/about/department/who-we-are.htm> (last visited Feb. 23, 2014). The Department's name has changed several times since 1945. Unless otherwise noted, this Article refers to the Department by its current name, the Department of Immigration and Border Protection.

186. See Twibell, *supra* note 9, at 59 (discussing similarities and differences in the immigration regimes of the United States and Australia).

Australia has the highest percentage of foreign-born residents; according to the 2006 census twenty-two percent of Australians were born overseas.¹⁸⁷ Immigrant participation in the workforce and in civic life has made a crucial contribution to the country's development since its origins as a British colony.¹⁸⁸ Today, immigrants continue to contribute significantly to the economic, social, and cultural landscape of the country.¹⁸⁹ There have, however, been radical changes in the demographics of immigrant communities, which have created greater challenges for integration into Australian society.¹⁹⁰

In the early twentieth century, immigrants to Australia were drawn almost exclusively from the British Isles.¹⁹¹ The discriminatory "White Australia Policy," enshrined in the Immigration Restriction Act of 1901, discouraged immigration from Southern Europe and excluded it from Asia and the Pacific Islands.¹⁹² As a consequence, in the 1950s over eighty percent of migrants hailed from Europe.¹⁹³ A series of reforms in the late 1950s, 1960s, and 1970s abolished the "White Australia Policy,"¹⁹⁴ but its effects were arguably still felt in the composition of immigration, even in the 1990s, at which time Europeans still constituted more than fifty percent of migrants to Australia.¹⁹⁵ By 2001, however, Asia contributed twice the number of migrants as Europe, and by 2009 the proportion of overseas-born residents from European countries of birth was clearly declining, while the proportion of migrants coming from Asia and Africa was steadily increasing.¹⁹⁶ From July 2008 to June 2009, there was a 34.3% increase in immigration from the Middle East and North Africa, a 22% increase in immigration from Sub-Saharan Africa, a 16.5% increase in immigration from North East Asia, and a 17.2% increase in immigration from Southern Asia.¹⁹⁷ During the same period immigration from Europe decreased

187. *Fact Sheet: More than One in Five Australians Born Overseas*, AUSTRALIAN BUREAU STAT. (June 27, 2007), <http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/ec871bf375f2035dca257306000d5422!OpenDocument>.

188. For a general history of Australia from the colonial era to the twentieth century, see CHARLES M. CLARK, *A HISTORY OF AUSTRALIA* (1963); AGNES MOFFAT LEARMONTH, *THE AUSTRALIANS: HOW THEY LIVE AND WORK* (1973); REX AND THEA RIENITS, *A PICTORIAL HISTORY OF AUSTRALIA* (1969); and WELSH, *supra* note 107.

189. See Garnaut et al., *supra* note 175, at 1-3.

190. See Statistics Section, *Immigration Federation to Century's End, 1901-2000*, DEP'T IMMIGR. & MULTICULTURAL AFF. (Oct. 2000), <http://www.immi.gov.au/media/publications/statistics/federation/federation.pdf>.

191. See MICHAEL ROE, *AUSTRALIA, BRITAIN, AND MIGRATION, 1915-1940, A STUDY OF DESPERATE HOPES* 200-03 (1995).

192. See A. C. PALFREEMAN, *THE ADMINISTRATION OF THE WHITE AUSTRALIAN POLICY* 122-123 (1967); MYA WILLARD, *HISTORY OF THE WHITE AUSTRALIA POLICY TO 1920*, at 188-212 (1968); see also *Factsheet 8—Abolition of the White Australia Policy*, DEP'T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/media/fact-sheets/08abolition.htm> (last updated Oct. 2012) (explaining origins of the policy and its repeal) [hereinafter *Factsheet 8*].

193. See Twibell, *supra* note 9, at 83.

194. See *Factsheet 8*, *supra* note 192.

195. See Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, 13 *GEO. IMMIGR. L.J.* 273, 288 (1999) (citing AUSTRALIAN BUREAU OF STATISTICS, *AUSTRALIA IN PROFILE* 19 (1993)).

196. See *Factsheet 15—Population Growth*, DEP'T IMMIGR. & BORDER PROTECTION, [http://www.immi.gov.au/media/fact-sheets/15 population.htm](http://www.immi.gov.au/media/fact-sheets/15%20population.htm) (last updated July 2013).

197. See *Factsheet 2—Key Facts About Immigration*, DEP'T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/media/fact-sheets/02key.htm> (last updated Nov. 19, 2013).

by 4.2%.¹⁹⁸ These demographic changes also reflect reduced English language competence among recent immigrants, which has created some obstacles for immigrant integration.¹⁹⁹

The changes in the national origin and ethnicity of migrants to Australia appear also to have had a profound effect on native population distributions.²⁰⁰ As in the United States, immigrant communities in Australia have settled in key “gateway” destinations, predominantly Sydney and Melbourne.²⁰¹ Yet, between the censuses of 1981 and 1996—the peak years for migration to Australia, and the years in which the ethnic and racial identities of migrants began to change—Sydney and Melbourne had the lowest population growth in the country, while other state capitals, such as Brisbane, Perth, Adelaide, Canberra, Hobart, and Darwin witnessed record growth.²⁰² Commentators suggest that internal migration, in response to the influx of new immigrants explains this phenomenon, as “Australian-born residents moved out of the great cities almost as rapidly as migrants moved in.”²⁰³ Thus, high levels of internal migration of natives caused overall regional patterns of population growth to diverge widely from patterns of migrant settlement.

These changing demographics of immigrant communities (and the native communities with which they interact and overlap) have posed newfound challenges for the administration of immigration law in Australia. In the late 1990s a number of Australian legal scholars and advocates criticized perceived inadequacies in the centralized immigration system that they saw as unresponsive to the varying requirements and priorities of the different states.²⁰⁴ Although they were constrained from engaging in independent immigration-related rulemaking, some state legislatures also began to lobby the federal government to increase immigration quotas in the hope that an influx of immigrants would boost their local economies.²⁰⁵ For example, the government of the state of Victoria “called for skilled migration levels to be more than doubled in a bid to increase Australia’s population to 28 million by 2060 from 18 million in 1998.”²⁰⁶ Against this background, a nascent system of immigration-federalism has begun (albeit incrementally) to evolve in Australia.

Australian immigration and naturalization law is set forth in the Migration Act of 1958 (and its subsequent extensive amendments),²⁰⁷ the *Australian Citizenship Act 2007*,²⁰⁸ and the Migration Regulations of 1994.²⁰⁹ The Aus-

198. *Id.*

199. See Zappala & Castles, *supra* note 195, at 287 (describing how “poor English language ability” has long been a barrier to integration in Australia).

200. See Garnaut et al., *supra* note 175, at 49-51.

201. *Id.* at 3.

202. See 3412.0 - Migration, Australia, 2011-12 and 2012-13, AUSTRALIAN BUREAU STAT., abs.gov.au/ausstats/abs@.nsf/mf/3412.0.

203. See Garnaut et al., *supra* note 175, at 46.

204. See NANCY VIVIANI, THE INDOCHINESE IN AUSTRALIA, 1975-1995: FROM BURNT BOATS TO BARBECUES 101 (1996); Zappala & Castles, *supra* note 195.

205. See Twibell, *supra* note 9, at 100.

206. *Id.*

207. *Migration Act 1958* (Cth) (Austl.).

208. *Australian Citizenship Act 2007* (Cth) (Austl.).

tralian statutory and regulatory scheme grants the federal government exclusive authority over the admission, selection, and exclusion of migrants, consistent with the constitutional definition of immigration, naturalization, and citizenship as exclusively federal powers.²¹⁰ The 1994 Regulations (as amended) permit the Department of Immigration and Border Protection to admit “permanent” immigrants under two programs: the Migration Program and the Humanitarian Program.²¹¹ The Migration Program has two streams: skilled workers who must satisfy a government-mandated “points” system in order to qualify for admission,²¹² and family stream migrants who are selected on the basis of their family relationship with their sponsor in Australia.²¹³ The government sets quotas for admission under the Migration Program.²¹⁴ Refugee and asylum seekers are admitted to Australia under the Humanitarian Program, which, unlike the Migration Program, sets no cap on immigrant admissions.²¹⁵ The vast majority of permanent immigrants (up to seventy percent in 2010) are admitted under the skilled stream of the Migration Program. In the last five years, the criteria for admission as a skilled worker have been raised, with an increased emphasis placed on applicants’ language proficiency, employment prospects, and assessments of credentials before they enter the country.²¹⁶ Regardless of the program under which a permanent immigrant enters Australia, decisions as to selection and admission are made exclusively by federal personnel at the Department of Immigration and Border Protection.²¹⁷

Immigration enforcement is also, at least theoretically, the exclusive preserve of the federal government, rather than the individual states. Under Sections 198 and 200 of the Migration Act of 1958, the Department of Immigration and Border Protection is responsible for the detection, detention, and removal of undocumented migrants.²¹⁸ Almost all of the methods used to fulfill that

209. *Migration Regulations 1994* (Cth) (Austl.). For an overview of the interplay of the statutory and regulatory provisions, see Kim Rubenstein, *Citizenship in Australia: Unscrambling its Meaning*, 20 MELB. U. L. REV. 503 (1995).

210. See CROCK, *supra* note 184, at 1-11.

211. *Id.* Individuals are also admitted to Australia on a “temporary” basis as temporary foreign workers (for up to four years), students, and long-term visitors. See *Fact Sheet 46—Temporary Entry: An Overview*, DEP’T IMMIGR. & BORDER PROTECTION, http://www.immi.gov.au/media/fact-sheets/46temporary_entry.htm (last updated March 2013).

212. See *Fact Sheet 12—Overview of Skilled Migration to Australia*, DEP’T IMMIGR. & BORDER PROTECTION, http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm (last updated July 2012) [hereinafter *Fact Sheet 12*].

213. *Fact Sheet 29—Overview of Family Stream Migration*, DEP’T IMMIGR. & BORDER PROTECTION, http://www.immi.gov.au/media/fact-sheets/29overview_family.htm (last updated Sept. 2012) [hereinafter *Fact Sheet 29*].

214. See Zappala & Castles, *supra* note 195, at 307-8; *Fact Sheet 12*, *supra* note 212; *Fact Sheet 29*, *supra* note 213.

215. See *Fact Sheet 60—Australia’s Refugee and Humanitarian Program*, DEP’T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/media/fact-sheets/60refugee.htm> (last updated Nov. 2013).

216. There are no such requirements for individuals entering the country for the purposes of family reunification. See *Overview*, DEP’T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/migrants/family/> (last visited Dec. 7, 2013).

217. See *About Us*, DEP’T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/about/> (last visited Dec. 7, 2013).

218. See *Annual Report 2006-07*, DEP’T IMMIGR. & CITIZENSHIP (Nov. 2007), http://www.immi.gov.au/about/reports/annual/2006-07/_pdf/annual-report-2006-07-complete.pdf [here-

mandate currently involve federal, rather than state, governmental actors. For example, one of the primary measures presently used to detect undocumented migrants is the Entitlement Verification Online (EVO) system.²¹⁹ The EVO system bears some resemblance to the United States' controversial E-Verify system,²²⁰ but, unlike E-Verify, it is an internet-based, real-time visa checking system that allows employers, labor suppliers, licensing authorities, and educational institutions to check immigration status and other entitlements of all visa holders in Australia.²²¹ Other measures include employer awareness training sessions conducted by federal Department of Immigration and Border Protection compliance officers and the issuance of Illegal Worker Warning Notices to employers or labor suppliers who are known to have employed or referred illegal workers.²²²

There is one area, however, in which federal immigration enforcement regulations potentially involve state and local law enforcement officers: detention of suspected "unlawful non-citizens."²²³ Section 189(1) of the Migration Act of 1958 ("The Act") states that "if an officer knows or reasonably suspects that a person in the migration zone is . . . an unlawful non-citizen, the officer must detain the person."²²⁴ Section 5(1) of the Act defines "officer," for the purposes of the Act, to include "a member of the Australian Federal Police or of the police force of a State or an internal Territory" (emphasis added).²²⁵ In practice, this means that state law enforcement personnel often play a role in assisting the federal authorities with border security and compliance under the Act.²²⁶ In order to facilitate the state police's delegated role, and to provide support to Australian Federal Police Officers engaged in immigration operations, the Department for Immigration and Border Protection operates the Immigration Status Service,²²⁷ a referral program that police officers may contact twenty-four hours a day, seven days a week, to verify immigration status.²²⁸

inafter *Annual Report 2006-07*].

219. *Id.*

220. E-Verify is a Department of Homeland Security database administered by United States Customs and Immigration Services (USCIS). USCIS describes the program as "an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility." *What Is E-Verify?*, U.S. CUSTOMS & IMMIGR. SERVICES, <http://www.uscis.gov/e-verify/what-e-verify> (last updated Sept. 29, 2013). E-Verify has been heavily criticized by immigrants' advocates, employers, and some state governments for a number of "false positive" results. See Peter Assad, *E-Verify: A Trojan Horse at the Employer's Doorstep*, 5 BUS. L. BRIEF 26 (2008); Naomi Barrowclough, Note, *E-Verify: Long-Awaited 'Magic Bullet' or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791 (2010); Emily Patten, Note, *E-Verify During a Period of Economic Recovery and High Unemployment*, 2012 UTAH L. REV. 475.

221. See *Annual Report 2006-07*, *supra* note 218, at 118.

222. *Id.* at 119.

223. *Migration Act of 1958* (Cth.) div 7 (Austral.).

224. *Id.* s 189(1).

225. *Id.* s 5(1).

226. See John McMillan, *Report into Referred Immigration Cases: Mr. G.*, DEP'T IMMIGR. & MULTICULTURAL AFF. (Dec. 2006), www.ombudsman.gov.au/files/investigation_2006_06.pdf. The Report was commissioned following the Palmer Inquiry into some 200 cases involving immigration detention, many of which involved misapplication of Migration Act Section 189 detention authority.

227. See *Annual Report 2006-07*, *supra* note 218, at 93.

228. *Id.*

Interestingly, according to the Department's own annual report, of the almost ten thousand enquiries received by the Department's Immigration Status Service in 2006, about ninety percent related to people who were lawfully present in Australia.²²⁹

In the mid-2000s, in the aftermath of a series of high-profile cases in which state police officers misidentified individuals as "unlawfully present" and detained them under their section 189 delegated powers, an independent ombudsman undertook an investigation of the detention practices of the Department of Immigration and Multicultural and Indigenous Affairs (DIMA), the predecessor of the Department of Immigration and Border Protection. The ombudsman recommended reforming the practical implementation of section 189(1):

DIMA should issue an instruction to provide guidance to police officers and DIMA officers on the exercise by police of the power conferred by s 189 of the Migration Act. The instruction should state that a DIMA officer must be contacted before a person is detained under s 189, unless there are exceptional circumstances. Either before a person is detained by a police officer under s 189, or as soon as practicable thereafter, a DIMA officer should speak to the person and document the conversation.²³⁰

Although the Department of Immigration and Multicultural and Indigenous Affairs was not bound by the Ombudsman's recommendation, it agreed in principle to the implementation of this operational change.²³¹ Since 2006 there have been a number of high profile challenges to various aspects of immigrant detention under Section 189,²³² but these have not focused on the involvement of state law enforcement personnel.²³³

In addition to the constitutionally mandated role of the federal Department of Immigration and Border Protection in immigrant selection, admission, and exclusion, it also has additional responsibilities for immigrant settlement and integration.²³⁴ This is one area in which states and localities have recently begun to carve out a role for themselves. Under the current regulations, the Australian government is required to provide a bundle of settlement services for newly arrived immigrants.²³⁵ Until recently, the federal government exclusive-

229. *Id.*

230. *Id.* at 26.

231. See *Response to Recommendations in Report into Referred Immigration Cases—Mr G*, DEP'T IMMIGR. & MULTICULTURAL AFF., http://www.immi.gov.au/media/publications/department/_pdf/response-to-ombudsmans-report-mr-g.pdf (last visited Dec. 7, 2013).

232. For a summary of litigation, see *Submission to the Joint Select Committee on Australia's Immigration Detention Network*, GILBERT & TOBIN CENTRE PUB. L., UNIV. NEW S. WALES (Aug. 10, 2011), http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/GT_Detention_Submission.pdf.

233. *Id.*

234. *Visas, Immigration and Refugees*, DEP'T IMMIGR. & BORDER PROTECTION, <http://www.immi.gov.au/immigration/> (last visited Dec. 7, 2013).

235. This is not a new phenomenon. Australia has a long history of providing comprehensive settlement support services for new immigrants. Travel and housing support, for example, were commonly available to immigrants in the early twentieth century. During the 1960s and 1970s, at the same

ly provided these services, under the auspices of its National Framework for Settlement Planning.²³⁶ The federal government adopted the National Framework for Settlement Planning in 2006.²³⁷ It did so unilaterally without engaging in negotiations with the states, an approach that subsequently garnered criticism from federalism experts.²³⁸ The Framework's statement of purpose suggests a vision of a coordinated intergovernmental, multilevel approach to immigrant integration:

The aim of the Framework is to provide a more strategic and coordinated approach to settlement planning at a national level, thus improving the ability of governments, service providers, community organizations and other settlement stakeholders to plan for the arrival and settlement of new entrants.²³⁹

The Framework unquestionably emphasizes the centralized role of the federal government, rather than that of the states. One major goal of the Framework is "to gain a national overview of settlement needs."²⁴⁰ Another major goal, at the time the Framework was introduced, was to eliminate unwelcome disparities in settlement services across the country by putting in place a more uniform, centralized system.²⁴¹ To further these twin goals, the Framework designated the National Office Settlement Planning Unit within the Department of Immigration and Border Protection as the lead institution for the development and oversight of all settlement services and responsibility for identifying the needs of new migrants to regional field offices of the federal Department of Immigration and Border Protection rather than to the states or municipalities.²⁴²

In practice, however, the implementation of the Framework has involved some state governments. Australia offers new immigrants three major settlement services, two of which are federally administered and one of which is administered in conjunction with the states. The Adult Migrant English Program (AMEP)²⁴³ and the Translating and Interpreting Service²⁴⁴ are purely federal

time that the "White Australia Policy" was revoked, the federal government introduced new programs including English language training, settlement orientation, and translation and interpretation services. See Zappala & Castles, *supra* note 195, at 289-93.

236. *National Framework for Settlement Planning*, DEP'T IMMIGR. & MULTICULTURAL AFF. (2006), http://www.immi.gov.au/living-in-australia/delivering-assistance/government-programs/settlement-planning/_pdf/sett_plan_framework.pdf [hereinafter *National Framework for Settlement Planning*].

237. *Id.*

238. See Siemiatycki & Triadafilopoulos, *supra* note 14, at 8.

239. *National Framework for Settlement Planning*, *supra* note 236, at 5.

240. *Id.* at 9.

241. *Id.* at 6 (describing one aim of the program as to provide a more coordinated approach to settlement planning at a national level).

242. *Id.* at 9.

243. Siemiatycki & Triadafilopoulos, *supra* note 14, at 9 (describing AMEP as a national settlement program that provides up to 510 hours of English-language instruction to family and humanitarian stream migrants and the dependents of skilled migrants).

244. *Id.* at 13 (describing Translating and Interpreting Service National as offering free translation services to certain groups, such as healthcare workers, emergency services, trade unions, and community-based organizations, in order to facilitate communication with immigrants).

programs. The Settlement Grants Program (SGP),²⁴⁵ however, was developed in consultation with state/territorial and local government agencies. Under the SGP, state and locally affiliated nonprofit community groups offer a range of services to immigrants, including care for the elderly, English classes for people not eligible for AMEP, driving instruction, housing assistance, legal advice, and counseling services. Project-specific funding is typically made available for up to three years.²⁴⁶ The involvement of the states in SGP programs, which are tailored to the requirements of individuals in specific localities, and to the needs of those localities with respect to immigrants, suggests some recognition by the various government actors of the need to allow state and regional authorities, who are well placed to engage with immigrants on the ground, a role in furthering immigrant inclusion.²⁴⁷ As such, it constitutes a small step towards a system of Australian immigration-federalism.

The State Specific and Regional Migration Program (SSRMP) provides a further example of an immigrant-inclusionary initiative that is responsive to the specific needs of states and localities and may also be considered a move towards immigration-federalism, at least in the sphere of immigrant inclusion.²⁴⁸ Although under the Migration Act of 1958 the federal government retains exclusive authority for immigrant selection and admission, this program allows employers, states, territories, or municipalities to sponsor skilled migrants who do not meet the national points-based test, as long as they settle outside of regions that are designated as high-migration areas.²⁴⁹ These programs were launched in the mid-1990s in response to labor shortages in certain parts of the country.²⁵⁰ Applicants must be endorsed by the state in which they intend to reside and must apply for positions that cannot be filled locally. Graeme Hugo has suggested that the SSRMP has led to “unprecedentedly greater involvement of state and local government in the immigration process.”²⁵¹ As yet, the number of admissions under the program represent a tiny fraction of all annual newcomer admissions to Australia, but the potential implications for the future development of state-based immigrant-inclusionary measures is far-reaching.

As is the case in Germany, the Australian model of immigration-federalism is relatively recent, and as yet there has been limited empirical assessment of its successes and weaknesses. Initial assessments of the new framework have, however, been mixed. Some commentators have suggested that a more rigorous immigrant selection process, informed by state participa-

245. *Id.* at 13 (noting that SGP actually predates the 2006 Framework. The consultation process between federal, state, and nongovernmental actors began in 2005 at a meeting of the Ministerial Council of Immigration and Multicultural Affairs).

246. *Id.*

247. See ANDREW MARKUS, JAMES JUPP & PETER McDONALD, AUSTRALIA'S IMMIGRATION REVOLUTION 68-105 (2009).

248. See *Trends in International Migration: Annual Report, 2003 Edition*, ORG. FOR ECON. CO-OPERATION & DEV. 107-08 (2004), <http://www.oecd.org/els/mig/trendsinternationalmigration2003.htm> [hereinafter *Trends in International Migration*].

249. *Id.*

250. *Id.*

251. Graeme Hugo, *Immigrant Settlement Outside of Australia's Capital Cities*, 14 POPULATION, SPACE & PLACE 553, 560 (2008).

tion via the SSRMP, has led to the admission of migrants who are able to integrate more swiftly and easily into Australian society than was previously the case.²⁵² However, the overall picture of immigrant integration is less positive; the most recent government-commissioned longitudinal survey of immigrants to Australia, for example, reports that forty percent of immigrants continue to encounter “some” racism and other adverse integration experiences.²⁵³ Forum on Federations research further suggests that some aspects of the Australian program, such as the federal government’s National Framework, have been highly effective in fostering federal, state, and local dialogue about migration law and policy, while at the same time the highly centralized scheme continues to constrict subnational governments from engaging in potentially useful law-making.²⁵⁴

C. *The Canadian Model*

The Canadian model of immigration regulation is perhaps the most complex of those surveyed in this Article—the federal government and the provinces share concurrent responsibility for immigration law and policy through a series of formally-negotiated bilateral federal-provincial immigration agreements.²⁵⁵ Once again, there are a significant number of similarities between the immigration-related challenges that were encountered by the Canadian government before legal reforms were introduced and the immigration-related issues being considered by lawmakers in the United States today. In Canada, as in the United States, Germany, and Australia, immigrants settle overwhelmingly in “gateway” metropolitan areas.²⁵⁶ Similar to both the United States and Australia, in the years before comprehensive reforms were introduced in Canada, there was widespread concern about the admission of immigrant workers, with a number of provinces urging the federal government to allow them to take on a more participatory role in the process.²⁵⁷ Furthermore, as in the United States, in the period before new immigration-related laws were promulgated, there was increasing tension in Canada between state and local immigrant-inclusionary lawmaking, including “sanctuary city” ordinances,²⁵⁸ and the growth of immigrant-exclusionary movements.²⁵⁹ The response of fed-

252. See Hawthorne, *supra* note 13, at 668.

253. *New Migrant Outcomes: Results from the Third Longitudinal Survey of Immigrants to Australia*, DEP’T IMMIGR. & BORDER PROTECTION (Aug. 2007), http://www.immi.gov.au/media/research/lsia/results_from_third_LSIA_body.pdf.

254. Siemiatycki & Triadafilopoulos, *supra* note 14, at 10-11.

255. See Tessier, *supra* note 9, at 229.

256. See *Population and Dwelling Counts, for Canada, Provinces and Territories, 2006 and 2001 Censuses – 100% Data*, STAT. CAN., [http://www12.statcan.ca/english/census06/data/popdwel/](http://www12.statcan.ca/english/census06/data/popdwel/Table.cfm?)Table.cfm? (last updated Jan. 30, 2013).

257. See Demetrios G. Papademetriou & Madeleine Sumption, *Eight Policies to Boost the Economic Contribution of Employment-Based Immigration*, MIGRATION POL’Y INST. (June 2011), <http://www.migrationpolicy.org/pubs/competitivenessstrategies-2011.pdf>.

258. As discussed below, Toronto has a sanctuary city policy. See *Access to City of Toronto Services by All Residents*, CITY TORONTO (May 2007), http://www.toronto.ca/immigration/pdfs/information/dadt_services.pdf.

259. See *Commentary and Analysis*, CAN. CENTRE FOR IMMIGR. POL’Y REFORM, <http://www.immigrationreform.ca/english/view.asp?x=901> (last visited Dec. 7, 2013) (criticizing the

eral, provincial, and local Canadian governmental actors to these challenges has been to develop a coherent framework defining federal, state, and local responsibility for immigration-related regulations—an approach that may also be of interest to U.S. lawmakers.

The Canadian federal structure consists of the federal government, based in Ottawa, ten provinces, and three territories. As in the United States, Germany, and Australia, the federal and provincial governments have three branches: the executive, the legislative, and the judiciary—although in Canada, as in Australia, the executive and legislative functions are effectively fused under the Westminster parliamentary system. In Canada, each of the provinces, the Yukon Territory, and the Northwest Territories have entered into one or more federal-provincial agreements with the federal Minister of Immigration.²⁶⁰ With the exception of Québec,²⁶¹ however, for many years the practical implementation of those agreements largely involved federal oversight (with limited provincial participation) of immigrant admission, selection, and exclusion,²⁶² and state rulemaking with respect to immigrant settlement, integration, and inclusion.²⁶³ Canada's 2013 Economic Action Plan, however, granted provinces and territories a greater stake in the selection and admission of skilled immigrant workers (but not in the exclusion of resident immigrants).²⁶⁴ In part, this reform was prompted by the more extensive role that provinces and territories have played in the last decade as the primary providers of inclusionary services to immigrant communities.²⁶⁵

Article 95 of the Canadian Constitution provides for the federal government and the provincial/territorial governments to have concurrent jurisdiction over “laws related to immigration,” with the federal government retaining primacy.²⁶⁶ The constitution also grants the federal government exclusive jurisdiction over “naturalization and aliens.”²⁶⁷ The Immigration Act of 1967 (as amended in 2001) creates the framework for cooperation between the provinces

fact that “[t]he number of visible minority neighbourhoods in Canada’s three largest cities increased from six in 1981 to 254 in 2001” and suggesting limiting immigration).

260. See *Federal-Provincial/Territorial Agreements*, CITIZENSHIP & IMMIGR. CAN., <http://www.cic.gc.ca/English/department/laws-policy/agreements/index.asp> (last modified Dec. 20, 2012) [hereinafter *Federal-Provincial/Territorial Agreements*].

261. *Id.*

262. Immigration enforcement in Canada is carried out by the federal Canada Border Services Agency with assistance from the Royal Canadian Mounted Police. See *Immigration Violations*, CAN. BORDER SERVICE AGENCY, <http://www.cbsa-asfc.gc.ca/security-secure/violation-infraction-eng.html> (last modified Jan. 26, 2007).

263. *Id.*

264. *Jobs, Growth, and Long-Term Prosperity, Economic Action Plan 2013*, MINISTRY FIN. (Mar. 21, 2013), <http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>.

265. *Id.*

266. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c.11, art. 95 (U.K.) (“In each Province the Legislature may make Laws in relation to . . . Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to . . . Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.”).

267. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91(25) (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

and the national government in Ottawa with respect to immigrant selection, admission, and settlement.²⁶⁸ Section 108 of the Immigration Act grants the provinces the authority to consult with the national government on immigration policy and to enter into agreements with the national government relating to immigration.²⁶⁹ Section 108 of the Act states:

(1) The Minister shall consult with the provinces respecting the measures to be undertaken to facilitate the adaptation of permanent residents to Canadian society and the pattern of immigrant settlement in Canada in relation to regional demographic requirements.

(2) The Minister, with the approval of the Governor in Council, may enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs.²⁷⁰

Despite this constitutional and regulatory scheme, however, with the exception of Québec, provinces, territories, and municipalities played a minimal role in immigration law until the mid-1990s.²⁷¹

The provincial government of Québec is, of course, a notable exception. As is true in many other spheres, Québec has developed the most autonomous role within the Canadian framework of immigration-federalism. In 1968, following the entry into force of the Immigration Act, Québec established its own Department of Immigration—it is the only Canadian province, thus far, to do so.²⁷² Since 1968, Québec has entered into four federal-provincial immigration agreements in total: the Lang-Cloutier Agreement of 1971,²⁷³ the Andras-Bienvenue Agreement of 1975,²⁷⁴ the Cullen-Couture Agreement of 1979,²⁷⁵ and the McDougall-Gagnon-Tremblay Agreement, known as the Canada-Québec Accord of 1991, which is still in effect today.²⁷⁶ Each of these agreements granted the government of Québec successively more power over immigration regulation.

The Lang-Cloutier Agreement of 1971 allowed Québec to send its own representatives to Canadian embassies overseas to engage in immigrant admis-

268. Immigration Act of 1976, R.S.C. 1985, c. I-2 (Can.).

269. *Id.*

270. *Id.*; see also Tessier, *supra* note 9, at 272. (“Section 109(1)’s reference to ‘demographic requirements’ is a clear reference to the special needs of Quebec.”).

271. See NINETTE KELLEY & MICHAEL TREBILCOCK, *THE MAKING OF THE MOSAIC: A HISTORY OF CANADIAN IMMIGRATION POLICY* (1998) (describing the evolution of Canadian immigration from the pre-Confederation to 1995 with scant reference to provinces or localities).

272. R.A. Vineberg, *Federal-Provincial Relations in Canadian Immigration*, 30 CANADIAN PUB. ADMIN. 299, 316 (1987).

273. See Penny Becklumb, *Immigration: The Canada-Quebec Accord*, PARLIAMENTARY INFO. & RES. SERVICE (2008), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp252-e.pdf>.

274. *Id.*

275. *Id.*

276. Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens, Feb. 5, 1991, available at http://www.micc.gouv.qc.ca/publications/pdf/Accord_canada_quebec_immigration_anglais.pdf.

sion counseling.²⁷⁷ The Andras-Bienvenue Agreement of 1975 gave Québec a role in the immigrant selection process: it allowed Québec officials to conduct interviews and to make recommendations to visa officers.²⁷⁸ The Cullen-Couture Accord of 1978 granted the government of Québec broad authority to select the immigrants who would settle in the province.²⁷⁹ According to the agreement, any potential immigrants to Québec must be reviewed by the Immigration Review Board of Québec.²⁸⁰ Canada, like Australia, uses a points-based system to assess immigrant eligibility for admission. Under the Cullen-Couture Accord, the Immigration Review Board of Québec was also granted discretion to award additional “points” to immigrants who demonstrated French fluency.²⁸¹ The 1991 Canada-Québec Accord expanded Québec’s role with respect to immigrant admission, selection, reception, and integration.²⁸² The most significant change under the 1991 agreement was the transfer of responsibility for immigrant selection within Canada to the government of Québec.²⁸³ This is a remarkable grant of autonomy to a subnational actor, not least because immigrants selected by Québec and admitted to permanently reside in the province are not required to remain there and may move freely throughout Canada.²⁸⁴

The Canada-Québec Accord is, however, an outlier among the federal-provincial regulatory schemes because of the remarkable amount of autonomy granted to the provincial government with regard to immigration selection, admission, and exclusion.²⁸⁵ The other bilateral federal-provincial immigration agreements are more asymmetrical, with the federal government retaining overall primacy in the fields of immigrant selection, admission, and exclusion and with the provinces assuming responsibility for settlement regulations to promote immigrant inclusion and integration.²⁸⁶

The scope of each federal-provincial agreement on immigration varies significantly. Some provinces and territories have comprehensive or omnibus agreements that cover a wide range of immigration issues; British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, and Prince

277. See Renée Joyal, *The Canada-Québec Accord Made Easy*, CITIZENSHIP & IMMIGR. CAN. (Nov. 2, 1994), <http://www.cic.gc.ca/english/department/laws-policy/agreements/quebec/can-que-guide.asp>.

278. *Id.*

279. *Id.*

280. *Id.*

281. See Tessier, *supra* note 9, at 255 (explaining that “under the Canadian point system, immigrants ordinarily receive an equal number of points (nine) for the ability to speak, read, and write fluently in either English or French.”). Under the agreement with the national government, Québec was allowed to give greater importance under the point system to French language skills. Consequently, any immigrant who has secured Québec’s approval for immigration to Québec needs to obtain only thirty points on the national point system.

282. *Id.* at 229.

283. *Id.*

284. Note that the Canadian Charter of Rights and Freedoms, § 6 (2)md(3) applies to both citizens and permanent residents. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

285. See *Federal-Provincial/Territorial Agreements*, *supra* note 260.

286. *Id.*

Edward Island have this kind of agreement with the federal government.²⁸⁷ Some provinces and territories also have single-issue agreements; for example, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, the Northwest Territories, and the Yukon have signed Provincial Nominee agreements.²⁸⁸ These agreements allow provinces to participate, albeit indirectly, in immigrant selection—although the final decision as to whether to admit an immigrant remains the responsibility of the federal agency, Citizenship and Immigration Canada. Under these agreements provinces may nominate individual immigrants to Citizenship and Immigration Canada, effectively sponsoring them through the admissions process.²⁸⁹ These programs are designed to meet the individual labor market needs of different regions.²⁹⁰ The province of Manitoba, which is often described as one of the “success stories” of the Provincial Nominee Program, habitually selects immigrants with particular skills that complement its rural economy and prioritizes immigrants that it believes are likely to settle permanently in the province.²⁹¹ In 1999, the first year of operation of Provincial Nominee Programs, provincial governments nominated fewer than five hundred immigrants for admission to Canada.²⁹² By 2008, however, more than twenty-two thousand immigrants were nominated through one of these programs, representing nine percent of all immigrants to Canada that year.²⁹³

The 2013 reforms to Canada’s immigration system explicitly addressed provincial concerns about new immigrants’ language capabilities, employment qualifications, and age. The reforms therefore increased the provinces’ role in immigrant selection beyond that granted by the Provincial Nominee Program. Provinces may now submit “Expressions of Interest” with respect to immigrants that they believe should be prioritized amongst a pool of skilled applicants preselected by the federal government for its Federal Skilled Worker Program (intended to identify those workers most likely to meet the needs of the national labor market).²⁹⁴ Yet, despite this opportunity for additional input by provincial governments, the federal government still makes the final decision as to each immigrant’s eligibility and suitability for admission.²⁹⁵ Some commentators previously predicted that admissions via Provincial Nominee Programs would overtake admissions via the Federal Skilled Worker Program.²⁹⁶ The 2013 immigration reforms make this prediction less certain. It remains to

287. *Id.*

288. *Id.*

289. *Id.*

290. See Rick Su, *Immigration as Urban Policy*, 38 *FORDHAM URB. L.J.* 363, 378 (2010).

291. See *From Immigration to Integration: Local Solutions to a Global Challenge*, *ORG. FOR ECON. CO-OPERATION & DEV.* 83, 127-28 (2006), <http://www.oecd.org/cfe/leed/fromimmigrationtointegrationlocalsolutionstoaglobalchallenge.htm> [hereinafter *From Immigration to Integration*].

292. See *Evaluation of the Provincial Nominee Program*, *CITIZENSHIP & IMMIGR. CAN.*, <http://www.cic.gc.ca/english/resources/evaluation/pnp/section3.asp> (last updated Jan. 24, 2012) [hereinafter *Evaluation of the Provincial Nominee Program*].

293. *Id.*

294. *MINISTRY FIN.*, *supra* note 264.

295. *Id.*

296. *Id.*

be seen how the new “Expression of Interest” scheme will affect the balance between federal and provincial input with respect to immigrant selection and admissions, but the increased involvement of the provinces in the federal scheme is surely significant.

The formal agreements between the federal, provincial, and territorial governments have had perhaps the greatest impact on rulemaking with respect to immigrant integration. In the past decade much of the responsibility for immigrant integration has been assumed by the provinces and territories.²⁹⁷ Although the federal government still retains responsibility for some settlement services, including adult language training and counseling for potential migrants in their countries of origin, there has been substantial devolution of settlement services delivery to provincial authorities.²⁹⁸ The role played by provincial agencies varies from province to province. In Manitoba and British Columbia, the provincial government has fully devolved responsibility.²⁹⁹ In Alberta, the provincial government co-manages the delivery of integration services with the federal government.³⁰⁰ In Ontario (as discussed in more detail below) there is tri-level consultation and delivery of services to immigrants by city, state, and federal government actors.³⁰¹

During the last ten years, as the provinces have adapted to their new roles as primary providers of settlement services to immigrants, Canadian municipalities have also begun to engage in rulemaking regarding immigrant integration. As in the United States, Germany, and Australia, the majority of immigrants to Canada live in a “census metropolitan area.”³⁰² Moreover, as in the United States, cities have begun to promulgate immigrant-inclusionary ordinances designed to provide municipal services to all residents, irrespective of immigration status. Toronto, a city in which immigrants compose 45.7% of the total population,³⁰³ has taken the lead in promulgating innovative immigration-related legislation.

Toronto is the only Canadian city with a tri-level intergovernmental accord on immigration, the Canada-Ontario-Toronto Memorandum of Understanding on Immigration and Settlement of 2006.³⁰⁴ According to its Preamble:

[The Memorandum of Understanding] establishes a framework for the federal, provincial and municipal governments to discuss matters related to immigration and settlement in the City of Toronto. It focuses on improving outcomes for immigrants through several areas of interest to all three governments, including citizenship and civic engagement, and facilitating access to employ-

297. See Keith Banting, *Federalism and Immigrant Integration in Canada*, F. FEDERATIONS (Jan. 28, 2011), http://www.forumfed.org/post/Banting_28_01_11.pdf.

298. *Id.* at 11.

299. *Id.* at 12.

300. *Id.*

301. *Id.*

302. See STAT. CAN., *supra* note 256.

303. *Id.*

304. Canada-Ontario-Toronto Memorandum of Understanding on Immigration and Settlement, Sept. 29, 2006, available at <http://www.cic.gc.ca/english/department/laws-policy/agreements/ontario/can-ont-toronto-mou.asp> [hereinafter Canada-Ontario-Toronto MOU].

ment, services, and educational and training opportunities.³⁰⁵

In accordance with the Memorandum, a Steering Committee composed of the City of Toronto's City Manager, the Assistant Deputy Ministers of Citizenship and Immigration Canada and the Ontario Ministry of Citizenship and Immigration, meet twice yearly to identify and recommend priorities for joint action in the area of immigrant integration and to undertake immigrant-inclusionary initiatives.³⁰⁶

In tandem with the development of this formal cooperation with the provincial and federal authorities with respect to the integration of lawfully present immigrants, the City of Toronto has also promulgated rules designed to foster the inclusion of undocumented migrants.³⁰⁷ These measures are remarkably similar to the American sanctuary city ordinances, discussed in Part III of this Article.³⁰⁸ This city legislation is particularly important, as there may be up to two hundred thousand undocumented individuals living in Toronto.³⁰⁹ Since 2007 the city has provided "services to residents regardless of immigration status."³¹⁰ The city's official policy is that no immigration documentation is required of residents "regarding their immigration status to participate in the programs, activities and services that we operate or fund."³¹¹ A twenty-two-page booklet, entitled *Access to City of Toronto Services by All Residents*, provides a full list of all city departments that provide services to undocumented residents and that do not report clients' immigration statuses to other authorities.³¹² The list of city agencies includes children's services, emergency medical services, fire services, homes for the aged, municipal licensing and standards, parks, forestry and recreation services, shelter support and housing administration, building services, public health, public libraries, Toronto water, and transportation services.³¹³ The Toronto Police also have a "don't ask" policy with respect to immigration status when handling family abuse cases.³¹⁴ The Toronto model

305. *Id.*

306. *Id.*

307. The election of a conservative, Rob Ford, as Mayor of Toronto in October 2010 led many to fear that he would abandon these immigrant-inclusionary policies. Since Mayor Ford took office on December 1, 2010, however, Toronto's immigrant-exclusionary laws have not changed. Moreover, under his leadership the City Council has endorsed the Enhanced Toronto Prosperity Initiative, which encourages, amongst other things: "the City to expand on the partnerships and programs assisting . . . recent immigrants to become active contributors to the labour force and the economy." *Enhanced Toronto Prosperity Initiative Endorsed by City Council*, CITY TORONTO (July 15, 2011), <http://wx.toronto.ca/inter/it/newsrel>.

308. See discussion *supra* Part III.

309. See Siemiatycki & Triadafilopoulos, *supra* note 14, at 26 (describing Toronto as "home to some of the highest concentrations of foreign-born population of cities anywhere").

310. See *City of Toronto Immigration and Settlement Portal*, CITY TORONTO http://www.toronto.ca/immigration/acc_ser_imm.htm (last visited Jan. 31, 2014).

311. *Id.*

312. *Access to City of Toronto Services*, *supra* note 258.

313. *Id.*

314. See Allison Hanes, *Toronto Police Chief Kills "Don't Tell" Immigration Policy*, NAT'L POST (Nov. 28, 2008), <http://mostlywater.org/node/58558>. An attempt to pass a further ordinance prohibiting local police officers from telling federal authorities if they suspect immigration law violations failed. *Id.*

of developing parallel tracks of immigrant-inclusionary rulemaking pertaining to documented and undocumented immigrant populations suggests one potential direction that “gateway” American cities like New York, Los Angeles, or San Francisco may also wish to pursue.

As is the case in Germany and Australia, the current Canadian model of immigration-federalism has existed for too short a period of time for its success to be analyzed thoroughly using a variety of metrics. Initial analyses of the Canadian system have, however, been broadly positive. Research undertaken by the Forum on Federations, a Canadian-based nonprofit, for example, underscores the fact that the current Canadian scheme for immigrant integration and settlement is more comprehensive than that of the United States, Germany, or Australia, and that the commitment by Canadian federal, provincial, and municipal governments to immigration inclusion through laws, policies, and institutions has been thoroughgoing and successful.³¹⁵ A report commissioned by the European Union also describes Canada’s subnational immigration programs involving immigrant selection and immigrant integration as particularly “smart” because they recognize “the divergent economic and demographic circumstances facing regions, states, and localities.”³¹⁶ The Canadian model may, therefore, prove attractive to American lawmakers as they attempt to determine the best way to allocate responsibility for immigration regulation among different governmental actors.

V. THE FUTURE OF IMMIGRATION REGULATION IN THE UNITED STATES

As the American debate about comprehensive immigration reform continues in Congress and elsewhere, it is essential to consider the important role that state and local governments might play in a reformed and reconfigured system. The Supreme Court’s *Arizona* ruling may have limited state and local governments’ opportunities to promulgate immigrant-exclusionary laws, but it has also thrown into stark relief the tremendous opportunity for state- and municipal-level immigrant-inclusionary rulemaking. Against this backdrop, the structures and practices of the other federal nations surveyed in this Article provide useful insights into potential legislative and regulatory options.

In the particularly dynamic sphere of immigration regulation, Germany, Australia, and Canada’s differing immigration schemes are worthy of consideration by American lawmakers and scholars, even though, as noted in Part IV, the immigration-federalism systems of Germany, Australia, and Canada are too freshly constituted to serve as wholly definitive, paradigmatic alternatives to the current U.S. model. Any consideration of these comparative models must also, of course, be tempered by an awareness of the many and various meaningful distinctions between the governmental and legal systems of these countries and the United States, not least of which are the different systems of federalism in each nation.³¹⁷ Furthermore, consideration of the attributes of the German,

315. See Siemiatycki & Triadafilopoulos, *supra* note 14 at 25-31.

316. See Papademetriou & Sumption, *supra* note 257, at 7.

317. For example, as discussed in Part IV, in Germany, Australia, and Canada the federal gov-

Australian, and Canadian immigration schemes must also be informed by an awareness of the differing economic, ideological, social, and cultural environments in each nation, and the ways in which those environments contrast with the United States.³¹⁸ Yet, despite these limitations, comparing the experiences of Germany, Australia, and Canada with those of the United States may prove illuminating for American lawmakers.

The experience of these other federal democracies is relevant and apposite for an American audience, because it clearly illustrates the potential implications and consequences of either limiting or permitting different governmental actors to engage in different aspects of immigration lawmaking. In the discussion that follows I highlight some lessons that American lawmakers might draw from the German, Australian, and Canadian experiences and approaches to immigrant selection and admission, immigration enforcement, and immigrant inclusion.

A. *Federal, State, and Local Involvement in Immigrant Selection and Admission*

The comparative analysis in this Article demonstrates that states could play a greater and more meaningful role in the initial selection of new immigrants. Germany, Australia, and Canada all grant subnational actors a greater role in immigrant selection than the United States currently permits its states. In the United States, the states' influence on decisions pertaining to immigrant admission is highly attenuated and limited to family unification visas; in order to qualify as a "spouse" for immigration purposes, an individual must be married according to the law of the state in which his marriage was performed and the law of the state in which he intends to reside.³¹⁹ States previously played a role in the issuance of employment-based visas via state labor office participation in the labor certification process for employers seeking to hire immigrant workers. In 2005, however, when the Department of Labor introduced the Program Electronic Review Management process, individual State Wage Agencies ceased to be involved in such determinations.³²⁰ In contrast, the other countries surveyed in this Article allow state equivalents to participate in immigrant selection processes, with respect, in particular, to employment-based admissions, and their differing experiences highlight the potential advantages and pitfalls of state engagement in this arena.

ernments are not restrained by American-style anticommandeering doctrines, and thus are more able than their American counterpart to co-opt state agencies to implement federal immigration laws and policies.

318. For example, as Peter Schuck has previously noted, in the United States, in contrast to Germany, Australia, and Canada, immigrant integration has long been perceived as a matter to be pursued by individual migrants, perhaps with the support of nongovernmental community groups (especially those with religious or ethnic affiliations), rather than a matter for state and local governmental entities. See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 75 (2003).

319. See Darwish, 14 I. & N. Dec. 307 (B.I.A. 1973).

320. See *Permanent Labor Certification*, U.S. DEP'T LAB., <http://www.foreignlaborcert.doleta.gov/perm.cfm> (last updated Nov. 1, 2013).

The Australian State Specific and Regional Migration Programs³²¹ and the Canadian Provincial Nominee Programs and “Expression of Interest” Program allow subfederal actors to nominate migrants for employment-based admission based on their particularized labor market needs.³²² Initial assessments of these programs suggest that they are successful in attracting suitably qualified migrants to areas that have not previously experienced high levels of migration, and can be particularly helpful for employers seeking to hire workers for positions that cannot be filled locally.³²³ The Australian and Canadian regional sponsorship schemes thus suggest that permitting states and localities to participate in some aspects of immigrant admission determinations may be beneficial. Some American commentators have previously proposed the adoption of a Canadian-inspired decentralized system for employment-based migration, pointing to the many potential advantages of greater state and local engagement with immigrant selection.³²⁴ These scholars do not, however, recognize that in Canada, as in Australia, although states and localities may nominate well-qualified migrants for admission, the final decision as to admissibility rests with the federal government. State (or provincial) sponsorship of an individual is one factor among many that federal immigration officials consider when determining, on the basis of federally established standards, whether or not to grant an immigrant visa.³²⁵ Furthermore, the German experience of state involvement in immigrant admissions decisions arguably speaks to the importance of federally determined standards for immigrant admission. The incidences of discriminatory admission-related decisions made by state immigration officials in Germany before more stringent federal guidelines were introduced³²⁶ underscore the potential high costs of allowing local lawmakers to influence national immigration decisions. Taken together, the Canadian, Australian, and German examples thus also highlight the importance of not devolving all admission and settlement-related decision-making powers to state and local officials.

Taken together, the German, Australian, and Canadian models therefore suggest that while there are significant potential advantages in allowing states and localities the opportunity to communicate to the federal government their interest in the admission of immigrants with particular qualifications or characteristics, there are also meaningful disadvantages in allowing the states to make the final determination about migrant admission. As the German government recognized, there is always a possibility that state and local officials with different preferences and commitments than those of the federal government

321. *Trends in International Migration*, *supra* note 248, at 107-08.

322. *From Immigration to Integration*, *supra* note 291.

323. Graeme Hugo, *Immigrant Settlement Outside of Australia's Capital Cities*, 14 *POPULATION, SPACE & PLACE* 553, 563 (2008).

324. See, e.g., Davon M. Collins, *Toward a more Federalist Employment-Based Migration System*, 25 *YALE L. & POL'Y REV.* 349, 360 (2007) (arguing that DEBI should be introduced in the United States for employment-based immigrants).

325. See Hawthorne, *supra* note 13, at 682; *Federal-Provincial/Territorial Agreements*, *supra* note 260.

326. See Hartnell, *supra* note 114, at 362; *Gejohle und Zwischenrufe*, *supra* note 127.

might use their delegated admissions authority to discriminate impermissibly against minority groups.³²⁷ The German, Australian, and Canadian examples therefore suggest that the most effective approach to immigrant admission decisions (at least with respect to employment-based admissions) may involve a mechanism that permits states and localities to advocate for certain well-qualified migrants to the federal government, which retains ultimate responsibility for admissions determinations.

B. *Federal, State, and Local Involvement in Immigration Enforcement and Immigrant Deportation*

The comparative analysis in this Article suggests that policy prescriptions that are entirely harmonious with the doctrinal strictures set forth in the U.S. Supreme Court's *Arizona* holding may be both viable and fruitful. State and local involvement in immigration enforcement operations should be tightly monitored and controlled by the federal government. The slew of state lawmaking pertaining to immigration enforcement that preceded the Court's *Arizona* opinion, including Arizona's S.B. 1070³²⁸ or Alabama's H.B. 56,³²⁹ underscores the continued political salience of the debate over the extent to which state and local police officers should be involved in immigration enforcement. The Supreme Court's ruling that the "show me your papers" provision of S.B. 1070 is not preempted has left state and local law enforcement personnel some leeway to question individuals about their immigration status (at least until as-applied challenges make their way through the courts.) But the experience of their counterparts in other federal democracies suggests that this power to inquire into immigration status should be exercised sparingly and, where possible, should only be attempted under the direct supervision of federal immigration officers. As Adam Cox and Eric Posner have previously noted, state and local engagement in immigration enforcement, even when acting under the auspices of federally delegated power, poses two principal potential agency problems.³³⁰ First, local law enforcement officers may be prone to mistakes that federal immigration officials would not make.³³¹ Second, local actors may, in exercising their arrest discretion, pursue different enforcement priorities than those of the federal government.³³² The Australian and German models illustrate both of these potential pitfalls.

The Australian experience suggests that state police officers may err in their exercise of delegated immigration detention powers if they exercise such powers without comprehensive federal oversight. Reports of Australian state police officers wrongfully imprisoning individuals in exercise of their delegat-

327. See Özdemir, *supra* note 118, at 224-26 (describing endemic discrimination against ethnic and religious minority groups in Germany, especially Turkish Muslims).

328. Ariz. S.B. 1070.

329. Ala. H.B. 56, §§ 1-7.

330. See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law* 44 (Univ. of Chi. Law Sch. John M. Olin Law & Econ. Working Paper No. 572, 2d Series, 2011).

331. *Id.*

332. McMillan, *supra* note 226.

ed powers under § 189(1) of the Migration Act led to an Ombudsman's inquiry in 2004.³³³ Since the publication of the Ombudsman's findings, Australian state police officers have been restricted to exercising their immigration-related detention powers only when acting under the direct supervision of federal personnel.³³⁴

The German experience suggests that state actors granted the opportunity to exercise their own discretion within the context of federally delegated operations might use that discretion to pursue strategies that are not commensurate with federal enforcement priorities. Reports of *Land* agencies prioritizing the pursuit and exclusion of undocumented migrants on the basis of their religious affiliations or ethnic identities, rather than their criminal histories or the nature of their immigration violations, illustrate the potential for state actors to be influenced by local sociopolitical concerns, to the detriment of national policies and commitments.³³⁵ Taken together, the Australian and German models therefore suggest that both federal control and close federal supervision of all kinds of immigration enforcement operations are highly desirable.

American scholars have argued previously that if the federal government retains such tight control over all aspects of immigration enforcement it must also retain control over all other aspects of immigration regulation. Peter Spiro and Cristina Rodriguez, for example, have suggested that a division of responsibility between federal and state governments wherein the federal government has exclusive power over immigration enforcement and "states and localities can choose different methods of integrating immigrants admitted by the federal government" would be "conceptually unstable" because it can be difficult to separate immigration control measures from integration measures.³³⁶ But, the post-*Arizona* legal developments in the United States suggest that this need not be the case. Recent federal appellate jurisprudence has precluded state immigrant-exclusionary lawmaking.³³⁷ At the same time, state laws fostering immigrant-inclusion have proliferated.³³⁸ The models of immigration-federalism in Canada and Australia suggest that such a division of responsibility between different governmental actors is possible and sustainable in the long-term.

In Canada, provinces and localities are able to employ a number of different methods of integrating immigrants admitted by the federal government, both independently and in coordination with the federal government through

333. *Id.*

334. *Id.*

335. See Europe Regional Office, *Protection Against Racial Discrimination in the EU*, UNITED NATIONS OFF. HIGH COMMISSIONER ON HUM. RTS. (2013), www.europe.ohchr.org/Documents/Publications/CERD_Reader.pdf.

336. See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 618 (2008); cf. Elias, *supra* note 6, at 705 (arguing that following the United States Supreme Court's *Arizona v. United States* opinion such a division of responsibility is required).

337. See *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013) (holding that the Federal Immigration Reform and Control Act preempted local ordinances regulating employment and rental housing); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528-29 (5th Cir. 2013) (holding that federal law preempted a local ordinance regulating rental housing).

338. See, e.g., Broder et al., *supra* note 8.

federal-provincial agreements.³³⁹ Immigration enforcement in Canada is, however, the exclusive preserve of the federal government and is carried out by the Canada Border Services Agency with assistance from the Royal Canadian Mounted Police.³⁴⁰ In Australia, similarly, states are developing greater roles in immigrant-integration, through SGPs and the State Regional Migration Program, while simultaneously decreasing their engagement in immigration enforcement operations.³⁴¹ In short, these comparative examples illustrate that it is at least possible to develop a framework of immigration-federalism within which power over immigration enforcement is both tightly held and decoupled from power over immigrant integration.

C. *Federal, State, and Local Involvement in Immigrant Integration*

In the United States, in contrast to Germany, Australia, and Canada, immigrant integration has been regarded as a government priority infrequently. Instead, it has been widely perceived as the responsibility of immigrants themselves.³⁴² In recent years, however, as the discussion in Part IV of this Article has shown, local immigrant-inclusionary legislation, including state DREAM Acts, sanctuary city ordinances, driver's license provisions, and workplace protections for immigrants, has implicitly and explicitly acknowledged the significance of providing migrants with avenues for integration into their local communities. The current impetus for comprehensive immigration reform has further highlighted the central importance of immigrant inclusion, both for immigrants and for immigrant-receiving communities. In this context, the German, Australian, and Canadian models of immigration-federalism highlight the potential advantages and disadvantages of greater intervention by subnational government actors in this area of immigration-related lawmaking.

The German, Australian, and Canadian systems of immigration-federalism all involve express coordinated agreements as to concurrent responsibility in the field of immigrant integration between the federal, state, and local governments. Germany's National Integration Plan,³⁴³ Australia's National Framework for Settlement Planning,³⁴⁴ and Canada's federal-provincial agreements, in particular the Canada-Ontario-Toronto Memorandum of Understanding on Immigration and Settlement of 2006,³⁴⁵ provide alternate examples of such a plan. Initial assessments of these national strategies have been broadly positive, with commentators praising both the practical outcomes of the

339. Robert Vineberg, Overview of Federal-Provincial Relations in Immigration and Integration, Presentation at the Forum of Federations and the Mowat Centre Conference - Immigrant Integration and Canadian Federalism: Exploring the Issues (Jan. 28, 2011).

340. See *Immigration Violations*, CAN. BORDER SERVICE AGENCY, <http://www.cbsa-asfc.gc.ca/security-securite/violation-infraction-eng.html> (last modified Jan. 26, 2007).

341. See *supra* Section IV(B).

342. See SCHUCK, *supra* note 318, at 75.

343. *Der Nationale Integrationsplan*, *supra* note 159.

344. *National Framework for Settlement Planning*, DEP'T. IMMIGR. & MULTICULTURAL AFF. (Mar. 2006), http://www.immi.gov.au/living-in-australia/delivering-assistance/government-programs/settlement-planning/_pdf/sett_plan_framework.pdf.

345. Canada-Ontario-Toronto MOU, *supra* note 304.

uniform national schemes and the normative message that the very existence of such schemes sends to disfavored groups.³⁴⁶ The trilateral Toronto-Ottawa-Canada agreement appears to be particularly successful, and would be especially helpful to American lawmakers if they were to contemplate similar initiatives—not least because in the United States, as in Canada, cities and municipalities are becoming increasingly active participants in immigration regulation.³⁴⁷

There are, however, significant limits to the potential feasibility of adopting any national framework of immigrant integration in the United States. Longstanding Tenth Amendment doctrine suggests that the introduction of a nationwide plan similar to those in force in Germany, Australia, and Canada is not necessarily constitutionally impermissible, although the process of creating and enforcing such a plan would undoubtedly involve protracted and careful negotiation between federal and state legislative and executive branches, given the separation of powers constraints specific to the American federalist system. Moreover, unlike in Germany, Australia, and Canada, as discussed above, American anti-commandeering doctrine ensures that state participation in any coordinated national plan—whether pertaining to immigration enforcement or immigrant integration—must be voluntary and cannot be mandated by the federal government.³⁴⁸

Furthermore, while the experiences of the other nations surveyed in this Article point to the potential advantages of a uniform national approach to immigrant integration, the Canadian and German models also suggest the potential benefits of allowing subnational variations to develop—including variations that include implied or express dissent from centralized policies—either in parallel with or before promulgating a definitive national rule pertaining to this aspect of immigration regulation. The experience of the City of Toronto, described in Section IV.C, suggests that it is possible for subnational actors to participate in immigrant integration initiatives in coordination with the federal government and to pursue simultaneously other inclusionary initiatives, including those that target undocumented populations. The Canadian scheme implicitly acknowledges the existence of undocumented populations that place extraordinary demands on urban areas, and allows for flexible responses by states and localities acting alone. The German “Socially Integrative Cities” program³⁴⁹ similarly provides an avenue for municipal autonomy in service provision to immigrants (including, potentially, undocumented immigrants) alongside the formal integration measures for documented migrants set forth in the National Integration Plan.³⁵⁰

346. See Siemiatycki & Triadafilopoulos, *supra* note 14, at 2, 21-23.

347. See *supra* Part II; Su, *supra* note 290; see also David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2221 (2006) (discussing San Francisco’s challenge to California’s same-sex marriage ban and challenging the conventional view that cities’ interpretations of the Constitution should be considered suspect, positing instead that cities may have an independent role in constitutional interpretation).

348. See *Printz v. United States*, 521 U.S. 898 (1997).

349. See *Soziale Stadt - Investitionem im Quartier*, *supra* note 169.

350. *Der Nationale Integrationsplan*, *supra* note 159.

The recent history of state and local immigration-related rulemaking in the United States, wherein a number of states and localities have pursued immigrant-inclusionary measures, such as state access to education laws, and thereby prompted federal legislative action, may also be seen as a form of the uncooperative, uncoordinated immigration-federalism that has flourished in the absence of national guidelines.³⁵¹ Somewhat counterintuitively, the combined experiences of Germany and Canada—and also the United States in the last decade—suggest that one of the most effective ways for federal lawmakers to promote greater immigrant integration might be to refrain from passing legislation encouraging immigrant integration, thereby facilitating innovative state and local immigration-related lawmaking by other governmental actors.³⁵² By refraining from action, federal lawmakers might therefore create a more effective opportunity for the states to serve as “laboratories of democracy” in the immigration arena.³⁵³

VI. CONCLUSION

The United States is poised to make thoroughgoing changes to its system of immigration regulation—whether the provisions of Senate Bill S.744 ultimately become law or not.³⁵⁴ Whatever happens in Congress during this legislative session, in the post-*Arizona* legal landscape, close attention must be paid to the pivotal role that states and localities can play in immigration regulation. The recent experience of other federal democracies demonstrates that state and local governments can inform, support, and promote the overhaul of immigration regulation at the national level.

The legal regimes of Germany, Australia, and Canada are strikingly different.³⁵⁵ Furthermore, each of these countries has traditionally approached immigration regulation in a very different way. Germany previously devolved a great deal of responsibility to its *Länder*.³⁵⁶ Australia left all immigration regulation in the exclusive charge of the federal government.³⁵⁷ Canada’s federal government entered into different bilateral agreements with the provinces and territories, but in practice (with the exception of Quebec) exerted its primacy in all aspects of immigration regulation.³⁵⁸ Yet, faced with a very similar set of challenges, including the massive influx of new immigrants to “gateway” urban centers and beyond,³⁵⁹ concerns about the terrorist threat to national securi-

351. See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1287 (2009).

352. See Cover, *supra* note 19, at 672-680.

353. *New State Ice v. Liebman*, 285 U.S. 262 (1932).

354. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2103 (as passed by Senate, June 27, 2013).

355. *Id.*

356. See discussion *supra* Section IV.A; see also Joppke, *supra* note 9, at 52-53 (describing the history of Germany’s approach to immigration regulation).

357. See discussion *supra* Section IV.B; Twibell, *supra* note 9 (discussing similarities and differences in the immigration regimes of the United States and Australia).

358. See discussion *supra* Section IV.C; see also Tessier, *supra* note 9, at 224-29 (discussing the very limited role previously adopted by all provincial governments, save Quebec).

359. Census statistics from each of the countries show large migrant communities in major met-

ty,³⁶⁰ labor market shortages or surpluses caused by the global economic recession,³⁶¹ and burgeoning undocumented populations,³⁶² Germany, Australia, and Canada reformed their immigration laws and regulatory practices in a way that increased the involvement of multiple tiers of government in immigration-related lawmaking, especially in the area of immigrant inclusion.

The United States should not import wholesale any other nation's immigration laws or regulations, but American lawmakers, jurists, and scholars can learn from the experiences of other mature, federal democracies that have confronted similar challenges. As we ponder various options for immigration reform, including the future direction of immigration-federalism in the United States, we would be well served to consider the different models of immigration regulation adopted in Germany, Australia, and Canada, and to contemplate the experiences of those countries in balancing federal, state, and local engagement in immigration-related lawmaking. The policy-based lessons from the German, Australian, and Canadian experiences are clear, consistent, and entirely harmonious with the U.S. Supreme Court's recent immigration preemption doctrine. In the wake of *United States v. Arizona*, as we enter a new era of immigration-federalism, states and localities must be wary of involvement in any aspect of immigration enforcement, but should embrace the important opportunities available to them to participate in the selection and inclusion of new immigrants and migrants.

ropolitan areas, such as Frankfurt and Stuttgart in Germany, Sydney and Melbourne in Australia, and Toronto in Canada. See Green, *supra* note 116, at 193 (describing the population of Frankfurt as thirty percent foreign-born, and that of Stuttgart as twenty-four percent foreign-born.); Garnaut et al., *supra* note 175, at 3 (describing the overwhelming concentration of immigrant communities in Sydney and Melbourne); *Population and Dwelling Counts, for Census Metropolitan Areas and Census Agglomerations, 2006 and 2001 Censuses*, STAT. CAN. <http://www12.statcan.ca/english/census06/data/popdwel/Table.cfm?T=201&S=3&O=DRPP=150> (last updated Nov. 5, 2008) (showing the population of Toronto as 37.5% foreign born).

360. This was a particular concern in Germany. See Furlong, *supra* note 117 ("The issue of terrorism came to dominate the debate over the bill, particularly after the Madrid bombings in March.")

361. This had a particular impact on the development of the Provincial Nomination Program in Canada. See *Evaluation of the Provincial Nominee Program*, *supra* note 292.

362. This issue is not unique to the countries surveyed, but rather is a global phenomenon. There are approximately thirty to forty million undocumented migrants worldwide. See Demetrios G. Papademetriou, *The Global Struggle with Illegal Migration: No End in Sight*, MIGRATION POL'Y INST. (Sept. 2005), <http://www.migrationinformation.org/feature/display.cfm?id=336>.