Immigration Status Federalism

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Recent subfederal interventions into immigration policymaking have sparked an explosion of federalism scholarship, but nearly all such accounts focus on two domains: enforcement and state benefits. The literature continues to assume that the federal government maintains exclusive control over immigration status decisions. This Article challenges that conventional wisdom by identifying a third missing category of immigration federalism—state and local influence over who receives immigration status in the first place. It unearths empirical data from the fifty states to reveal far more vertical contestation in immigration selection decisions than previously documented and develops a theoretical framework to explain how such contestation differs from existing immigration federalism accounts. States are increasingly influencing immigration law in a more fundamental way: they are shaping the adjudication of immigration status and are doing so consciously, often responding to federal policy. As federal-state disputes over immigration deepen, they are likely to move further into this new frontier. Current doctrine, however, is ill-equipped to adjudicate disputes about the scope of state authority in the immigration statute, as it relies on outdated presumptions rooted in the respective sovereign powers of federal and state governments. Courts should instead give greater consideration to conventional administrative law principles when evaluating states' roles in immigration adjudication, recognizing them as joint policymakers in the selection of immigrants.

This Article is the first to identify state involvement in status determinations as a distinct field of immigration federalism worthy of attention, and it is the first to assemble empirical evidence from the fifty states to challenge long-held assumptions that immigrant selection remains the last domain of federal exclusivity in immigration law. Finally, beyond immigration, this Article introduces considerations for the study of federalism in agency adjudication, an underexplored field of administrative law.

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Introduction

Immigration federalism is by now a familiar concept in both legal scholarship and legal practice. Historically considered a domain of exclusive federal control, immigration regulation has been increasingly shaped and contested by states and localities in recent decades. In pitched political battles over border security,[1] local cooperation with immigration agents,[2] and the fate of undocumented youth,[3] state and local actors have inserted themselves into—and often led the charge in—national policy debates on immigration.

Immigration scholarship has similarly recognized that much of immigration policymaking no longer belongs—and in fact never did belong—to the federal government's exclusive domain.[4] These federalism accounts have focused almost entirely on two domains of immigration law: enforcement and integration.[5] First, there is now a rich literature on subfederal participation in immigration enforcement—the laws and policies that determine whom the government pursues removal actions against and its various tools of coercion. Scholarship has highlighted how some jurisdictions have enacted so-called sanctuary policies that shield residents from federal immigration agents, while others have deployed state officers to enforce federal immigration laws more aggressively.[6] Second, there has been considerable attention on state and local regulations that affect how noncitizens are integrated into or excluded from public life. These measures define immigrants' access to public institutions and benefits as well as

1. *See* Connor O'Brien, *19 States Sue the Trump Administration over Border Wall Money Shift*, POLITICO (Mar. 3, 2020, 5:36 PM EST), https://www.politico.com/news/2020/03/03/states-sue-trump-administration-border-wall-119806 [https://perma.cc/D7NA-N37C].

2. *See* New York v. Dep't of Just., 951 F.3d 84, 90 (2d Cir. 2020) (challenging conditions of federal funding requiring states' cooperation with immigration officials); City of Philadelphia v. Att'y Gen., 916 F.3d 276, 279 (3d Cir. 2019); City of Chicago v. Sessions, 888 F.3d 272, 276 (7th Cir. 2018).

3. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 8 (2020) (challenging the rescission of the Deferred Action for Childhood Arrivals policy).

4. *See, e.g.*, Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1567-69 (2019); Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 473 (2018); Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 90 (2016); Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. U. L. REV. 353, 358-59 (2016); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705-06 (2013) [hereinafter Burch Elias, *The New Immigration Federalism*]; Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1287 (2012); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 (2008).

5. *See* Emily R. Chertoff, *Citizenship Federalism*, 81 MD. L. REV. 503, 536 (2022) ("The existing academic literature on immigration federalism reveals that most legislative activity falls into one of two categories: measures that promote or impede immigration enforcement and measures that provide or restrict access to social services or entitlements like health care or funding for higher education." (footnote omitted)).

6. *See* Cristina Rodríguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. ON MIGRATION & HUM. SEC. 509, 513-28 (2017).

regulate their participation in the private sphere, including housing and employment.[7] But one domain still widely considered to be within the federal government's exclusive purview is the regulation of immigration status: the processes and criteria that determine who is authorized to enter and remain in the country, such as whether an individual is deportable, a permanent resident, or a citizen. Scholars assume that "states have no significant role" in "the formulation and implementation of admissions policy" and thus largely either ignore their role in status determinations altogether or conclude they play only a subordinate function.[8]

This Article challenges that conventional understanding. Through a systematic empirical account of growing state and local efforts to shape immigration status in recent years, I argue that there is far more vertical participation and contestation in immigration adjudications than previously documented. States and localities actively participate in the adjudication of immigration status. And they do so consciously—sometimes directly responding to and contesting national immigration policy over who is legally entitled to enter and remain in the United States.

To name just a few examples: Local prosecutors increasingly recognize that the criminal offenses they charge effectively select noncitizens for deportation, and many have instituted policies to account for those consequences on the front end.[9] Nearly half of all states have enacted standards for law-enforcement certifications used in humanitarian U and T visa status adjudications.[10] Twenty-five states have defined the scope of state-court authority to make findings for Special Immigrant Juvenile status (SIJS) adjudications.[11] And a handful of jurisdictions have loosened licensing requirements for noncitizen medical professionals to obtain employment visas.[12] These subfederal efforts have borne fruit. For the first time, in fiscal year 2023, more noncitizens obtained legal status through SIJS, U visas, and T visas—forms of status requiring state participation—than through asylum, an exclusively federal form of relief that has received the most public attention.[13]

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7. *See id.* at 511.

8. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 68 (2007); *see also* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 824-25 (2008) ("[S]tates and localities have not asserted a role in immigration [admissions policy] since the nineteenth century.").

9. *See infra* Section II.B.2.

10. *See infra* Section II.A.1; *infra* Appendix A.

11. *See infra* Section II.A.2; *infra* Appendix B.

12. *See infra* Section II.A.3.

13. In fiscal year 2023, the U.S. Citizenship and Immigration Services (USCIS) approved 53,205 Special Immigrant Juvenile status (SIJS) petitions; 17,889 U visa petitions (counting both principal and family-member petitions); and 3,676 T visa petitions (counting both principal and family-member petitions). *See I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status (Fiscal Year 2024, Quarter 1)*,

These developments indicate that federal-state dynamics in the immigration status context deserve the same level of attention as those in immigration enforcement and integration. While Congress retains ultimate authority over admissions policy, it delegates numerous selection functions to states and localities, integrating them into the immigration adjudication bureaucracy and giving them important leverage to shape national policy in a dynamic I call *immigration status federalism*. Our modern immigration system selects immigrants for admission and removal based largely on criminal, family, and employment grounds, areas of long-running state regulation. As a result, immigration status adjudications frequently rely on subfederal capacity and expertise to find facts and supply substantive legal standards. This is "federalism by the grace of Congress," but it is far from one that subordinates states.[14] Contrary to conventional assumptions, subfederal actors in recent years have not accepted their delegation passively. Instead, they are conscious of their role in the adjudication bureaucracy and deliberately respond to, challenge, and shape that bureaucracy according to their own policy goals.

This Article is the first to combine an empirical, theoretical, and legal account of subfederal participation in immigration status adjudications. My descriptive goals are twofold. Empirically, I demonstrate through a survey of state and local law the breadth and depth of emerging subfederal attempts to shape federal immigration selection policy, revealing such policymaking to be a joint federal-state enterprise. States have primarily used this power to expand the pool of vulnerable noncitizens eligible for immigration status and to decouple criminal law from the removal system. Legal space exists for states to do more. As immigration becomes ever more politicized under successive presidential administrations, federal-state contestation over the terms of selection policy will undoubtedly lead to further

U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 21, 2024) [hereinafter *I-360 Petitions for Special Immigrant Juvenile Status*], https://www.uscis.gov/sites/default/files/document/data/i360_sij_performancedata_fy2024_q1.xlsx [https://perma.cc/79NR-3M4B]; *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status and Form I-918, Petition for U Nonimmigrant Status, Bona Fide Determination Review (Fiscal Year 2024, Quarter 1)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 21, 2024) [hereinafter *I-918 Petitions for U Nonimmigrant Status*], https://www.uscis.gov/sites/default/files/document/data/i918u_visastatistics_fy2024_q1.xlsx [https://perma.cc/9BPL-NEJD]; *Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status (Fiscal Year 2024, Quarter 1)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 21, 2024), https://www.uscis.gov/sites/default/files/document/data/i914t_visastatistics_fy2024_q1.xlsx [https://perma.cc/7GAD-4KEQ]. By contrast, the Executive Office for Immigration Review granted asylum in 32,039 cases, while USCIS granted 16,041 principal asylum petitions and 17,383 petitions for relatives of asylum recipients. *See Adjudication Statistics: Asylum Decisions*, EXEC. OFF. FOR IMMIGR. REV. (Oct. 10, 2024), https://www.justice.gov/eoir/media/1344851/dl [https://perma.cc/7TCU-QCLK]; *Asylum Division Monthly Statistics Report. Fiscal Year 2023. October 2022 to September 2023.*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 3, 2023), https://www.uscis.gov/sites/default/files/document/data/asylumfiscalyear2023todatestats_230930.xlsx [https://perma.cc/P44B-ZJ56]; *All USCIS Application and Petition Form Types (Fiscal Year 2023, Quarter 4)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 29, 2023), https://www.uscis.gov/sites/default/files/document/forms/quarterly_all_forms_fy2023_q4.pdf [https://perma.cc/JQ23-U8YW].

14. Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2003 (2014).

activity by states. This account challenges stubbornly persistent assumptions about federal dominance over immigration status and identifies avenues for states to shape national policy even when Congress fails to act.

Conceptually, I argue that subfederal involvement in immigration status deserves attention as a separate category of study that current frameworks centered on enforcement and integration do not account for. For one, state interventions that shape status determinations are often legally determinative of federal entitlements. By contrast, the influence of public benefits laws and sanctuary policies on federal immigration law is indirect: they alter the incentives of migrants to move from one jurisdiction to another or the probability that they will be subjected to enforcement action, but they do not conclusively establish federal rights. The difference is between influencing and deciding.

For another, unlike enforcement and integration, status is determined through agency adjudications. Congress allocates adjudicative responsibility to both state and federal actors, delegating to them sometimes distinct, sometimes overlapping functions within the overall adjudication scheme. Subfederal power to shape federal policy, and its limits, is thus a function of how that authority is allocated and the choices federal and state actors make in exercising their respective powers. State and local agents may lend their expertise as fact finders, supply substantive legal standards, or both. The type of subfederal agent implicated also matters. Adjudications may involve state policymakers, judges, line officers, or some combination of these actors. These dynamics structure the levers of influence available to states, as well as the ways federal agencies can limit that influence. And these structural considerations apply beyond immigration to federal-state relations in adjudications more generally, a terrain largely overlooked in administrative law.[15]

From these descriptive claims follows my prescriptive argument. Increasing federal-state contestation over immigration status is bound to create legal friction about the proper allocation of authority between federal agencies and states under the immigration statute, including questions about the proper scope of state fact-finding authority, the amount of deference federal agencies should afford to state determinations, and the choice between federal and state law.[16] I show through a survey of case law that existing doctrine is not up to the task of coherently resolving these disputes. As with much of immigration federalism doctrine, courts adjudicating status federalism disputes remain committed to a separate sover-

15. *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1817 (2023) (recounting administrative law's "relative inattention to adjudication"); Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1353 (explaining that adjudications are "[a]bsent from the standard narrative of administrative law").

16. All references to the "immigration statute" in this Article refer to the organic statute governing federal immigration regulation, the Immigration and Nationality Act (INA).

eigns federalism: they assume that each part of the adjudication must belong either to the federal government's exclusive control over immigration or to the states' traditional police powers. Courts are especially wary of state policies that appear to circumvent or manipulate immigration law.

As an alternative, I sketch out a doctrinal framework rooted in expertise. Here, my goal is a modest one. While a complete theory is beyond the scope of this Article, I suggest that courts would do well to discard presumptions rooted in sovereignty in favor of traditional administrative law principles, which justify policymaking delegation on the basis of the agent's comparative experience and expertise. Those principles explain Congress's choice to incorporate state criminal, family, and employment law into immigration status decision-making. Centering the expertise of states in these areas allows courts to recognize states as joint policymakers in immigrant selection, and thus to give federal effect to their efforts to shape immigration policy.

This Article thus expands two threads of scholarship, one concerning immigration law's structure and the other about modern federalism's rules of engagement. First, doctrinal debates about immigration federalism, which often involve federal-state contestation outside delegated authority, focus on preemption and constitutional power.[17] Less attention has been given to federal-state disputes over authority within the immigration statute itself, where the issues are related, but distinct. Status federalism questions involve disputes between competing implementers of federal statutory law and implicate administrative law principles rather than constitutional ones related to sovereignty. In fact, it is precisely because courts remain inured to constitutional principles rather than administrative law frameworks that they go wrong. Second, adherents of the nationalist school of federalism have recognized—and largely celebrate—the integration of states in administering federal programs as a source of subfederal power and dissent.[18] Immigration status federalism is one example of such integration. But, as these scholars recognize, doctrine has not kept up with theory.[19] This modern form of federalism is in need of legal doctrines that

17. *See, e.g.*, Rodríguez, *supra* note 4, at 620-38; David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 603-09 (2017); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 124 (2014); Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 10-40 (2013); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 500 (2001).

18. *See* Gluck, *supra* note 14, at 1998; Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2334 (2020); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014); Heather K. Gerken, *Federalism as the New Nationalism*: *An Overview*, 123 YALE L.J. 1889, 1890 (2014); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9, 11 (2010).

19. *See* Gluck, *supra* note 14, at 2023-26 (identifying unresolved doctrinal questions concerning federal-state regulatory interaction).

acknowledge states as co-implementers of federal law and can mediate disputes between federal agencies and states over the meaning of federal law.[20] This Article answers that call by offering the beginnings of a framework for resolving interpretive disputes in shared regulatory spaces.

The Article proceeds as follows. Part I summarizes existing accounts of immigration federalism to demonstrate that they overlook the power states wield over immigration status. Part II fills this gap in the scholarship by documenting how, as a functional matter, states have leveraged federal reliance on their expertise to shape national immigration status policy, often in conscious response to federal action. Part III supplies a theoretical framework to understand when and how subfederal actors utilize the legal pathways described in the previous Part to wield influence over immigration policy, exploring the opportunities and costs of such influence. Finally, Part IV moves from theory to law. It first canvasses federal case law to critique how courts have attempted to resolve federal-state disputes about the proper allocation of authority over immigration status adjudications. It then argues that courts should embrace state expertise in immigration policymaking.

I. Immigration Federalism's Missing Piece

Although immigration scholars have in recent decades documented the influence subfederal actors wield over immigration enforcement and integration policy, they have overlooked the similar power such actors wield over immigration status. This Part begins with conceptual table setting by outlining the separate domains of law in immigration scholarship. I then briefly summarize the existing accounts of immigration federalism, which focus almost exclusively on state and local power to shape enforcement policy and the integration of immigrants into society. Persistent in the literature is the belief that states have no significant role to play in determining immigration status.

20. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 538 (2011) ("[W]e have [no] doctrines that attempt to recognize, much less negotiate, the relationship that is created between state and federal agencies when Congress gives them both concurrent authority to implement federal law . . . .").

A. Taxonomy: Enforcement, Integration, and Status

Although immigration scholars employ varied terminology, the standard account divides immigration law into three domains: enforcement, integration, and status.[21] Enforcement measures refer to the laws and policies that determine whom the government pursues removal actions against and its attendant mechanisms of coercion, including apprehension and detention. It is a reality of legal regimes that not all who violate the law are sanctioned.[22] That reality is particularly pronounced in immigration law, where it has long been the case that there are many millions more people living in the country who may legally be removed than the government has resources to pursue removal against.[23] As a result, officials must make policy choices about which individuals to prioritize, and they often leverage state and local law enforcement to accomplish their enforcement goals.

Federalism in immigration enforcement thus concerns policy choices about the use of government discretion and "the extent to which localities should assist or resist federal removal policies."[24] It involves decisions about intergovernmental information sharing, resource coordination, law-enforcement cooperation, and assistance. Think, for example, of state laws that target and arrest undocumented immigrants more aggressively than federal policy, or of ordinances that refuse to transfer noncitizens detained in local jails to Immigration and Customs Enforcement (ICE) at its request. Such decisions influence the likelihood that federal consequences will be brought to bear on noncitizens.

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21. This taxonomy simplifies an often-confusing variety of terms. The most conventional formulation divides immigration regulation into *immigration* laws (those that concern the admission and removal of noncitizens) and *alienage* laws (those that generally regulate the lives of noncitizens within the United States). *See* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994). Other formulations use different nomenclature but are conceptually similar, if not identical, to this division. *See* Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1091 (2014) (distinguishing between regulations "at the borders" and those "between borders"); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 345 (2008) (identifying "selection" laws and "rules that regulate immigrants outside the 'selection' context," but for purposes of critiquing said distinction). Compounding this confusion, some scholars then further divide alienage laws into those dealing with "enforcement" and those dealing with "integration." *See* Rodríguez, *supra* note 6, at 509. Others use the term alienage laws to refer only to laws that concern the integration or exclusion of noncitizens in the country. *See* Motomura, *supra*, at 202.

22. *See, e.g.*, Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185, 2185 (2015) ("Because enforcement takes resources, and because resources are limited, gaps materialize between the law in books and the law in action.").

23. The federal government has never built an enforcement apparatus capable of identifying and apprehending everyone who has violated immigration law. *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 135-139 (2020).

24. *See* Rodríguez, *supra* note 6, at 509.

Integration measures, on the other hand, encompass the broad category of policies that affect how noncitizens in the United States, both lawful and unlawful, are integrated into or excluded from the body politic.[25] Sometimes referred to as "alienage law[s],"[26] these laws and policies define immigrants' access to public institutions and benefits, including schools, driving privileges, and health insurance, as well as regulate their participation in the private sphere, including in housing and employment.[27] Regulations of daily civic, economic, and social life are the primary domain of states and localities, so integration measures by and large operate without formal federal involvement.[28] While such policies do not directly regulate who may or may not reside in the country, they can exert significant influence on immigration flows by making it more or less hospitable to live and work in parts of the country.[29] Such measures can therefore complement or undermine federal immigration priorities.

Finally, immigration status regulation—the primary concern of this Article—governs the processes and selection criteria that determine who is authorized to enter and remain in the United States and for what purposes. Whereas enforcement decisions influence the probability that any set of federal legal consequences or entitlements will be imposed on an individual, status decisions actually determine what those legal entitlements and consequences are. Sometimes referred to simply as "immigration law," status regulation involves decisions about admissions, alienage classifications, and naturalization—in other words, the legal categories from which federal benefits and consequences flow.[30]

In our immigration system, legal status is a federal entitlement determined through federal administrative adjudications. No fewer than three cabinet-level federal agencies and several components within them administer the law and policy of immigration status. The U.S. Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS), is primarily responsible for administering the lawful

25. *Id.* at 509 ("[I]ntegration federalism encompasses measures designed to assist immigrants, regardless of status, to plant roots and acculturate to life in the United States.").

26. *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1089 (1994).

27. *See* Rodríguez, *supra* note 6, at 528-29.

28. *Id.* at 528. One exception is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Among other things, that statute establishes default restrictions on undocumented persons' eligibility for state and local benefits that states can override with affirmative legislation. *See* 8 U.S.C. § 1621 (2018); BEN HARRINGTON, CONG. RSCH. SERV., R46510, PRWORA'S RESTRICTIONS ON NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC BENEFITS: LEGAL ISSUES 1-2 (2020), https://crsreports.congress.gov/product/pdf/R/R46510 [https://perma.cc/X68P-LEBZ].

29. Rodríguez, *supra* note 4, at 618 ("[P]olicies that dole out relatively negative or positive treatment to immigrants will inevitably induce immigrants to move across state (and possibly national) borders.").

30. *See* Motomura, *supra* note 21, at 202.

immigration system.[31] It adjudicates applications for immigration benefits, including naturalization applications, requests for humanitarian relief such as asylum, and visa applications from employees of U.S. employers and family members of immigrants.[32] A different agency, the Department of Justice (DOJ), adjudicates whether an immigrant is removable from the country and whether they may be protected by legal status such as asylum.[33] DOJ both administers removal proceedings through an immigration judge within the Executive Office for Immigration Review (EOIR) and prosecutes them through an attorney in the Office of Immigration Litigation.[34] Finally, the Department of State adjudicates whether a visa applicant abroad is admissible to the United States and issues visas to noncitizens abroad.[35]

Admittedly, the above taxonomy of immigration law into enforcement, integration, and status is not airtight. As explained below, modern immigration scholars have questioned whether these categories should have any significance for legal doctrine.[36] My purpose in this Article is not to defend the legal integrity of the above categories, but to identify a gap in how scholarship has both documented and theorized subfederal involvement in immigration. For those purposes, there is value to maintaining these distinctions as a common vocabulary in the legal literature, even if it is an imperfect one.

B. The Rise of Enforcement and Integration Federalism

It is no exaggeration to say that state and local governments have transformed the landscape of immigration policymaking in the last two decades.[37] Subfederal actors have awakened to the power they possess as part of the immigration bureaucracy and have wielded that power to shape national policy, sometimes at odds with the federal government.[38]

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31. *See* 6 U.S.C. § 271 (2018); Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707, 710.

32. *See* 6 U.S.C. § 271(b) (2018).

33. *See* Cox & Kaufman, *supra* note 15, at 1798.

34. *See Office of the Chief Immigration Judge*, U.S. DEP'T JUST. (Apr. 4, 2025), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/TDL7-ZBEA]; *Office of Immigration Litigation*, U.S. DEP'T JUST. (Oct. 15, 2024), https://www.justice.gov/civil/office-immigration-litigation [https://perma.cc/6M8C-BRME].

35. RUTH ELLEN WASEM, CONG. RSCH. SERV., R41093, VISA SECURITY POLICY: ROLES OF THE DEPARTMENTS OF STATE AND HOMELAND SECURITY 6 (2011), https://crsreports.congress.gov/product/pdf/R/R41093 [https://perma.cc/Z3JX-EA5X].

36. *See* sources cited *infra* note 76.

37. *See* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 58 (2015) (marking the acceleration of state and local involvement beginning in 2004); Amdur, *supra* note 4, at 94 ("Our immigration enforcement system has undergone profound changes in the last three decades.").

38. Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 197 (2016) (explaining

Scholars have documented this rise in subfederal activity extensively, calling it "the new immigration federalism."[39] However, these recent accounts focus almost exclusively on the domains of immigration enforcement and integration. With respect to enforcement, the literature has chronicled the federal government's dramatic expansion of the deportation apparatus under both Democratic and Republican administrations by leveraging state and local law enforcement's pervasive footprint to identify and detain immigrants.[40] Notorious among these initiatives is the 287(g) program, which authorizes the training and deputization of local law enforcement to interrogate suspected noncitizens, detain them on suspected immigration violations, and, in some cases, make immigration arrests in the field.[41] Receiving less attention but arguably more impactful was the Secure Communities program and its successor the Priority Enforcement Program, which seamlessly connected criminal intelligence with immigration enforcement.[42] Rolled out nationwide in 2013 during the Obama administration, Secure Communities automatically forwarded routine fingerprint data to DHS that local law-enforcement agencies shared with the Federal Bureau of Investigation.[43]

For some jurisdictions, federal enforcement did not go far enough. These jurisdictions enacted their own more aggressive enforcement regimes, most prominent of which was Arizona's S.B. 1070.[44] These statutes unleashed state and local law-enforcement agents to enforce federal law

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that federal-state involvement was "local and ad hoc," whereas today it is "national, automated, and comprehensive"); Burch Elias, *The New Immigration Federalism*, *supra* note 4, at 722 ("[S]tate involvement grew exponentially in the early years of the twenty-first century."). For an overview of immigration federalism before 2000, see GULASEKARAM & RAMAKRISHNAN, *supra* note 37, at 12-56; and COX & RODRÍGUEZ, *supra* note 23, at 135-39.

39. *See, e.g.*, Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076 (2013) ("We term this recent resurgence of subfederal legislative activity 'the new immigration federalism.'"); Saucedo, *supra* note 4, at 504 ("[N]ew immigration federalism scholars appreciate the power of states and localities to control the movement and integration of immigrants."); Burch Elias, *The New Immigration Federalism*, *supra* note 4, at 705.

40. *See* COX & RODRÍGUEZ, *supra* note 23, at 10, 135; GULASEKARAM & RAMAKRISHNAN, *supra* note 37, at 58-59; Amdur, *supra* note 4, at 97-110; Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 22-56 (2016).

41. Amdur, *supra* note 4, at 150; *see* 8 U.S.C. § 1357(g) (2018). *See generally* Randy Capps, Marc R. Rosenblum, Cristina Rodríguez & Muzaffar Chishti, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INST. (Jan. 2011), http://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf [https://perma.cc/47KR-MMRW] (discussing the implementation and effects of the 287(g) program).

42. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013) (arguing that Secure Communities is "the largest expansion of local involvement in immigration enforcement in the nation's history"); Amdur, *supra* note 4, at 103-05, 109-10.

43. Amdur, *supra* note 4, at 103-04; *see* COX & RODRÍGUEZ, *supra* note 23, at 143-44.

44. S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Alabama, Georgia, South Carolina, Utah, and Colorado enacted similar legislation. S. 06-090, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006); H. 56, 2011 Leg., Reg. Sess., § 2 (Ala. 2011); GA. CODE ANN. § 17-5-100 (2024); UTAH CODE ANN. §§ 76-9-1001 to -1009 (LexisNexis 2024); S.C. CODE ANN. § 16-13-480 (2024).

independent of federal direction. With minor variation, each required state and local agents to check immigration status during routine stops and, in some cases, to arrest individuals if they were suspected of violating immigration law.[45] Although states could not themselves deport individuals, such laws placed political pressure on federal officials to initiate more removal proceedings.[46] However, in 2012, the Supreme Court largely rejected state competition with federal officials over immigration enforcement. In *Arizona v. United States*, the Court held that federal immigration law and the enforcement discretion it afforded federal officials preempted state legislation that encroached upon that discretion.[47]

During the Obama and Trump administrations, scores of other states and localities resisted federal enforcement through noncooperation. These policies took on varied forms, including limits on information-sharing with federal officials, on the collection of immigration information, on federal access to jails and prisons, and on compliance with immigration detainer requests.[48] These policies were often the mirror image of aggressive enforcement measures, prohibiting officers from asking about immigration status, making civil immigration arrests, and honoring detainer requests.[49] By the end of the Obama administration, according to one count, more than six hundred counties limited cooperation with federal immigration officials in some form.[50] That resistance only grew during the first Trump administration.[51]

A second category of immigration federalism that has received significant attention is state and local regulation of immigrants' integration into

45. *See* sources cited *supra* note 44.

46. *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 484-85 (2012); *see also* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1853 (2011) (discussing state arrests as a means of pressuring federal officials to initiate removal proceedings).

47. 567 U.S. 387, 416 (2012).

48. Rick Su, *Designing Sanctuary*, 122 MICH. L. REV. 809, 836-42 (2024); *see* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1707 (2018); Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 148 (2008); Rodríguez, *supra* note 4, at 600.

49. *See, e.g.*, CAL. GOV'T CODE § 7284.6 (West 2024).

50. This figure represents the number of counties with at least one policy limiting cooperation with federal immigration officials. Lena Graber & Nikki Marquez, *Searching for Sanctuary: An Analysis of America's Counties & Their Voluntary Assistance with Deportations*, IMMIGRANT LEGAL RES. CTR. 12 (Dec. 2016), https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf [https://perma.cc/UMB4-J3VR] (indicating 612 counties that limit their assistance in immigration enforcement).

51. Krsna Avila, Kemi Bello, Lena Graber & Nikki Marquez, *The Rise of Sanctuary: Getting Local Officers Out of the Business of Deportations in the Trump Era*, IMMIGRANT LEGAL RES. CTR. 16 (Jan. 2018), https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf [https://perma.cc/QXK6-25KW].

society.[52] These integration measures touch nearly every aspect of immigrant life, including access to employment, education, housing, identification documents, and health and welfare benefits. As with state and local enforcement measures, the initial wave of subfederal legislation regulating immigrant life was restrictionist in nature. Representative of these measures was Arizona's 2007 statute, which imposed stricter requirements than federal law on employers to verify the eligibility of their employees under penalty of license revocation.[53] After the Supreme Court upheld the law,[54] a cascade of similar statutes in other states and local jurisdictions followed.[55] Still other localities enacted ordinances barring property owners from leasing to undocumented immigrants or requiring prospective renters to register with the city and show proof of lawful status.[56] And in the realm of education, states have either denied undocumented students access to in-state tuition rates at public colleges and universities or altogether excluded them from admission to those institutions.[57]

As the political tides shifted in 2012, immigrant-friendly jurisdictions began enacting more welcoming legislation. Some provided certain immigrants with drivers' licenses, while others issued local identification without asking about immigration status.[58] In the realm of education, immigrant-friendly states took the opposite tack from their restrictionist counterparts and provided in-state tuition rates for undocumented immigrants.[59] And although state and local entities are limited in their ability to regulate noncitizen employment, some have wielded what authority they do have to integrate immigrant workers into the economy. In some jurisdictions, publicly funded day-labor centers offered services like legal representation for immigrant workers, English language classes, rights-education programs, health-clinic access, and financial assistance.[60] Recently, some advocates have called on state institutions to hire undocumented

52. *See* GULASEKARAM & RAMAKRISHNAN, *supra* note 37, at 3, 58-60; Rodríguez, *supra* note 4, at 581-609; Burch Elias, *The New Immigration Federalism*, *supra* note 4, at 743-48; Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1460-62 (1995).

53. *See* ARIZ. REV. STAT. ANN. §§ 23-211, 23-212, 23-212.01 (West 2024).

54. *See* Chamber of Com. of the U.S. v. Whiting, 563 U.S. 582, 587 (2011).

55. *See State E-Verify Action*, NAT'L CONF. STATE LEGISLATURES (Aug. 19, 2015), https://www.ncsl.org/immigration/state-e-verify-action [https://perma.cc/ESU4-3KW7].

56. *See* Chico Harlan, *In These Six American Towns, Laws Targeting 'the Illegals' Didn't Go as Planned*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/business/economy/in-these-six-american-towns-laws-targeting-the-illegals-didnt-go-as-planned/2017/01/26/b3410c4a-d9d4-11e6-9f9f-5cdb4b7f8dd7_story.html [https://perma.cc/M2S9-P7W4] (documenting anti-immigrant ordinances in Hazelton, Pennsylvania; Farmers Branch, Texas; Valley Park, Missouri; Riverside, New Jersey; Escondido, California; and Fremont, Nebraska).

57. *Tuition Benefits for Immigrants*, NAT'L CONF. STATE LEGISLATURES (Mar. 1, 2021), https://web.archive.org/web/20230310143710/https://www.ncsl.org/immigration/tuition-benefits-for-immigrants#expand [https://perma.cc/7YRK-VJCE].

58. GULASEKARAM & RAMAKRISHNAN, *supra* note 37, at 131-34.

59. *See id*. at 134-35.

60. Rodríguez, *supra* note 4, at 598.

workers.[61] States have also opened access to public benefits. In 1996, as part of the landmark Personal Responsibility and Work Opportunity Reconciliation Act, Congress set a default rule making noncitizens ineligible for public benefits, but delegated to states the authority to enact laws extending eligibility.[62] Many states did just that, allowing lawful permanent residents to apply for welfare programs.[63] Since then, some jurisdictions have gone further and extended state medical coverage to noncitizens without formal status.[64]

C. Immigration Status Federalism Overlooked

Despite immigration's general federalism turn, the scholarship has yet to focus on subfederal participation in the realm of immigration status. For example, Cristina M. Rodríguez divides immigration federalism into only "enforcement" and "integration" without mention of subfederal participation in immigration status determinations.[65] More recently, Emily R. Chertoff's survey of the scholarship concluded that "most [subfederal] legislative activity falls into one of two categories: measures that promote or impede immigration enforcement and measures that provide or restrict access to social services or entitlements like health care or funding for higher education."[66]

That is not entirely surprising. For one, most subfederal attempts to shape immigration status have occurred within the past decade and may not have reached a critical mass to attract scholarly attention until recent years. Apart from a few outliers, such interventions emerged after 2012, along with the general wave of immigrant-welcoming policies.[67] For an-

61. *See* Ahilan Arulanantham, *Solutions That Work? Analyzing State Employment Authorization for Noncitizens in the US*, JUST SEC. (Nov. 30, 2023), https://www.justsecurity.org/90346/solutions-that-work-analyzing-state-employment-authorization-for-noncitizens-in-the-us [https://perma.cc/F6GT-U6MH].

62. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2268-69 (codified as amended at 8 U.S.C. § 1621); Schuck, *supra* note 8, at 60.

63. GULASEKARAM & RAMAKRISHNAN, *supra* note 37, at 135-36.

64. *See* Claire Heyison & Shelby Gonzales, *States Are Providing Affordable Health Coverage to People Barred from Certain Health Programs Due to Immigration Status*, CTR. ON BUDGET & POL'Y PRIORITIES 15-16 (Feb. 1, 2024), https://www.cbpp.org/sites/default/files/12-15-23health.pdf [https://perma.cc/CH2A-DJWB].

65. *See* Rodríguez, *supra* note 6, at 511. However, elsewhere Cristina M. Rodríguez acknowledges that immigration federalism "[n]ot only . . . incorporate[s] state and local decisionmakers into the system" but "also makes the system of removal and relief dependent on the reach of state law and the fact of state law convictions, as well as the discretion of administrative actors." Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J.F. 499, 503-04 (2014).

66. Chertoff, *supra* note 5, at 536 (footnote omitted); *see also id.* at 507 n.11 (noting that "the range of actual policymaking that falls under [immigration federalism] is relatively narrow, primarily addressing itself to cooperation or noncooperation with immigration enforcement and to benefits or entitlements").

67. *See infra* Part II; *infra* Appendices A, B.

other, as legal doctrine, immigrant selection is deeply entrenched as an exclusive federal power, in contrast to immigration enforcement and integration, which courts have permitted states to regulate to varying degrees.[68] Since the development of the modern immigration system in the late nineteenth century, the Supreme Court has repeatedly pronounced that the Constitution reserves power over regulating immigrant status to the federal government alone.[69]

But from the constitutional premise that Congress has ultimate authority over immigrant selection, scholars have drawn the more expansive assumption that "states have no significant role" whatsoever in "the formulation and implementation of admissions policy."[70] As a result, scholars have mostly left unquestioned the inherited wisdom that admissions policy, both as a descriptive and prescriptive matter, lies squarely within the exclusive purview of the federal government.[71] Cristina Rodríguez identifies "immigration control, or the setting of standards for admissions and removal," as a "primary federal function."[72] Ming H. Chen differentiates between immigration regulations "at the borders," which include status determinations, and those "between borders," such as laws that "touch on education, housing, drivers' licenses, and health care."[73] She only suggests that the latter implicates "matters of shared concern for state and federal government."[74] What these accounts miss is that just because Congress has

68. *See* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 606 (2013) ("[T]he 'core' functions of immigration law—the admission and removal of noncitizens—are commonly understood as exclusively federal."); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 263 (2011) (recognizing federal exclusivity in "the procedures for admission and exclusion at the border, as well as the procedure for removal—also known as deportation—from the interior of the United States").

69. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 228 n.23 (1982) ("[T]he State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government . . . ."); De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); Galvan v. Press, 347 U.S. 522, 531 (1954) ("[T]hat the formulation of . . . policies [regarding the entry of noncitizens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."); Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." (citing Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893))); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."); Henderson v. Mayor of New York, 92 U.S. 259, 272 (1875) (holding that immigration is a "power[], which, from [its] nature, [is] exclusive in Congress"). For a critique of this doctrine, see Huntington, *supra* note 8, at 792-94.

70. Schuck, *supra* note 8, at 68.

71. Huntington, *supra* note 8, at 791 ("Courts and scholars . . . widely accept . . . that the Constitution commits authority over immigration law solely to the federal government.").

72. Rodríguez, *supra* note 4*,* at 581, 624.

73. Chen, *supra* note 21, at 1091.

74. *Id.*; *see also* Shani M. King & Nicole Silvestri Hall, *Cooperative Federalism and SIJS*, 61 B.C. L. REV. 2869, 2875 n.22 (2020) (distinguishing "between exercises of power relating to

ultimate say over immigrant selection as a constitutional matter does not mean that, as a statutory matter, it has precluded subfederal actors from exerting influence over the immigration sorting system.

Even accounts more critical of federal exclusivity have left unexplored the subfederal role in status determinations. Rather than question federal exclusivity over immigrant selection, much modern immigration scholarship has debated where to draw the line between selection rules and integration measures.[75] More recently, some scholars have critiqued the soundness of this distinction altogether.[76] These critiques argue that the line-drawing exercise is a futile one because integration policies inevitably have effects on selection, and selection rules influence the integration of noncitizens into society. The upshot is that, as a matter of constitutional doctrine, courts should not treat selection rules and rules outside the selection context so differently. But even these scholars do not argue that subfederal actors have or should have a formal say in federal status determinations.

What scholarship exists about subfederal participation in status adjudications focuses on isolated forms of participation without looking across immigration law to recognize the breadth of subfederal input over the various decisions immigration adjudicators make.[77] It tends to characterize subfederal participation as anomalous and is concerned primarily with substantive immigration law rather than structural issues of federal-state interaction.[78] Finally, Adam B. Cox and Eric A. Posner have recognized that federal immigration law delegates significant selection authority to both private and subfederal actors, but their focus was on the principal-agent

'core' immigration functions (removal and admission)," which are "more appropriate for an exercise of plenary power," and "alienage laws where plenary power may yield to traditional state powers"); Matthew J. Lindsay, *Disaggregating "Immigration Law*," 68 FLA. L. REV. 179, 240 (2016) (calling for disaggregation of immigration law into component parts but recognizing that "the authority to govern the right of noncitizens to enter or remain within the United States would remain both broad and presumptively federal").

75. Cox, *supra* note 21, at 357 ("A good chunk of modern immigration law scholarship focuses, either directly or indirectly, on differences of opinion about the appropriate location of the line between immigrant-selecting and immigrant-regulating rules.").

76. *See id*. at 357; Rodríguez, *supra* note 4, at 618 (arguing that the "division [between immigration control and integration policy] is conceptually unstable, if not incoherent"); Huntington, *supra* note 8, at 826 ("[T]he categories of immigration law and alienage law bleed together . . . .").

77. *See* Angela R. Remus, *Caught Between Sovereigns: Federal Agencies, States, and Birthright Citizens*, 34 STAN. L. & POL'Y REV. 225, 227 (2023) (state-issued birth certificates); Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 76 (2016) (SIJS certification); King & Hall, *supra* note 74, at 2908 (same); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 556-57 (2013) (criminal prosecutions).

78. One exception is Leticia M. Saucedo's work, which discusses how states could potentially leverage their delegated immigration authority. *See* Saucedo, *supra* note 4, at 493. But her account does not offer empirical support from the fifty states that have already leveraged their authority or engage with the theoretical and doctrinal implications specific to immigration status adjudications.

problems of delegation rather than how delegation enables states to be independent immigration policymakers.[79] Indeed, they remain skeptical that states could use their delegated authority to influence federal immigration policy.[80] In general, then, accounts of immigration federalism have so far failed to recognize the many ways in which states and localities have used their role in immigration adjudications to decide who receives immigration status.

II. Status Federalism in Action

Contrary to the above accounts, states have actively shaped the law around immigration status in conscious response to federal action, sometimes challenging and contesting federal priorities. Status federalism fits the model of federal-state relations identified by nationalist federalism scholars, which emphasizes state and local influence resulting from integration into the administration of federal programs rather than from constitutional power over certain legal domains.[81] Federal reliance on state capacity and expertise gives subfederal actors leverage to influence federal policy by cooperating with, competing against, and resisting federal objectives.

This Part maps the ways in which federal law relies on subfederal actors to adjudicate status across the immigration selection scheme, which is composed of admissions and adjustment, removal, and citizenship. For each, I explain the legal space available to states and localities to exercise their influence, document their efforts thus far to shape immigration law, and point out gaps that subfederal actors have yet to leverage.

I find that states have primarily leveraged federal dependence in favor of immigrant inclusion, enacting laws and policies that expand the pool of noncitizens eligible for durable immigration status and decoupling state criminal laws from the removal system. And the breadth of congressional delegation offers opportunities for them to do even more. It is of course possible that restrictionist jurisdictions may also use their position to foreclose immigration relief. But, as I explain, cross-cutting political incentives and offsetting policies from immigrant-protective jurisdictions may mitigate some of those efforts.

79. Cox & Posner, *supra* note 4, at 1340 ("Because our focus is on principal-agent problems . . . this Article is concerned only with those situations where the federal government wants to capitalize on the informational advantages of state and local officials while retaining control over . . . [who] should be admitted or removed.").

80. *Id.* at 1333 (recognizing the possibility that states may use their authority to skew immigration policy but stating that "it seems highly unlikely that a state would manipulate its criminal or family law in order to change the immigration consequences for migrants living in the state").

81. *See* sources cited *supra* note 18.

A. Admissions and Adjustment

Immigration status and the entitlements, protections, and benefits that flow from it turn on the legal concept of admission, which designates whether a noncitizen has been given legal authorization to enter the country.[82] To somewhat complicate matters, noncitizens may be *physically* present in the United States without being *legally* admitted.[83] Admissions rules can therefore confer legal status both on those applying from abroad and on those already present in the country. And once a noncitizen is admitted to the United States, she may eventually adjust to a more permanent status if she meets the requirements to do so under federal law.[84] A primary way subfederal entities shape federal immigration status is by gathering the facts and supplying the legal standards that determine who merits admission and adjustment.

1. U and T Visas

Immigration law recognizes certain humanitarian grounds for conferring legal status, one of which is being the victim of a serious crime. As part of the Trafficking Victims Protection Act of 2000, Congress established U and T visas, which grant temporary lawful status and an eventual path to citizenship to victims of certain crimes who are willing to assist in the investigation or prosecution of criminal activity, as well as to their family members.[85] Although USCIS retains ultimate discretion to grant these visas,[86] Congress delegated significant fact-finding responsibility to local law-enforcement agencies as part of the scheme. To obtain a U visa, a petitioner must provide a signed certification from a law-enforcement agency attesting to her helpfulness in investigating or prosecuting the crime of

82. *See* Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 601 (2021).

83. *See id.* ("[Physical] entry no longer significantly impacts access to substantive immigration status . . . ."); 8 U.S.C. § 1225(a)(1) (2018) ("An alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this chapter an applicant for admission.").

84. 8 U.S.C. § 1255 (2018 & Supp. V 2023).

85. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 101-113, 1501-1513, 114 Stat. 1464, 1466-91, 1518-37 (codified as amended in scattered sections of 8 and 22 U.S.C.); 8 U.S.C. § 1101(a)(15)(T), (U) (2018 & Supp. V 2023). The T visa is narrower and is limited to severe forms of human trafficking. 8 U.S.C. § 1101(a)(15)(T)(i) (2018 & Supp. V 2023). However, Congress limited the number of U visas that may be granted annually to 10,000 and T visas to 5,000. *See id.* § 1184(o)(2), (p)(2)(A).

86. *See, e.g.*, *U Visa Law Enforcement Resource Guide*, U.S. DEP'T OF HOMELAND SEC. 16, https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf [https://perma.cc/9C3P-W3UF] ("The determination of what evidence is credible and the weight to be given to that evidence is within the sole discretion of USCIS."); *T Visa Law Enforcement Resource Guide*, U.S. DEP'T OF HOMELAND SEC. 1 (Oct. 2021), https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf [https://perma.cc/9ZM8-SH8S] ("USCIS has sole jurisdiction to determine who is eligible for a T visa.").

which she is a victim.[87] Such certifications are optional for T visa applications but in practice are frequently obtained.[88]

The certification authority is remarkably broad. First, as to who can certify, the statute grants the power to any "law enforcement official, prosecutor, judge or other . . . authority investigating [qualifying] criminal activity," whether at the federal, state, or local level.[89] The certifying agency need not have prosecution authority or be exclusively involved in criminal investigations.[90] Second, the noncitizen need not provide actual testimony or material information to obtain certification. The agency need only find that a petitioner "'is likely to be helpful' in the investigation or prosecution of [qualifying] criminal activity."[91] So long as the petitioner remains willing to cooperate during the course of an investigation, certification is permitted. Third, certification can occur at any stage of the investigative process.[92] As the federal government has construed the statute, "[t]here is no requirement that you sign the certification at a specific stage of the investigation or prosecution" or "that an investigation or prosecution" actually "be initiated or completed after the victim reports the crime and makes themselves available."[93]

States have consciously leveraged this broad fact-finding delegation to construct their vision of membership in the polity. As documented in Appendix A, twenty-four states and the U.S. Virgin Islands have enacted U and T visa legislation, all of which have bolstered or expanded the certification process.[94] A majority of those jurisdictions have enrolled their law-

87. 8 U.S.C. § 1184(p)(1) (2018 & Supp. V 2023). The INA does not specifically require the certifying agency to be a state one. *Id.* But because states investigate and prosecute the vast majority of criminal activity, certification delegates significant authority to states as a practical matter.

88. *See* 8 C.F.R. § 214.11(d)(3)(i), (h)(3) (2024); Danhong Cao, K.D. Harbeck, Emma Heijmans & Andrew Craycroft, *Using the T Visa Law Enforcement Resource Guide: Advocating for Survivors of Trafficking*, IMMIGRANT LEGAL RES. CTR. 2 (Jan. 2024), https://www.ilrc.org/sites/default/files/2024-02/Using%20the%20T%20Visa%20Law%20Enforcement%20Resource%20Guide.pdf [https://perma.cc/FY2G-2P2W] ("[A] law enforcement certification can often be an important piece of evidence . . . for T visa applicants . . . .").

89. 8 U.S.C. § 1184(p)(1) (2018 & Supp. V 2023).

90. *U Visa Law Enforcement Resource Guide*, *supra* note 86, at iii (listing among certifying agencies "child and adult protective services, the Equal Employment Opportunity Commission, and federal and state Departments of Labor").

91. 8 U.S.C. § 1184(p)(1) (2018 & Supp. V 2023).

92. 8 C.F.R. § 214.14(a)(5), (c)(2)(i) (2024).

93. *U Visa Law Enforcement Resource Guide*, *supra* note 86, at 8; *see also* Villegas v. Metro. Gov't, 907 F. Supp. 2d 907, 914 (M.D. Tenn. 2012) (certifying without "affirmatively concluding that the acts in the record constitute crimes"); 8 C.F.R. § 214.14(a)(5), (b)(3) (2024) (specifying that a petitioner qualifies for a U visa if she is helpful to the "detection" of "a qualifying crime or criminal activity").

94. *See infra* Appendix A.

enforcement officers in the certification program by mandating that officers respond to certification requests and do so within a certain timeframe.[95] Other common protections for U and T visa applicants include requiring agencies to provide reasons for denying a request,[96] to provide an opportunity to respond to a certification denial,[97] to limit disclosure of applicants' immigration information,[98] and to report annual data about certifications.[99] And perhaps in the clearest manifestation of their immigration policy preferences, six states have created a presumption that an applicant is likely to be helpful to a criminal investigation so long as she has not refused to provide information.[100]

At the same time, states have left on the table other strategies to structure the certification process within the bounds of congressional delegation. For example, states can centralize the certification process to reduce the variability that local control creates and increase the visibility of the certification process. Second, states can project their influence across state lines. States often aid in the detection and investigation of criminal activity that occurred elsewhere or violated another jurisdiction's law.[101] Indeed, USCIS guidance recognizes both that state law-enforcement agencies "may have the authority to detect, investigate, or prosecute qualifying criminal activity occurring outside of their jurisdiction" and that a victim may "choose to report the criminal activity outside of the jurisdiction

95. Fifteen states have such deadlines, which range from fifteen to 120 days. *See infra* Appendix A. Eleven states mandate expedited response times if an applicant is in removal proceedings, if an applicant has a final order of removal, or if a family member who would benefit as a derivative U visa recipient will age out of qualification. *See infra* Appendix A.

96. California, Colorado, Delaware, Illinois, Indiana, Massachusetts, Montana, North Dakota, Nebraska, Oregon, Rhode Island, Virginia, and the U.S. Virgin Islands have adopted this protection. *See infra* Appendix A.

97. Delaware, Illinois, Indiana, Montana, North Dakota, Nebraska, Oregon, Rhode Island, and the U.S. Virgin Islands have adopted this protection. *See infra* Appendix A.

98. California, Colorado, Illinois, Maryland, Minnesota, Nevada, Oregon, Utah, and Washington have adopted this protection. *See infra* Appendix A.

99. California, Colorado, Massachusetts, Nevada, Oregon, Utah, and Washington have adopted this protection. *See infra* Appendix A.

100. These states are California, Colorado, Illinois, Nebraska, Nevada, and Oregon. *See infra* Appendix A.

101. *See, e.g.*, Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 812 (2004) ("Important leads uncovered by state and local agents can be relayed to federal agents for joint or federal-only investigation."); Fahey, *supra* note 18, at 2346 (outlining federal-state task forces in the Drug Enforcement Administration and the Federal Bureau of Investigation); Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 169-70 (2020) ("Federal and local officials have created and maintained a 'negotiated boundary' where local agents often conduct initial investigations and arrests before turning case files over to the federal government for prosecution." (footnote omitted)); State v. Evers, 815 A.2d 432, 438 (N.J. 2003) (describing a criminal investigation in which a California officer forwarded information to New Jersey police for prosecution); N.Y. CORRECT. LAW § 621(1) (McKinney 2025) ("All law enforcement officers and agencies of this state and its subdivisions, including the division of criminal justice services, are hereby authorized to cooperate with agencies of other states and of the United States, having similar powers, to develop and carry on a complete interstate, national and international system of criminal identification and investigation . . . .").

where it occurred."[102] USCIS therefore accepts certifications involving criminal activity occurring in a different jurisdiction.

Of course, jurisdictions may also elect to refuse certification requests. Previous surveys have identified local jurisdictions that either have a blanket policy of refusing to provide certification or restrict certification to circumstances narrower than federal parameters.[103] However, no statewide legislation exists prohibiting or otherwise restricting certification. And the effect of the local prohibitions may be limited because migrants may obtain certification from multiple jurisdictions.

2. Special Immigrant Juvenile Status

State participation is also critical to Special Immigrant Juvenile status, another form of humanitarian immigration status. SIJS provides lawful status and a path to naturalization to immigrant children unable to reunify with a parent due to abuse or neglect.[104] To identify qualifying youth, Congress crafted an adjudication process that relies expressly on state law and fact-finding.[105] A child applying for SIJS must first obtain an order from a state court finding that the child is dependent on the custody of the court or on a court-appointed individual or agency; that reunification with one or both of the child's parents "is not viable due to abuse, neglect, abandonment, or a similar basis"; and that it is not in the best interests of the child to be returned to her country of origin.[106] For example, a child may be apprehended while crossing the border and released to the custody of a relative in the United States, who then petitions a family court for guardianship

102. *U Visa Law Enforcement Resource Guide*, *supra* note 86, at 13.

103. Jean Abreu, Sidney Fowler, Nina Holtsberry, Ashley Klein, Kevin Schroeder, Melanie Stratton Lopez & Deborah M. Weissman, *The Political Geography of the U Visa: Eligibility as a Matter of Locale*, UNIV. N.C. SCH. L. IMMIGR. / HUM. RTS. POL'Y CLINIC 12-21, 25-32, http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf [https://perma.cc/37ZY-BV3L] (describing results of several surveys of immigration practitioners conducted prior to 2014). As a result of recently enacted state legislation, many of the local jurisdictions with restrictive certification procedures have been preempted. *See infra* Appendix A.

104. *See* 8 U.S.C. § 1101(a)(27)(J) (2018 & Supp. V 2023). SIJS does not itself provide permanent-resident status but instead qualifies an individual to adjust to lawful-permanent-resident status pending visa availability. *See id.* §§ 1153(b)(4), 1427, 1255(h) (allocating a certain percentage of visas annually to "special immigrants," including special-immigrant juveniles).

105. The Secretary of Homeland Security has ultimate authority to "consent[] to the grant of special immigrant juvenile status." *Id.* § 1101(a)(27)(J)(iii). USCIS has interpreted this consent authority to entail review to ensure that a SIJS petition is "bona fide," such that obtaining relief from parental abuse or neglect was "a primary reason" for seeking SIJS relief. *See USCIS Policy Manual, Volume 6, Part J, Chapter 2—Eligibility Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2 [https://perma.cc/8R28-WEZS]. For a detailed explanation of the SIJS application process from start to finish, see Laila L. Hlass, Rachel Leya Davidson & Austin Kocher, *The Double Exclusion of Immigrant Youth*, 111 GEO. L.J. 1407, 1431 (2023).

106. 8 U.S.C. § 1101(a)(27)(J) (2018 & Supp. V 2023).

over the child and seeks SIJS findings in that proceeding.[107] State law governs which courts have jurisdiction to issue SIJS orders as well as the substantive standards for the required findings.[108]

Through legislation and doctrinal innovation, states have also injected their immigration policy preferences by structuring family law in response to their role in the adjudication scheme.[109] One set of interventions involves supplying state definitions for undefined federal terms. Several states have defined expansively the types of courts and proceedings in which SIJS findings can be made, including "[c]ourts of general jurisdiction, probate courts, family courts, domestic relations courts, and juvenile courts."[110] Other states have expanded their jurisdiction by defining "child" to include all youth under age twenty-one, ensuring that courts can make SIJS findings for all potentially eligible applicants up to the maximum age that federal statute permits.[111] Finally, two states have altered the substantive standards for SIJS findings. Minnesota has defined the term "abandonment" broadly to include the death of a parent, substantively expanding the grounds on which SIJS findings can be made.[112] Meanwhile, the Nebraska Supreme Court requires a SIJS petitioner to show abuse, abandonment, or neglect by *both* parents[113] even though federal law requires only a showing with respect to "1 or both . . . parents."[114]

Another response, primarily by state judiciaries, has been to clarify whether state courts must exercise mandatory jurisdiction over requests for SIJS findings. Most courts have held that SIJS jurisdiction is mandatory, though a few states have disagreed.[115] Still further, some states have

107. *See, e.g.*, Flores Zabaleta v. Nielsen, 367 F. Supp. 3d 208, 213 (S.D.N.Y. 2019) (describing similar facts); Marcelina M.-G. v. Israel S., 973 N.Y.S.2d 714, 716 (N.Y. App. Div. 2013) (same); *see also Special Immigrant Juvenile Status: A Primer for One-Parent Cases*, IMMIGRANT LEGAL RES. CTR. 2 (Mar. 12, 2015), https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf [https://perma.cc/6PQW-TSPS] (describing hypothetical examples).

108. 8 U.S.C. § 1101(a)(27)(J)(i) (2018 & Supp. V 2023) (requiring a finding that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found *under State law*" (emphasis added)); 8 C.F.R. § 204.11(a) (2024) (defining a "[j]uvenile court" as "a court located in the United States that has jurisdiction *under State law* to make judicial determinations about the dependency and/or custody and care of juveniles" (emphasis added and omitted)).

109. *See infra* Appendix B.

110. Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 280 (2014); *see* Hlass et al., *supra* note 105, at 1431; King & Hall, *supra* note 74, at 2870 (describing how a child with the requisite SIJS state-court judgment can be recognized as a Special Immigrant Juvenile by USCIS); Keyes, *supra* note 77, at 76 (considering the "value [of] more state-level involvement in the benefits-side of immigration").

111. These states are California, Colorado, Connecticut, Hawaii, Illinois, Maryland, New Mexico, New York, and Virginia. *See infra* Appendix B.

112. *See* Act of Apr. 13, 2022, ch. 45, sec. 1, § 257D.01(2), 2022 Minn. Laws 73, 73 (codified at MINN. STAT. § 257D.01(2)).

113. *In re* Interest of Erick M., 820 N.W.2d 639, 646-48 (Neb. 2012).

114. 8 U.S.C. § 1101(a)(27)(J)(i) (2018 & Supp. V 2023).

115. The minority states are Kentucky, Missouri, Nevada, Virginia, and Vermont. *See infra* Appendix B.

taken their fact-finding role beyond the courtroom to identify children eligible for SIJS proactively. Because many noncitizen children who would be eligible for SIJS come within state custody at some point in their youth, and because they will almost always need assistance applying for immigration relief, states and localities have enacted policies requiring child welfare agencies to screen those children for SIJS eligibility or to petition a court for SIJS findings or both.[116] Finally, in states with decentralized child welfare systems administered by counties,[117] SIJS policies may vary across localities.[118] Some such states have attempted to standardize SIJS practices statewide by announcing best practices and issuing administrative guidance on services that children eligible for SIJS should receive.[119]

These interventions, primarily aimed at expanding the pipeline of youth who qualify for SIJS, have succeeded in dramatically increasing the number of SIJS petitions received and approved by USCIS.[120] Filed petitions increased from fewer than 2,000 in fiscal year 2010 to more than 53,000 in fiscal year 2023.[121] SIJS approvals have similarly kept pace, with more than 53,000 approvals in fiscal year 2023.[122] And, as explained, there is room for some states to go further in their SIJS interventions, such as by altering the substantive standards governing SIJS findings.

116. N.Y.C., N.Y., Local Law 2010/006 (Apr. 14, 2010), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-205391 [https://perma.cc/N88W-3TWK]; *Permanency Planning Policy*, MASS. DEP'T CHILD. & FAMS. 18 (July 1, 2013), https://www.mass.gov/files/documents/2018/01/16/Permanency%20Planning%20Policy.pdf [https://perma.cc/X2UH-HJUT]; *6700 International and Immigration Issues*, TEX. DEP'T FAM. & PROTECTIVE SERVS., https://www.dfps.texas.gov/handbooks/cps/files/CPS_pg_6700.asp [https://perma.cc/8JJ8-6CYP]; N.M. STAT. ANN. § 32A-4-23.1 (2024); FLA. STAT. ANN. § 39.5075(4) (West 2024).

117. Those states are California, Colorado, Minnesota, New York, North Carolina, North Dakota, Ohio, Pennsylvania, and Virginia. *See State vs. County Administration of Child Welfare Services*, CHILD WELFARE INFO. GATEWAY 1 (Mar. 2018), https://www.childwelfare.gov/resources/state-vs-county-administration-child-welfare-services [https://perma.cc/AV5A-QCYD].

118. Hlass, *supra* note 110, at 306 (describing "great variance in SIJS practice throughout" California).

119. *See* CAL. WELF. & INST. CODE § 10609.97 (West 2024) (requiring the State Department of Social Services to issue best practices "on assisting a child in a juvenile court case who is eligible for" SIJS); *Administrative Directive: Special Immigrant Juvenile Status*, N.Y. STATE OFF. CHILD. & FAM. SERVS. 2 (Feb. 7, 2011), https://ocfs.ny.gov/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20(SIJS).pdf [https://perma.cc/9ADL-SZ2C] ("The purpose of this Administrative Directive (ADM) is to remind local departments of social services (LDSSs) and voluntary authorized agencies (VAs) that Special Immigrant Juvenile Status (SIJS) eligibility must be assessed for youth in foster care . . . . If the youth is found to qualify for SIJS, this status should be pursued whenever appropriate.").

120. *See* Hlass et al., *supra* note 105, at 1445 (describing growth in SIJS applications as "happen[ing] alongside a growing number of Central American child immigrants, a proliferation of nonprofits focused solely on child migration or with a child-specific practice and increasing familiarity with SIJS within the broader immigration bar").

121. *I-360 Petitions for Special Immigrant Juvenile Status*, *supra* note 13.

122. *Id.*

3. Employment Visa Requirements

Another major axis along which the modern immigration system selects noncitizens is employment. The Immigration and Nationality Act (INA) offers visas to noncitizens for specific areas of employment in the United States but has generally left it to the states to regulate the rules of doing business within their jurisdictions, which can include a licensing system to practice certain professions.[123] As a result, certain federal provisions incorporate state licensing requirements as a condition for obtaining a visa. For example, the INA issues visas for employment in certain "specialty occupations," jobs that require specialized knowledge and at least a bachelor's degree or its equivalent.[124] If the state of intended employment requires a license to practice the specialty occupation, a noncitizen must generally obtain such license to receive a visa.[125]

And so, by setting licensing requirements, states have shaped the pool of foreign workers. States aiming to select more workers in certain professions have carved out exceptions to normal licensing requirements—most evidently in the healthcare field, where there has been a shortage of medical professionals. Tennessee, Illinois, Virginia, and Florida recently enacted statutes that allow qualified foreign physicians to obtain provisional licenses and a pathway to full licensure without undergoing traditional medical residency training.[126] While other states have not eliminated residency training for noncitizens, they have shortened the length of that training[127] and authorized foreign medical graduates to obtain temporary licenses in order to receive such training.[128] States have similarly altered licensing requirements to attract foreign nurses.[129]

123. One major exception is that federal law regulates, and preempts state regulation of, the employment of unauthorized noncitizens. *See* 8 U.S.C. § 1324a (2018).

124. 8 U.S.C. § 1184(i)(1) (2018 & Supp. V 2023).

125. *Id.* § 1184(i)(2); 8 C.F.R. § 214.2(h)(4)(v)(A) (2024) ("If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.").

126. TENN. CODE ANN. § 63-6-207(g) (2024); 225 ILL. COMP. STAT. 60/15.5 (West 2025); VA. CODE ANN. § 54.1-2933.1 (2024); FLA. STAT. ANN. § 458.311 (West 2024).

127. Act of June 7, 2022, ch. 379, § 4, 2022 Colo. Sess. Laws 2689, 2696-97 (codified at COLO. REV. STAT. § 12-240-114) (shortening the required amount of postgraduate clinical experience from three years to one year, creating parity with requirements for U.S. medical school graduates).

128. N.Y. EDUC. LAW § 6525 (McKinney 2025); WASH. REV. CODE § 18.71.095(6) (2024); IDAHO CODE § 54-1813 (2024).

129. John Kasprak, *Foreign Educated Nurses*, CONN. GEN. ASSEMBLY OFF. LEGIS. RSCH. (Nov. 21, 2002), https://www.cga.ct.gov/2002/olrdata/ph/rpt/2002-R-0931.htm [https://perma.cc/SR8K-CK7M].

4. Defining the Family

A foundational principle of the modern immigration selection system is family unity.[130] Since 1965, the INA has contained numerous provisions that prioritize admission for close family members of principal-status recipients. Citizens and lawful permanent residents may petition for certain close family members to become immigrants.[131] And nearly every type of nonimmigrant and immigrant visa allows for family members either to accompany the principal visa recipient or to simultaneously have a separate petition filed on their behalf.[132] Even forms of humanitarian status, including U and T visas, asylum, and SIJS, allow close family members to derive immigration status from the principal recipient.[133] And, as described in more detail below, children born outside the United States may derive citizenship from their parents.[134]

Because family relationships are so important to immigrant selection, federal immigration law already contains complex definitions for some domestic relationships such as "parent" and "child," which at times differ from corresponding state definitions.[135] But it leaves other definitions up to the states, including the definition of marriage. Spouses of citizens and lawful permanent residents may derive permanent immigration status,[136] and they qualify for discretionary waivers of various grounds of inadmissibility.[137] Moreover, the status of children depends in part on whether their

130. WILLIAM A. KANDEL, CONG. RSCH. SERV., R43145, U.S. FAMILY-BASED IMMIGRATION POLICY, at ii (Feb. 9, 2018), https://www.congress.gov/crs_external_products/R/PDF/R43145/R43145.12.pdf [https://perma.cc/2NUP-GKDQ] ("Family reunification has historically been a key principle underlying U.S. immigration policy."); *id.* at 5 ("In [fiscal year 2016], a total of 804,793 family-based immigrants made up just over two-thirds (68%) of all 1,183,505 new [lawful permanent residents]. This proportion has remained stable for the past decade." (footnote omitted)).

131. 8 U.S.C. §§ 1151(b)(2)(A), 1153(a), 1154(a)(1)(A)(i) (2018 & Supp. V 2023).

132. *Id.* § 1153(d).

133. *Id.* § 1158(b)(3) (asylum); *id.* § 1101(a)(15)(T)(ii) (T visa); *id.* § 1101(a)(15)(U)(ii) (U visa).

134. *See id.* §§ 1431, 1433; *infra* Section II.C.

135. *See* 8 U.S.C. § 1101(b)(1) (2018 & Supp. V 2023) (defining "child"); *id.* § 1101(b)(2) (defining "parent"); Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 631 (2014) ("State family law and immigration and citizenship law have developed differing and sometimes conflicting methods of balancing the parentage claims of various types of parents . . . .").

136. 8 U.S.C. § 1151(b)(2)(A) (2018) (allocating immigrant visas for immediate relatives of U.S. citizens, including spouses); 8 U.S.C. § 1153(a)(2) (2018 & Supp. V 2023) (allocating immigrant visas for spouses and children of lawful permanent residents).

137. 8 U.S.C. § 1182(g)(1)(A) (2018) (waiver of inadmissibility for communicable diseases); *id.* § 1182(h)(1)(B) (waiver of inadmissibility for various criminal activities); *id.* § 1182(i)(1) (waiver of inadmissibility for fraud); *id.* § 1182(a)(3)(D)(iv) (waiver of inadmissibility for membership in a totalitarian party); *id.* § 1182(a)(9)(B)(v) (waiver of inadmissibility for previous unlawful presence).

parents are married.[138] While the INA does not cede the definition of marriage entirely to the states, it relies primarily on state law to supply its contents. The INA defines a "qualifying marriage" for purposes of obtaining permanent status as one "entered into in accordance with the laws of the place where the marriage took place," so long as it is "not entered into for the purpose of procuring an alien's admission as an immigrant."[139] While the latter requirement is a federal determination, whether there is a legal marriage depends on state law. Before the Supreme Court federalized the right to same-sex marriage in *Obergefell v. Hodges*, state variations in the definition of marriage were more consequential.[140] But even now, variations in state law continue to have disparate immigration consequences. A handful of states recognize common-law marriages between two partners without requiring a formal marriage license or ceremony.[141] This more expansive view of marriage also expands the pool of individuals who qualify for permanent immigration status.[142]

However, it does not appear that any state has deliberately revised its definition of marriage as a form of immigration policymaking. That may be because such revisions would invariably have consequences for a wide swath of domestic-relations law entirely unrelated to immigration. As explained below, state-law responses to federal immigration come with spillover political and legal costs that states may find prohibitive.[143]

B. Removal

The other end of the immigration selection system is removal. Noncitizens present in the United States—even those admitted as lawful permanent residents—may be removed from the country for violating a number

138. *Id.* § 1401 (defining the requirements for citizenship for children born to U.S.-citizen parents); *id.* § 1409 (defining the citizenship status of children born out of wedlock); 8 U.S.C. § 1101(b)(1) (2018 & Supp. V 2023) (basing the definition of "child" on the marital status of the child's parents); 8 U.S.C. § 1101(b)(1)(B) (2018 & Supp. V 2023) (defining "child" to include stepchildren).

139. 8 U.S.C. § 1186a(d)(1)(A)(i) (2018); *see* Lovo-Lara, 23 I. & N. Dec. 746, 753 (B.I.A. 2005) ("We have long held that the validity of a marriage is determined by the law of the State where the marriage was celebrated.").

140. 576 U.S. 644, 675-76 (2015). Before *Obergefell* but after *United States v. Windsor*, 570 U.S. 744, 775 (2013), which struck down the Defense of Marriage Act's federal definition of marriage, federal officials treated same-sex marriages like other marriages: such marriages were valid for immigration purposes so long as they were valid in the jurisdiction where the marriage was entered. Zeleniak, 26 I. & N. Dec. 158, 160 (B.I.A. 2013).

141. *See* COLO. REV. STAT. § 14-2-109.5 (2024); IOWA ADMIN. CODE r. 441-62.19 (2025); KAN. STAT. ANN. §§ 23-2502, -2714(b) (2024); MONT. CODE ANN. § 40-1-403 (2023); Erlandson v. Coppedge, 451 P.3d 909, 909 (Okla. 2019); Smith v. Smith, 966 A.2d 109, 114 (R.I. 2009); TEX. FAM. CODE ANN. §§ 1.101, 2.401-.402 (West 2023).

142. *See, e.g.*, United States v. Gomez-Orozco, 188 F.3d 422, 426 (7th Cir. 1999) (recognizing that a defendant charged with illegal reentry as a noncitizen may be a citizen because of the common-law marriage of his parents).

143. *See infra* Section III.B.2.

of prohibitions. The most prominent among these—past criminal conduct—is also one heavily dependent on state law and fact-finding. When the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 dramatically expanded the crimes that can render a noncitizen deportable, states were granted more power to define immigrant desirability.[144] For noncitizens residing in the United States, lawfully or not, a qualifying state or federal conviction is grounds for removal.[145] And while the INA generally provides various forms of equitable relief from deportation, noncitizens with certain convictions are categorically ineligible for such relief.[146] Even if a conviction does not lead to removal, it can pose a barrier to subsequent attempts to adjust one's immigration status.[147]

1. State Authority to Define Criminal Sanctions

First and foremost, federal law relies on states to define the criminal prohibitions that trigger deportation. The INA renders a noncitizen removable upon receiving a state or federal conviction for a long list of enumerated offenses.[148] For some offenses, the INA simply refers to a generic crime like "theft" or "burglary" without otherwise specifying its elements.[149] For others, the INA points to some specific prohibition in the federal criminal code and incorporates its recital of the elements of the offense.[150] In either case, a state conviction or a federal conviction will do: as long as a state offense lines up with the offense listed in the INA, a noncitizen convicted of the state offense is removable. And to determine whether a state conviction matches one of the INA's enumerated offenses, courts use the so-called categorical approach.[151] In broad strokes, the approach asks not about the noncitizen's actual conduct but instead about the statutory elements of the state crime of which she was convicted. If the elements as defined by state law are no broader than the elements in the federal

144. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937-39 (2000).

145. 8 U.S.C. § 1182(a)(2) (2018) (criminal grounds for inadmissibility); *id.* § 1227(a)(2) (criminal grounds for deportation).

146. *Id.* § 1158(b)(2)(A)(ii), (B)(i); *id.* § 1229b(a)(3), (b)(1)(C).

147. 8 U.S.C. § 1255(a)(2) (2018 & Supp. V 2023).

148. 8 U.S.C. § 1182(a)(2) (2018) (criminal grounds for inadmissibility); *id.* § 1227(a)(2) (criminal grounds for deportation). A conviction is not always necessary. An individual "who admits having committed, or who admits committing acts which constitute the essential elements of," a "crime involving moral turpitude" or an offense "relating to a controlled substance" is deportable. *Id.* § 1182(a)(2)(A).

149. 8 U.S.C. § 1101(a)(43)(G) (2018 & Supp. V 2023); *see also id.* § 1101(a)(43)(B) ("illicit trafficking").

150. *See, e.g.*, *id.* § 1101(a)(43)(D) (listing "an offense described in section 1956 of title 18 (relating to laundering of monetary instruments)").

151. Moncrieffe v. Holder, 569 U.S. 184, 190 (2013).

definition, a state conviction for that offense triggers immigration consequences.[152]

Because of how the INA is structured, then, the categorical approach relies on state definitions of criminal conduct in two respects. First, when the INA lists a generic offense such as burglary that lacks a federal definition, the Supreme Court has said that the offense is used in "the generic sense in which the term is now used in the criminal codes of most States."[153] State criminal definitions in the aggregate therefore determine the scope of the generic offense. Second, whether the INA lists a crime with a specific federal definition or not, the court must ask if the elements of the noncitizen's state conviction correspond to the federal crime. Whether an individual is subject to removal based on a state conviction thus depends on the scope of the criminal law she was convicted of.

States can therefore decide whether or not convictions under their criminal statutes trigger federal immigration consequences by altering the content of state law. They can amend the definition of criminal offenses to align or decouple state definitions of criminal conduct from federal ones. A number of states have awakened to this power and used it to insulate noncitizens from removal. Some of these interventions have been targeted. For example, the INA makes removable a noncitizen who has been convicted of a "crime involving moral turpitude" "for which a sentence of one year or longer may be imposed."[154] Eight states have amended their criminal laws to reduce the maximum sentence for certain misdemeanors by one day, from 365 to 364 days,[155] a technical change that insulates noncitizens with such convictions from deportation. Others have pursued decriminalization more broadly, such as by decriminalizing marijuana possession, while expressly citing the immigration consequences of conviction as one reason to eliminate criminal sanctions.[156]

Yet given the range of possible reforms, states have not come close to taking full advantage of their leverage over criminal removals. As best as my research has revealed, no state has modified the elements of any criminal offense in order to remove it from, or place it within, the coverage of

152. *Id.* With certain exceptions, this approach ignores the actual facts of the individual case. *See* Mathis v. United States, 579 U.S. 500, 505-06 (2016) (explaining the modified categorical approach, which permits looking at "a limited class of documents . . . to determine what crime . . . a defendant was convicted of").

153. Taylor v. United States, 495 U.S. 575, 598 (1990).

154. 8 U.S.C. § 1227(a)(2)(A)(i) (2018). Such convictions also disqualify individuals for certain forms of relief from removal, *see id*. § 1229b(b)(1)(C), and subject them to mandatory detention, *see* 18 U.S.C.A. § 1226(c)(1)(C) (West 2025).

155. The states are California, Colorado, Minnesota, Nevada, New York, Oregon, Utah, and Washington. *See infra* Appendix C.

156. Act of July 29, 2019, ch. 131, 2019 N.Y. Laws 928; *Senate Bill S6579A*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2019/S6579 [https://perma.cc/9SHE-GB3B] (noting in the sponsor memorandum that marijuana-possession convictions can "impact the ability to access banking services, schools, jobs, housing, certain licensing, and also have immigration consequences").

a federal criminal ground of removal. This is the case despite calls by some scholars to do so,[157] and even though small differences in state criminal law can yield different immigration consequences.[158] As I suggest in the next Part, that may be because cross-cutting political incentives complicate such reforms.

2. Prosecutorial Discretion

In addition to substantive law, the federal immigration system also relies on state criminal legal systems to investigate and find the facts necessary to adjudicate an individual's status. At the initial stage of the criminal legal process is the prosecutor, whose investigative and charging decisions serve a gatekeeping function in the crime-based immigration system.[159] Because state law criminalizes a wide range of often overlapping conduct, prosecutors usually have a menu of criminal offenses, ranging in severity, that they can charge in any given criminal episode.[160] Some of these offenses carry immigration consequences. And because the overwhelming majority of criminal prosecutions are resolved through pleas, the prosecutor's broad discretion over what offense to charge often determines the downstream immigration outcomes for the defendant. A conviction for a qualifying offense makes it nearly certain that a noncitizen will be found to be deportable if she is placed in removal proceedings.[161] Conversely, a prosecutor's decision not to charge a qualifying offense immunizes the noncitizen from deportation.

Since the Supreme Court recognized a Sixth Amendment right to be informed about the immigration consequences of a plea deal in *Padilla v.*

157. *See* Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1447 (2021) ("States could make other crimes non-deportable by . . . defining their criminal laws as slightly broader than the relevant federal equivalents."); Amit Jain & Phillip Dane Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISCOURSE 132, 149 (2019) ("[States] may explore mechanisms of structuring criminal law that both limit state penalties and avoid federal ones." (emphasis omitted)).

158. *See, e.g.*, United States v. Minter, 80 F.4th 406, 411 (2d Cir. 2023) (finding a categorical mismatch between New York and federal controlled-substance offenses because "New York's definition of cocaine is categorically broader than the federal definition").

159. *See* Lee, *supra* note 77, at 553 (describing prosecutors' role as "gatekeepers" in "de facto immigration courts"); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1152 (2013) (analyzing how prosecutors' "hold[ing] the cards" in plea bargaining can result in serious immigration consequences); Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 6-9, 36 (2012) (examining prosecutors' consideration of the immigration consequences of convictions during plea bargaining); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1203-04 (2016) (discussing prosecutors' charging discretion and various factors for consideration at plea bargaining).

160. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

161. *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010) ("[R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.").

Kentucky,[162] local prosecutors have increasingly become cognizant of their power over immigration status. Of the fifteen counties with the largest immigrant populations in 2022, nearly half have formal policies directing prosecutors to consider the immigration consequences of their charging decisions, inviting them to bring alternative charges that avoid triggering removal.[163] These policies range from mere advisements to consider immigration consequences in charging and plea bargaining to more directive guidelines to avoid potential removal "[w]henever possible."[164] Other prosecutors have instituted general decriminalization policies that effectively insulate noncitizens from removal, ranging from refusals to prosecute low-level theft and drug offenses to preplea diversionary programs that don't result in a conviction for immigration purposes.[165] Finally, alongside the growing integration of immigration functions in prosecution offices is a similar trend in public defense.[166] Better-resourced public-defender offices now have specialized units that help criminal defendants

162. *See id.* at 360.

163. *See infra* Appendix D. My research obtained only publicly available prosecution policies and therefore may undercount the actual number of policies in existence. In any case, the proportion of immigrant-populous counties considering the immigration consequences of criminal prosecution has grown in the past decade. *Cf.* Eagly, *supra* note 159, at 1152 (noting that, as of 2013, twenty-nine of forty-two county prosecutors in the five states with the highest levels of criminal immigrant detainees had no written policy regarding the immigration consequences of charging decisions).

164. Press Release, Kings Cnty. Dist. Att'y, Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants (Apr. 24, 2017), http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants [https://perma.cc/VRM5-PNSG]. *Compare Immigration Policy: Consideration of Collateral Immigration Consequences in Review & Charging Cases, in Plea Negotiations and Post-Conviction Review*, OFFICE DIST. ATT'Y FOR ALAMEDA CNTY. 2-3 (Mar. 26, 2020), https://www.ilrc.org/sites/default/files/resources/alameda_county_immigration_guidelines_2020.pdf [https://perma.cc/7VEY-GB2V] ("[T]he [defendant's] immigration status . . . shall be taken into consideration when evaluating if charges will be filed . . . [and] which charges will be alleged. This policy shall not preclude or interfere with the decision of the prosecutor for those cases that are serious, involve a victim, involve firearms or other crimes that impact the safety of the community or others. . . . When it would be just to do so, it is appropriate to consider the collateral consequences, including potential immigration consequences, of a criminal conviction during the plea negotiation process. . . . However, it is our responsibility to ensure safety to the public, consideration of the impact of the crime and outcome on the victim(s) as well as the seriousness and/or violent nature of the crime. . . . These guidelines are not intended to limit the discretion of individual prosecutors."), *with* Press Release, Kings Cnty. Dist. Att'y, *supra* ("Whenever possible, if an appropriate disposition or sentence recommendation can be offered that neither jeopardizes public safety nor leads to removal or to any other disproportionate collateral consequence—the ADA should offer that disposition or make that recommendation.").

165. *See* Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. 141, 170 (2021) (providing an example of declination policies); *Addressing Immigration Issues*, FAIR & JUST PROSECUTIONS 5 (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf [https://perma.cc/98MH-TNFG] (providing examples of diversion programs).

166. Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense After* Padilla, 74 STAN. L. REV. 1, 8-9 (2022).

navigate the immigration consequences of plea bargaining and conviction.[167]

Yet state and local recognition of the influence prosecutors wield over downstream immigration consequences is not universal. When local jurisdictions enacted a wave of noncooperation policies in response to the Trump administration's aggressive immigration tactics, laws channeling prosecutorial discretion to avoid immigration consequences were largely absent from those responses.[168] Moreover, only about half of the fifteen counties with the largest immigrant populations have formal policies advising prosecutors to consider immigration consequences.[169] And even in these counties, the policies often merely advise prosecutors to consider immigration consequences, rather than requiring prosecutors to choose the charge that will avoid triggering removal. There is a legitimate question whether such generically worded advisements, without more, actually change prosecution practices for the benefit of immigrants. In the other counties, individual line prosecutors are left to implement their individual immigration policy preferences. And only California has enacted a statewide requirement to consider immigration consequences when making charging decisions.[170] There remains room for subfederal criminal policies to shape immigration status.[171]

3. Criminal Adjudication and Administration

Apart from prosecutors, state criminal courts are also fact finders in the immigration apparatus, and they too influence the pool of potentially removable noncitizens. Largely understudied, one area of criminal administration that directly affects downstream immigration adjudications is recordkeeping.[172] In some circumstances, the categorical approach re-

167. *Id.*

168. *See* Peleg, *supra* note 165, at 183 (explaining that "there has been an insufficient focus on local prosecutors in sanctuary laws and policies"); Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 250 (2019/2020) ("[District attorneys] are notably absent from conversations about policing and sanctuary protections.").

169. *See infra* Appendix D.

170. *See* CAL. PENAL CODE § 1016.3(b) (West 2024) ("The prosecution, in the interests of justice . . . shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."). While New Jersey has not enacted a similar statute, its Attorney General has issued a directive advising local prosecutors across the state to "be mindful of potential collateral consequences and consider such consequences" when resolving cases. *Attorney General Law Enforcement Directive No. 2018-6 v2.0: Strengthening Trust Between Law Enforcement and Immigrant Communities*, N.J. OFF. ATT'Y GEN. 8 (Sept. 27, 2019), https://www.nj.gov/lps/dcj/agguide/directives/ag-directive-2018-6_v2.pdf [https://perma.cc/EH9T-WUD7].

171. *See* Peleg, *supra* note 165, at 182-83 (providing recommendations that prosecution offices can implement to avoid the immigration consequences of convictions).

172. In one sense, every rule of state criminal procedure and policy that makes it more or less likely for a noncitizen defendant to be found guilty of a removable offense affects downstream

quires peeking behind the records of conviction in a particular case to determine what state crime an individual was convicted of.[173] As a result, whether an individual's state conviction renders a noncitizen removable or ineligible for discretionary relief can depend on what state records are available. But states and local jurisdictions vary widely in how they develop and keep criminal records.[174] For misdemeanor convictions, records of criminal convictions are often not created and are frequently incomplete where they are created.[175] Many states have no requirement that a misdemeanor guilty plea in a lower criminal court be on the record. As a result, information about the specifics of an individual's conviction necessary to determine whether the conviction has immigration consequences is unavailable.[176] Even when records of misdemeanor pleas are created, they often do not include the statutory subsection or factual basis underlying the conviction, making it impossible to determine the specific conduct a defendant was convicted of.[177]

Record ambiguity is far from a marginal consideration. Many types of state offenses labeled as misdemeanors qualify as "crime[s] involving moral turpitude," "controlled substance" offenses, or "aggravated felon[ies]" for immigration purposes, triggering deportation and barring relief from removal.[178] And a survey of federal appellate opinions, which represent just the tip of the iceberg of immigration cases, shows that records are frequently inconclusive for purposes of determining whether an individual has been convicted of a qualifying crime.[179] State and local governments therefore shape who is removable based on administrative practices in criminal court.[180]

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immigration adjudications. But the effects of such policies can be indirect, and a full account of each is beyond the scope of this Article.

173. *See supra* notes 148-152 and accompanying text; Mathis v. United States, 579 U.S. 500, 505-07 (2016).

174. *See* Pereida v. Wilkinson, 592 U.S. 224, 257-58 (2021) (Breyer, J., dissenting) (discussing how inconsistent recordkeeping practices can lead to inconsistent immigration outcomes).

175. *See* Brief for Amici Curiae National Ass'n of Criminal Defense Lawyers & National Ass'n of Federal Defenders in Support of Petitioners at 6, *Pereida*, 592 U.S. 224 (No. 19-438).

176. *See id.* at 8-9 (collecting jurisdictions).

177. *See id.* at 10-13 (collecting jurisdictions).

178. *See* 8 U.S.C. § 1227(a)(2)(A)(i), (iii), (B)(i) (2018); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-59 (2013).

179. *See, e.g.*, Avila v. Holder, 454 F. App'x 618, 620-21 (9th Cir. 2011); Young v. Holder, 697 F.3d 976, 982 (9th Cir. 2012) (en banc), *overruled on other grounds by* Marinelarena v. Barr, 930 F.3d 1039 (9th Cir. 2019) (en banc); Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1079 (9th Cir. 2007); Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1129-1130 (9th Cir. 2007); Duran-Jurado v. Keisler, 250 F. App'x 213, 215 (9th Cir. 2007); Fajugon-Hurguilla v. Gonzales, 175 F. App'x 832, 833 (9th Cir. 2006); Salem v. Holder, 647 F.3d 111, 115-16 (4th Cir. 2011); Garcia v. Holder, 584 F.3d 1288, 1289-90 (10th Cir. 2009).

180. Criminal recordkeeping may affect status adjudications even outside the removal context. Police reports of arrests and charging documents—even where they do not lead to any conviction—often serve as the basis for USCIS to deny immigration relief. *See* Sarah Vendzules, *Guilty After Proven Innocent: Hidden Factfinding in Immigration Decision-Making*, 112 CALIF. L. REV. 697, 699-701 (2024).

However, no jurisdiction that I am aware of has modified its criminal recordkeeping practices in response to the potential immigration consequences those practices could create. That is unsurprising, as local court practices are rarely studied—much less local misdemeanor administration.[181] Moreover, immigration consequences are relevant to only a portion of individuals in the vast misdemeanor system, such that any desired immigration consequences from reforming procedures may not justify the costs of doing so.

C. Citizenship

Finally, citizenship and naturalization determinations also rely on state law and fact-finding. Individuals acquire U.S. citizenship at birth, through their parents, or through naturalization.[182] Evidence of birth and family relationships almost always comes from state sources. That is because federal law has traditionally left regulation of domestic affairs to the states, viewing them as possessing a "'special proficiency' in the field of domestic relations."[183] For that reason, "in the typical case, birth certificates and marriage certificates suffice to demonstrate the required relationship for a family-based visa petition."[184] But states issue such documents only after adjudications by state agencies or courts, which vary from jurisdiction to jurisdiction.[185] For example, states have different procedural and evidentiary requirements for issuing delayed birth certificates when a birth is registered months or years after it occurs.[186] While it does not appear that any jurisdiction has amended its fact-finding standards and capabilities to respond to immigration law, variations in how states determine such family relationships shape who is eligible for a variety of immigration benefits.

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181. *See* Jason Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1034-35 (2020) (revealing that local court systems are rarely studied by legal academics or incorporated into law-school curricula outside of certain clinical courses). For an important exception to the understudied nature of local court practices, see generally ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

182. U.S. CONST. amend. XIV, § 1 (citizenship by birth in U.S. jurisdiction); 8 U.S.C. § 1431(a) (2018 & Supp. V 2023) (citizenship through parental relationship); 8 U.S.C. § 1431(b) (2018 & Supp. V 2023) (citizenship through adoption).

183. Reno v. Flores, 507 U.S. 292, 310 (1993) (quoting Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992)); *see also In re* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

184. Abrams & Piacenti, *supra* note 135, at 672.

185. *Id.* at 666 (noting that delayed birth certificate "processes vary from jurisdiction to jurisdiction").

186. *Compare* ARIZ. ADMIN. CODE § R9-19-204 (2020) (requiring all individuals to undergo a registration process to obtain a delayed birth certificate), *with* NEB. REV. STAT. §§ 71-617.01 to .15 (2025) (allowing individuals up to one year before their birth certificates are marked "delayed").

Further, for purposes of deriving citizenship as the child of a qualifying parent, Congress included adopted and legitimated children.[187] But it did not define adoption and expressly made legitimation contingent on state law.[188] As a result, some courts have concluded that these federal definitions are determined by state law, such that state changes also carry federal immigration consequences.[189] For example, several courts have held that state-court orders retroactively dating a child's adoption for state-law purposes also determine the date of adoption for federal immigration purposes, qualifying adoptees for derivative citizenship.[190] In recognizing the retroactive date for federal purposes, these courts have reasoned that the federal definition "carries with it the understanding that adoption proceedings in this country are conducted by various state courts pursuant to state law."[191] By permitting adoption decrees to be dated retroactively, state laws have expanded the pool of children eligible for permanent immigration status and citizenship.

III. Status Federalism's Structure

This Part provides a theoretical framework to understand how the pathways for subfederal participation identified in Part II translate into influence over federal immigration policy, as well as the limits and tradeoffs of that influence. In doing so, I demonstrate that status federalism is a distinct aspect of immigration federalism that merits focused analysis: it illuminates federal-state dynamics that existing accounts of immigration federalism, which focus almost exclusively on enforcement and integration, overlook.

In contrast to enforcement and integration decisions, decisions about status give states a more direct role in shaping immigration law: they allow

187. 8 U.S.C. § 1101(b)(1)(C), (b)(1)(E), (b)(1)(F), (b)(1)(G), (c) (2018 & Supp. V 2023).

188. *See* Ojo v. Lynch, 813 F.3d 533, 535 (4th Cir. 2016) ("The INA does not provide its own definition of the term 'adopted,' specify any requirements for a proper adoption, or contemplate the [Board of Immigration Appeals'] involvement in any adoption proceedings."); 8 U.S.C. § 1101(b)(1)(C), (c)(1) (2018 & Supp. V 2023) (defining "child" to include a person under twenty-one who has been "legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile").

189. *See* O'Donovan-Conlin v. U.S. Dep't of State, 255 F. Supp. 2d 1075, 1082 (N.D. Cal. 2003) ("Legitimacy is a legal concept, and a state has the power to define what constitutes it, how to regulate it, or even to abolish the concept altogether."); *Ojo*, 813 F.3d at 540 (holding that the INA's definition of "adoption" is based on when state law says adoption is effective). *But see* Schreiber v. Cuccinelli, 981 F.3d 766, 776 (10th Cir. 2020) (holding that "legitimation" has a uniform federal definition).

190. *See Ojo*, 813 F.3d at 539-40; Cantwell v. Holder, 995 F. Supp. 2d 316, 317 (S.D.N.Y. 2014); Sook Young Hong v. Napolitano, 772 F. Supp. 2d 1270, 1272 (D. Haw. 2011); Gonzalez-Martinez v. Dep't of Homeland Sec., 677 F. Supp. 2d 1233, 1238 (D. Utah 2009); Amponsah v. Holder, 709 F.3d 1318, 1319 (9th Cir. 2013). The Ninth Circuit's opinion in *Amponsah* was withdrawn after the Board of Immigration Appeals advised the court that it was considering whether to overrule or modify its rule against considering nunc pro tunc orders. Amponsah v. Holder, 736 F.3d 1172, 1173 (9th Cir. 2013).

191. *Ojo*, 813 F.3d at 540.

states to *decide* rather than merely *influence* federal legal entitlements. And those decisions have consequences in all fifty states. Status federalism also highlights how federal-state interaction plays out on the terrain of administrative adjudications. The respective influence states and federal agencies have turns on how Congress has allocated adjudicative responsibilities between the center and the periphery—whether it has tasked subfederal actors with finding facts or supplying law, and which subfederal component it has delegated those tasks to. Each of these choices structures subfederal power over federal immigration policy in a different way.

A. Deciding Federal Entitlements

A distinguishing feature of status federalism is the direct role subfederal actors play in deciding the allocation of federal legal entitlements. Congress expressly delegated various parts of the federal adjudication process to subfederal actors, allowing them to make decisions that have formal consequences for an individual's immigration status. Often, subfederal determinations supply legally necessary findings: a law-enforcement certification qualifies a noncitizen crime victim for U visa status. In other cases, subfederal actions trigger immediate immigration consequences by operation of law: a state court's judgment of adoption can automatically confer citizenship under the INA's derivative citizenship provisions. Still in other cases, subfederal action or forbearance preserves an individual's existing status: charging a nonremovable criminal offense does not trigger removability. In each case, subfederal entities formally shape federal legal entitlements.

By contrast, subfederal enforcement and integration policies alter or create *local* entitlements that have practical consequences for the federal system—sometimes large ones—but do not dictate *federal* legal rights.[192] For example, noncooperation policies frustrate ICE's ability to identify and apprehend noncitizens for removal as a practical matter. But such policies do not legally shield individuals from removal. The federal government has its own (albeit far smaller) enforcement apparatus, and federal agents have historically conducted direct raids on workplaces and residences.[193] Similarly, measures governing the lives of noncitizens do not legally alter who can or cannot reside in the state, but they shape the flow of

192. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2058 (2008) ("[M]uch subfederal activity governs the lives of noncitizens, and thus may regulate immigration *indirectly*." (emphasis added)).

193. *See* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 274 (2018).

migration by creating incentives or disincentives for individuals to move there.[194]

Two implications follow. First, by deciding—not merely influencing—federal rights, status federalism highlights new sites of federal-state contestation. Contemporary immigration federalism scholarship concerns subfederal efforts to construct conceptions of immigrant belonging in the absence of formal inclusion.[195] Through integration measures, states have attempted to mitigate the precarity of living without full status by regularizing everyday life for immigrants, extending benefits that allow them to drive, afford healthcare, and secure employment. Enforcement measures too attempt to create zones of inclusion by shielding individuals within them from formal federal consequences.[196] But even as many scholars endorse these interventions, they continue to frame immigration federalism as a second-best arrangement that is no substitute for formal legal status.[197] Status federalism challenges that notion by revealing states to be altering the terms of formal status itself. They are doing so by operating within the congressional scheme and changing its contours, shaping who and how many obtain legal status. Thus, subfederal activism in shaping federal policy occurs not merely from outside the formal process of status adjudications; it is also embedded within that process.

Second, states' power to decide federal entitlements expands the geography of concern for states when it comes to immigration. Because immigration status is a federal legal designation that attaches to the statusholder, it transcends state boundaries.[198] Once a noncitizen becomes a lawful permanent resident, she can legally seek employment in every state.[199] And if someone has been convicted of a deportable crime in one state, she is subject to deportation no matter which state she moves to. Not only that,

194. *See* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1880-82 (2019). One exception through which state integration policies do decide federal entitlements is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which authorizes states to decide noncitizen access to certain federal welfare benefits including Temporary Assistance for Needy Families, social-services block grants, and Medicaid. *See* 8 U.S.C.A. § 1612 (West 2025).

195. *See, e.g.*, Rodríguez, *supra* note 6, at 530 (observing that "[a] great deal of contemporary immigration federalism, both of the enforcement and integration varieties," involves "ameliorat[ing noncitizens'] lack of status with the regulatory authorities at [state and local] disposal").

196. *See* Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 576 (2010) (arguing that local noncooperation measures have "arguably constructed membership for undocumented immigrants located within their jurisdictions").

197. *See* Rodríguez, *supra* note 6, at 529-531 (arguing that immigration federalism "cannot cure the ultimate instability of unlawful status" and that federal intervention is needed); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 902-03 (2015) (acknowledging that states cannot "provide protection against deportation" or "authorize employment in the United States," which are "the rights that are, in many ways, most critical to stabilize the lives of the vast undocumented population").

198. With respect to U visas, states can even reach across jurisdictional lines to provide certification for crimes that occurred elsewhere, further extending the legal reach of subfederal decisions. *See supra* notes 101-102 and accompanying text.

199. *See* 8 U.S.C. § 1324a(h) (2018).

but an individual also enjoys any legal entitlements that a state's law attaches to her federal status when she moves to that state, such as access to certain welfare benefits.[200] Subfederal interventions into immigration status thus alter legal entitlements across state lines, and their interventions endure even after an individual has moved across jurisdictions.

By contrast, the primary effect of subfederal enforcement and integration policies is local. Sanctuary legislation shields those caught up in the enacting jurisdiction's criminal legal system, and integrationist measures provide state-level benefits to noncitizens residing in the enacting state. They do not, however, protect or benefit noncitizens in an adjacent jurisdiction. Indeed, a primary justification scholars cite in support of increased state and local influence over immigration is that such policymaking autonomy allows "state and local officials to address local problems in the manner they see fit."[201] Of course, that is not to say that subfederal enforcement and integration policies lack any secondary effects on other jurisdictions. For example, they may induce noncitizens to move from one state to another in search of more favorable treatment.[202] But ultimately, state enforcement and integration efforts do not formally dictate legal rights at the federal level or in another state in the same way that subfederal interventions into immigration status do.

That distinction matters for how we understand the scope of state power in immigration law. Status federalism offers a more robust explanation of how subfederal interventions translate into national policy than existing accounts provide. Immigration scholars frequently argue that policies at the periphery help construct national identity and define the boundaries of national belonging.[203] And contemporary federalism scholars hold up subfederal immigration enforcement policies as examples of

200. States may condition eligibility for certain federal welfare benefits, such as Temporary Assistance for Needy Families and Medicaid, on immigration status. 8 U.S.C.A. § 1612 (West 2025).

201. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2120 (2014); *see also* Rodríguez, *supra* note 4, at 616 (arguing that states should play a more prominent role in immigration regulation because "immigration implicates the definition of localized political communities as well as divergent local interests in the pace and scope of integration and social change"); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635-36 (1997) (arguing that greater state authority would allow states to welcome or discourage immigrants according to their preferences, which would also benefit immigrants).

202. *See* Rodríguez, *supra* note 4, at 618 ("[P]olicies that dole out relatively negative or positive treatment to immigrants will inevitably induce immigrants to move across state (and possibly national) borders."); Cox, *supra* note 21, at 364 ("[P]utative immigrant-regulating rules create substantial selection pressure: they can affect decisions about whether to migrate in the first place or whether to stay if one has already migrated.").

203. *See, e.g.*, Rodríguez, *supra* note 4, at 573 (arguing that "federalism serves as a crucial mechanism for shaping and managing national identity"); Motomura, *supra* note 192, at 2076 ("[S]ubfederal immigration authority . . . has historically been not just a story of direct or indirect enforcement of admission restrictions and expulsion rules, but also a deeper story of who belongs.").

the periphery's flexing its muscle over policies at the center.[204] But in focusing on enforcement and integration federalism, these accounts of subfederal influence are necessarily constrained. By "national identity," scholars really mean separate individual state interventions aggregated together. By "belonging," they mean functional integration into society without formal legal protections. But recognizing status federalism as a distinct concept reveals that states directly engage themselves in the construction of the national community by dictating who obtains federal legal status. It thus changes how we think about the scope of state power over immigration.

B. The Federalism of Administrative Adjudications

A second hallmark of status federalism's structure is the terrain on which it occurs. Whether an individual applies for a visa through USCIS or contests her removability before EOIR, her immigration status is determined through an agency adjudication. Adjudications at their core—including ones that determine immigration status—involve the finding of facts, and the application of law to facts, according to a set of predetermined procedures.[205] In the simplified model, a single agency has jurisdiction over the entire adjudication. Immigration adjudications complicate that picture. Congress allocated responsibility over status adjudications to both state and federal actors, delegating the administration of sometimes distinct, sometimes overlapping components of the overall adjudication scheme. The federalism of immigration adjudication, then, concerns the interaction of these components. That interaction occurs in dynamic and dialogic fashion. Subfederal decisions upstream influence ultimate outcomes downstream, and federal responses downstream have implications for upstream state policies. These dynamics are distinct enough from those of enforcement and integration decisions that the federalism frameworks developed to understand the latter two do not neatly map onto the former.

This Section explores the distinct roles subfederal actors play in adjudications. At times, state and local agents lend their expertise as finders and deciders of fact. In other cases, states supply the legal standards for federal adjudicators to apply. The type of subfederal actor implicated also matters. Adjudications may involve state policymakers, judges, line agents,

204. *See, e.g.*, Bulman-Pozen, *supra* note 46, at 484-85 (describing state laws such as Arizona's S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), that challenge federal enforcement of immigration law).

205. *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 820 n.41 (2015) ("[A]t its core, adjudication in any setting involves gathering facts and applying the law to those facts."). Although the rigor of adjudicative procedures differs depending on the forum, even informal agency adjudications involve some set of rules channeling decision-making. *See* Bremer, *supra* note 15, at 1404 (explaining that most agencies "adjudicate using unique procedures that have been congressionally or administratively tailored to suit the unique needs of the particular agency or regulatory program").

or some combination of these actors. These dynamics structure the levers of influence available to states as well as the ways that federal adjudicators can limit that influence.

1. States as Federal Fact Finders

State and local law enforcement, administrators, and courts serve as indispensable gatherers and deciders of fact for federal adjudications. Although immigration enforcement also enrolls state officials in gathering factual material, states in the adjudication process often decide factual disputes in hearing-like proceedings. Such fact-finding may involve the hearing of testimony and the resolution of factual disputes; it may require determining when and where a child was born, whether an individual is qualified to perform a certain job, or whether a crime victim is likely to provide helpful information in prosecuting the crime. As fact gatherers, states and localities possess informational and capacity advantages over the federal government. The findings subfederal actors are tasked with making rely heavily on knowledge and expertise in criminal law, domestic relations, and employment—domains states have developed robust legal infrastructures to regulate.[206] But this reliance also affords subfederal actors leverage to advance their own immigration policy preferences. By facilitating or hindering the finding of critical facts, subfederal actors wield gatekeeping authority over the adjudication pipeline to grant or deny individuals access to downstream federal immigration benefits. And because states administer the fact-finding processes under state law, federal officials have no direct legal authority over state choices.

To be sure, finding facts that qualify individuals for immigration consequences downstream does not guarantee that those consequences will be realized. Noncitizens must satisfy additional criteria under federal law to obtain status.[207] Federal adjudicators make the ultimate decision and often

206. Cox & Posner, *supra* note 4, at 1339 ("State and local criminal justice systems that interact with people charged and convicted of crimes will, in general, have far richer information about the offender than will the federal government."); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1005-11 (2002) (discussing the design of the SIJS statute and noting that "[t]he statute, recognizing that juvenile courts have particularized training and expertise in the area of child welfare and abuse, places critical decisions about the child's best interests and the possibility of family reunification with state juvenile courts").

207. The additional criteria noncitizens must satisfy differ in the level of discretion they afford to federal officials. For example, to obtain a U visa, an applicant must show that she has "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity" and that the crime involved one of several enumerated offenses, in addition to providing a law-enforcement certification. 8 U.S.C. § 1101(a)(15)(U)(i)(I), (iii) (2018 & Supp. V 2023). Meanwhile, to acquire citizenship through adoption, a child must have been adopted while under the age of sixteen and have "been in the legal custody of, and ha[ve] resided with, the adopting parent or parents for at least two years." *Id.* §§ 1101(b)(1)(E)(i), 1431(b).

have legal authority to second-guess state fact finders.[208] Even so, states and localities continue to exert significant leverage over ultimate immigration outcomes, perhaps because the federal bureaucracy lacks capacity to scrutinize every subfederal finding of fact. Recent data bear this out. Even as subfederal jurisdictions have altered fact-finding processes to reflect their immigration policy preferences in recent years, federal adjudicators have rarely disagreed with state findings. U visa approval rates averaged 80% from fiscal years 2009 through 2023 and never dropped below 70% in any given year.[209] SIJS approval rates averaged 93% from fiscal years 2010 through 2023.[210] If federal adjudicators were second-guessing state factual determinations at a significant rate, one would expect more denials of applications.[211]

Moreover, increasing the pipeline of immigrants eligible for status can increase political pressure on the federal government to provide relief for more applicants. A larger pool of applicants raises their political visibility and can force the federal government to confront the large demand for immigration status—potentially goading it into addressing regulatory shortcomings.[212] For example, investigations and certifications for criminal activity targeting migrants in particular, such as child-labor violations and human trafficking, can underscore the number of people in need of federal U visa protection and potentially spur federal action.[213] While it may be difficult to imagine amid the pitched political battles over immigration in recent years, such investigations could also have bipartisan political appeal in less polarized times. After all, every statewide U visa statute enacted so far, in states governed by both parties, has expanded access to certifications.[214]

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208. *See, e.g.*, *U Visa Law Enforcement Resource Guide*, *supra* note 86, at 16 ("The determination of what evidence is credible and the weight to be given to that evidence is within the sole discretion of USCIS."); *T Visa Law Enforcement Resource Guide*, *supra* note 86, at 1 ("USCIS has sole jurisdiction to determine who is eligible for a T visa."); Remus, *supra* note 77, at 239-47 (discussing how state-issued birth certificates are sometimes questioned by federal agencies when evaluating citizenship claims).

209. *See I-918 Petitions for U Nonimmigrant Status*, *supra* note 13. The approval rates given above are for principal petitioners, though the approval rates for family members are similar. *See id.* The approval rates are calculated according to the proportion of petitions approved over those disposed of (approved or denied) within a given fiscal year.

210. *See I-360 Petitions for Special Immigrant Juvenile Status*, *supra* note 13; *see also* Keyes, *supra* note 77, at 76 ("[O]nce filed, the state-level predicate order had a 94.25% chance of leading to successful adjudication at the federal level.").

211. Of course, it is possible that federal adjudicators do independently verify all state findings of fact and simply agree with those findings. But that still shows the amount of subfederal control over the number of noncitizens who ultimately receive federal immigration status.

212. *See* Bulman-Pozen, *supra* note 46, at 485 ("Congress often includes states in federal schemes in ways that lend them soft power to force federal executive action.").

213. *See* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html [https://perma.cc/F4AH-3MT6].

214. *See infra* Appendix A.

Of course, restrictionist jurisdictions can also throw up procedural hurdles to accessing immigration status or foreclose it altogether. Jurisdictions can refuse to gather or adjudicate the requisite facts, closing the door to downstream federal adjudications that determine status. In this sense, state influence over immigration status is asymmetrical. Decisions not to participate in the adjudicative scheme—which is to say refusing to make factual findings—can be determinative of downstream consequences, while decisions to participate are usually not. But this asymmetry does not always redound to the detriment of noncitizens. Prosecutorial decisions not to charge a removable offense, for example, legally insulate the noncitizen from being found removable for that offense. And some state refusals to participate in the adjudicative scheme may, to some extent, be balanced out by other jurisdictions more willing to participate. As one example, law enforcement can issue U and T visa certifications for crimes committed in other jurisdictions.[215] And, anecdotally, some immigration practitioners have advised noncitizen children with relatives in multiple states to seek legal-custody determinations with relatives in states with more generous SIJS laws.

However, the power subfederal actors are able to project is constrained by the structure of status adjudications. After all, federal officials are the ultimate adjudicators. Federal agencies too can influence substantive outcomes by altering adjudication procedures and how discretion is exercised. Reluctant adjudicators can drag their feet in completing adjudications, impose additional procedural and evidentiary requirements, and, in certain cases, exercise their discretion to deny applications outright. The Trump administration used these strategies to devastating effect, erecting what immigration lawyers have called an "invisible border wall" in USCIS that prevented thousands of noncitizens from obtaining lawful immigration status.[216] Among other changes, USCIS "made immigration application forms longer, required more green-card applicants to sit for in-person interviews, asked more applicants for additional evidence, and required more scrutiny of renewal applications."[217] In one particularly draconian move, USCIS began rejecting humanitarian-relief applications if any field

215. *See supra* notes 101-102 and accompanying text.

216. Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71, 73, 81 (2021); Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL'Y INST. (Feb. 23, 2022), https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden [https://perma.cc/2Z3Q-4F5C].

217. Chishti & Gelatt, *supra* note 216; *see Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 158-59 (2019) [hereinafter *Hearing*] (statement of Marketa Lindt, President, American Immigration Lawyers Association).

was left blank, even if the appropriate response was "not applicable."[218] These changes increased the resources agency officials devoted to each application, increasing processing times by months.[219]

But on the whole, federal attempts to stymie subfederal influence over status adjudications have not risen to the level of federal-state conflict witnessed in the enforcement and integration arenas.[220] Compared with other forms of humanitarian relief like asylum, applications for SIJS and U and T visas have continued to be approved at high rates, even during the Trump administration.[221] This suggests that while federal adjudicators can drag their feet, outright rejection of state fact-finding is much harder to accomplish. Meanwhile, legal challenges have successfully reined in the most overzealous attempts to interfere with the states' fact-finding role. For example, courts have vacated USCIS policies scrutinizing certain state-court factual findings[222] and denying SIJS to children aged eighteen to twenty-one.[223]

In sum, states' fact-finding role structures the landscape for federal-state negotiation and bargaining, both affording subfederal actors a number of leverage points over immigration outcomes and setting the limits of their influence. How they ultimately exercise power over status adjudications is as much a product of politics as of the structural constraints imposed by law.

2. Incorporating State Laws

The INA relies on subfederal actors not only to find facts under federal standards but also to supply the legal standards to be applied by federal adjudicators, a role states do not play in enforcement and integration

218. Press Release, U.S. Dep't of Homeland Sec., CIS Ombudsman Alert: Recent Updates to USCIS Form Instructions (Jan. 23, 2020), https://www.dhs.gov/archive/news/2020/01/23/ombudsman-alert-recent-updates-uscis-form-instructions [https://perma.cc/W9CK-9B5A].

219. By fiscal year 2018, the average case-processing time at USCIS was 9.48 months, up from 6.5 months in fiscal year 2016 (just before the start of the Trump administration). *See Hearing*, *supra* note 217, at 157 (statement of Lindt).

220. For a contrary view, see Hlass et al., *supra* note 105, at 1436-40.

221. *See I-918 Petitions for U Nonimmigrant Status*, *supra* note 13; *I-360 Petitions for Special Immigrant Juvenile Status*, *supra* note 13; Keyes, *supra* note 77, at 76. Grant rates for asylum have averaged in the forty to fifty percent range in the last decade. *See* Transactional Recs. Access Clearinghouse, *Speeding Up the Asylum Process Leads to Mixed Results*, SYRACUSE UNIV. (Nov. 29, 2022), https://web.archive.org/web/20250101201508/https://trac.syr.edu/reports/703 [https://perma.cc/ZL42-ECFB].

222. *See* Flores Zabaleta v. Nielsen, 367 F. Supp. 3d 208, 216 (S.D.N.Y. 2019); Settlement Agreement and Release at 11, Saravia *ex rel.* A.H. v. Barr, No. 17-CV-03615 (N.D. Cal. Sept. 17, 2020), https://www.ice.gov/doclib/legalNotice/SaraviaSA-Settlement.pdf [https://perma.cc/BX8D-Q2DH] ("Under the terms of the settlement agreement, *Saravia* class members are entitled to expedited custody hearings and the government is required to prove that there has been change of circumstances to justify [Immigration and Customs Enforcement's] rearrest of the minor.").

223. *See* R.F.M. v. Nielsen, 365 F. Supp. 3d 350, 380 (S.D.N.Y. 2019); J.L. v. Cissna, 341 F. Supp. 3d 1048, 1061 (N.D. Cal. 2018).

decisions. For example, federal law relies on state criminal law to define the prohibitions that trigger removal;[224] it leaves states to prescribe the contours of various domestic relationships such as legal dependency, adoption, and marriage;[225] and it allows states to designate criteria for employment licenses that qualify individuals for certain employment visas.[226] As with federal reliance on state fact-finding, incorporation allows the federal government to leverage the expertise and established legal frameworks developed at the state level, often in areas states have historically regulated.[227] But at the same time that incorporation transfers expertise upward, it also distributes power downward, giving states power to dictate the substantive standards that federal adjudicators apply. In doing so, incorporation blurs the line between principal and agent, allowing states to infuse federal adjudications with their normative judgments about who ought to be part of the body politic.

As a species of federalism, incorporation is somewhat of an outlier that has only recently received scholarly attention.[228] It lacks the typical features of contemporary administrative federalism involving reciprocal engagement between the central authority and its peripheral counterparts.[229] And in the immigration context in particular, it differs in operation from the back-and-forth of enforcement cooperation or the independent

224. *See supra* Section II.B.1.

225. *See supra* Section II.A.4.

226. *See supra* Section II.A.3.

227. *See* Divine, *supra* note 101, at 134 (explaining that incorporation "allows a legislature to rely on the experience, research, and writing of other legislatures as well as the proven merit of the adopted legislation"); Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 134 (2008) (theorizing that incorporation can occur where a state has "special expertise in a given subject area"); Gluck, *supra* note 14, at 2008 (explaining that dynamic incorporation allows Congress to "draw on state expertise").

228. *See* Gluck, *supra* note 14, at 2008 (explaining that incorporation as a species of federalism has "gone almost entirely unrecognized"). Most scholarship concerning incorporation involves criminal law. *See generally* Divine, *supra* note 101 (offering ways that dynamic incorporation can resolve conflicts between overlapping state and federal mandates in the realm of criminal law); Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65 (2006) (detailing "the broader implications of federal deference to state criminal laws and outcomes"); Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019) (criticizing the categorical federal standards enacted through the Armed Career Criminal Act). The only scholar who has explored immigration-law incorporation with any depth is Professor Sheldon A. Evans. *See* Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1776-77 (2020); Sheldon A. Evans, *Interest-Based Incorporation: Statutory Realism Exploring Federalism, Delegation, and Democratic Design*, 170 U. PA. L. REV. 341, 352-55 (2022) [hereinafter Evans, *Interest-Based Incorporation*]. But, as I will explain, *see infra* text accompanying notes 233-237, Evans's analysis critiques incorporation for sidelining states but fails to explore the many ways in which states have consciously leveraged their roles to inject their own immigration policy preferences into federal law.

229. *See* Evans, *Interest-Based Incorporation*, *supra* note 228, at 374 (critiquing incorporation for having "little overlap . . . with both traditional and contemporary federalism theory"); Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320, 1333 (2023) (describing the back-and-forth process of coordinated rulemaking); Fahey, *supra* note 18, at 2329 ("At the center of American federalism are thousands of written agreements that facilitate shared governance among levels of government.").

policymaking of integration.[230] Instead, incorporation involves a more direct and automatic linkage between legal systems. When Congress dynamically incorporates state law into federal legislation, changes in state law automatically trigger concomitant changes in federal law without back-and-forth bargaining or intergovernmental exchange of information.[231] There is no mediating agent that translates state action into federal consequences. What's more, Congress need not consult states to incorporate state law; it can unilaterally do so without prior consent or even notice.[232] Indeed, the state criminal and domestic-relations laws being incorporated were most likely initially enacted for state regulatory purposes rather than for their immigration effects.

As a result, some scholars have criticized statutory incorporation for sidelining states. Professor Sheldon A. Evans argues that incorporation gives no role to states in the federal scheme and predicts that "[s]tates will continue on their path with little if any acknowledgment that their current and future laws will carry impactful ramifications in shaping federal law."[233] Cox and Posner have echoed the same sentiment, stating that "it seems highly unlikely that a state would manipulate its criminal or family law in order to change the immigration consequences for migrants living in the state."[234] But their contentions underemphasize how incorporation puts federal adjudication at the mercy of state lawmakers. Just as Congress can attach federal consequences to state laws without state permission, states can change the content of federal law without federal permission. States need not passively allow the federal government to make use of state legal schemes but can enact laws mindful of and in response to their role in the immigration scheme. And when they do so, the high barriers to enacting federal legislation make it difficult for Congress to abrogate those changes. Recent state-law amendments aimed at shaping immigration adjudications demonstrate this influence: states have reduced maximum sentences for misdemeanors by one day to prevent such convictions from serving as predicates for deportation;[235] they have expanded state-court jurisdiction to make SIJS findings for youth who would have otherwise

230. *See* Rodríguez, *supra* note 6, at 511 (noting that integration federalism "implicates affirmative strategies to either promote or prevent immigrant incorporation into the body politic and may have little if anything to do with federal policy").

231. This is in contrast with static incorporation, which adopts by reference another jurisdiction's law only "as it stands at the moment of incorporation." Dorf, *supra* note 227, at 104.

232. *See* Evans, *Interest-Based Incorporation*, *supra* note 228, at 346 (critiquing incorporation because "[i]t is not a two-way partnership, negotiation, or exchange of power between the federal and state governments. Instead, Congress simply incorporates state law without any input from or notice to the states").

233. *Id.* at 374.

234. Cox & Posner, *supra* note 4, at 1333.

235. *See* sources cited *supra* notes 155-156; *infra* Appendix C.

aged out;[236] and they have liberalized certain employment licenses to facilitate obtaining employment visas in high-demand fields.[237]

At the same time, there are costs to modifying state law in response to incorporation. Of course, costs exist whenever legislators attempt legislative reform. Lawmakers must expend time, resources, and political capital to amend an existing law and, as a result, do so infrequently.[238] But what's more in the immigration selection context, the parts of state adjudicative systems Congress incorporated into the INA also regulate other domains outside immigration and have a purpose independent of federal law. State criminal legal systems are meant to deter and punish socially disfavored behavior, and family courts regulate family relations among immigrants and citizens alike. States craft such systems with purposes and goals separate from fulfilling a federal immigration mission. In most cases, then, amending state law to alter immigration consequences carries legal consequences for other areas of state regulation. Even when state legislators are dissatisfied with how state law is incorporated into the federal immigration scheme, the potential spillover effects of any response may dissuade them from taking action.

Take, for example, state criminal offenses that trigger removal eligibility. Recall that under the categorical approach, if the elements of a state criminal statute are broader than the elements of the federal ground of removal, a state conviction does not trigger removal.[239] So to prevent criminal convictions from causing deportation, state legislatures could expand the conduct a statute criminalizes beyond the elements of its federal counterpart. But doing so also expands the scope of state criminal law, which may conflict with a legislature's criminal policy goals. States will thus be more likely to respond to federal incorporation in more targeted ways or when they do not face conflicting incentives between their immigration objectives and their domestic policy objectives.

3. Policymakers, Local Actors, and Line Agents

The type of subfederal agent wielding authority in status determinations is as important as what function the agent serves. Needless to say, states are not monoliths.[240] A diversity of adjudicative agents and bodies makes up the variegated state, from the governor and the state legislature

236. *See infra* Appendix B.

237. *See* sources cited *supra* notes 126-129.

238. *See* Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1612 (2015) ("Empirical studies have shown that legislatures are quite reluctant to override existing laws.").

239. *See* Mathis v. United States, 579 U.S. 500, 505 (2016).

240. This axiom may have become apparent only recently. *See* Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J. F. 56, 56 (2015) ("Federalism scholarship and doctrine have long viewed the states as monoliths.").

to municipal employees, employment licensing boards, judges, and police officers.[241] They possess different levels of authority, mechanisms of accountability, processes for decision-making, political incentives, and expertise.

When the federal government delegates implementation of a federal program to subfederal actors, it has the prerogative to designate which subfederal body or agents speak for the state and the process through which they participate. Congress, in other words, "control[s] the 'choice architecture' within which states make the decision to join or reject cooperative [federal] programs."[242] Immigration adjudications are no exception. While the center also delegates to various law-enforcement agents in the enforcement context, the types of subfederal actors in status adjudications are more varied. As Part II documented, there is a dizzying array of subfederal actors recruited into the immigration adjudication bureaucracy. State and local law-enforcement officers provide U visa certifications; local prosecutors, defense attorneys, and state criminal courts determine whether an individual is subject to a criminal ground of removal; state health agencies issue birth certificates; family courts approve adoptions; and state legislatures enact statutes that are incorporated into federal law. The federal government's choice of subfederal official is consequential because how the government structures the choice architecture for state participation shapes the substantive decisions those participants make as part of the federal program.[243] Designating different subfederal agents yields different results given their differing characteristics, positions within state systems, and stances on immigration policy.

An important dimension of this choice architecture is whether the federal government devolves authority to state policy-level officials such as agency heads, or directly to line agents such as police officers. Decision-making within states is governed by a complex set of structures and lines of political accountability. For example, line police officers follow policies set by the chief of police, who is in turn accountable to the local executive. But a federal program can circumvent these accountability structures and directly empower line officials to make decisions for federal programs. For instance, the INA authorizes any "Federal, State, or local law enforcement official . . . investigating [qualifying] criminal activity" to provide a U visa

241. *See* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999) (explaining that the term "state" refers to a wide array of different actors).

242. Fahey, *supra* note 238, at 1565 (borrowing the term "choice architecture" from Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003)).

243. *Id.* at 1566 ("[C]onsent procedures do more than operate as processes for registering state consent; many also shape how states internally discuss, deliberate, and decide whether to join federal programs. Whether by accident or by design, these procedures affect the *formation* as much as the *expression* of state consent.").

certification;[244] line prosecutors have authority to charge a noncitizen with a removable criminal offense; and individual family-court judges have authority to make SIJS findings. These choices are not inevitable. Federal law could have instead designated the state legislature to enact a law specifying how the state will implement the federal program, or not specified the state body involved at all.[245]

But devolving authority to line officers has certain advantages for the federal government. A central concern of devolving immigration authority is "to capitalize on the informational advantages of state and local officials while retaining control over the first-order questions about how many, and what types, of noncitizens should be admitted or removed."[246] Subfederal actors, however, may wish to insert their own immigration policy preferences when implementing federal programs, and those preferences may run counter to federal ones. Delegating directly to line-level officers reduces that risk; it elevates the discretion of individual officers and circumvents any accountability those officers may normally owe to higher-level officials who can set policies that may advance a set of immigration preferences. Line officers, who generally have less policy-level expertise and information, are more likely to perform their duties without considering the downstream immigration consequences of their actions.[247] And they cannot coordinate and discipline decision-making with the same effectiveness as statewide policy-setting can. In other words, line officers are more likely to be faithful agents to their federal principals as compared with actors at the policymaking level. The federal government can thus exploit state expertise while avoiding potential interference from state policymakers who have diverging policy agendas.

States, however, are not entirely without recourse. Although federal law can designate specific state officials and bodies to find facts and supply

244. 8 U.S.C. § 1184(p)(1) (2018 & Supp. V 2023). Note, however, that USCIS has interpreted the provision more narrowly by defining "[c]ertifying official" as "[t]he head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency." 8 C.F.R. § 214.14(a)(3) (2024).

245. Federal law employs these broader choice architectures in other parts of immigration law. For example, it prohibits states from providing undocumented immigrants with state-funded public benefits but authorizes state legislatures to override that prohibition "through the enactment of a State law." 8 U.S.C. § 1621(d) (2018). Federal law also allows states to qualify children and pregnant women for Medicaid through a state plan amendment, 42 U.S.C. § 1396b(v)(4)(A) (2018 & Supp. V 2023), which states can approve through their own designated procedures, *see* Fahey, *supra* note 229, at 1339 (describing various state processes for the approval of Medicaid state plan amendments).

246. Cox & Posner, *supra* note 4, at 1340.

247. *See, e.g.*, Eagly, *supra* note 159, at 1222 ("[M]ost local prosecutors are currently 'unaware that omissions or slight changes in pleas make a world of difference in whether a defendant is later removed.'" (quoting E-mail from David H. Pendle, Senior Att'y, Nat'l Dist. Att'ys Ass'n, to Ingrid V. Eagly, Assistant Professor of L., UCLA Sch. of L. (June 22, 2012))); Abreu et al., *supra* note 103, at 16 (reporting a survey showing that nearly twenty-five percent of instances in which law enforcement did not provide U visa certifications were because the official was unfamiliar with U visa process).

law, states ultimately control the authority of those designated actors. States can enact their own rules, which their officials must follow before supplying the information called for by federal law. Thus, state policy-level officials have intervened to coordinate and constrain line-level discretion with an awareness of the immigration consequences that may result. Rather than allow officers to make decisions for federal adjudications without constraint, legislatures have enacted centralized statewide requirements for U visa certifications, SIJS findings, and prosecutorial charging decisions.[248] Some statutes have taken choices off the table, such as those requiring law-enforcement agencies to respond to U visa certification requests, obligating state courts to exercise SIJS jurisdiction, and punishing misdemeanors with a maximum of 364 days' imprisonment.[249] Other legislation has channeled discretion toward particular outcomes, such as by introducing a presumption of helpfulness when evaluating U visa certification requests.[250]

IV. The Law of Status Federalism

So far, this Article has treated the boundaries of federal-state interaction as fixed—Congress allocates authority between federal agencies and states, with both sides wielding their respective powers to shape immigration policy. But just as there is contestation within the limits Congress established, there is also contestation over the limits themselves. These legal disputes involve questions of statutory interpretation about the proper distribution of authority between federal agencies and states in administering federal law, including the scope of state fact-finding authority, the amount of deference federal agencies owe to state determinations, and the choice between federal and state law.

This Part critiques how courts have thus far attempted to resolve these questions and begins to develop an alternative administrative law of status federalism. Courts lack a coherent framework for resolving disputes about the proper distribution of federal-state authority in status federalism cases. They fall back on dueling presumptions about the federal government's historically exclusive control over immigration or about the states' traditional police powers, but they have no coherent second-order principles to choose between those presumptions. The results are inconsistency and circuit splits. More fundamentally, reliance on statutory presumptions rooted in sovereignty overlooks the nature of delegated authority. Congress deliberately transferred some of its sovereign power to states in recognition of their comparative expertise in specific regulatory domains important to immigrant selection. Centering that fact, rather than sovereignty, allows

248. *See supra* notes 94-100, 109-119, 163-167 and accompanying text.
249. *See supra* notes 95, 115, 155 and accompanying text.
250. *See supra* note 100 and accompanying text.

courts to recognize that Congress chose states as joint policymakers in the implementation of immigration law.

This Part also answers a call in federalism scholarship more generally for principles of statutory interpretation that acknowledge states as co-implementers of federal law. Abbe R. Gluck has revealed that administrative law has almost entirely ignored the role of states as partners in implementing federal programs.[251] In federal programs jointly administered by federal agencies and states, courts addressing disputes between the two have no settled way to reconcile instincts of federal-agency deference on one hand and traditional federalism doctrines emphasizing state sovereignty on the other.[252] Gluck argues for a jurisprudence that can mediate conflicts between co-implementers of federal law. While a complete theory of expertise is beyond the scope of this Article, I begin to sketch one out for federal-state disputes over the meaning of the immigration statute.

A. Federal Exclusivity and States' Traditional Powers

Accepted theories of statutory interpretation begin with the text.[253] But they also rely on substantive canons of interpretation that reflect constitutional considerations about the structure of government and rights of individuals, as well as historical understandings about the traditional roles of state and federal authority.[254] Status federalism disputes are no different. On the surface, the division of federal-state authority in immigration status adjudications is controlled by the text of the INA. But status adjudications exist at the intersection of two strong structural presumptions: that the federal government has exclusive control over immigration regulation and that states are traditionally responsible for the regulation of health, safety, and welfare. Both are rooted in ideas about the sovereign power of the respective governments. And courts, in resolving disputes about federal-state authority under the INA, often fall back on one or the other.

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251. *See* Gluck, *supra* note 14, at 2026; Gluck, *supra* note 20, at 556.

252. *See* Gluck, *supra* note 14, at 2028 (identifying "the deep tension between two of the Court's favorite interpretive rules: *Chevron* deference for federal agencies and the presumptions that favor federalism for the states"); Gluck, *supra* note 20, at 609-11 (addressing the "[t]ensions [b]etween *Chevron* and the [f]ederalism [p]resumptions").

253. *See, e.g.*, WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 524-25 (6th ed. 2020); Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 873-74 (2017).

254. *See* Gluck, *supra* note 20, at 553 (explaining that the substantive canons of interpretation "have been the critical set of interpretive doctrines that courts have used to negotiate statutory ambiguities related to both federalism and agency implementation"). The use of substantive presumptions is particularly common in immigration law. *See* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 490-91 (2018) (arguing that federal courts frequently enforce constitutional norms through statutory immigration law); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (same).

In this way, courts facing statutory status federalism disputes behave in the same way as they do when resolving constitutional questions of immigration federalism. As Julie P. Stumpf has recognized, often "[t]he decision to categorize subnational action as either unduly intruding into the realm of foreign policy or as merely regulating within traditional subnational spheres drives the outcome of preemption and equal protection challenges."[255] Scholars have pointed to the futility of such line-drawing in the constitutional context,[256] but have yet to extend their critique to questions of statutory interpretation.

1. Federal Exclusivity over Immigrant Selection

As explained, status adjudications lie at the core of the federal government's exclusive power over immigration regulation.[257] The Supreme Court has entrenched the power to regulate immigrant selection, as a constitutional matter, within the federal government exclusively, concluding that the federal government's status as a sovereign requires it to speak with one voice on immigration.[258] This principle is so dominant that it often acts as a "heavy thumb . . . o[n] the scale" in disputes about whether federal immigration regulations preempt state laws in the same or adjacent fields.[259] While federal exclusivity over immigrant selection is primarily invoked in constitutional disputes, courts encountering status federalism questions sometimes rely on the principle as a background canon of statutory interpretation.[260] The implication is similar: because the federal government has exclusive power to regulate immigration, the content of terms in the INA should be federally determined (rather than dependent upon state law) absent clear congressional intent to the contrary. Allowing states to define terms, the reasoning goes, would result in diverging policies across jurisdictions and frustrate the federal government's interest in a uniform national policy.[261]

255. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1613 (2008); *see also* Cox, *supra* note 21, at 356 (explaining the same phenomenon as the "distinction between rules that select immigrants and rules that regulate immigrants' lives outside the selection context").

256. *See* sources cited *supra* note 76.

257. *See* sources cited *supra* notes 68-69.

258. *See* sources cited *supra* note 69.

259. Abrams, *supra* note 68, at 603.

260. *See infra* Section IV.B.

261. *See* Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1086 (9th Cir. 2021) (emphasizing that "federal laws should be construed to achieve national uniformity" (quoting United States v. Diaz, 838 F.3d 968, 974 (9th Cir. 2016))).

2. States' Traditional Powers

At the same time, our immigration admissions system selects individuals based on criteria that lie within domains traditionally left to state regulation. Undergirding the Court's federalism jurisprudence is the premise that the Constitution divides government between two sovereigns, federal and state.[262] States possess broad powers over the regulation of general welfare, powers they have historically exercised as part of their sovereign authority even before the Constitution's ratification.[263] Courts are deeply skeptical of federal laws that intrude upon these areas of traditional state regulation.[264]

The precise bounds of states' historic powers are debated,[265] but the Court has cited regulation of domestic relations, criminal punishment, and employment as key examples.[266] With respect to domestic relations, federal courts have long resisted developing a federal domestic-relations law even when the scope of a federal right depends upon familial relationships. For example, in *De Sylva v. Ballentine*, the Supreme Court held that the meaning of the term "children" in the Copyright Act depended on state definitions of that term.[267] It reasoned that although

> [t]he scope of a federal right is . . . a federal question . . . that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.[268]

The same is true of criminal prohibitions. Although Congress over time has built a robust federal criminal code, courts continue to declare that

262. *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

263. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (referring to an "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass").

264. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (citation omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 715-16 (1985).

265. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538 (1985) (detailing the difficulty of drawing lines between traditional and nontraditional state functions).

266. *See* Arizona v. United States, 567 U.S. 387, 441 (2012) (Alito, J., concurring in part and dissenting in part) ("[E]mployment regulation . . . is an area of traditional state concern." (citing De Canas v. Bica, 424 U.S. 351 (1976))); *infra* notes 267-270 and accompanying text.

267. 351 U.S. 570, 580 (1956).

268. *Id.* (citations omitted).

"the '"States possess primary authority for defining and enforcing the criminal law."'"[269] As recently as last Term, the Court interpreted federal criminal statutes narrowly in order to avoid covering traditionally local criminal conduct.[270]

B. The Incoherence of Current Status Federalism Doctrine

The problem is that courts do not apply the above principles coherently. Courts remain wedded to an either/or conception of federalism on which sovereigns are responsible for regulating separate spheres of law. At times they invoke federal exclusivity over immigration and at times traditional state police powers, tilting authority in favor of one or the other. But they have identified no coherent principles to guide that choice. As a result, circuits have split on whether federal agencies or states determine the content of important terms in the INA.

This incoherence arises in disputes about the immigration consequences of state criminal convictions. On one side are cases like *Velasquez-Rios v. Wilkinson*[271] and *Vasquez v. Garland*,[272] two recent court of appeals decisions refusing to recognize the retroactive effect of state statutes for immigration purposes. Recall that several states have enacted laws reducing the maximum sentence for misdemeanor convictions from one year to 364 days in order to prevent those convictions from triggering certain immigration consequences.[273] California and New York went one step further by making the reduction retroactive for individuals with existing misdemeanor convictions. The Ninth and Second Circuits, however, both held that retroactive sentence modifications under those laws could not be recognized for federal immigration purposes.[274] Instead, whether a conviction triggered immigration consequences was to be determined by the law at the time the conviction was entered.

Notable was each opinion's reliance on general principles of federal exclusivity to read the statute. In *Velasquez-Rios*, the court invoked the federal government's "sweeping authority over immigration policy" and its

269. United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)); *see also* Kansas v. Garcia, 140 S. Ct. 791, 806 (2020) ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States . . . ."); Bond v. United States, 572 U.S. 844, 858 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.").

270. Snyder v. United States, 144 S. Ct. 1947, 1956 (2024) (arguing that interpreting the statute broadly would "significantly infringe on bedrock federalism principles"); *see also* United States v. Bass, 404 U.S. 336, 350 (1971) (refusing to interpret federal law to "intrude[] upon traditional state criminal jurisdiction"); Jones v. United States, 529 U.S. 848, 858 (2000) ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." (quoting *Bass*, 404 U.S. at 349)).

271. 988 F.3d 1081 (9th Cir. 2021).

272. 80 F.4th 422 (2d Cir. 2023).

273. *See supra* note 155 and accompanying text; *infra* Appendix C.

274. *Velasquez-Rios*, 988 F.3d at 1083; *Vasquez*, 80 F.4th at 434.

exclusive prerogative to "make laws defining the proper sphere in which a" noncitizen "may be removed from this country."[275] That power meant that only "Congress, but not individual states, can give an escape hatch for removal in certain cases."[276] It then warned that "federal law standards cannot be altered or contradicted retroactively by state law actions, and cannot be manipulated after the fact by state laws modifying sentences that at the time of conviction permitted removal or that precluded cancellation."[277] The court thus viewed California's legal responses to federal use of state convictions for immigration purposes as improper interference with federal law. *Vasquez* echoed the same logic, "declin[ing] to give retroactive effect to the [state] statute in the . . . removal context where it appears that the purpose of that state law amendment is to circumvent federal law."[278] It then went further to question whether, even prospectively, "364 days is functionally the same as a year if the single day is abated for the purpose of frustrating federal law."[279]

That logic contrasts with the Supreme Court's decision in *Carachuri-Rosendo v. Holder*.[280] There, the federal government claimed that Carachuri-Rosendo, a lawful permanent resident, was ineligible for discretionary immigration relief because his Texas conviction for possessing a single pill of Xanax qualified as an aggravated felony for immigration purposes.[281] Both Texas law and federal law made the Xanax possession punishable as a felony under recidivist statutes due to an unrelated prior misdemeanor conviction.[282] But Carachuri-Rosendo was never prosecuted federally for his Xanax possession, and the state prosecutor had elected to charge his conduct as only a misdemeanor.[283] Nonetheless, the federal government argued in his removal proceedings that, because he *could have been* charged as a felon if prosecuted under federal law, his conviction was an aggravated felony.[284] Accepting that approach would have effectively nullified the state prosecutor's discretion to charge a lesser offense.

Recognizing this implication, the Court reasoned, "Were we to permit a federal immigration judge to apply his own recidivist enhancement after the fact so as to make the noncitizen's offense 'punishable' as a felony for immigration law purposes, we would denigrate the independent judgment

275. *Velasquez-Rios*, 988 F.3d at 1088-89.

276. *Id.* at 1089.

277. *Id.*

278. *Vasquez*, 80 F.4th at 434 (second alteration in original) (quoting *Velasquez-Rios*, 988 F.3d at 1087).

279. *Id.* at 434 n.9.

280. 560 U.S. 563 (2010).

281. *Id.* at 570-71.

282. *Id.* at 566-71.

283. *Id.* at 570-71.

284. *See id.* at 566-70, 572-73. The INA defines "aggravated felony" to include, among other things, all federal drug offenses punishable by more than a year's imprisonment. *Id.* at 566-67.

of state prosecutors to execute the laws of those sovereigns."[285] The Court thus saw interference as going in the opposite direction than did *Velasquez-Rios* and *Vasquez*. It was hesitant to interpret federal law in a way that would disregard or override a state's sovereign authority to enforce its criminal laws. While *Velasquez-Rios* warned that "Congress, but not individual states, can give an escape hatch for removal in certain cases,"[286] *Carachuri-Rosendo* gave states precisely that power. The record is unclear whether the Texas prosecutor consciously chose a lesser charge with immigration consequences in mind,[287] but the exercise of charging discretion shielded the defendant from immigration consequences.

Velasquez-Rios, *Vasquez*, and *Carachuri-Rosendo* are not isolated contrasts. Consider also the conflicting cases addressing whether certain family relationships in current and former versions of the INA should be defined by a uniform federal definition or track state law. Although the INA contains intricate definitions for some family law terms, it has left others without definition at all, including "spouse,"[288] "legal separation,"[289] "legal custody,"[290] "physical custody,"[291] "adoption,"[292] and "adultery."[293] Such relationships determine who may be eligible for derivative immigration status and citizenship. Courts have struggled with how to fill these gaps, resulting in circuit splits.[294] Some have held that such terms are to be defined by state law, citing as "a hallmark of our federalism principles that full authority over domestic-relations matters resides not in the national government, but in the several States."[295] They reason that allowing a federal agency to supply a uniform federal definition would "impermissibly

285. *Id.* at 579-80.

286. Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1089 (9th Cir. 2021).

287. The prosecutor simply "did not elect to seek" the recidivist enhancement. *Carachuri-Rosendo*, 560 U.S. at 571.

288. 8 U.S.C. § 1151(b)(2)(A)(i) (2018).

289. 8 U.S.C. § 1432(a)(3) (1994), *repealed by* Child Citizenship Act of 2000, Pub. L. No. 106-395, § 103(a), 114 Stat. 1631, 1632.

290. *Id.*; *see also* 8 U.S.C. § 1431(a)(3) (2018 & Supp. V 2023) ("legal and physical custody").

291. 8 U.S.C. § 1431(a)(3) (2018 & Supp. V 2023); *see also id.* § 1101(a)(27)(J)(i) (referring to "custody").

292. *Id.* § 1431(b).

293. 8 U.S.C. § 1101(f)(2) (1976), *repealed by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611, 1611.

294. *See* Bagot v. Ashcroft, 398 F.3d 252, 258 (3d Cir. 2005) ("There exist two partially competing paradigms of INA legal custody."). *Compare* Moon Ho Kim v. U.S. Immigr. & Naturalization Serv., 514 F.2d 179, 181 (D.C. Cir. 1975) (uniform definition for "adultery"), *and* Wadman v. Immigr. & Naturalization Serv., 329 F.2d 812, 816-17 (9th Cir. 1964) (same), *with* Brea-Garcia v. Immigr. & Naturalization Serv., 531 F.2d 693, 695 (3d Cir. 1976) (state definition); *compare* Nehme v. Immigr. & Naturalization Serv., 252 F.3d 415, 424 (5th Cir. 2001) (uniform definition for "legal separation"), *with* Thompson v. Lynch, 808 F.3d 939, 941 (1st Cir. 2015) (state standard), Minasyan v. Gonzales, 401 F.3d 1069, 1076 (9th Cir. 2005) (same), *and* Morgan v. Att'y Gen., 432 F.3d 226, 232 (3d Cir. 2005) (same).

295. Perez v. Cuccinelli, 949 F.3d 865, 875 (4th Cir. 2020) (en banc) (quoting Ojo v. Lynch, 813 F.3d 533, 540 (4th Cir. 2016)).

intrude[] into issues of state domestic relations law."[296] But other courts have done just that, adopting the federal agency's uniform interpretation of domestic-relations terms.[297] Stressing the federal government's dominant role in immigrant selection, they have emphasized the requirement of uniformity.[298]

As one final example, federal courts have split along the same lines when deciding whether to give effect to state-court nunc pro tunc orders for naturalization purposes. Nunc pro tunc orders retroactively modify a previous court judgment, usually "to correct a clear mistake and prevent injustice."[299] A number of federal courts of appeals have refused to recognize such orders for purposes of immigration status.[300] For example, in *Fierro v. Reno*, a noncitizen subject to removal obtained a state-court nunc pro tunc order modifying the date his father obtained legal custody of him, which, if recognized for immigration purposes, would have conferred citizenship on him and insulated him from removal.[301] But the First Circuit refused to afford it such recognition, reasoning that doing so would "allow the state court to create loopholes in the immigration laws on grounds of perceived equity or fairness."[302] The Ninth Circuit in *Carino v. Garland* echoed this logic, stating that giving the nunc pro tunc order effect would "improperly give the state court the power to affect the terms and conditions" of immigration law.[303]

But in *Ojo v. Lynch*, the Fourth Circuit held that a nunc pro tunc order modifying the date of a noncitizen's adoption did have federal effect.[304] Rather than begin from the premise of federal exclusivity over immigration, the court started with the presumption that Congress legislates against the background of state control of domestic relations.[305] Short of

296. *Id.* at 868.

297. Lockhart v. Napolitano, 573 F.3d 251, 258 (6th Cir. 2009) (defining "spouse"); *Nehme*, 252 F.3d at 424 (defining "legal separation"); *Bagot*, 398 F.3d at 258 (defining "legal custody"); *Moon Ho Kim*, 514 F.2d at 181 (defining "adultery"); *Wadman*, 329 F.2d at 816-17 (defining "adultery").

298. *See Nehme*, 252 F.3d at 424 ("[T]he Constitution specifically commands that Congress legislate *uniform* rules of naturalization.").

299. *Nunc Pro Tunc Amendment*, BLACK'S LAW DICTIONARY (12th ed. 2024).

300. Carino v. Garland, 997 F.3d 1053, 1059 (9th Cir. 2021); Bustamante-Barrera v. Gonzales, 447 F.3d 388, 401 (5th Cir. 2006); Fierro v. Reno, 217 F.3d 1, 6 (1st Cir. 2000). These cases address the definition of "legal custody" in the previous version of 8 U.S.C. § 1432. *See* 8 U.S.C. § 1432(a)(3) (1994). Although that provision was repealed by the Child Citizenship Act of 2000, Pub. L. No. 106-395, § 103(a), 114 Stat. 1631, 1632, a parallel provision of the current INA also uses the term. *See* 8 U.S.C. § 1431(a)(3), (c)(1), (c)(2)(A) (2018 & Supp. V 2023) ("legal and physical custody").

301. *Fierro*, 217 F.3d at 6.

302. *Id.* at 4, 6.

303. *Carino*, 997 F.3d at 1059.

304. Ojo v. Lynch, 813 F.3d 533, 540 (4th Cir. 2016); *see also* Cantwell v. Holder, 995 F. Supp. 2d 316, 322 (S.D.N.Y. 2014) (holding that the Board of Immigration Appeals' failure to give effect to a nunc pro tunc adoption order altering the date of a noncitizen's adoption was arbitrary and capricious).

305. *Ojo*, 813 F.3d at 540.

unmistakable language to the contrary, the court reasoned, domestic-relations terms in federal law must be interpreted according to state standards.[306] Approached from that direction, the court reasoned, attempts to impose a uniform federal definition would allow "a federal agency t[o] tread[] on a traditional judicial domain of the various States."[307]

Taken together, these decisions exhibit a failure to move beyond rigid conceptions of divided sovereignty. This separate sovereigns approach is particularly pronounced when courts detect in state law a specific purpose to influence federal immigration outcomes. Courts are suspicious of such motives, viewing such laws as impermissible attempts to "manipulate[]"[308] or "create loopholes in the immigration laws."[309] The implication is that states should stay in their own regulatory lanes. Even though Congress has attached immigration consequences to state law, the expectation is that states administer their systems blind to those consequences.

C. Taking Status Federalism Seriously: From Sovereignty to Expertise

Status federalism requires a more legally coherent approach that accurately reflects the reality of the federal-state relationship in immigrant selection. Presumptions rooted in divided sovereignty fit poorly when construing federal statutes, like the INA, that create shared regulatory space among state and federal authorities. Courts should abandon these presumptions when resolving statutory disputes over the proper allocation of authority in the immigration statute. Instead, they should recognize that by deliberately delegating to states the role of implementing parts of the immigration law, Congress recognized states' comparative expertise in domains important to immigrant selection and made them joint policymakers in the field.

Doctrinally, this does not mean that every dispute over federal-state authority would cash out in favor of states. Each interpretive question ultimately turns on the text, history, and structure of the statutory provision

306. *Id.*

307. *Id.*

308. Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1089 (9th Cir. 2021); *see id.* at 1087 ("[W]e decline to give retroactive effect to the California statute . . . where it appears that the purpose of that state-law amendment is to circumvent federal law."); Vasquez v. Garland, 80 F.4th 422, 434-35 (2d Cir. 2023) (same).

309. Fierro v. Reno, 217 F.3d 1, 6 (1st Cir. 2000). Courts have expressed a similar skepticism in a related line of cases holding that "an alien remains convicted of a removable offense for federal immigration purposes when the predicate conviction is vacated simply to aid the alien in avoiding adverse immigration consequences." Saleh v. Gonzales, 495 F.3d 17, 25 (2d Cir. 2007); *see also* Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006) ("[W]hen a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes."); Alim v. Gonzales, 446 F.3d 1239, 1249-50 (11th Cir. 2006) (same), *abrogated on other grounds by* Santos-Zacaria v. Garland, 143 S. Ct. 1103 (2023); Pinho v. Gonzales, 432 F.3d 193, 195 (3d Cir. 2005) (same); Ramos v. Gonzales, 414 F.3d 800, 805-06 (7th Cir. 2005) (same).

at issue—that is, the traditional tools of statutory interpretation. Rather, it means that when courts confront ambiguity or open-textured delegations in the immigration statute, they should deemphasize sovereignty presumptions in favor of ones grounded in comparative expertise, much as they do in conventional administrative law. In other words, generic appeals to the federal government's exclusive sovereign control over immigrant selection would not resolve the questions about whom among states and federal agencies Congress delegated immigration authority to. Relatedly, it would not be impermissible for states to enact laws for the purpose of shaping immigration policy. Instead, courts should consider the comparative expertise of federal agencies and states over various aspects of the immigration statute.[310]

This reorientation is warranted because state and federal-agency authority over immigration adjudications derives from congressional delegation. Disputes about the proper allocation of authority between states and federal agencies are thus not battles between sovereign prerogatives. There is no question that whatever immigration power states and federal agencies properly exercise is held at the behest of Congress.[311] In status adjudications, states function as agents of Congress much in the same way as federal agencies do.[312] The question is instead whom Congress intended to allocate authority to.[313] Default sovereignty principles are of little utility in answering this question, when Congress has deliberately transferred

310. Note that recognizing state expertise in the regulation of domains traditionally associated with state control—criminal and family law, for example—makes no claims about the proper scope of state *sovereignty* over those (or any other) domains.

311. To be sure, whether the Executive possesses inherent authority over immigration independent of Congress has been an unsettled question since the origins of federal immigration law in the 1890s. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 465 (2009) ("The courts have never precisely delineated the relative powers of the political branches over immigration regulation."). And in practice, the Executive has long exercised its enforcement power to shape immigration policy. *Id.* at 483-528 (tracing the history of executive domination). But at least with respect to defining the categories of legal immigration status, Congress has maintained a monopoly on such power.

312. *See* Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 182 (1998) ("[N]on-federal governments serve as agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes."); Fahey, *supra* note 229, at 1358 ("The dominant way that scholars and courts gesture at the administrative aspects of cooperative programs is . . . [to] analogize[] states to federal agencies . . . ."); Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1040 (2015) (describing the "agency model" of federal-state relations advanced by the nationalist school of federalism). In drawing the analogy between states and agencies, I do not mean to suggest that state implementers of federal programs are indistinguishable from federal agencies. As Gillian E. Metzger has astutely argued, there remains value to recognizing states as distinct political entities. *See* Gillian E. Metzger, *The States as National Agents*, 59 ST. LOUIS U. L.J. 1071, 1072-73 (2015). That independence is what enables states to develop the expertise to approach federal programs in different ways. *Id.*

313. Abbe R. Gluck makes a similar point with respect to federalism canons that presume that Congress does not intend to intrude upon traditional state functions. She explains that such canons are "irrelevant once Congress unambiguously enters an area of traditional state authority—that is, once Congress legislates in the field—and the only question is what role the named state actors should play in the implementation of that new federal law." Gluck, *supra* note 20, at 555.

some of its sovereign power to states or made federal entitlements turn on legal categories traditionally within states' expertise. In such cases, it is not at all clear that Congress wished for default sovereignty presumptions to resolve legal ambiguities.[314] Rather, the opposite is more plausible: through delegation to states, Congress intended to integrate rather than separate federal and state power. As the Court recently cautioned, "Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality."[315]

Shifting from sovereignty to delegation brings into focus the general administrative law principles that ought to guide courts confronting status federalism disputes. When Congress delegates policymaking authority to a federal agency, courts afford that agency some measure of respect to interpret and fill gaps in the federal statute. The basis for that respect is largely one of experience and expertise.[316] As the entities possessing experts with specialized knowledge and experience gained from implementing federal policy, federal agencies have knowledge and resources superior to courts' to interpret federal law. Of course, the Court's recent decision in *Loper Bright Enterprises v. Raimondo*[317] upended the existing framework for applying deference by overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[318] leaving uncertainty about how much weight courts will give to agency interpretations.[319] But the Court did not abandon respect for expertise altogether. To the contrary, the Court indicated that

314. In a seminal empirical study of congressional drafting, congressional staff expressed that they sometimes do intend for states to have implementation flexibility on a level with deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 1), 65 STAN. L. REV. 901, 1011 (2013) (reporting that half of congressional drafters surveyed sometimes intend for states to implement federal statutory ambiguities).

315. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 399 (2024).

316. *See* Kisor v. Wilkie, 588 U.S. 558, 577-78 (2019) ("Administrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.'" (alteration in original) (quoting Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 153 (1991))); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 469 (2007) ("The delegation of substantial policymaking authority to administrative agencies is often both explained and justified by the belief that agencies have more accurate information about the actual impacts of different policy choices."); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983) (describing agencies' expertise in understanding policy matters as superior to generalist judges'); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154-55 (1938) (justifying the administrative state on the basis of its superior expertise).

317. 603 U.S. 369.

318. 467 U.S. 837.

319. *See* Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV. 1, 5 (2025) ("Both as a legal text and as a structural intervention into complex institutional politics, *Loper Bright*'s internal ambiguities cloud the picture of the future.").

deference under *Skidmore v. Swift & Co.*[320] continues to apply.[321] Under that framework, an "agency's 'body of experience and informed judgment'" can be "especially informative" and have "particular 'power to persuade.'"[322] Indeed, in the short time since *Chevron*'s demise, lower courts have continued to show respect for agency experience under *Skidmore*.[323] The presumption that Congress intends to delegate to obtain the benefits of expertise thus remains alive.

Similar considerations apply when Congress splits statutory implementation among multiple agents. Here, the question is not so much *whether* an agent has comparative expertise requiring deference. It is instead *which* agent has that expertise—and thus which agent Congress should be presumed to have delegated authority to. For example, in *Martin v. Occupational Safety & Health Review Commission*, the Court was asked to decide which actor possessed interpretive authority over regulations promulgated by the Secretary of Labor—the Secretary herself or the Occupational Safety and Health Review Commission, a separate agency which adjudicates claims the Secretary brings.[324] The Court's decision siding with the Secretary relied heavily on her comparative expertise. It reasoned that

> [b]ecause historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.[325]

The Secretary enjoyed "structural advantages over the Commission," including that she was the one who promulgated the regulations being interpreted, and that she was more familiar with the problems that bear on such regulations as the enforcing entity.[326] And in *Gonzales v. Oregon*, the Court applied the same logic, refusing to give weight to the Attorney General's interpretation of the Controlled Substances Act because the statute "conveys unwillingness to cede medical judgments to an executive official

320. 323 U.S. 134 (1944).

321. *Loper Bright*, 603 U.S. at 388, 394, 399, 402 (citing *Skidmore v. Swift & Co.* with approval); *see id.* at 476 (Kagan, J., dissenting) ("[T]he majority makes clear that what is usually called *Skidmore* deference continues to apply. Under that decision, agency interpretations 'constitute a body of experience and informed judgment' that may be 'entitled to respect.'" (citation omitted) (quoting *Skidmore*, 323 U.S. at 140)).

322. *Id.* at 402 (majority opinion) (quoting *Skidmore*, 323 U.S. at 140).

323. *See, e.g.*, Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 620 (5th Cir. 2024) (concluding under *Skidmore* that the Department of Labor had authority to promulgate the rule because it has consistently done so for more than eighty years).

324. 499 U.S. 144, 146-47 (1991).

325. *Id.* at 153 (citations omitted).

326. *Id.* at 152.

who lacks medical expertise."[327] Familiar administrative law principles thus presume, absent contrary indicators, that Congress intends to delegate authority to the agent best positioned to interpret the statute.

There are numerous reasons why, in many cases, states may have superior expertise in defining the terms of immigrant selection, such that it is reasonable to assume Congress delegated policymaking authority to them rather than to federal agencies. In immigration law, Congress tasked states with finding facts and supplying legal standards in order to leverage the informational advantages states have over the federal government.[328] Through everyday adjudications in family and criminal court, and through regulating most areas of daily life, states have accrued expertise and knowledge valuable to federal immigration determinations. Critically, that expertise consists not merely of technical knowledge but also of the experience and information to make policy judgments about immigrant desirability.[329] In setting criminal penalties, exercising prosecutorial discretion, and adjudicating guilt, state legislatures, prosecutors, and judges have accrued understandings of what conduct is deserving of serious sanction. They make decisions based on policy judgments about what to sanction and whether to pursue sanctions at all. And in making determinations about child dependency and custody, state family courts understand the nuances of a child's best interests and whether deporting the child would serve those interests.[330] Thus, just as federal-agency expertise justifies agency policymaking authority, so too does state expertise justify state policymaking authority.

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327. 546 U.S. 243, 267 (2006); *cf.* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (looking to an agency's "relative expertness" to determine whether its interpretation should be afforded deference).

328. *See* Cox & Posner, *supra* note 4, at 1337-40; Gluck, *supra* note 14, at 2008 ("Congress can draw on state expertise by taking well-developed bodies of state statutory or common law on the subject and incorporating them by reference into the new federal statute."); Divine, *supra* note 101, at 134 (explaining that incorporation "allows a legislature to rely on the experience, research, and writing of other legislatures as well as the proven merit of the adopted legislation"); Dorf, *supra* note 227, at 134 (theorizing that incorporation can occur where a state has "special expertise in a given subject area").

329. *See, e.g.*, Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 707 (2015) (arguing that criminal history, for example, provides the government with information about membership choices); Cox & Posner, *supra* note 4, at 1339 ("[S]tate and local officials may also have better information than the federal government about an immigrant's desirability."); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 846-47 (2007) (similar).

330. *See, e.g.*, Perez-Olano v. Gonzalez, 248 F.R.D. 248, 265 (C.D. Cal. 2008) ("The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests."); H.S.P. v. J.K., 121 A.3d 849, 858 (N.J. 2015) ("Congress chose to rely on state courts to make [initial factual findings] because of their special expertise in making determinations as to abuse and neglect issues, evaluating the best interest factors, and ensuring safe and appropriate custodial arrangements." (alteration in original) (quoting Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, A.B.A. 9 (July 14, 2014), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/summer2014.authcheckdam.pdf [https://perma.cc/ZEE9-4KTQ])).

One might counter that a state's expertise extends at most to its own laws, not to the federal consequences that flow from those laws. So if Congress delegates toward expertise, the response goes, it would not grant states authority over federal law. In the first place, the premise that states lack expertise over federal law is overstated. Numerous scholars have shown that states and localities are better positioned than the federal government to evaluate the costs and benefits of immigration because the economic and social consequences of immigrant population flows are primarily felt at the local level.[331] Noncitizens contribute to the local labor market, develop community ties, and use local resources. When they are deported, the community they belong to feels those effects most acutely. At the very least, it is not obvious that federal officials have greater information when it comes to making immigration selection decisions.

On top of that, when Congress tasks states with making value judgments that translate directly into who is worthy of entering and remaining in the country, disentangling where state expertise ends and federal expertise begins becomes difficult.[332] Federal immigration law often defines the broad contours of desirability—for example, selecting for neglected children[333] and against those who have committed a "burglary offense"[334]—and, with some direction, leaves it to states to supply the substantive contents of those categories. In such cases, the very normative judgments Congress makes about immigrant selection are given content by states.

Still, one might say, the above concern about state expertise over federal law is especially acute when it is clear that a state action is taken solely to alter immigration outcomes rather than for some state-law purpose. For in that case, a state is not acting on the basis of state-law expertise at all (and indeed may even be acting contrary to its domestic policy priorities[335]); it is simply using state law as a means to manipulate federal law. But even in this edge case, it is not clear that a court should side with the federal government. Refusing to give federal effect to state actions with an impermissible purpose runs into a number of workability issues. For one, it would create the anomalous result that two state laws operating in the same way could have different federal effects based only on the motivation

331. *See* Rodríguez, *supra* note 4, at 580-90 (describing the local effects of immigration and policies in three states); Cox & Posner, *supra* note 4, at 1339-40 (arguing that state and local officials have superior information to evaluate the equities of criminal defendants); Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 390 (2002) (describing the economic costs of state public expenditures on behalf of immigrants); *see also* Gluck, *supra* note 14, at 2026 ("[A]lthough state agencies may lack 'federal law' expertise, Congress often relies on states because the law being implemented covers an area of historic *state* expertise, making states qualified to fill in policy gaps.").

332. *See* Stumpf, *supra* note 255, at 1596 ("When the traditional police enforcement of criminal laws intermingles with immigration law and terrorism, the delineation between foreign policy and domestic law falls away.").

333. *See* 8 U.S.C. § 1101(a)(27)(J) (2018 & Supp. V 2023).

334. *Id.* § 1101(a)(43)(G).

335. *See supra* text accompanying notes 238-239.

of the state legislatures. Recall that several states reduced the maximum punishment for certain misdemeanors by one day—from a year to 364 days—to insulate noncitizens convicted of those crimes from removal.[336] Other states, however, have long punished misdemeanors with less than 365 days without regard to immigration purpose.[337] Putting aside the challenges of plumbing institutional intent, giving immigration effect to the latter category of laws but not to the former based on the state legislature's motivation would produce inconsistency. Even stranger, a state could amend its state law for nonimmigration reasons (which would be given federal effect) but then reverse itself after becoming aware of the amendment's immigration consequences—only to be told such a change makes no difference. For another, rather than deciding who has authority over a particular part of the statute on a categorical basis, such an approach would require assessing each action individually to determine the state's motivation. That is not usually how we evaluate the scope of congressional delegation.

A third and final objection may be that comparative expertise considerations are only appropriate when Congress has expressly delegated to both federal and state actors. Where a term is left undefined in the INA, it is not clear Congress intended for states to play a role in the first place. But, as explained above, traditional administrative law principles presume that Congress delegates to the agent best positioned to administer the statute absent indicators to the contrary. That is especially true when Congress legislates in areas implicating traditional spheres of state regulation such as family law. Respect for this traditional role is grounded not simply in sovereignty concerns, but in the "special proficiency developed by state tribunals over the past century and a half."[338]

Consider, then, how an expertise-based approach would reevaluate holdings like those in *Velasquez-Rios* and *Vasquez*.[339] Both opinions declined to give retroactive effect to state laws reducing sentences for misdemeanor convictions while recognizing that states had power to avoid immigration consequences prospectively.[340] And both privileged the federal agency's interpretation of the statute over the state's interpretation based on a view of the federal government's sovereign prerogative over immigration. But on an expertise-based view, these holdings are harder to justify. It is difficult to explain why federal law would recognize states' expertise

336. *See supra* note 155 and accompanying text; *infra* Appendix C.

337. *See* sources cited *infra* note 344.

338. Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992) ("As a matter of judicial economy, state courts are more eminently suited to [domestic-relations matters] than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees.").

339. *See* Velasquez-Rios v. Wilkinson, 988 F.3d 1081, 1083 (9th Cir. 2021); Vasquez v. Garland, 80 F.4th 422, 434 (2d Cir. 2023).

340. *Vasquez*, 80 F.4th at 434 ("[I]t seems that aliens convicted of [qualifying] misdemeanors going forward will avoid federal removal proceedings.").

in identifying who has committed a qualifying crime and even in initially defining what crimes qualify (by determining what conduct to criminalize as misdemeanors), but then would ignore that very expertise when states decide to revise their own definition. Taking state expertise seriously would, at the very least, require special reasons for rejecting the state view.

Ultimately, my goal is not to articulate a fully developed framework for treating states as federal agencies when they are delegated authority by Congress.[341] It is rather to suggest that courts should give greater consideration to the general administrative law principles driving Congress to delegate policymaking authority to both federal agencies and states. Framed in this way, the almost instinctive skepticism courts hold toward state-law interventions to influence immigration outcomes appears unwarranted.

Conclusion

The recent spate of subfederal interventions documented in this Article reveals that even immigration status—long considered the last redoubt of federal exclusivity—is not immune to state contestation and influence. That is likely to ring truer in the coming years. "[M]ore states are doing immigration federalism than ever before, targeting an expanding set of issues, and advocates and scholars have consistently called on them to do still more."[342] The momentum of subfederal involvement is only increasing as immigration becomes an ever more politically contested issue. Immigration advocates seeking to move immigration policy in the absence of congressional action may find immigration status another terrain on which to act.

More generally, this Article's exploration of federal-state dynamics in adjudications and in doctrines addressing statutory disputes in shared regulatory spaces—two underexplored topics in legal scholarship—informs administrative-federalism questions beyond immigration. Congress tasks subfederal actors with finding facts and supplying laws necessary for agency adjudications in numerous regulatory domains.[343] Federalism scholars in these domains should pay attention to the "what" and "who" of subfederal involvement—the specific roles subfederal actors play as well as which subfederal actors are playing them. Policymakers should similarly

341. Doing so may not even be desirable. *See* Gluck, *supra* note 14, at 2041 (arguing against imposing a single set of generally applicable presumptions due to the diversity of statutes and interpretive needs).

342. *See* Chertoff, *supra* note 5, at 533.

343. *See* Samantha Strimling, Note, *Shared Regulatory Space at the Nexus of Green Energy and Green Laws: Rethinking Administrative Deference*, 48 HARV. ENV'T L. REV. 255, 292-93 (2024) (collecting examples from environmental law, banking, drug enforcement, workplace safety, and international treaties); Remus, *supra* note 77, at 249 (identifying examples of federal incorporation of state law in areas of social security, veterans affairs, and tax, among other domains); Fahey, *supra* note 229, at 1360 n.157 (identifying examples of federal incorporation of state standards in environmental law and child welfare).

pay attention to these structural dynamics when designing federal programs that include the states to better calibrate how much influence states should have.

APPENDIX A – State U and T Visa Legislation

State	Statute	Application to U or T visa	Required Response Time	Helpfulness Presumption	Reasons for Denial and Opportunity to Respond	Other Relevant Provisions
AR	ARK. CODE ANN. § 12-19-104	Both (only trafficking crimes)	30 days	No		
CA	CAL. PENAL CODE §§ 679.10-.11	Both	30 days; 7 days if applicant is in removal proceedings or if applicant's qualifying family member will age out of eligibility	Yes	Agency must provide denied petitioner with reason for denial	• Emphasizes that an active investigation is not required for certification; • Requires annual reporting of certifications; • Limits disclosure of immigration information
CO	COLO. REV. STAT. §§ 24-4.1-401 to -406	U only	90 days; 30 days if applicant is in removal proceedings or if applicant will age out of eligibility	Yes	Agency must provide denied petitioner with reason for denial	• Requires annual reporting of certifications; • Limits disclosure of immigration information
CT	CONN. GEN. STAT. § 46b-38b	U only	60 days; 14 days if applicant is in removal proceedings or detained or if applicant's qualifying family member will age out of eligibility	No		• Emphasizes that an active investigation is not required for certification

DE	DEL. CODE ANN. tit. 11, § 787	Both	"As soon as practicable"	No	Agency must provide denied petitioner with reason for denial and opportunity to respond	
IL	5 ILL. COMP. STAT. §§ 825/10 to /11	Both	90 days; 21 days if applicant is in removal proceedings or detained or if applicant's qualifying family member will age out; 5 days if applicant's qualifying family member will become ineligible for certain benefits in fewer than 21 days	Yes	Agency must provide denied petitioner with reason for denial and opportunity to respond	• Limits disclosure of immigration information
IN	IND. CODE ANN. § 35-42-3.5-4	T only	15 days	No	Agency must provide denied petitioner with reason for denial and opportunity to respond	
LA	LA. STAT. ANN. § 46:2162	Both (only trafficking crimes)	None	No		
MA	MASS. GEN. LAWS ANN. ch. 258F, §§ 1-4	Both	90 days	No	Agency must provide denied petitioner with reason for denial	• Requires annual reporting of certifications

MD	MD. CODE ANN., Criminal Procedure § 11-931	Both	90 days; 14 days if applicant is in removal proceedings or has a final order of removal	No		• Emphasizes that an active investigation is not required for certification; • Limits disclosure of immigration information
MN	MINN. STAT. ANN. § 611A.95	Both	90 days; 14 days if applicant is in removal proceedings	No		• Emphasizes that an active investigation is not required for certification; • Limits disclosure of immigration information
MT	MONT. CODE ANN. § 44-4-1503	Both	"As soon as practicable"	No	Agency must provide denied petitioner with reason for denial and opportunity to respond	
ND	N.D. CENT. CODE ANN. § 12.1-41-18	Both	"As soon as practicable"	No	Agency must provide denied petitioner with reason for denial and opportunity to respond	
NE	NEB. REV. STAT. ANN. § 29-217	Both	90 days	Yes	Agency must provide denied petitioner with reason for denial and opportunity to respond	• Emphasizes that an active investigation is not required for certification
NV	NEV. REV. STAT. ANN. §§ 217.550-.590	U only	90 days; 14 days if applicant is in removal proceedings or if applicant will age out of eligibility	Yes		• Emphasizes that an active investigation is not required for certification; • Requires annual reporting of certifications;

						• Limits disclosure of immigration information
NY	N.Y. SOCIAL SERVICES LAW §§ 483-AA to -EE	T only	"As soon as practicable"	No		
OR	OR. REV. STAT. ANN. § 147.620	U only	90 days; 14 days if applicant is in removal proceedings	Yes	Agency must provide denied petitioner with reason for denial and opportunity to respond	• Emphasizes that an active investigation is not required for certification; • Requires annual reporting of certifications; • Limits disclosure of immigration information
PA	18 PA. STAT. AND CONS. STAT. § 3054	Both (only trafficking crimes)	None	No		
RI	11 R.I. GEN. LAWS ANN. § 11-67.1-22	Both	"As soon as practicable"	No	Agency must provide denied petitioner with reason for denial and opportunity to respond	
UT	UTAH CODE ANN. § 77-38-503	U only	90 days; 14 days if applicant is in removal proceedings	No		• Emphasizes that an active investigation is not required for certification;

						• Requires annual reporting of certifications; • Limits disclosure of immigration information
VA	VA. CODE ANN. §§ 9.1-1500 to -1502	Both	120 days; 21 days if applicant is in removal proceedings or detained; 30 days if applicant's qualifying family member will age out of eligibility; 7 days if applicant's qualifying family member will become ineligible for certain benefits in fewer than 30 days	No	Agency must provide denied petitioner with reason for denial	
VT	VT. STAT. ANN. tit. 13, § 2663	Both (only trafficking crimes)	None	No		
Virgin Islands	V.I. CODE ANN. tit. 14, § 151	Both	"As soon as practicable"	No	Agency must provide denied petitioner with reason for denial and opportunity to respond	

WA	WASH. REV. CODE ANN. §§ 7.98.005-.98.900	Both	90 days; 14 days if applicant is in removal proceedings or applicant will age out of eligibility	No		• Emphasizes that an active investigation is not required for certification; • Requires annual reporting of certifications; • Limits disclosure of immigration information
WY	WYO. STAT. ANN. § 6-2-709	Both (but only for trafficking)	"[A]s soon as possible after the initial encounter" between law enforcement and a victim of human trafficking	No		

APPENDIX B – State Special Immigrant Juvenile Status Interventions

State	Type of Intervention	Name	Year	Summary	Details
CA	Judicial decision	*In re* Y.M., 144 Cal. Rptr. 3d 54 (Ct. App. 2012)	2012	Mandatory SIJS jurisdiction	Holding that state courts are required to exercise jurisdiction when an individual requests SIJS findings
	Statute	CAL. WELF. & INST. CODE § 10609.97	2013	Miscellaneous	Requiring the Department of Social Services to identify and share best practices with county-level child welfare agencies regarding assistance to children in securing SIJS findings
	Statute	CAL. PROB. CODE § 1510.1	2016	Expands state-court jurisdiction to age 20	Conferring jurisdiction on California probate courts to appoint a guardian for an individual aged 18 to 20 for purposes of making SIJS findings
CO	Statute	COLO. REV. STAT. ANN. § 15-14-204	2019	Mandatory SIJS jurisdiction; expands state-court jurisdiction to age 20	Requiring state courts to make SIJS findings if substantial evidence supports such findings; conferring jurisdiction on Colorado courts to appoint a guardian for an individual under 21
CT	Statute	CONN. GEN. STAT. ANN. §§ 45a-608n, -608o	2014, 2018	Mandatory SIJS jurisdiction; expands state-court jurisdiction to age 20	Requiring state courts to make SIJS findings if they grant a petition to terminate parental rights or a petition to approve an adoption; defining a "minor child" for purposes of making SIJS findings as an unmarried person under 21
FL	Statute	FLA. STAT. ANN. § 39.5075	2005	Screening	Requiring the Department of Children and Families to petition court for SIJS findings if a child may be eligible for SIJS, and to apply for SIJS on child's behalf
GA	Judicial decision	*In re* J.J.X.C., 734 S.E.2d 120 (Ga. Ct. App. 2012)	2012	Mandatory SIJS jurisdiction	Holding that state courts are required to exercise jurisdiction when an individual requests SIJS findings
HI	Statute	HAW. REV. STAT. ANN. § 571-11	2020	Expands state-court jurisdiction to age 20	Defining a "child" for purposes of making SIJS findings as an unmarried person under 21

IL	Statute	750 ILL. COMP. STAT. ANN. § 46/613.5; 755 ILL. COMP. STAT. ANN. § 5/11-5.5	2019, 2021	Mandatory SIJS jurisdiction; expands state-court jurisdiction to age 20	Requiring state courts to make SIJS findings if evidence supports such findings; defining a "minor" for purposes of making SIJS findings as including an unmarried person under 21
IN	Judicial decision	*In re* Guardianship of Luis, 114 N.E.3d 855 (Ind. Ct. App. 2018)	2018	Mandatory SIJS jurisdiction	Holding that state courts are required to exercise jurisdiction when an individual requests SIJS findings
	Judicial decision	*In re* Guardianship of Xitumul, 137 N.E.3d 945 (Ind. Ct. App. 2019)	2019	Recognizing SIJS jurisdiction in general-jurisdiction trial courts	Holding that circuit courts qualify as "juvenile" courts able to make required findings for SIJS status
KY	Judicial decision	Cabinet for Health & Fam. Servs. v. N.B.D., 577 S.W.3d 73 (Ky. 2019)	2019	Discretionary SIJS jurisdiction	Noting that Kentucky state courts have jurisdiction to make SIJS findings but are not required to engage in SIJS fact-finding, unless the evidence to be gleaned from a SIJS hearing is relevant to the noncitizen child's best interests
MA	Policy	Permanency Planning Policy, Policy No. 2013-01, Mass. Dep't of Children and Families, (July 1, 2013)	2013	Screening	Requiring state Department of Children Services to consider immigration relief options, including SIJS, for noncitizen children in state custody at multiple points in children's lives
	Judicial decision	Dep't of Revenue v. Lopez (Guardianship of Penate), 76 N.E.3d 960 (Mass. 2017)	2017	Mandatory SIJS jurisdiction	Holding that state courts are required to exercise jurisdiction when an individual requests SIJS findings regardless of whether the court suspects that the noncitizen child's motivation is something other than relief from abuse, neglect, or abandonment
MD	Statute	MD. CODE ANN., FAM. LAW § 1-201(a), (b)(10)	2014	Expands state-court jurisdiction to age 20	Providing that for the purposes of "Special Immigrant Juvenile factual findings," Maryland equity courts have jurisdiction over noncitizen children, including "unmarried individual[s] under the age of 21 years"

	Judicial decision	Simbaina v. Bunay, 109 A.3d 191 (Md. Ct. Spec. App. 2015)	2015	Mandatory SIJS jurisdiction	Holding that Maryland trial courts must make SIJS findings if the issue is properly before them
MN	Judicial decision	*In re* Guardianship of Guaman, 879 N.W.2d 668 (Minn. Ct. App. 2016)	2016	Mandatory SIJS jurisdiction	Holding that Minnesota probate courts must consider an individual's request for SIJS findings
	Statute	MINN. STAT. § 257D.01(2)	2022	Changing substantive SIJS standard	Defining "abandonment" broadly to include the death of a parent
MO	Judicial decision	De Rubio v. Rubio Herrera, 541 S.W.3d 564 (Mo. Ct. App. 2017)	2017	Discretionary SIJS jurisdiction	Holding that Missouri courts are permitted to make SIJS findings but that "federal law cannot mandate a state court to make findings," and that courts are obligated to make findings only if doing so is compelled by their obligation to act in the best interest of the noncitizen child
NE	Judicial decision	State v. Erick M. (*In re* Int. of Erick M.), 820 N.W.2d 639 (Neb. 2012)	2012	Changing substantive SIJS standard	Requiring showing of abuse, abandonment, or neglect by both parents in order to qualify for SIJS findings
	Statute	NEB. REV. STAT. § 43-1238(b)	2018	Mandatory SIJS jurisdiction	Requiring Nebraska courts to make SIJS findings if there is sufficient evidence to support such findings
NJ	Judicial decision	H.S.P. v. J.K. (*In re* J.S.G.), 121 A.3d 849 (N.J. 2015)	2015	Mandatory SIJS jurisdiction	Holding that family courts faced with a request for a SIJ predicate order should make SIJS findings
NM	Statute	N.M. STAT. ANN. § 32A-4-23.1	2009	Screening	Requiring the Children, Youth and Families Department to screen undocumented noncitizen children for SIJS eligibility and, if a child is found eligible, to move the state court to make the requisite SIJS findings

	Statute	N.M. STAT. ANN. §§ 40-18-2, 40-18-4	2023	Mandatory SIJS jurisdiction; expands state-court jurisdiction to age 20	Requiring New Mexico courts to make SIJS findings; defining "child" for SIJS purposes to mean "any unmarried, foreign-born person under the age of twenty-one"
NV	Judicial decision	Ramirez v. Menjivar, No. 74030, 2018 WL 6829010 (Nev. Dec. 27, 2018)	2018	Discretionary SIJS jurisdiction	Holding that Nevada courts have jurisdiction to make SIJS findings "only to the extent those findings are ancillary to proceedings under state law"
NY	Judicial decision	Trudy-Ann W. v. Joan W., 901 N.Y.S.2d 296 (N.Y. App. Div. 2010)	2010	Recognizing that state-court jurisdiction over guardianship determinations extends to individuals under 21	Holding that a family court erred in refusing to make SIJS findings in part because state law "explicitly authorizes the appointment of a guardian for a person" under age 21 who consents to such appointment after age 18
	Judicial decision	*In re* Mohamed B., 921 N.Y.S.2d 145 (N.Y. App. Div. 2011)	2011	Mandatory SIJS jurisdiction	Holding that the family court erred in denying a noncitizen child's motion for issuance of an order making SIJS findings
OH	Judicial decision	*In re* J.A.S., 192 N.E.3d 1313 (Ohio Ct. App. 2022)	2022	Mandatory SIJS jurisdiction	Holding that Ohio courts are required to make SIJS findings
PA	Judicial decision	Orozco v. Tecu, 284 A.3d 474 (Pa. Super. Ct. 2022)	2022	Mandatory SIJS Jurisdiction	Holding that Pennsylvania courts are required to make SIJS findings
	Judicial decision	Rivas v. Villegas, 300 A.3d 1036 (Pa. Super. Ct. 2023)	2023	Recognizing SIJS jurisdiction in courts other than juvenile and dependency courts	Holding that the fact that the state court of common pleas was not a juvenile or dependency court did not bar it from considering a grandmother's petition for special relief seeking an order making SIJS findings

SC	Judicial decision	Corrales v. Aguilera, No. 2022-001342, 2023 WL 5139071 (S.C. Ct. App. 2023)	2023	Mandatory SIJS Jurisdiction	Holding that South Carolina family courts are required to make SIJS findings
TN	Judicial decision	*In re* Domingo C.L., No. M2016-02383-COA-R3-JV, 2017 WL 3769419 (Tenn. Ct. App. Aug. 30, 2017)	2017	Mandatory SIJS Jurisdiction	Holding that lower court had jurisdiction to make finding of whether it was in best interest of minor noncitizen child to be returned to child's home country of Guatemala, remanding case, and directing lower court to make requested finding
VA	Statute	VA. CODE ANN. § 16.1-241(A1)	2024	Discretionary SIJS jurisdiction; expands state-court jurisdiction to age 20	Providing that a Virginia court "may continue to exercise its jurisdiction until such person reaches 21 years of age, for the purpose of entering findings of fact" for SIJS
VT	Judicial decision	Kitoko v. Salomao, 215 A.3d 698 (Vt. 2019)	2019	Discretionary SIJS jurisdiction	Holding that Vermont courts are not required to make SIJS findings, but that Vermont courts have the authority to make such findings if doing so serves noncitizen child's best interest (and generally should do so)
WA	Judicial decision	*In re* Custody of A.N.D.M., 527 P.3d 111 (Wash. Ct. App. 2023).	2023	Recognizing SIJS jurisdiction in courts other than juvenile and dependency courts	Holding that a superior-court judge or family-law commissioner making determinations of a child's custody is a "juvenile court" judge authorized to make SIJ findings

APPENDIX C – State Maximum Sentence Reductions from 365 to 364 Days[344]

State	Bill	Year Enacted	Retroactivity
CA	Act of July 21, 2014, ch. 174, 2013-2014 Cal. Stat. 2253	2015	"This section shall apply retroactively, whether or not the case was final as of [January 1, 2015]."[345]
CO	H.R. 19-1148, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (enacted)	2019[346]	None
MN	Act of May 19, 2023, ch. 52, art. 6, §§ 6, 16, 2023 Minn. Laws 801, 918, 925	2023	"Any sentence of imprisonment for one year or 365 days imposed or executed before July 1, 2023, shall be deemed to be a sentence of imprisonment for 364 days."
NV	Act of May 28, 2013, ch. 229, 2013 Nev. Stat. 976	2013	"A person who was convicted of a gross misdemeanor and sentenced before October 1, 2013, to serve a term of imprisonment in the county jail for 1 year may file a petition with the court of original jurisdiction requesting that the court, for good cause shown, order that his or her original sentence be modified to a sentence imposing a term of imprisonment for 364 days."
NY	Act of Apr. 12, 2019, ch. 55, pt. OO, § 2, 2019 N.Y. Laws 279, 319-20	2019	"The amendatory provisions of this subdivision . . . shall apply to all persons who are sentenced before, on or after the effective date of this subdivision."[347]

344. In addition to the eight states listed in this Appendix, the following states have historically punished misdemeanors, or certain subsets thereof, with fewer than 365 days: Arizona (ARIZ. REV. STAT. ANN. § 13-707 (West 2024)); Illinois (720 ILL. COMP. STAT. ANN. 5/2-11 (West 2024)); New Jersey (N.J. STAT. ANN. § 2C:43-8 (West 2024)); New Mexico (N.M. STAT. ANN. § 30-1-6 (West 2024)); North Carolina (N.C. GEN. STAT. ANN. § 15A-1340.23 (West 2024)); Ohio (OHIO REV. CODE ANN. § 2929.24 (West 2025)); Tennessee (TENN. CODE ANN. § 40-35-111 (West 2025)); and Wisconsin (WIS. STAT. ANN. § 939.51 (West 2024)).

345. Act of Sept. 28, 2016, ch. 789, 2015-2016 Cal. Stat. 5368. However, under *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1083 (9th Cir. 2021), the retroactivity provision does not apply for purposes of federal immigration law.

346. Two years earlier, in 2017, Denver also reduced its maximum sentence for certain municipal offenses from 365 days or more to 300 days. Samantha Schmidt, *Denver Fights Back Against Trump's Deportation Crackdown with Surprisingly Simple Change in Law*, WASH. POST (May 24, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/24/denver-fights-back-against-trumps-deportation-crackdown-with-surprisingly-simple-change-in-law [https://perma.cc/686S-C7PP].

347. However, under *Vasquez v. Garland*, 80 F.4th 422, 427 (2d Cir. 2023), the retroactivity provision does not apply for purposes of federal immigration law.

OR	Act of Aug. 15, 2017, ch. 706, § 22, 2017-2018 Or. Laws 1963, 1973	2017	None
UT	Act of Mar. 25, 2019, ch. 222, 2019 Utah Laws 1429	2019	None
WA	Act of Apr. 15, 2011, ch. 96, 2011 Wash. Sess. Laws 831	2011	None

APPENDIX D – Local Prosecution Policies Considering Immigration Consequences

The following table displays publicly available policies from several of the fifteen largest counties by noncitizen population[348] directing prosecutors to consider potential immigration consequences when making charging, plea-bargaining, or sentencing decisions.

County	Noncitizen population (millions)	Year Policy Promulgated	Policy Description
Alameda, CA	0.6	2020	"[I]f the immigration status is known to the prosecutor [at the time of charging], that status shall be taken into consideration when evaluating if charges will be filed, if there are alternatives to filing charges to which the individual can be referred, [and] if charges are filed, which charges will be alleged."[349]
Kings, NY	0.9	2017	"Among the several factors to be considered [in determining an appropriate plea offer or sentencing recommendation after trial] are the defendant's present and future immigration status and any humanitarian factors, such as hardships if the defendant were deported. Whenever possible, if an appropriate disposition or sentence recommendation can be offered that neither jeopardizes public safety nor leads to removal or to any other disproportionate collateral consequence—the ADA should offer that disposition or make that recommendation." [350]
King, WA	0.6	2016	"[P]rosecutors should consider any verified immigration consequences to a defendant from any negotiated plea or sentence recommendation."[351]
Los Angeles, CA	3.3	2020	"Deputies shall seek to avoid immigration consequences. Deputies are instructed to offer dispositions in accordance with Penal Code § 1016.3(b) . . . ."[352]

348. Based on the U.S. Census Bureau's pooled 2018-2022 American Community Survey. *See U.S. Immigrant Population by State and County*, MIGRATION POL'Y INST. (2022), https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-state-and-county [https://perma.cc/LU4F-T76A].

349. *Immigration Policy: Consideration of Collateral Immigration Consequences in Review & Charging Cases, in Plea Negotiations and Post-Conviction Review*, *supra* note 164, at 2-3.

350. Press Release, Kings Cnty. Dist. Att'y, *supra* note 164.

351. *Filing and Disposition Standards*, KING CNTY. PROSECUTING ATT'Y'S OFF. 30 (May 2016), https://kingcounty.gov/~/media/depts/prosecutor/documents/2016/fads-may-2016.ashx?la=en [https://perma.cc/89TV-HTNA].

352. Memorandum from George Gascón, Dist. Att'y, Los Angeles Cnty., to Deputy Dist. Att'ys, Los Angeles Cnty. 5 (Dec. 7, 2020), https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-09.pdf [https://perma.cc/A43Z-562G].

San Diego, CA	0.7	2024	"San Diego County Deputy District Attorneys . . . shall in the interests of justice consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[353]
Santa Clara, CA	0.8	2011	"[I]n those cases where the collateral consequences are significantly greater than the punishment for the crime itself, it is incumbent upon the prosecutor to consider and, if appropriate, take reasonable steps to mitigate those collateral consequences."[354]
Queens, NY	1.1	2020	Establishes Immigration Specialist within office which helps district attorneys "navigate through plea options . . . [and] fashion dispositions that will prevent unwanted immigration consequences should the equities call for it."[355]

353. *Legal Policies Guide*, SAN DIEGO CNTY. DIST. ATT'Y'S OFF. 12-13 (Nov. 2024), https://www.sdcda.org/content/prosecuting/Legal%20Policies%20Guide.pdf [https://perma.cc/7MD2-D82U].

354. Memorandum from Jeff Rosen, Dist. Att'y, Santa Clara Cnty, to Fellow Prosecutors, Santa Clara Cnty. 2 (Sept. 14, 2011), https://libguides.law.ucla.edu/ld.php?content_id=13653091 [https://perma.cc/LR7B-XKK3].

355. *Brave Justice: Annual Report 2020*, DIST. ATT'Y QUEENS CNTY. 38 (2020), https://queensda.org/wp-content/uploads/2022/02/BraveJusticeV2_2020_Final.pdf [https://perma.cc/Y42N-MR94].